

MAINE STATE LEGISLATURE

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125th MAINE LEGISLATURE

SECOND REGULAR SESSION-2012

Legislative Document

No. 1721

S.P. 586

In Senate, December 29, 2011

**An Act To Improve the Method of Classifying Shellfish Harvesting
Areas and Providing Notification of Changes**

Submitted by the Department of Marine Resources pursuant to Joint Rule 204.

Received by the Secretary of the Senate on December 23, 2011. Referred to the Committee on Marine Resources pursuant to Joint Rule 308.2 and ordered printed.

Joseph G. Carleton Jr.

JOSEPH G. CARLETON, JR.
Secretary of the Senate

Presented by Senator LANGLEY of Hancock.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 12 MRSA §6076, sub-§2**, as enacted by PL 1985, c. 784, §1, is amended
3 to read:

4 **2. Responsibilities.** The department ~~shall be~~ is the state agency responsible for
5 implementing the program. ~~The department may adopt rules under section 6172 as may~~
6 ~~be warranted to provide for adequate protection of the public health.~~

7 **Sec. 2. 12 MRSA §6172**, as amended by PL 2009, c. 528, §3, is further amended
8 to read:

9 **§6172. Contaminated or polluted flats**

10 **1. Commissioner's powers.** The commissioner may examine the coastal waters and
11 the intertidal zone and ~~adopt rules to close~~ classify coastal waters or intertidal zone areas
12 as closed if the commissioner determines that any marine organisms are or may become
13 contaminated or polluted ~~and may classify coastal waters or intertidal areas as open if the~~
14 ~~commissioner determines that the marine organisms no longer present a risk to public~~
15 ~~health.~~ The commissioner may ~~adopt or amend rules~~ classify areas through text
16 descriptions and maps as the commissioner determines necessary, setting forth standards
17 for closure of contaminated or polluted areas and for opening areas determined to no
18 longer present a risk to public health, giving consideration to established state water
19 quality standards, the most recently adopted federal sanitation standards, or other state or
20 federal public health standards, the most recent generally accepted research data and
21 known sources of pollution in any area, in a manner to protect the public health and
22 safety while allowing reasonable use of the State's marine organisms.

23 **1-A. Federal waters.** The commissioner may ~~adopt rules establishing standards for~~
24 ~~closing~~ classify an area through text descriptions and maps to close waters under the
25 jurisdiction of the Federal Government to the harvesting of a marine organism that the
26 commissioner determines is or may become contaminated or polluted and to open waters
27 under the jurisdiction of the Federal Government to the harvesting of marine organisms
28 that the commissioner determines no longer present a risk to public health. ~~The~~
29 ~~commissioner may, in accordance with standards adopted under this subsection, by rule~~
30 ~~close waters under the jurisdiction of the Federal Government to the harvesting of a~~
31 ~~marine organism when the commissioner determines the organism is or may become~~
32 ~~contaminated or polluted. Rules adopted pursuant to this subsection must be in~~
33 ~~conformance with applicable federal law and regulations. Rules adopted under this~~
34 ~~subsection are routine technical rules pursuant to Title 5, chapter 375, subchapter II-A.~~

35 **1-B. Advisory council.** ~~Notwithstanding section 6171-A, the advice and consent of~~
36 ~~the Marine Resources Advisory Council is not required prior to adoption of a rule under~~
37 ~~this section.~~

38 **2. Emergency rules.** ~~The commissioner may adopt or amend rules under the~~
39 ~~emergency procedures, if immediate action is necessary to prevent the taking of polluted~~
40 ~~or contaminated marine organisms.~~

1 ~~**3. Repeal.** The commissioner shall repeal a rule closing an area or waters when the~~
2 ~~marine organisms are no longer contaminated or polluted or when the waters meet the~~
3 ~~sanitary standards set forth in any department rules. The commissioner may use~~
4 ~~emergency regulatory procedures to open areas or waters that have been closed under~~
5 ~~emergency procedures of this section.~~

6 ~~**4. Procedure.** The procedures of subchapter II shall be used in adopting or~~
7 ~~amending rules authorized by this section.~~

8 **5. Private property; right of entry.** The commissioner's authority to enter privately
9 owned land or buildings to carry out the purposes of this section is prescribed as follows:

10 A. The commissioner, upon presentation of credentials, may enter privately owned
11 land at reasonable times with the owner's permission. If entry to the land is denied by
12 the owner, the commissioner may seek a search warrant to inspect the land for
13 sources of pollution under this section. A warrant may not be issued to search a
14 domicile or residential building or ancillary structures; and

15 B. The commissioner may enter a privately owned domicile, building or structure
16 only with the owner's permission and only in the presence of the owner or the owner's
17 agent.

18 For the purposes of this subsection, "commissioner" means the Commissioner of Marine
19 Resources or an employee of the department authorized by the commissioner to inspect
20 coastal waters and intertidal zones for sources of pollution.

21 **6. Effective immediately upon signature.** The classification of an area as open or
22 closed under this section is effective immediately upon signature by the commissioner or
23 the commissioner's authorized designee.

24 **7. Notification.** Notification of the classification of a shellfish area as open or
25 closed and any information concerning the opening or closing of a shellfish area under
26 this section must be placed on the department's publicly accessible website and must be
27 provided to the municipal office of each municipality in the affected area and to the
28 Bureau of Marine Patrol.

29 **8. Enforcement.** Upon notification as described in subsection 7, marine patrol
30 officers shall take action to prevent the taking of shellfish from a closed area, including
31 the embargo of contaminated shellfish under section 6856, subsection 6 and the arrest or
32 summons of any person taking or attempting to take shellfish from an area classified as
33 closed.

34 **Sec. 3. 12 MRSA §6191, sub-§1,** as amended by PL 2007, c. 692, §1, is further
35 amended to read:

36 **1. Procedures.** In adopting or amending any rule, ~~except as provided in section~~
37 ~~6194,~~ the commissioner shall use the procedures required for rulemaking under the Maine
38 Administrative Procedure Act, ~~Title 5, chapter 375,~~ and the additional requirements of
39 this subchapter.

1 **Sec. 4. 12 MRSA §6191, sub-§2, ¶C**, as amended by PL 2003, c. 248, §4, is
2 further amended to read:

3 C. A rule, ~~except a rule authorized under section 6172,~~ may not be adopted or
4 amended without the advice and consent of the advisory council, except as provided
5 in section 6192, subsection 2.

6 **Sec. 5. 12 MRSA §6192, sub-§1, ¶A**, as amended by PL 2009, c. 528, §4, is
7 further amended to read:

8 A. In an emergency adoption of a rule or amendment to a rule relating to the public
9 health and safety, including rules authorized under ~~sections~~ section 6171-A ~~and 6172,~~
10 prior public notice and hearing is not required.

11 **Sec. 6. 12 MRSA §6192, sub-§3**, as amended by PL 2003, c. 248, §5, is further
12 amended to read:

13 **3. Effective period.** Any emergency rule is effective only for 90 days, or any lesser
14 period of time specified in the rule. After the expiration of the emergency period, the rule
15 may only be adopted only as provided by section 6191. ~~This subsection does not apply to~~
16 ~~emergency rules authorized under section 6172, which are effective until repealed.~~

17 **Sec. 7. 12 MRSA §6192, sub-§4**, as amended by PL 2003, c. 248, §5, is further
18 amended to read:

19 **4. Effective date.** Except as provided in this subsection, emergency rules become
20 effective immediately upon publication in a newspaper of general circulation in the area
21 of the State affected, provided as long as those rules are submitted to the Attorney
22 General and filed with the Secretary of State as required under the Maine Administrative
23 Procedure Act, ~~Title 5, chapter 375,~~ within the next business day following publication.

24 ~~Notwithstanding any provisions of the Maine Administrative Procedure Act, an~~
25 ~~emergency rule authorized by section 6172, subsection 2 or 3 is effective immediately~~
26 ~~upon signature by the commissioner or the commissioner's authorized designee. Upon~~
27 ~~signing an emergency rule that closes or opens an area or waters to the taking of marine~~
28 ~~organisms, the commissioner or the commissioner's authorized designee shall give oral~~
29 ~~notice of that action to local governmental authorities and shall publish notice of a closure~~
30 ~~as soon as possible in a newspaper of general circulation in the area of the State affected.~~
31 ~~Marine patrol officers shall take action to prevent taking of shellfish from a closed area,~~
32 ~~including the embargo of contaminated shellfish under section 6856, subsection 6 and the~~
33 ~~arrest of any person violating the emergency rule.~~

34 **Sec. 8. 12 MRSA §6193**, as amended by PL 1999, c. 790, Pt. A, §11, is repealed.

35 **Sec. 9. 12 MRSA §6194**, as enacted by PL 2007, c. 692, §2, is repealed.

36 **Sec. 10. 12 MRSA §6621, sub-§§1 and 2**, as repealed and replaced by PL 2003,
37 c. 452, Pt. F, §16 and affected by Pt. X, §2, are amended to read:

38 **1. Taking from closed areas.** A person may not:

- 1 A. Fish for or take shellfish from any area closed ~~by regulation~~ pursuant to section
2 6172;
- 3 B. Fish for or take shellfish from any area closed ~~by regulation~~ pursuant to section
4 6172 when the person has one or more prior convictions for violating paragraph A;
- 5 C. Possess, ship, transport or sell shellfish taken from any area closed ~~by regulation~~
6 pursuant to section 6172; or
- 7 D. Possess, ship, transport or sell shellfish taken from any area closed ~~by regulation~~
8 pursuant to section 6172 when the person has one or more prior convictions for
9 violating paragraph C.

10 **2. Washing or holding in closed areas.** A person may not:

- 11 A. Wash, hold or keep shellfish in any area closed ~~by regulation~~ pursuant to section
12 6172;
- 13 B. Wash, hold or keep shellfish in any area closed ~~by regulation~~ pursuant to section
14 6172 when the person has one or more convictions for violating paragraph A;
- 15 C. Possess, ship, transport or sell shellfish washed, held or kept in any area closed ~~by~~
16 ~~regulation~~ pursuant to section 6172; or
- 17 D. Possess, ship, transport or sell shellfish washed, held or kept in any area closed ~~by~~
18 ~~regulation~~ pursuant to section 6172 when the person has one or more convictions for
19 violating paragraph C.

20 **SUMMARY**

21 The method currently used by the Department of Marine Resources to manage
22 contaminated or polluted shellfish resource areas to protect public health is through the
23 adoption of emergency rules. This bill changes the management method to a
24 classification by the Commissioner of Marine Resources of areas as open or closed
25 through text descriptions and maps provided on the department's website and to affected
26 municipalities and the Bureau of Marine Patrol.