

NOTICE OF AGENCY RULE-MAKING ADOPTION

AGENCY: Department of Marine Resources

CHAPTER NUMBER AND TITLE: Chapter 25.65; Lobster and Crab Closure in Penobscot River

ADOPTED RULE NUMBER:

(LEAVE BLANK - ASSIGNED BY SECRETARY OF STATE)

CONCISE SUMMARY:

This rulemaking is adopted in order to protect public health due to the risk of mercury contamination in lobsters and crabs found in the mouth of the Penobscot River north of a line starting at the westernmost point of Perkins Point in the Town of Castine continuing in a northwesterly direction to the southernmost point on Squaw Point on Cape Jellison in the Town of Stockton Springs. In 2013, DMR received data warranting the current closure in the mouth of the river, and undertook confirmation work to provide the basis for future management or public health decisions. Based on analysis of the data collected in 2014 through the confirmation work, DMR determined that public health risks exist relating to the consumption of lobster taken from the area. Because this remains a very discrete area and in order to be health protective, DMR took action to expand the existing closed area. In making this determination, DMR considered issuing a consumption advisory in lieu of a closure but determined that a closure would be the most effective means to achieve public health protection due to the difficulty of effectively communicating the risk to the public, including non-commercial harvesters who may be fishing in this area, the seasonal nature of the commercial fishery in this area, and the inability to track lobsters taken from the area once they enter into the market. While the confirmation work did not show levels of concern for crabs, the area will remain closed to the harvest of crabs due to enforcement constraints.

EFFECTIVE DATE:

(TO BE FILLED IN BY SECRETARY OF STATE)

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Chapter 25.65 Lobster and Crab Closure in Penobscot River

25.65 Lobster and Crab Closure in Penobscot River

It is unlawful to fish for or take lobsters or crabs by any means from the waters north of a line starting at the ~~most northwestern point of Wilson Point (near the end of Wilson Point Road)~~ western most point of Perkins Point in the Town of Castine continuing in a northwesterly direction to the ~~Fort Point Lighthouse~~ southernmost point of Squaw Point on Cape Jellison in the Town of Stockton Springs. This section does not apply to equipment operated by the Department of Marine Resources.

Basis Statement

This rulemaking is necessary to protect public health due to the risk of mercury contamination in lobsters and crabs found in the mouth of the Penobscot River north of a line starting at the westernmost point of Perkins Point in the Town of Castine continuing in a northwesterly direction to the southernmost point on Squaw Point on Cape Jellison in the Town of Stockton Springs.

The justification for the expanded boundary of the closed area is based on recent data collected by the Department that shows lobsters in this area may have mercury levels above the Maine Center for Disease Control and Prevention (MECDC) action level. State health agencies use action levels as a guide to determine whether they should issue a consumption advisory warning consumers to limit meals of fish from certain waters. Action levels are defined as concentrations of a contaminant in fish or shellfish tissue below which there should be negligible risk of deleterious health effects, at a consumption rate of one meal per week. An action level takes into account exposure level for a human population, including sensitive subpopulations such as pregnant women and children, body weight, and fish consumption rate.

In 2013, DMR received data warranting the current closure in the mouth of the river, and undertook confirmation work to provide the basis for future management or public health decisions. Based on analysis of data collected in 2014 through the confirmation work, DMR determined that public health risks exist relating to the consumption of lobster taken from the area. Because this remains a very discrete area and in order to be health protective, DMR is taking action to expand the existing closed area. In making this determination, DMR considered issuing a consumption advisory in lieu of a closure but determined that a closure would be the most effective means to achieve public health protection due to the difficulty of effectively communicating the risk to the public, including non-commercial harvesters who may be fishing in this area, the seasonal nature of the commercial fishery in this area, and the inability to track lobsters taken from the area once they enter into the market. . DMR will continue to analyze lobster data collected in 2015 and anticipates that additional information would be collected prior to any future regulatory and public health actions. While the confirmation work did not show levels of concern for crabs, the area will remain closed to the harvest of crabs due to enforcement constraints.

Summary of Comments

Attendance List

Name	Town	Affiliation/Occupation
Rick Gilley	East Orland	Maine Lobstering Union (IMLU)
Joel Pitcher	Jefferson	Maine Lobstering Union (IMLU)
Kim Ervin Tucker	Not Stated	Maine Lobstering Union (IMLU)
Cyrus Sleeper	Thomaston	Maine Lobster Marketing Collaborative
Wayne Canning	Belfast	Maine Lobstering Union (IMLU)
William Kirby III	Waldo	Lobster and Crab Fisherman out of Searsport
Anne Farnham	Castine	Neighbor/Clam Digger
Ewen Farnham	Castine	Retired Banker
Nick Battista	Camden	Island Institute
Cathryn Simon	Not Stated	Not Stated
Michael Dassatt	Belfast	Fisherman/Downeast Lobstermen's Assn. (DELA)
Jeff Farrel	Not Stated	Fisherman
Nelson Walter	Not Stated	Amec Foster Wheeler
Hugh Reynolds	Stonington	Maine Lobster Dealer's Assn.
David Black	Belfast	Lobsterman
Tony Kulik	Belfast	Not Stated
Elaine Tucker	Belfast	Not Stated
Sheila Dassatt	Belfast	DELA

Patrice McCarron	Kennebunk	Maine Lobstermen's Assn (MLA)
David Cousens	South Thomaston	Lobsterman/MLA
Jonathan Fulford	Monroe	Candidate for Maine House District II
Melvin Grant	Stockton Springs	Lobsterman

Summary of Comments Made at Public Hearing (09/06/2016)

Public Hearing Comments in Opposition to the Proposed Rulemaking

Kim Tucker spoke on behalf of the Maine Lobster Union (IMLU). Ms. Tucker stated that the IMLU contests the Department's authority to implement consumption advisories or implement fisheries closures based on environmental data demonstrating a public health risk. That aside, even if the Department does have the authority to implement a closure, Ms. Tucker argued that, after reviewing the data, it is in the opinion of the IMLU that the mercury levels found in lobster are not so high as to warrant a closure. She noted that mercury is found in the water and therefore in all fish and shellfish. The Maine Centers for Disease Control and Prevention (CDC) action level is an action level for a screening advisory based on Environmental Protection Agency (EPA) guidelines in 1997. These action levels have not incorporated updated EPA guidelines issued in 2000, or additional changes which the EPA made in 2014. These changes suggested that rather than imposing a limit on the volume of shellfish and fish consumed, at 2-3 servings/week of fish/shellfish be consumed as part of a healthy diet. Further, the EPA suggests limiting the consumption of certain fish, but makes no mention of lobster. In 2014, 61 lobsters were tested. She went on to note that the levels found in the tail meat of the lobsters was significantly lower than any levels found to be dangerous in the typical serving of tuna at a restaurant. Further, Ms. Tucker noted that levels in crabs were not analyzed sufficiently to warrant the closure of the crab fishery. Based on this, Ms. Tucker argued that the department has taken extreme and unnecessary measures that are harmful to the industry. Ms. Tucker later clarified that the Union is not stating that the Department has authority to issue a consumption advisory or should issue a consumption advisory, and that the Union would support a movement of the line of closure further North, based on the existing data. She submitted a suggested line.

Public Hearing Comments in Support to the Proposed Rulemaking

Sheila Dassatt, Executive Director of the Downeast Lobstermen's Association, read the notes she took during the public meeting regarding the Penobscot closure held on February 18, 2014. The meeting was led by Patrick Keliher, DMR Commissioner, Carl Wilson, DMR Director of the Bureau of Marine Science, and Andy Smith, state toxicologist with Maine Center for Disease Control. Sheila noted that the decision to establish the closure was not taken lightly and was regarded as the best path forward in order to demonstrate that the Department was taking action on information regarding higher mercury levels in the area. It was explained during the meeting that lobster are especially subject to contamination from mercury spills such as the one in Penobscot because they live on the bottom and feed off of food on the seafloor bottom (not in the water column). A statewide consumption advisory would have severely detracted from perceptions of lobster as a healthy food source across the state – thereby also causing harm to the Maine lobster brand and the marketability of Maine lobster in the U.S. and in other countries. The closure demonstrated that the Department was placing controls on the problem area as a precautionary approach, while avoiding tarnishing the brand coast-wide.

Patrice McCarron spoke representing the Maine Lobstermen's Association (MLA). The MLA has reviewed all the data, has attended all the public meetings and hearings on this issue, and strongly supports the closure action. Further, the MLA noted that the Department has the authority to implement the closure based on public health concerns. Ms. McCarron further noted that a U.S. Food and Drug Administration (FDA) advisory against consumption of tomalley from American lobster ("Maine lobster") in 2008 proved to be a major setback to the

lobster industry in terms of marketing. Consumers failed to understand the details of the advisory and instead of avoiding just that part of the Lobster which could have dangerous levels of Paralytic Shellfish Poisoning, the advisory ended up making consumers think that the entire lobster could be a health risk. This damaged the Maine Lobster brand. Ms. McCarron emphasized that it is human tendency to avoid what is perceived to be dangerous, even if an advisory is more nuanced. This can create confusion and MLA's main concern is to protect the Maine lobster brand. Therefore, where possible, any rulemaking or advisories should be contained within affected areas in order to avoid coast wide tarnishing of the brand. At the same time, the MLA would support reopening of the crab fishery if testing demonstrates that mercury levels are low enough in crabs.

Cyrus Sleeper spoke on behalf of the Maine Lobster Marketing Collaborative (MLMC). He noted that usually the MLMC does not comment on rule making given that the focus of the organization is marketing. However, this rule making is unique. Mr. Sleeper noted that there are major impacts if this issue remains in the news. Contesting the warranted and limited closure based on clear evidence, and thereby keeping this issue in the news, will not only set back the marketing efforts of the MLMC, it could potentially cause major challenges to the Maine lobster brand overall. Mr. Sleeper suggested that supporting the contained closure is the best path forward in assuring consumers, restaurants, and chefs across the country that Maine lobster is healthy to consume and is being protected as a premium Maine product through such measures.

Hugh Reynolds spoke on behalf of the Maine Lobster Dealer's Association (MLDA) and noted that an advisory would be devastating. Mr. Reynolds noted that the 2008 advisory, also referenced by McCarron, severely cut exports of lobster to Japan and other countries. Further, he noted that applying consumption advisories based on levels of contaminants is highly problematic in terms of foreign sales. Each country has their own standards for "safe" levels of heavy metals. These nuances are often lost or ignored and, instead, an entire export product can be perceived to be unsafe simply because of the publicity – no matter what the actual measure levels of contaminants in the food are. Further, different countries utilize animals in different ways – some countries typically use the whole animal, others only use pieces. This can influence the impacts of contaminants. Mr. Reynolds concluded by saying that he supports the closure and added that the Commissioner is well informed and is acting in the best interest of both public health and the Maine lobster brand.

David Cousens, President of the Maine Lobstermen's Association (MLA) commented on the difference between a consumption advisory and a closure. Having talked with over 60 lobstermen – he hasn't heard anyone suggesting that we should issue an advisory instead of moving forward with the closure. Consumers here and in other countries do not understand the nuances of advisories, and instead consider an advisory a mark against the product.

Mike Dassatt, Downeast Lobstermen's Association Board Member, noted that the closure is needed, and when the last two years of the sampling were occurring, the group was pushing the court to sample further down the coast. However, the line that was drawn by the Department is appropriate based on the sampling that is currently available. He did further note that areas further south seemed to be trending towards lower levels of mercury. This would indicate that the impacts of the mercury contamination decrease further from the main spill site, and that lobsters further from the site have a chance to purge their systems of the contaminants. Mr. Dassatt further noted that the sampling was in depth and included many other species. He further noted that as a result of this sampling, the court has ordered the companies to pursue clean up measures. DMR and the lobster industry should maintain good relationships with the companies who are pursuing clean up measures by taking steps, like the closure, in order to maintain the integrity of the Maine lobster brand.

Wayne Canning, a Zone D Lobster Zone Council member, made a comment based on his discussions with lobstermen. He noted that most lobstermen agree that the closure is the best approach, given that a consumption advisory will impact the brand and lobstering coast wide. He noted that there are other set-backs facing the lobster industry – such as bait prices – and there is no reason to take measures that would damage the marketing strength of the lobster product. DMR is clearly aiming to protect the reputation of the product by moving forward with the closure.

Neutral Public Hearing Comments

Jonathan Fulford commented about the impacts of the displaced fishing community into the rest of the bay. He asked whether the Department is compensating or recognizing this impact. Elaine Tucker also commented on the uncertain impacts that the closure has on real estate values. She complained that the Department has not provided a clear answer as to the health impacts of the contamination in terms of recreational uses of the area, such as swimming.

Summary of Written Comments Submitted to DMR

Written Comments in Opposition to the Proposed Rulemaking

Rufus Brown, of Brown and Burke, submitted written comments dated August 10, 2016 on behalf of Skeet Wyman and Billy Kirby, both commercial crab and lobster fishermen who have used the proposed closed area for fishing. Mr. Brown stated that his clients have already experienced significant economic losses as a result of the original Penobscot closure effective February 22, 2014. While acknowledging the public health concerns underlying the Department's actions, Mr. Brown stated that the data available do not support consumption advisory levels for crabs. Mr. Brown went on to state that his clients are encouraged that the Department will consider reopening the original and expanded closure for crabs depending on the outcomes of analysis of the 2015 crab samples.

Ron Huber, Executive Director of Friends of Penobscot Bay, submitted written comments to the Department dated August 12, 2016. Friends of Penobscot Bay (FOPB) is a Maine nonprofit organization dedicated to restoration and conservation as well as improving water quality and ecosystem services. FOPB felt compelled to comment due to the socioeconomic impacts and economic losses that would be posed by the proposed closure. FOPB further stated that the closure is not warranted based on the available data. FOPB argued that the mercury levels found in the lobster meat is “well below” federal and state action levels and further emphasized that the CDC includes lobster on the list of seafood low in mercury. Other species listed as low in mercury were not included in the closure. FOPB is particularly concerned with the permanent displacement of commercial fishing communities from the closure area. Further, the closure could make the area more vulnerable to coastal development proposals including waste discharge permits. Finally, FOPB argued that there has not been sufficient opportunity for public comment on the proposed regular rulemaking process.

The Maine Lobstering Union (IMLU) submitted written comments to the DMR dated August 12, 2016. IMLU argued that DMR's proposal to close an additional 5.5 square miles to all lobstering and crabbing has unjustifiably damaged the reputation for wholesomeness of all Maine lobsters – especially Penobscot Bay lobsters – including those from the Cape Jellison and Turner Point areas. IMLU argued that the closure is proposed in the absence of sound scientific support or legal authority under Maine law. Key parts of their arguments read as follow:

DMR's 2014 study does not demonstrate that there are lobsters or crabs which have been adulterated by mercury or that are unfit for commercial sale or consumption in this new closure area. Contrary to DMR's assertions in the emergency and proposed permanent Rule Notices, the 2014 DMR Study provides no grounds to either issue a consumption advisory or to expand the existing closure area by 5.5 square miles "in order to protect public health due to the risk of mercury contamination in lobsters and crabs found in the mouth of the Penobscot River north of a line starting at the westernmost point of Perkins Point in the Town of Castine continuing in a northwesterly direction to the southernmost point on Squaw Point (also known as Rocky Point) on Cape Jellison in the Town of Stockton Springs." See proposed permanent rule Notice.

Rather than protecting the Maine Lobster brand by keeping tainted lobsters from market, the Maine DMR inexplicably is damaging the Maine Lobster brand by falsely claiming that lobsters that have demonstrably low levels of mercury as compared to all seafood deemed safe for consumption by the EPA and FDA, pose a public health risk that would require a consumption advisory and/or treatment as "adulterated" by consumers and the State government through imposition of a permanent closure of 5.5 square miles to commercial, recreational and sustenance lobster and crab fishing.

How can DMR justify permanently closing an area to all lobstering and crabbing when DMR acknowledges that the mean level of mercury found in lobsters from this area is less than the mean level of mercury in each can of albacore tuna found on every grocery store shelf in Maine and the U.S.? More importantly: Why would DMR disparage the Maine Lobster brand in this way when DMR acknowledges that (i) the levels of mercury found in the tail meat of lobsters in this area are less than that in a can of tuna; and (ii) the levels of mercury in the claw meat of those same lobsters and all crabs tested is less than 200 ng/g?!

All fish and shellfish in the United States contain trace amounts of mercury – whether wild caught or farm raised, in fresh or saltwater. Because of this reality, the EPA, FDA and State public health agencies have established guidance for the consumption of fish and shellfish for the general population and vulnerable populations (including pregnant women, nursing mothers, and children under the age of 8 (EPA says 6 years of age; the Maine CDC says 8 years of age). The FDA also has established an "action level" for treating fish and shellfish as "adulterated" food that is subject to legal action to remove it from the consumer marketplace. The FDA "action level" for lobster is 1,000 ng/g.

The levels of mercury found in all lobsters tested off Cape Jellison and Turner Point are significantly below the FDA action level – with the highest level of mercury found in a single lobster caught adjacent to the existing closure area being 807.6 ng/g...

The EPA lists 107 ng/g as the mean level of mercury expected to be found in North American (Maine) lobsters -- other environmental groups list that level at as high as 310 ng/g. The mean level found in the 40 legal-size Cape Jellison lobsters collected in 2014 was 292.7 ng/g and the mean level found in the 21 legal size Turner Point lobsters was 302.6. To put this in perspective, a can of albacore tuna contains 350 ng/g of mercury....

Maine CDC established an "action level for screening evaluations" in 2001 of 200 ng/g.⁴ However, DMR is seemingly attempting to improperly use this 200 ng/g level used by the Maine CDC to assess when to issue a consumption advisory to noncommercial recreational fishermen in freshwater, as an action level to permanently shut down all commercial, recreational and sustenance lobster and crab fishing in an area of Penobscot Bay. Significantly, there is no immediate or long-term public health risk posed to any

population from eating fish and shellfish with the mean mercury levels found in the proposed expanded closure areas (i.e. 292.7 to 302.6 ng/g) in 2014....

At these modest levels of mercury, even vulnerable consumers can safely continue to use the levels of consumption already suggested in the existing Maine CDC consumption advisory above (1 to 2 meals per week).

Thus, this closure is an abuse of the limited closure powers provided to DMR by Maine statute. In the DMR 2014 Study, the tail meat of approximately 24 lobsters had levels of mercury over 200 ng/g. No lobsters were found with levels of mercury high enough to meet the FDA definition as adulterated (1,000 ng/g). The mean level of mercury in all claw meat in the 61 legal size lobsters tested (including the 24 lobsters with higher levels of mercury in their tail meat), and the mercury levels in all crabs tested were below 200 ng/g. Yet DMR claims in its rulemaking notice that the levels of mercury found in these 24 lobster tails with mercury levels in excess of 200 ng/g would justify issuing a consumption advisory. However, in lieu of issuing a consumption advisory – which could only apply to noncommercial recreational or sustenance fishermen -- DMR is ordering the draconian measure of permanently closing this area to all commercial, recreational and sustenance lobster and crab fishing.

This action by DMR exceeds the Department’s statutory authority and is not justified for the following reasons:

- The only consumption advisory that the 2014 DMR test data arguably supports is an advisory to recreational (noncommercial) and sustenance fishermen in this area to limit the consumption of lobster tail meat from lobsters caught in this area to 1 serving per week by pregnant and nursing women, women who may get pregnant and children 8 years of age (i.e. the same consumption advisory applicable to a can of albacore tuna) – rather than 2 meals per week. However, issuing such an advisory in the circumstances here is outside the jurisdiction of the Maine CDC to issue, pursuant to 22 M.R.S.A. § 1696-I – which provides limited authority to Maine CDC to issue consumption advisories for persons consuming freshwater and anadromous fish caught in state waters by noncommercial anglers. This provision does not authorize Maine CDC to issue a consumption advisory for lobsters in Penobscot Bay nor to issue a consumption advisory relating to commercially caught shellfish.
- No public health threat is posed by consuming lobster tails with the levels of mercury found in the 2014 study in the Cape Jellison and Turner Point area⁵ – where all lobsters tested had levels of mercury significantly below the level to be considered “adulterated” and all had levels consistent with and within the normal limits for fish and shellfish sold commercially in the United States.
- If, in an abundance of caution, DMR determined that it was in the interest of the fishery to expand the closure area to include the area where the two lobsters with highest mercury levels were collected – that expansion area would only need to include the roughly half- mile area directly adjacent to the existing closure area – not the 5.5 square mile area proposed. The justification for a more limited expansion of the closure zone can be found in Figure 6b on page 21 of the 2014 DMR Study – which shows the location of lobsters caught during the study and confirms that the two lobsters caught with levels around 800 ng/g were very close to the existing closure area. However, even the level of mercury found in these two specimens does not pose an

immediate or long-term public health threat nor meet the requirements for these lobsters to be classified as adulterated requiring their removal from the commercial market.

- In the absence of any public health threat, DMR is without statutory authority to close this area to lobstering or crabbing. See e.g. 12 M.R.S.A. § 6171-A, § 6172 and § 6192 (e.g. in the absence of any public health threat or emergency).

Written Comments in Support to the Proposed Rulemaking

The Maine Lobster Marketing Collaborative (MLMC) submitted comments focused on the impacts of the closure on marketing. The MLMC stated that the proposed closure is the best way forward and the impacts of the closure will be absorbed by the market. In contrast, a closure or consumer warning would do serious damage to the market, including renewed and negative press attention; failure to differentiate between lobster from the impacted area and lobster along the Maine coast; and the creation of confusion and fear, requiring significant and additional outreach and marketing efforts that would impact MLMC's budget.

The Maine Lobstermen's Association, Inc. (MLA) submitted written comments to the Department dated September 6, 2016. The MLA stated that after reviewing all available data and reports, and attending all public meetings, MLA is in support of the closure. MLA stated that it is their understanding that DMR has authority and responsibility to protect public health, using closures such as this one. There is also historical precedent for such measures, including the advisory issued in July 2008 regarding the consumption of lobster tomalley. In the past, MLA has been opposed to the use of closures as a management tool, but this is a unique case. The contamination in the lower Penobscot River poses a serious health risk. While the closure poses hardship for area fishermen, the risk to public health in this case warrants the closure. Issuing an advisory as opposed to the closure would confuse buyers and consumers, who would have difficulty determining if the lobster they were purchasing or eating is from the contaminated area. MLA noted that, in the past, consumer advisories – even if limited in geographic scope – tend to lead to the avoidance of the product no matter where it is originating from. Prohibiting lobstering in a limited area will avoid any confusion as lobsters from the contaminated area will not be in circulation. MLA further stated that it is appropriate to move from emergency to regular rulemaking in order to close the area until such time as DMR can reopen the area based on new data.

The Maine Lobster Dealers' Association (MLDA) provided written comment on September 16, 2016. The MLDA expressed support for the closure, noting that in the past when a broad health advisory has been placed on, this has led to major marketing challenges. For example, MLDA noted that in 2008, the United States Food and Drug Administration (FDA) placed a health advisory on lobster tomalley. As a result, Maine struggled to compete with other New England states in the Japanese lobster market. While a closure is unfortunate, it avoids the detrimental impacts that a health advisory would cause. MLDA further noted that as Asian countries increasingly seek sea food from America in order to ensure food safety, it is vital that Maine maintain a perception of healthy and uncontaminated sea food. Closures are a way of containing and defining the area of contamination and avoiding the generalization of warnings on a coastwide basis.

Department's Responses

Introduction/Rulemaking Background

DMR proposed this rulemaking in order to protect public health due to the risk of mercury contamination in lobsters and crabs found in the mouth of the Penobscot River north of a line starting at the westernmost point of

Perkins Point in the Town of Castine continuing in a northwesterly direction to the southernmost point on Squaw Point (also known as Rocky Point) on Cape Jellison in the Town of Stockton Springs.

In 2013, DMR received data warranting the current closure in the mouth of the river, and undertook confirmation work to provide the basis for future management or public health decisions. Based on analysis of data collected in 2014 through the confirmation work, DMR determined that public health risks exist relating to the consumption of lobster taken from the area. Because this remains a very discrete area and in order to be health protective, DMR is taking action to expand the existing closed area. In making this determination, DMR considered issuing a consumption advisory in lieu of a closure but determined that a closure would be the most effective means to achieve public health protection due to the difficulty of effectively communicating the risk to the public, including non-commercial harvesters who may be fishing in this area, the seasonal nature of the commercial fishery in this area, and the inability to track lobsters taken from the area once they enter into the market. DMR will continue to analyze lobster data collected in 2015 and anticipates that additional information would be collected prior to any future regulatory and public health actions. While the confirmation work did not show levels of concern for crabs, the area will remain closed to the harvest of crabs due to enforcement constraints.

Emergency vs. Regular Rulemaking

The Department expanded the closed area through an emergency rule-making effective June 22, 2016. This rule-making would make that emergency rule-making permanent. The Department had implemented the previous closure by emergency rule then had regular concurrent rulemaking, and heard no objections to that closure during the regular concurrent rulemaking process for the initial closure.

This time around, given that an emergency rule does not require a hearing, the Department felt the best approach was to offer an informational meeting when the emergency closure was implemented so that the Department could provide the basis for our decision and members of the public would have an opportunity to ask any questions they may have. As such, the Department's original publication of this regular rulemaking, which will make the emergency closure permanent, stated that DMR did not intend to hold a hearing. However, the Department was petitioned to hold this hearing by six individuals. A request by five or more individuals is required by the state Administrative Procedures Act to hold a hearing.

The expanded closure was implemented as an emergency rule in June due to the fact that the Department felt it was important to take action prior to the late summer months, when many commercial and recreational harvesters would be setting traps in the area. Regular rulemaking takes approximately 90 days. Since the Department did not receive the Maine Center for Disease Control's analysis of the 2014 data until early May, and the whole body analysis in early June, that process would have taken until early September to complete, with approval from the DMR Advisory Council not likely to occur until their October meeting. The Department felt that this time frame would raise additional concerns and cause additional hardship for fishermen to take up gear that had already been set in the area.

Department Authority to Implement the Closure

Under Title 12, the DMR Commissioner has broad authorities to protect public health under both his regular and emergency rulemaking authorities, as well as the authority to close the intertidal zone and coastal waters if any marine organisms become contaminated or polluted.

Closure v. Consumption Advisory

Some comments in opposition to the closure noted that the mean mercury levels in lobster claw or tail meat samples tested are not as high as those in products such as canned tuna, or do not exceed the Food and Drug Administration (FDA) action level of 1,000 ng/g. Therefore, these commenters argued, the Department should

not be issuing a closure, because this action is effectively equivalent to removing product from the market. However, the commenter is misinterpreting the basis for, and rationale behind, the closure.

The various action levels used by different agencies have different purposes. For example, the FDA action level of 1000 ng/g is the point when product would be removed from the marketplace (e.g. removed from store shelves). For purposes of this decision, the Department consulted with the Maine Center for Disease Control (MECDC), whose guidance is that any levels over 200 ng/g (the MECDC Fish Tissue Action Level), warrants a consumption advisory for the most sensitive populations, including pregnant or nursing women, and children under the age of 8. In this expanded area, the mean levels of mercury in lobster tissue, including both claw and tail muscle tissue range from 242 ng/g along the Cape Jellison shoreline, to 263 ng/g along Turner Point. The upper confidence limits for those areas are 291 ng/g for Cape Jellison, and 335 ng/g for Turner Point. It is important to note that both the FDA and US Environmental Protection Agency (EPA) do indeed have consumption advisories in place for canned tuna, confirming that some sort of advice is warranted at these levels.

Therefore, the Department needed to take action to inform and protect the public regarding the risk of consuming lobster from this area, and the only question was how to most effectively and efficiently protect public health. There were two key aspects to that decision that led us to determine that a closure was the most effective and efficient means. First, this area has a limited seasonal lobster fishery, and a relatively small number of harvesters operating in the area. Furthermore, there was minimal opposition to the rulemaking implementing the original closure. Given the challenges associated with attempting to effectively and comprehensively communicate an advisory to impacted harvesters (e.g. recreational harvesters, who do not have to declare a zone or may fish in areas far from their home), a closure assured that this product was not reaching consumers, assuring confidence that all sensitive populations are being fully protected. Due to the fact that this area has a limited seasonal lobster fishery, and a relatively small number of harvesters operating in the area, the Department felt that a closure was the most effective means of protecting harvesters and consumers while minimizing the impact on lobster harvesters. Second, using a closure instead of issuing a consumption advisory assured that there would be no detrimental impact to the entire lobster fishery that would come from the market concerns around contaminated product. Because there is no traceability in the lobster supply chain, a consumption advisory would be likely to have an adverse impact on the entire fishery and lobster market. There is a short season when lobsters are present within the closure area, and compared to other parts of the coast, the area is not densely fished by a large number of harvesters.

Given this, the Department felt that a closure may have minimal impact and maximum benefit to the industry. Therefore, DMR made the determination for both the original closure and the expanded area that is the subject of this rulemaking, to close the area to harvest rather than issuing a consumption advisory. DMR understands that the expanded closure area increases the adverse impact to crab harvesters in particular, and will be re-evaluating the potential for opening a crab-only fishery in this area after testing and analysis of the 2015 confirmation samples has been completed.

Location of the Proposed Closure Line

Based on sampling results, the Department determined that the closure line should be moved south to encompass the ledges below Fort Point. Enforceability was a key factor, as it is challenging to have a line of sight over such a long distance. Therefore, the Department needed to move the western edge to the southernmost point on Cape Jellison, and use Turner Point or Perkins Point on the eastern side of the river. While the levels are higher closer to the edge of the original closure, near Fort Point Ledge, the Department's additional, gap filling sampling demonstrated higher levels overall, indicating that the conservative and precautionary approach would be to move the line south in order to accommodate uncertainty about the extent of the mercury contamination in the area.

Crab Closure

While the 2014 confirmation work did not show levels of concern for crabs, the area will remain closed to the harvest of crabs until further analysis can be conducted and management options analyzed. 2015 lobster and crab samples are currently being tested and will be analyzed once the results are received. It may be that the department will be able to open up the crab fishery to crab-only traps in the future if this analysis demonstrates that crabs are at safe levels for consumption and any enforceability issues are able to be addressed.

Economic Impacts of Closure

While DMR realizes that this has adverse economic impact to local harvesters, and does not make a closure lightly given that reality, this health protective measure ensures that those local fishermen, and any recreational harvesters who may be taking lobster from this area for personal use and therefore eating lobster from this area on a more regular basis than a consumer elsewhere in the country, are not at risk from increased toxicity due to mercury levels in lobsters from this area. Furthermore, the closure protects the Maine lobster brand because it ensures that consumers can continue to eat as much Maine lobster as they want, without concern about where it was harvested.

Compensation for the Closure

The Department does not have a mechanism or resources to provide compensation for the closure to impacted fishermen.

Rule-Making Fact Sheet

(5 M.R.S., §8057-A)

AGENCY: Department of Marine Resources

NAME, ADDRESS, PHONE NUMBER OF AGENCY CONTACT PERSON:

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CHAPTER NUMBER AND RULE: Chapter 25.65

STATUTORY AUTHORITY: §12 M.R.S. §6171-A

DATE AND PLACE OF PUBLIC HEARING: None Scheduled

COMMENT DEADLINE: 8/12/2016

PRINCIPAL REASON(S) OR PURPOSE FOR PROPOSING THIS RULE: [see §8057-A(1)(A)&(C)]

The Commissioner proposes this rulemaking in order to protect public health due to the risk of mercury contamination in lobsters and crabs found in the proposed expansion of the existing closed area. Recent confirmation data collected by the Department and analyzed by the Maine Department of Health and Human Services, Center for Disease Control (Maine CDC) indicates that lobsters in this area may have mercury levels above the Maine CDC action level and would warrant a consumption advisory for the most sensitive populations. The Department believes the expansion of the existing closure is warranted.

IS MATERIAL INCORPORATED BY REFERENCE IN THE RULE? ___ YES ___ NO [§8056(1)(B)]

ANALYSIS AND EXPECTED OPERATION OF THE RULE: [see §8057-A(1)(B)&(D)]

The rule is expected to protect public health by ensuring that lobsters which may contain levels of mercury above the Maine Center for Disease Control and Prevention action levels for the most sensitive populations are not available for consumption.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE (including up to 3 primary sources relied upon) [see §§8057-A(1)(E) & 8063-B]

In 2013, DMR received data warranting the current closure in the mouth of the river in early 2014, and undertook confirmation work to provide the basis for future management or public health decisions. Based on analysis of the data collected in 2014 through the confirmation work, DMR determined that a consumption advisory would be warranted for lobster taken from an expanded area south of the existing closure. Because this remains a discrete area and in order to be health protective, DMR is instead taking action to expand the existing closed area. While the 2014 confirmation work did not show levels of concern for crabs, the area will remain closed to the harvest of crabs until further analysis can be conducted and management options analyzed.

ESTIMATED FISCAL IMPACT OF THE RULE: [see §8057-A(1)(C)]

Enforcement of the proposed regulation would not require measurable additional activity in this Agency. Existing enforcement personnel would monitor compliance during their routine patrols.