



Department of the Secretary of State

Regulatory Fairness Board Public Hearing  
Friday, June 29, 2012  
1:00 – 3:00 p.m.

### Public Hearing Notes

**In attendance:**

Board Members:

Mark A. Tyler, Oakland - Vice Chairman  
Michael R. Cote  
Doug Smith

Other Attendees:

Jay Martin, Small Business Advocate  
Megan Sanborn, Special Assistant  
Debbey French, Information Services Technician  
Six members of the general public

As **Chairman Summers** was detained, **Vie-Chair Tyler** led the hearing.

Introductions.

**Mr. Smith** motioned to approve the Board's February 24, 2012 public hearing minutes; seconded by **Mr. Tyler**. Motion approved unanimously.

**Ms. Darcie A. Couture** submitted written and oral testimony to the Board (please see Appendix A for her full written testimony). To summarize, Ms. Couture stated the following. She is a former director of the Department of Marine Resources' biotoxin monitoring (red tide) program. She owns and operates Resource Access International, LLC, in Brunswick, a private lab inspected and certified by the U.S. Food and Drug Administration (FDA) to run red tide testing used to inform federal regulations. Her revenue is derived from other states, including New Hampshire, Massachusetts and New Jersey, and she has yet to complete any work for the state of Maine because of her departure from DMR this spring. Her lab is capable of doing all the work currently processed at DMR's two labs at a lower cost, and many state government programs impede growth in the private sector. She cited a 2011 meeting between private lab operators and DMR, where the department doubted both the claims of private sector cost efficiencies and the likelihood of FDA certification. While the state sees some minor purchasing advantages, its capital, maintenance, and payroll costs are higher than private sector labs. Compared with private labs, state labs work less efficiently and are less innovative. Though the state retains some excellent staff, it also retains "plenty of not-so-excellent staff." There exist numerous companies interested in conducting work currently assigned to state agencies, but many in the marine industry do not speak up on this issue for fear of retaliation from DMR. She asked the Board to consider conducting an independent review to establish whether privatization of certain services assigned to state employees is warranted.

Board members asked Ms. Couture a series of follow-up questions, and she responded as follows. Regarding any projected cost savings that may be achieved should functions currently performed by state labs be conducted by private labs, she said that if given access to the state lab financial data, she would be able to fairly estimate cost savings. The department runs two full-time year-round labs and she could expand her capacity to fulfill this work very quickly. New Hampshire has its own lab but finds it easier and cheaper to send lab work to her. Red tide is considered specific to the Northeast. While employed at DMR, she examined the budgets and found that DMR tends to move costs around, so to determine privatization cost savings, the Board would need to request that these costs be specifically identified. She emphasized that there are many private companies that can conduct basic activities now completed by state agencies, and that some activities require a certain level of expertise that private companies could achieve more effectively. Regarding what would happen should she close her business, she said that much of this work is seasonal (spring-autumn), and that the state could maintain the skill set among certain staff as a back-up plan. The federal government provides oversight of state labs, but the responsibility for monitoring shellfish safety belongs to the states, and her lab meets the same federal standards as the state labs. She does not believe current state statutes would prohibit privatization of lab activities. DMR offers some matching grants, and Maine taxpayers cover the full cost of state lab activities.

**Mr. Eric Mihan** is the owner of Bangor Wine and Cheese Co. in Bangor. (Please see Appendix A for his full written testimony). To summarize, **Mr. Mihan** stated the following. He is seeking assistance from the Board to be allowed to repackage keg beer brewed by other companies into 64 ounce bottles (“growlers”) for retail off-premise sale. His proposal has been denied by the Department of Health and Human Services (DHHS) Liquor Licensing Division. He cited certain statutory clauses that should allow him to conduct this business practice, one of which specifically allows businesses with an off-premise license to resell a fraction of a keg of beer in sealed containers for consumption off premise where sold. DHHS first denied permission based upon federal law, yet because many other states allow this practice, he believes federal law must not prohibit such practices. His written testimony includes a flowchart comparing the sales practices allowed and disallowed by DHHS based upon whether a business is a brewer, wholesaler, or maintains an on-premise or off-premise license. His written testimony also includes a letter from numerous legislators to DHHS asking that the department explore Mr. Mihan’s proposal with him to make this idea a reality.

In response to questions posed by the Board, **Mr. Mihan** offered the following. The law clearly states that he is allowed to sell beer in sealed containers or original packages. Growlers can be considered sealed containers. Maine brewers sought a change in the law as they wanted on-premise licensees to sell packaged beer off-premise. There are many beers not available in bottles so this practice would make these products further available. The other states allowing this practice include South Carolina, New Jersey, and some west coast states. His primary motivation to pursue this practice is to ensure the preservation of his business. He would like to engage in this practice immediately rather than wait for the Legislature to visit this matter.

In response to a question from the Board, **Mr. Martin** said that his office has looked into this matter and was advised that the pertinent law, when considered in full context, expressly forbids

such business practices to any companies other than the original brewers of the product. His office contacted the state of New York's Attorney General's Office, as that state allows this practice even at convenience stores, and learned that the New York law is an artifact from the days when Prohibition was repealed. He said that Maine liquor law is structured so that if a business practice is not expressly allowed by law, then it is considered disallowed.

**Mr. Mihan** said that he disagrees with this view, as his interpretation of the law allows for this practice. He believes the state is standing upon the law that provides an exception for brewers to sell packaged beer for off-premise consumption. In response to a question from the Board regarding who may be harmed by this practice, he said Anheuser Busch, because they receive retail distribution income. He plans to repackage and sell craft beers, so he doubts that Anheuser Busch would be harmed, however, he believes the law allows him to repackage Anheuser Busch beer.

**Mr. Bruce Chamberlain** is a former head of the shellfish plant sanitation program for the Maine Department of Marine Resources (DMR) and a current consultant for Maine shellfish dealers. (Please see Appendix A for his full written testimony). To summarize, **Mr. Chamberlain** stated the following. Shellfish dealers using closed wet storage systems to sanitize shellfish must meet a standard of less than 1 total naturally occurring, non-disease coliform bacteria per 100 mls of seawater. In 2012, when DMR changed the test methods used for this procedure, the department failed to consider that this would result in a greater degree of test failures, as dealers who had passed tests under the previous "multi-tube" method are now failing tests using the new "membrane filtration" method. Federal guidelines require dealers to immediately correct deficiencies or close the plants affected, risking loss of shellfish up to hundreds of thousands of dollars in value. He suggested a two-step solution: 1) DMR should revert to the multi-tube testing method temporarily; and 2) the membrane filtration testing method standard should be recalibrated and re-submitted to the federal standards organization in the fall of 2013. Maine is the only state using this new testing method, and that by implementing it to ease test processing, DMR has placed Maine's major shellfish dealers at a significantly competitive disadvantage. Shellfish that is not stored in closed wet storage systems may be sold with up to 14 fecal coliforms per 100 mls of seawater. These clams may go directly to the consumer, without any further treatment or processing.

In response to questions posed by the Board, **Mr. Chamberlain** offered the following. DMR approved a new standard put in place last year by the Interstate Shellfish Sanitation Conference that functions to ensure safety protocols for interstate sales of shellfish. Their next meeting will be held on October 16. Maine shellfish dealers who fail to meet shellfish sanitation standards risk losing tens of thousands of pounds of clams, costing hundreds of thousands of dollars. DMR could either consider calibrating the new standard to prevent such economic hardship, or return to the old standard. There are at least four or five shellfish dealers of the 120 in Maine that used closed wet storage systems. **Mr. Smith** said that the Board could seek to address this issue perhaps through the rulemaking process, and suggested that the Board request **Mr. Martin** to look further into this matter and report to the Board. **Mr. Martin** agreed to do so.

**Motion by Mr. Tyler** to adjourn.

**Seconded by Mr. Cote.**

**Voted:** unanimous.

**NEXT MEETING:** Friday, November 16, 1 p.m. – 3 p.m., Rines Auditorium, Portland Public Library, 5 Monument Square, Portland.

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## APPENDIX A

### Written Testimony

Ms. Darcie A. Couture, Brunswick

Mr. Eric Mihan, Bangor

Mr. Bruce Chamberlain, Monroe