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May 2, 2011

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: House Bills 208 and 1053, and Senate Bill 847

Dear Governor O'Malley:

We have reviewed and hereby approve House Bill 208, "Aquaculture – Shellfish Leasing Areas – Expansion," House Bill 1053, "Natural Resources – Aquaculture," and Senate Bill 847 "Natural Resources – Aquaculture," for constitutionality and legal sufficiency. We write to discuss the interaction between the bills, and the constitutionality of certain severable portions of House Bill 208.

House Bills 208 and 1053 and Senate Bill 847 all amend Natural Resources Article §§ 4-11A-06(b)(1) and 4-11A-07(b). These sections of the Natural Resources Article provide for shellfish submerged land leases in the Chesapeake Bay and Atlantic Coastal Bays, so long as the waters "meet applicable water quality requirements for shellfish cultivation as determined by the Department of the Environment." House Bill 1053 and Senate Bill 847 are cross filed bills that amend both § 4-11A-06(b)(1) and §4-11A-07(b) to clarify the water quality requirements. House Bill 208 amends those same sections to provide that the Department of Natural Resources is only authorized to issue a shellfish lease to a corporation if the corporation is organized in the State of Maryland and more than 50% of the corporation's stock is owned by Maryland residents. It is our view that these bills are not substantively incompatible, but they are structurally incompatible. These structural conflicts can be resolved by the codifier of laws incorporating the changes made by all three bills as follows:

- (b)(1) Subject to paragraph (2) of this subsection, the Department may issue to a person a submerged land lease in waters of the Atlantic Coastal Bays after the Department of the Environment classifies the waters as:
- (i) Approved, conditionally approved, or restricted for harvest; or
 - (ii) Prohibited, provided that the lease is used exclusively for the planting and gathering of seed for aquaculture and the leaseholder complies with the requirements of the National Shellfish Sanitation Program as implemented by the Department.
- (2) The Department may issue a submerged land lease in the waters of the Atlantic Coastal Bays to a corporation only if:
- (i) The corporation is organized under the laws of the State; and
 - (ii) More than 50% of the stock in the corporation is owned by residents of the State.

Additionally, the provisions added by House Bill 208 that limit corporate shellfish leasing to Maryland corporations may be subject to a constitutional challenge on the ground that they violate the Commerce Clause, Article I, Section 8 of the United States Constitution. Under the dormant Commerce Clause, a state law that discriminates against interstate commerce in favor of local business or investment is per se invalid, except in a narrow class of cases where the law is necessary to advance state interests and there is no other nondiscriminatory means to accomplish the goals of the law.¹

House Bill 208 may fall under one or both of the two exceptions to the dormant Commerce Clause. The first exception is for laws that discriminate against interstate commerce that have been expressly permitted by Congress. In 2005, the United States Congress passed the "Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005."² That Act provides:

¹ *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 392 (1994).

² H.R. 1268, 109th Cong. § 6063(b)(1).

It is the policy of Congress that it is in the public interest for each State to continue to regulate the taking for any purpose of fish and wildlife within its boundaries, including by means of laws or regulations that differentiate between residents and nonresidents of such State with respect to the availability of licenses or permits for taking of particular species of fish or wildlife, the kind of numbers of fish and wildlife that may be taken, or the fees charged in connection with issuance of licenses or permits for hunting or fishing.³

The Tenth Circuit Court of Appeals has interpreted this Act to signify that "Congress has unmistakably foreclosed dormant Commerce Clause petitions challenging state hunting and fishing statutes that treat nonresidents differently than residents."⁴ The Court of Appeals for the Eighth Circuit has also applied the Reaffirmation Act of 2005,⁵ upholding a North Dakota law that prohibited all nonresidents from hunting waterfowl.⁵ As House Bill 208 generally relates to oysters and shellfish aquaculture, it may fall within this class of fishing laws that Congress intended to permit under the Reaffirmation Act of 2005.

The provisions of House Bill 208 related to Maryland corporations might also fall within the market participant exception to the dormant Commerce Clause. Under the market participant exception, a state may favor its own residents in laws that deal with state proprietary activities because in those situations the state is acting as a market participant rather than a market regulator.⁶ The market participant exception is supported by "considerations of state sovereignty, the role of each State 'as guardian and trustee for its people,' and 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'"⁷ The Maryland Department of Natural Resources is responsible for managing state-owned land, including all state-owned submerged lands, for the benefit of the public. For decades, the General Assembly has authorized the Department to issue leases of areas of submerged land for the purpose of conducting aquaculture. The Department enters into contractual agreements with the leaseholders

³ *Id.*

⁴ *Schutz v. Thorne*, 415 F.3d 1128, 1138 (2005)(holding a claim against a Wyoming statute that imposed higher fees for hunting licenses on out-of-staters was moot in light of the Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005).

⁵ *Minnesota v. Hoeven*, 456 F.3d 826, 833 (2006).

⁶ *Reeves, Inc. v. William Stake*, 447 U.S. 429, 438 (1980).

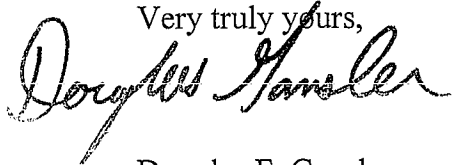
⁷ *Id.* at 438-439 (citations omitted).

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and collects rent from them. Because of the State's role as a lessor of the submerged lands, and the contractual relationships that are involved in aquaculture leasing, the State might be seen as a market participant. If so, then the dormant Commerce Clause would not invalidate a law that restricts aquaculture leasing to Maryland corporations.

Lastly, we note that the provisions of House Bill 208 are severable. Thus, in the event the provisions related to Maryland corporations are held unconstitutional, the remaining provisions of the bill would not be affected. For these reasons, we conclude that the corporation provisions of House Bill 208 are not clearly unconstitutional, and approve the bill for your signature.

Very truly yours,

A handwritten signature in cursive script that reads "Douglas F. Gansler". The signature is written in dark ink and is positioned above the printed name of the signatory.

Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Joseph Bryce
Karl Aro