Department of Legislative Services

Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

House Bill 915 (Delegate Jacobs, *et al.*)
Environmental Matters Judicial Proceedings

Commercial Fishing and Seafood Operations - Nuisance Actions - Exemption

This bill expands existing provisions of law protecting agricultural and silvicultural operations from nuisance actions to also apply to commercial fishing and seafood operations. The bill also generally excludes conditions resulting from a commercial fishing and seafood operation from a definition of "nuisance" under provisions authorizing and/or requiring actions to be taken by the Secretary of Health and Mental Hygiene and local health officers to control and abate nuisances.

Fiscal Summary

State Effect: None. The bill is not expected to affect State finances.

Local Effect: None. The bill is not expected to affect local government finances.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Protection from Nuisance Actions

The bill expands existing provisions applicable to agricultural and silvicultural operations to specify that if a commercial fishing or seafood operation has been under way for a period of one year or more and if the operation is in compliance with applicable federal, State, and local health, environmental, zoning, and permit requirements relating to any nuisance claim and is not conducted in a negligent manner:

- the operation, including any sight, noise, odors, dust, or insects resulting from the operation, may not be deemed to be a public or private nuisance; and
- a private action may not be sustained on the grounds that the operation interferes or has interfered with the use or enjoyment of other property, whether public or private.

Except in cases where an action is brought by a government agency, if a local agency is authorized to hear a nuisance complaint against a commercial fishing or seafood operation, a person may not bring a nuisance action against an operation in any court until the person has filed a complaint with the local agency and the local agency has made a decision or recommendation on the complaint. A decision of a local agency may be appealed to a circuit court in accordance with the Maryland Rules governing judicial review of administrative agency decisions.

A "commercial fishing or seafood operation" is an operation for the harvesting, storage, processing, marketing, sale, purchase, trade, or transport of any seafood product and includes the delivery, storage, and maintenance of equipment and supplies as well as charter boat fishing and related arrival and departure activities, equipment, and supplies.

The bill does not prohibit government enforcement of health, environmental, zoning, or any other applicable laws. The bill also does not relieve a commercial fishing or seafood operation or operator from the responsibility of complying with permit terms and any applicable federal, State, or local health, environmental, and zoning requirements. Nor does it relieve the operation from liability for conducting the operation in a negligent manner.

The bill does not apply to any commercial fishing or seafood operation that is not in compliance with applicable federal, State, and local regulations.

Finally, the bill does not create, and may not be construed as creating, a new cause of action or substantive legal right against a person engaged in a commercial fishing or seafood operation. The bill also does not affect, and may not be construed as affecting, common law defenses to a nuisance action involving such an operation.

Exemption for Purposes of DHMH/Local Health Officer Nuisance Control/Abatement

The bill generally excludes conditions resulting from a commercial fishing or seafood operation from a definition of "nuisance" under provisions authorizing and/or requiring actions to be taken by the Secretary of Health and Mental Hygiene and local health officers to control and abate nuisances. Specifically, the bill excludes from the definition of "nuisance" any condition resulting from a commercial fishing or seafood operation

following generally accepted industry standards and processes that are not creating a condition dangerous to health or safety.

Current Law:

Protection of Agricultural and Silvicultural Operations from Nuisance Actions

Agricultural and silvicultural operations are currently provided generally the same protection from nuisance actions as the bill provides for commercial fishing or seafood operations. "Agricultural operation" is defined as an operation for the processing of agricultural crops or on-farm production, harvesting, or marketing of any agricultural, horticultural, silvicultural, aquacultural, or apicultural product that has been grown, raised, or cultivated by the farmer.

DHMH/Local Health Officer Nuisance Abatement

The Secretary of Health and Mental Hygiene and local health officers are given certain authority and responsibilities with respect to nuisance control and abatement including the authority to investigate a suspected nuisance and devise means for control of the nuisance, to issue abatement orders, and to bring an action to enjoin any person from committing a nuisance. "Nuisance" is defined as a condition that is dangerous to health or safety, including various specified conditions. The definition of nuisance, however, does not include any condition resulting from a farm operation following generally accepted agricultural practices that are not creating a condition dangerous to health or safety.

County Authority to Enact Laws Relating to Seafood Businesses

Under Article 25, § 232 of the Maryland Code, a county may adopt an ordinance, resolution, or regulation, or take any other action considered necessary to authorize a person to:

- use the person's personal property or real estate to operate a seafood business;
- buy or sell seafood;
- store equipment used in the person's seafood business;
- enjoy the quiet conduct of the person's seafood business in conformance with county and State requirements; and
- harvest seafood.

Before adopting an ordinance, resolution, or regulation, the county must hold a public hearing and provide reasonable notice of the hearing, and obtain the written consent of

the Secretary of Natural Resources. An ordinance, resolution, or regulation adopted without the written consent of the Secretary is void and without legal effect.

A county ordinance, resolution, or regulation, or other action taken by a county under § 232, is preempted, however, in the event of a conflict with federal law, State law, or written program guidance issued by a federal or State agency.

Background: In a December 2011 opinion, the Attorney General addressed the authority granted to counties by § 232 of Article 25 and county authority to enact "right-to-fish" laws that place limitations on a person's ability to bring a common law nuisance or trespass action against a fishing or seafood operation. The opinion was written in response to questions asked by the County Commissioners of Kent County concerning § 232 of Article 25 and a right-to-fish ordinance passed by the county in 2009.

The common law tort of "nuisance" is described in the opinion as "a substantial interference with another's use and enjoyment of land" and "not limited to negligent or intentionally wrongful conduct."

The opinion briefly discusses "right-to-farm" laws in order to aid in understanding the purpose, and limits of, right-to-fish laws. The opinion generally indicates that right-to-farm laws arose out of expansion of urban and suburban residential development into farming areas and the fact that agricultural activities "may impact the air and water of adjacent properties in a manner that would ordinarily constitute a common law nuisance or trespass or violate local land use standards." According to the opinion, there was a perceived need in many jurisdictions to limit common law torts and modify local regulatory authority to support agricultural operations. According to the opinion, right-to-farm laws exist in all 50 states, including Maryland. This bill expands Maryland's right-to-farm law to apply to commercial fishing and seafood operations.

The opinion generally indicates that Kent County lacked authority to enact the right-to-fish ordinance under § 232 of Article 25 or otherwise under the Maryland Constitution or other State law. According to the opinion, neither the Maryland Constitution nor other State law grants authority to a code home rule county to restrict filing of common law trespass and nuisance actions or to impose conditions on a person's access to a judicial remedy for common law torts arising out of the conduct of a seafood operation. Section 232 "merely delegates to a county the power to authorize seafood operations" and "does not authorize conduct that otherwise constitutes a trespass or nuisance … [or] address common law remedies at all." The opinion also compared § 232 with the right-to-farm statutory scheme in which the General Assembly has expressly created limited immunity from liability for nuisances arising out of agricultural

operations, indicating that § 232, by contrast, does not expressly grant counties the authority to enact similar laws.

The opinion also states that, while code counties are authorized to "enact, amend, or repeal a public local law…" under the Maryland Constitution, the restrictions/conditions under Kent County's right-to-fish ordinance are not within the definition of a local law or otherwise within the county's authority to enact, for specified reasons.

Small Business Effect: The bill has a meaningful beneficial impact on any commercial fishing or seafood operation that meets the standards specified in the bill and that might otherwise be subject to a nuisance action. The possibility of a nuisance action being brought against a small business commercial fishing or seafood operation due to changes in surrounding land use and ownership is a potential concern for watermen and seafood businesses. A small business commercial fishing or seafood operation may also have limited resources and/or time to devote to a defense against a nuisance action. DNR indicates that it has issued 5,773 commercial fishing licenses for the 2011-2012 license year, but it is uncertain how many of these licenses are associated with small businesses that would be affected by the bill.

Presumably the bill could also conversely have an adverse impact on a small business landowner that might otherwise look to a nuisance action against a commercial fishing or seafood operation for recourse for "a substantial interference with the use and enjoyment of their land." Any such impact, however, is uncertain.

The final 2008 report of the Maryland Working Waterfront Commission includes certain information indicating the potential for conflicts between commercial fishing and seafood operations and their neighboring communities. The commission was created by the General Assembly to study and make recommendations for protecting and preserving Maryland's commercial fishing industry's access to public trust waters.

The report includes a survey conducted by the commission of a small sample of watermen. In response to a question about conflicts commercial fishermen were confronting in their community, some of the comments referred to opposition from the community to watermen, their equipment, and/or associated odor, with a couple of comments specifically referring to land developers and new residents. A summary of the survey in the report cited "newcomers" as one of the more prevalent issues in the responses, indicating that there was "a disconnect between [recent arrivals'] needs and the needs of watermen with watermen's long-time access at stake."

The report and its recommendations did not specifically address protection of waterfront commercial fishing or seafood operations from nuisance actions, but it made

recommendations related to tax abatement, infrastructure preservation and development, local planning/zoning assistance, education/research/outreach, and federal legislation.

Additional Information

Prior Introductions: None.

Cross File: SB 706 (Senators Pipkin and Colburn) - Judicial Proceedings.

Information Source(s): Department of Natural Resources; Department of Health and Mental Hygiene; Office of the Attorney General; Maryland Department of Agriculture; Judiciary (Administrative Office of the Courts); Maryland Working Waterfront Commission; Baltimore, Garrett, Howard, Montgomery, Somerset, and Worcester counties; Chesapeake Bay Seafood Industries Association; Department of Legislative Services

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Analysis by: Scott D. Kennedy

Direct Inquiries to:
(410) 946-5510
(301) 970-5510