STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-25-337

FRIENDS OF EASTERN BAY

Petitioner – Appellant

v.

MAINE DEPARTMENT OF MARINE RESOURCES, et al.

Respondents – Appellees

ON APPEAL FROM THE BUSINESS AND CONSUMER COURT
DOCKET NO. BCD-APP-2025-00001

BRIEF OF APPELLANT FRIENDS OF EASTERN BAY

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INTRODUCTION

This appeal challenges the decision of the Department of Marine Resources ("DMR" or the "Department") to grant a 20-year lease of State-owned and publicly controlled submerged lands in the same area of ocean that this Court previously addressed in the *Uliano v. Board of Environmental Protection* line of cases. The statutory standards that control DMR's decision substantially mirror those that led the Maine Department of Environmental Protection ("DEP") to deny a permanent residential dock in this area, yet DMR reached the opposite result, and purported to authorize a permanent floating dock for the warehousing of unused equipment without statutory authorization to do so.

Furthermore, DMR's decision approves a particularly noisy type of aquaculture activity that will involve the first-in-Maine use of a mechanical harvester, despite unrebutted expert testimony that the resulting noise emanating from the boundaries of the lease site would have unreasonable adverse impacts on experiments conducted at the Mount Desert Island Biological Laboratory ("MDI Bio Lab"). Compounding this, DMR failed to impose reasonable noise mitigation measures that align with the applicant's intended use of the site. Finally, DMR's decision does not require that all high-density polyethylene equipment in the lease operations be free of per- and polyfluoraoalkyl substances ("PFAS") despite being a pollutant and common component of this equipment.

DMR's leasing decision was in error, and Petitioner-Appellant Friends of Eastern Bay ("Friends") asks the Court to vacate and reverse the decision.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Aquaculture lease applicant Respondent-Appellee Acadia Aqua Farms, LLC ("AAF") submitted a final standard lease application in 2020 to DMR for an exclusive lease of a particularly scenic and oft-navigated portion of Eastern Bay to raise blue mussels, sea scallops, softshell clams, and hard clams. (Appendix "A." 145-197.) AAF proposed raising these shellfish on lines and nets that are hung from pipes made of high-density polyethylene ("HDPE"). (A.148-150.) AAF then proposed to harvest these shellfish on-site using an in-water harvest machine with a hydraulic pump system, which it intends to warehouse on a floating dock[1] year-round in the lease site when not in use, all of which DMR authorized in its final lease decision. (A. 80, 92-93, 149, 258.) Despite testimony from Alex de Koning of AAF that AAF intends to use this harvest machine for approximately three or so weeks per year (A. 249),[2] AAF's application requests authorization to warehouse this harvest machine year-round on a 400 square-foot floating dock, alternatively referred to as a raft and a floating dock. (A. 149, 152, 179-180, 198, 257-258;

[1] This brief uses "floating dock" interchangeably with "raft" – to reference structures (in this instance) that are moored, anchored, or otherwise secured, are not directly connected to the shoreline, and are not vessels.

[2] Alex de Koning also stated that AAF may use the harvest machine more frequently but stated "there's quite a low chance of needing to do that." (A. 249-250.)

Administrative Record "A.R." 1659 (Hearing Transcript) ("need to keep a legal option for having the dock on - - the float onsite to put the machine on").) The dock's sole purpose is to store the harvest machine when it is not in use, and the dock is not used for harvesting or other activities. (*See e.g.,* A. 248-249, 257-258; A.R. 1657, 1659 (Hearing Transcript).) The dock and the harvest machine, when stored on its side, will together sit 12 feet high. (A. 180.)

DMR held a scoping session in 2020 and notified the public of a hearing by publishing a notice in the Mount Desert Islander on December 23, 2021. (A.R. 0168 (Notice of Scoping Session); A.R. 0463 (Notice of Hearing).) Due to Friends' concerns about the impact of the proposed lease site activities on other uses in the immediate vicinity of the site and insufficient information in AAF's application materials to allay those concerns, such as a dearth of information about the level and quality of the noise that will be produced by the motorized equipment, Friends, a Maine 501(c)(4) membership organization, applied for intervenor status. (A.R. 0497-0514 (Intervenor Application).) DMR granted Friends intervenor status on January 31, 2022 (A.R. 0528 (Intervenor Decision)).[3] Friends is organized to promote social welfare including, but not limited to, educating, engaging, and informing the public and lobbying on issues related to protecting the health, beauty,

[3] DMR consolidated the participation of intervenors Friends and Allyn and Frances Seymour into Concerned Citizens of Eastern Bay. (A.R. 0528-0531 (Intervenor Decision).)

and historic accessibility of Eastern Bay and the waters surrounding Mount Desert Island, protecting these waters from incompatible commercial or environmentally exploitive uses, and ensuring use of these waters complies with best practices and local, state, and federal regulations. (A.R. 0500 (Intervenor Application).)

Over two evenings, March 28 and 29, 2022, DMR held an adjudicatory hearing on the lease application, allowing AAF and Friends to testify, along with other abutters and members of the public. (A.R. 1576-1877 (Hearing Transcript).) Following the hearing, AAF and Friends submitted written closing arguments and rebuttals. (A.R. 0773-0858 (Closing Arguments and Rebuttals).) Friends alone submitted comments on DMR's proposed lease decision. (A.R. 0930-0942 (Friends' Comments on Draft Decision).) There, Friends alerted DMR that the submerged equipment is made from material that commonly includes compounds recently designated as hazardous substances and pollutants; therefore, this application must be treated as a discharge application absent a lease condition requiring use of pipes designated PFAS-free. (A.R. 0939-0942 (Friends' Comments on Draft Decision).) DMR did not impose such a condition nor treat it as a discharge application.

On October 2, 2024, DMR issued a final lease decision granting a twenty-year aquaculture lease to AAF on 19.71 acres southwest of Googins Ledge in Eastern Bay, Bar Harbor, Hancock County for the cultivation of blue mussels, sea scallops, softshell clams, and hard clams ("Decision"). (A. 33-105.)

The expected noise impacts from site activities, including use of the harvest machine with hydraulic engine and water pump were immediate issues. MDI Bio Lab (a member of Friends) first raised it at the scoping session, a full two years *before* the DMR hearing. (*See* A.R. 0169 (Notice of Scoping Session); *see also* A.R. 0799-0780 (Closing Arguments).) Located less than 2,000 feet from the proposed lease is a century-old biomedical research, development, and education institution. (A. 211, 266.) MDI Bio Lab is home to "one of the largest colonies of research organisms dedicated for the study of regeneration and age-related diseases on the eastern seaboard." (A.R. 1949 (J. Bowers Testimony).) Karlee Markovich, a marine biologist and Animal Facility Manager at MDI Bio Lab, testified that the Laboratory "maintains robust zebrafish, axolotl, and African Turquoise Killifish colonies with more than 25,000 organisms at any given time." (A. 202.) As Dr. Haller testified, its animal breeding and husbandry programs and millions of dollars invested "in physical and human infrastructure to maintain these research animals in environmentally controlled conditions," supports important biomedical research. (A. 262-263.) Several of these highly sensitive research model organisms are genetic strains that are unique in the world. (*See, e.g.,* A. 263.) "Scientists at MIDIBL have $20 million in active federally funded research projects . . . [that] are dependent upon healthy research animals." (A. 263.) Moreover, as of the hearing, MDI Bio Lab had brought in over $180 million in federal grants over the last 20 years." (A. 263.)

Alex De Koning testified that AAF intends to use the harvest machine, powered by a hydraulic pump, for approximately three or so weeks per year (A. 249), and that between the harvester and the power washer, these would be in use for a couple weeks in the spring and a couple weeks in the fall. (A. 252.) However, AAF requested authorization from DMR to operate the harvester year-round despite Alex De Koning's testimony that "there's quite a low chance of needing to do that." (A. 249-250, 258-259.) Despite AAF's and DMR's knowledge that noise at the lease site from this equipment was of deep concern to the century-old research institution poised on the shore overlooking the lease site, AAF provided no concrete information about the anticipated noise and noise impacts from its activities. (*See, e.g.,* A. 152-153.) In contrast, Dr. Hermann Haller, Dr. James Coffman, Karlee Markovich, and James Strickland all provided unrebutted expert testimony demonstrating that the information provided by AAF was insufficient to allay significant concerns that these proposed activities would unreasonably impact research animals critical to MDI Bio Lab's research. (*See, e.g.,* A. 205-208, A. 262-277.) Interference with these animals threatens to jeopardize more than $20 million dollars in current ongoing federal research projects along with a new initiative "to provide unique comparative research animals to the global pharmaceutical industry as a tool for improving early-stage drug discovery" and "$10 million from the Maine Technology Institute to support commercialization of . . . research." (A. 263-265.)

AAF did not account for or evaluate its noise levels and impacts, despite ample opportunity to do so. AAF provided no evidence of the full sound level or quality of its presumably loudest equipment and activities – its in-water harvest machine with hydraulic pump and its pressure washer. (A. 145-153, 254-256.) While AAF stated in its application that "[a]ccording to the manufacturer the noise of the running harvest machine is very mild, less than a 4-stroke outboard engine"[4] (A. 153), AAF provided no evidence to support this statement. Marcy Nelson of DMR confirmed at the hearing that DMR's statement in its Site Review about the sound level of the harvest machine was based solely on this unsupported statement in AAF's application and was not based on any additional information provided by AAF or the manufacturer. (A.R. 1802-1803 (Hearing Transcript).) Instead, Alex de Koning testified that he did not yet know the decibel level[5] of the harvest machine and its hydraulic pump because "it has not been built." (A. 256.) Further, AAF has chosen to have the motor for the harvest machine built by someone other than AAF's harvest machine vendor, on which it relied for its unsupported statement in its application. (A. 251.) Therefore, the harvest machine manufacturer's vague assertions about a product it will not construct (the hydraulic pump) are merely

[4] James Strickland testified that according to a test of popular four-stroke engines, the maximum noise range is 84-89 decibels, just shy of the legal workplace limit for continuous exposure. (A. 206.)

[5] Sound intensity uses a logarithmic scale, where an increase in 10 decibels is ten times (1,000%) louder. (A. 206.) Moreover, sound intensity is an incomplete measure of noise impacts, which are also caused by the frequency, duration, and quality of the sound. (A.R. 1198 (Technical Assistance Bulletin: Noise).)

conjecture. When asked by DMR about the sound levels of the pressure washer, Alex de Koning resorted to a contemporaneous google search and stated that 75-105 decibels is the level of a standard pressure washer. (A. 254-255.) AAF provided no supported information about the sound level and quality associated with its pressure washing activities, despite it being one of the loudest activities that will take place in the lease site. Further, AAF provided no evidence of the actual sound level and quality of this harvest machine *while* harvesting mussels, either by itself or in conjunction with other equipment that may be running simultaneously.

Alex de Koning admitted that he never made measurements in the lease site or at nearby locations where the noise leaving the boundaries of the lease site would cause impacts on existing surrounding uses. (A. 260.) Therefore, AAF never used even these unsupported and incomplete sound intensity measurements to determine sound levels in the very locale in which they will be produced, nor how they will be transmitted at the boundary of the lease site or to other users and uses of the area.

Given the paucity of information about the noise levels that AAF will produce with its proposed activities, Friends recommended a reasonable condition in its closing argument in response to DMR's direct request[6] for such suggested measures: a lease stipulation that use of the harvest machine and power washer be limited to

[6] DMR requested: "If the lease were granted, what noise mitigation measures would the intervenor and applicant offer for consideration to the Department? For example, limiting the use of certain equipment to specific times of year, certain times of day, etc." (A.R. 0771 (Fourth Procedural Order).)

four weeks total in the spring and fall, which conforms with AAF's anticipated plans, and that AAF provide ninety (90) days advanced notice of such activities. (A.R. 0935-0936 (Friends' Comments on Draft Decision); A. 252; A.R. 0835 (Closing Argument).) Friends later modified one of its recommended measures to decrease the time for advanced notice to a minimum of fifteen (15) business days' notice. (A.R. 0935-0936 (Friends' Comments on Draft Decision).) DMR refused to require AAF to provide advance notice to MDI Bio Lab prior to operating the harvester, power washer, and certain other mechanized equipment. (A. 86-91.) DMR's Decision further rejected a mitigation measure suggested by Friends that would limit the use of the harvester to four weeks per year, which is in line with the expected use of the harvesting machine. (A. 91, 249, 252.)

AAF's application is full of unknowns. In addition to missing information, AAF did not seem to understand that sounds can appear amplified when traveling over water.[7] (A.R. 1665 (Hearing Transcript).) Amplification of sound over water is an essential starting point; however, as expert witness James Strickland testified, "[w]e know the scientific explanation of sound being amplified by travel over water, but we do not know how the noise from lease activities will impact our operations." (A. 206.) James Strickland's uncertainty is due to AAF's failure to submit complete

[7] Patricio Silva testified that the sound carries far over the water of Eastern Bay, such as sounds of eider ducks carrying for long distances and his ability, while on shore, to understand the conversations of paddlers not just by shore, but in the middle of the bay. (A.R. 1810 (Hearing Transcript).)

information about its sounds and the lack of any data about how its sounds will be transported over water in-situ. AAF's misconception about the amplification of sound over water is based upon a failure on their part to fully quantify its noise profile in the lease site and assess its impact.

Friends timely appealed to this Court.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the Department erred as a matter of law by authorizing activities in a standard aquaculture lease for which it lacks statutory authority;

2. Whether the Department's findings that the lease a) will not result in unreasonable impacts from noise at the boundaries of the lease site; and b) will not unreasonably interfere with other uses of the area, were arbitrary and capricious and an abuse of its discretion and were not supported by substantial evidence;

3. Whether the Department violated Section 6072 and its own Rule 2.37(1)(A)(9) by failing to require the applicant demonstrate that all reasonable measures will be taken to mitigate noise impacts; and

4. Whether the Department erred as a matter of law in not treating AAF's application as a "discharge application" under Rule 2.10(B)(2) and in authorizing activities that could result in the discharge of pollutants in violation of its own rules.

ARGUMENT

I. STANDARD OF REVIEW

In a Rule 80C appeal, this Court "review[s] the administrative agency's decision directly for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record." *Manirakiza v. Dep't of Health & Hum. Servs*.,

2018 ME 10, ¶ 7, 177 A.3d 1264 (marks omitted).

Whether an agency exceeded its authority or violated statutory directive in application of its rules is an issue of statutory interpretation. *Conservation Law Found., Inc. v. Dep't of Env't Prot*., 2003 ME 62, ¶ 23, 823 A.2d 551. "Statutory construction is a question of law [this Court] review[s] de novo[,]" *Goodrich v. Me. Pub. Employees Ret. Sys.,* 2012 ME 95, ¶ 6, 48 A.3d 212, and whether the correct legal standard was applied is an issue of law reviewed de novo, as well, *see State v. Jones*, 2012 ME 126, ¶ 31, 55 A.3d 432. In interpreting statutes and rules administered by an agency, the Court first examines the provision at issue to determine whether it is ambiguous. *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 2014 ME 56, ¶¶ 18-19, 90 A.3d 451; *Office of the Pub. Advocate v. Pub. Utils. Comm'n*, 2024 ME 11 ¶ 12, 314 A.3d 116. Absent an ambiguity, the Court applies the plain language without deference to the agency's independent interpretation. *Cobb v. Bd. Of Counseling Prof'ls Licensure*, 2006 ME 48, ¶ 13, 896 A.2d 271. Even in resolving ambiguous statutory authority, Courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 369, (2024); *Cobb v. Bd. of Counseling Prof'ls Licensure*, 2006 ME 48, ¶ 13, 896 A.2d 271 (Maine follows the same interpretative framework as the federal Courts). Even if this Court

does not follow federal law, it cannot defer to an agency's interpretation when the issue of statutory construction is not limited to a single statute and a single agency charged with its administration. *See, e.g., E. Maine Conservation Initiative v. Bd. Of Env't Prot.*, 2025 ME 35, ¶ 22, 334 A.3d 706. Factual findings are reviewed under a substantial evidence standard, which exists "when a reasonable mind would rely on that evidence as sufficient support for a conclusion." *Osprey Family Tr. v. Town of Owls Head*, 2016 ME 89, ¶ 9, 141 A.3d 1114 (quoting *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 16, 868 2.d 161).

II. THE DEPARTMENT EXCEEDED ITS AUTHORITY IN REVIEWING AND APPROVING PERMANENTLY MOORED RAFTS OR FLOATING DOCKS.

Whether an agency exceeded its authority is an issue of statutory interpretation, a question of law which this Court reviews de novo. *Conservation Law Found., Inc.*, 2003 ME 62, ¶ 23, 823 A.2d 551; *Goodrich,* 2012 ME 95, ¶ 6, 48 A.3d 212. In this instance, DMR both exceeded its clear statutory authority and usurped the direct legislative authority of two of its peer agencies.

A. A permanently moored storage raft or floating dock is not "aquaculture," and cannot be approved by the Department.

DMR lacks statutory authority to grant leases or approvals of any kind for floating storage docks. Jurisdiction over floating storage docks is shared between the permitting review of DEP and submerged lands leasing program of the Bureau of Parks and Lands ("BPL"). *See, e.g.*, *Uliano v. Bd. of Env't. Prot.,* 2009 ME 89, 977 A.2d 400 (upholding denial of DEP permits for a dock in Eastern Bay—the same

waterbody at issue in the instant case—because of its unreasonable impacts); *Britton v. Dep't of Conservation*, 2009 ME 60, ¶¶ 15-17, 974 A.2d 303 *as revised* (July 9, 2009) (discussing submerged lands leasing criteria for docks and wharves).

In contrast, DMR has a narrow (and exclusive) authority to "lease areas in, on and under the coastal waters . . . for aquaculture of marine organisms." 12 M.R.S. § 6072(1) (2024). "Aquaculture" is expressly limited to "the culture or husbandry of marine organisms by any person." *Id.* § 6001(1). DMR's aquaculture leasing authority nowhere authorizes it to allow a floating storage dock for the sole purpose of warehousing unused equipment. This Court ascertains the intent of the Legislature from the plain language of the statute and does not defer to the agency. *Guilford Transp. Indus. v. Pub. Utils. Comm'n*, 2000 ME 31, ¶ 11, 746 A.2d 910; *Nat'l Indus. Constructors, Inc. v. Superintendent of Ins*., 655 A.2d 342, 342 (Me. 1995). Thus, the Court first looks to DMR's limited authority to "lease areas in, on and under the coastal waters" for "the culture or husbandry of marine organisms by any person," which DMR has defined by rule[8] as the "production, development or improvement of a marine organism," and determines whether the Legislature intended that to include the review and approval of floating storage rafts or docks. 12 M.R.S. §§ 6001(1), 6072(1) (2024); 13-188 C.M.R. ch. 2 § 2.05(1)(A)-(B) (2019). While

[8] DMR's rules governing aquaculture leasing are located in Chapter 2 of the Department's rules, 13-188 C.M.R. ch. 2 (2019). The applicable version of Chapter 2 is included in the Appendix. (A.107-144.)

certain structures *may* be permitted as a part of an aquaculture lease *if* such structure is used for the culture or husbandry of marine organisms, a storage raft, useful as it may be, is not necessary for or even directly used as a part of the culture or husbandry of marine organisms. 12 M.R.S. § 6072(1) (2024). Therefore, under this plain language review, the only reasonable conclusion is that the Legislature did not include authorization of storage rafts or docks under DMR's leasing authority: a floating dock or raft to warehouse an unused harvester is not the culture or husbandry of marine organisms. DMR is without authority to authorize structures at the site that are not directly used for the culture or husbandry of marine organisms. Authority to approve *certain* structures does not give DMR authority to grant *all* such structures within the confines of an aquaculture lease site.

By AAF's own admission, this dock or raft is only used to warehouse the harvester when not in use and is not actively used in the production, development, or improvement of a marine organism. (A. 149, 179-180, 248-249.) Such a raft or dock to warehouse unused equipment requires appropriate authorization from DEP and/or BPL, and such storage structures may not be authorized through DMR's narrow and exclusive aquaculture leasing authority. Anything different would stretch DMR's authority and allow DMR, without proper legislative authorization, to permit floating structures that are not necessary for the site-specific aquaculture facility, such as floating seafood processing plants or structures for other potentially

related or unrelated activities. For these reasons, the Decision should be vacated and the matter remanded to the Department for further proceeding.

B. The statutory authority given to DEP and BPL to review floating docks shows they are outside DMR's exclusive authority over aquaculture.

In reviewing an agency's statutory authority over docks, a "particular statute is not reviewed in isolation but in the context of the statutory and regulatory scheme." *Conservation Law Found., Inc.*, 2003 ME 62, ¶ 23, 823 A.2d 551. Because DMR's authority is exclusive (when it has it), the Legislature couldn't have intended that authority to overlap with the scheme the Legislature has provided for review of floating docks under the Natural Resources Protection Act ("NRPA"), 38 M.R.S. §§ 480-A to 480-KK (2024), and the submerged lands leasing program operated by BPL, 12 M.R.S. §§ 1861-1868 (2024). Indeed, the Legislature has expressly exempt aquaculture activities regulated by DMR under Title 12, Section 6072 from review under NRPA, but while doing so, expressly retained DEP's jurisdiction over building or altering docks,[9] even if associated with aquaculture. 38 M.R.S. § 480-Q(10) (2024) ("Ancillary [to aquaculture] activities, including, but not limited to, **building or altering docks** or filling of wetlands, are not exempt from [permitting

[9] DMR's Decision states that if a permit is required under NRPA, that would be a determination made by DEP. (A. 38 n.15.) Notably, there is no record evidence that DMR sent a copy of the application to the Land Bureau at DEP, which is responsible for NRPA permitting. While DMR is not required to provide a copy of the application to the Land Bureau, DMR did provide a copy to DEP's Water Quality Bureau. (A. 49; A.R. 406 (Notice of Complete Application).) Any comments the Water Quality Bureau did or did not provide would be irrelevant to the issue of dock permitting.

under NRPA].") (emphasis added). The word "dock" in this section includes a "floating dock."[10] *See, e.g., Id.* § 480-Q(2-B). This is clear evidence of legislative intent that DMR's exclusive aquaculture leasing authority does not extend to docks used solely for storage and does not usurp the plain legislative directives to the DEP and BPL.[11] Neither is the proposed floating structure used for the warehousing of unused equipment, at best ancillary to aquaculture, exempt from DEP's NRPA permitting scheme. 38 M.R.S. § 480-Q(10) (2024).

Indeed, this Court has noted that the aquaculture-specific statutory framework contrasts in substance with that applied by the DEP for docks. *Maquoit Bay, LLC v. Dep't of Marine Res.*, 2022 ME 19, ¶ 16, 271 A.3d 1183 (contrasting DMR's statutory scheme for aquaculture with the statutory scheme in *Uliano* that applies to docks). DMR's aquaculture leasing requirements do not impose the same rigorous review imposed by NRPA on floating docks, including whether there are reasonable

[10] The Legislature carved out an exemption for replacement of floating docks, but no such exemption for installation of new floating docks. 38 M.R.S. § 480-Q(2-B) (2024). Similarly, the Legislature carved out an exemption for aquaculture activities, but not "building or altering docks", which it describes as "ancillary" to aquaculture. *Id.* § 480-Q(10). The Legislature knows how to specify when the docks in question do not include floating docks, which it did in its exemption for lobster trap storage. *Id.* § 480-Q(30). In that very same statute, it limited that exemption's application to a "structure built in part on the shore and projected into a harbor[.]" *Id.* It did not do the same under the aquaculture leasing exception; thus, the clear intent of the Legislature was to include floating docks or rafts under the definition of "docks".

[11] This Court is not faced with a situation where it is interpreting a statute "both administered by [an] agency and within the agency's expertise." *E. Maine Conservation Initiative*, 2025 ME 35, ¶ 22, 334 A.3d 706. Instead, it is interpreting a statutory scheme administered by three agencies (DMR, DEP and BPL), each with their own overlapping "agency expertise." Within that agency framework, DMR has no expertise in floating storage docks, and there is thus no reason for this Court to defer to DMR's statutory interpretation on whether its aquaculture leasing authority is that broad. This Court has expertise in statutory construction, and a plain reading of DMR's statutes (and those of the other agencies) shows that DMR's authority is not so broad as to include approval of storage docks.

alternatives to the proposed dock. *Maquoit Bay, LLC*, 2022 ME 19, ¶ 16, 271 A.3d 1183. There, this Court said that "neither *Uliano I* nor the statutes and regulations governing aquaculture leases compel" an alternatives analysis for an aquaculture lease. *Maquoit Bay, LLC*, 2022 ME 19, ¶ 16, 271 A.3d 1183.

This difference is explainable because of the different purposes of the aquaculture leasing statutes from NRPA and the submerged lands leasing program. When establishing NRPA, the Legislature found that the "cumulative effect of frequent minor alterations and occasional major alterations of [the State's natural resources of state significance, including its coastal wetlands] poses a substantial threat to the environment and economy of the State and its quality of life." 38 M.R.S. § 480-A (2024). One of the primary purposes of NRPA was to "develop management programs and establish sound environmental standards that will prevent the degradation of and encourage the enhancement of [the enumerated] resources." *Id.* Under NRPA, DEP is charged with the protection of natural resources of state significance and their "great scenic beauty and unique characteristics, unsurpassed recreational, cultural, historical and environmental value of . . . benefit to the citizens of the State." *Id.* Similarly, BPL is charged with, *inter alia*, protecting and preserving submerged lands. 12 M.R.S. § 1803(6)(A) (2024). In contrast, DMR is charged with the commercial development of marine resources, which it is to carry out "in cooperation with other state agencies, and federal, regional and local governmental

entities, or with private institutions or persons," *Id.* § 6051, and the "conserve[ation] and develop[ment of] marine and estuarine resources," *Id.* § 6021.

The *Uliano* cases expressly applied to a dock proposed in Eastern Bay—the very same water body that is the subject of DMR's Decision. *See Uliano,* 2009 ME 89, ¶ 9, 977 A.2d 400 (discussing "the nature of Eastern Bay" including the "relatively large expanse of intertidal area at low tide" near to the "Mount Desert Island Biological Laboratory" and the "significant visual intrusion" to walkers and boaters that would be caused by a pier in that area); *see also Kroeger v. Dep't of Env't. Prot.*, 2005 ME 50, ¶ 9, 870 A.2d 566 (upholding denial of a dock permit on Mount Desert Island on the eastern shore of Sommes Sound). It is informative that DMR's statutory leasing authority, when it exists, is exclusive. 12 M.R.S. § 6072(1) (2024) ("Except as provided in this Part, the commissioner's power to lease lands under this section is exclusive."). The proposed dock in *Uliano* and the lease at issue here would have been in sight of each other. There is no textual basis in the statutes for concluding that the Legislature would have required such a rigorous review for one pier and dock, but that it intended DMR to have unlimited authority to permit floating storage docks as long as they were housed within an aquaculture lease site.

Despite this clear demarcation in regulatory authority and contrary to its statutory authority, DMR's Decision authorizes a 20' x 20' floating dock in the lease site to house the harvest machine. (A. 54, 92-96.) The only purpose served by this

floating dock is to warehouse AAF's unused equipment for its own convenience. (*See e.g.,* A. 248-249, 257-258; A.R. 1657, 1659 (Hearing Transcript).) The dock is superfluous to any actual aquaculture activities. Indeed, the warehousing of the unused equipment could take place on land or in any other location. It simply is not aquaculture. This regulatory scheme is evidence that the Legislature never intended to delegate to DMR the exclusive authority to consider floating storage docks under 12 M.R.S. § 6072(1) (2024), and expressly retained that authority in DEP under NRPA, 38 M.R.S. § 480-Q(10) (2024), and BPL under the submerged lands leasing program, 12 M.R.S. § 1862(2) (2024). Because DMR has no authority to grant a lease for a floating storage dock, DMR has acted in excess of its statutory authority, and those portions of DMR's Decision must be vacated.

III. THE AUTHORIZED LEASE ACTIVITIES WILL RESULT IN UNREASONABLE IMPACTS FROM NOISE AT THE BOUNDARIES OF THE LEASE SITE AND WILL INTERFERE WITH OTHER USES OF THE AREA.

This Court's reviews statutory construction de novo, and absent an ambiguity, the Court applies the statute's plain language without deference to the agency's independent interpretation. *Goodrich,* 2012 ME 95, ¶ 6, 48 A.3d 212; *Cobb,* 2006 ME 48, ¶ 13, 896 A.2d 271. Factual findings are reviewed under a substantial evidence standard. *Osprey Family Tr.,* 2016 ME 89, ¶ 9, 141 A.3d 1114. DMR misapplied one of the statutory licensing conditions, failed to adhere to the plain language of its own rules, and made findings not supported by substantial evidence.

A. DMR Ignored Licensing Criteria to Avoid Considering Impacts from Noise at the Boundaries of the Lease Site and on Other Uses of the Area.

DMR is not authorized to grant a lease unless the applicant proves by a preponderance of the evidence that it will not "result in unreasonable impact from noise . . . at the boundaries of the lease site." 12 M.R.S. § 6072(7-A)(G) (2024). Despite this clear mandate, the DMR Decision authorizes a particularly noisy set of on-site aquaculture activities including the use of a mechanical harvester never before approved in Maine. (A. 84.). While DMR's rules exempt certain types of equipment and activities from this assessment (*see, e.g.,* 13-188 C.M.R. ch. 2 § 2.37(1)(A)(9) (2019)), the noisy equipment proposed here, such as the harvest machine, hydraulic pump, and pressure washers and graders, are not exempt.

Eastern Bay is home to varied uses and users, including MDI Bio Lab. MDI Bio Lab is home to "one of the largest colonies of research organisms dedicated for the study of regeneration and age-related diseases on the eastern seaboard." (A.R. 1947 (J. Bourne Written Testimony).) In addition to considering issues of noise at the boundaries of the lease site, DMR is required to find that the proposed lease site activities will not unreasonably interfere with uses of the area such as use of the area by MDI Bio Lab, 12 M.R.S. § 6072(7-A)(C); however, DMR impermissibly redefined the relevant licensing criterion to avoid assessment of this interference, stating that biomedical research programs in a land-based facility are "beyond the scope of 'other uses of the areas' as that phrase is used in 12 M.R.S.A. §6072(7-

A)(C) when read in the context of the rest of the statute" with no rationale or explanation as to why this adjacent use is beyond the scope and not considered. (A. 70-71.) DMR has a statutory obligation to provide "findings of fact sufficient to apprise the parties . . of the basis for the decision[,]" which it did not do here. 5 M.R.S. § 9061 (2024). Instead, DMR's statement is conclusory and does not permit meaningful review, requiring remand. *Christian Fellowship and Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶ 14, 769 A.2d 834.

MDI Bio Lab's use of the area and potential impacts on MDI Bio Lab from AAF's activities was a focus of Friends' testimony and comments. MDI Bio Lab scientists provided unrebutted expert testimony on the negative impacts that operation of the mechanical harvester would have on their drug-trial experiments using sound-sensitive zebrafish, as well as on their outdoor classroom activities.[12]

[12] "Persistent and variable sounds and vibrations cause an increase in stress hormones like cortisol and changes the behavior in aquatic species and nematodes." (A. 272.) These "behavioral and hormonal changes . . . can have a direct impact on sensitive research." (A. 262.) Karlee Markovich testified that "[e]ven modest changes in noise levels can have a serious effect on the behavior and stress levels of research animals." (A. 267.) The intensity, frequency, duration, and quality of the noise produced by AAF's lease-site activities may interfere with MDI Bio Lab's on-going scientific studies. (*See, e.g.,* A. 204-208, 262-277.) For example, James Strickland, the Director of MDI Bioscience, which focuses on the discovery of new medicines, testified that "excessive noise and vibration would make it very difficult or likely impossible to determine whether an observed behavior change is attributable to background noise or vibration instead of the pharmaceutical compound; . . . thereby making it impossible to conduct studies for the pharmaceutical industry when behavior is an evaluation criteria." (A. 204.) These conditions would make the data from studies difficult or impossible to interpret; "such an outcome would jeopardize not only the individual research projects, but would threaten the future viability of MDI Bioscience." (A. 272-273.) Noise and vibrations affect not only the organisms, but also research activity. For example, research at MDI Bioscience "requires precise dosing of minute amounts of experimental compounds in organisms so small that a microscope is required to make sure the dose is delivered correctly." (A. 271.) Vibrations will impact the ability to administer these doses, and persistent noise will impact the researchers' ability to concentrate while doing so. (A. 270-273.)

(A. 205-208, 262-277.) MDI Bio Lab scientists plan every detail when it comes to minimizing variations in the environment for its organisms – including where a freezer can be placed and when minor construction can be conducted. (A. 268, 277-280.) James Strickland testified that if a pharmaceutical company's representative was on a site-visit to evaluate the suitability of MDI Bio Lab as a lab with which to partner, the sustained sounds of harvesting fewer than 2,000 feet away would be a source of concern.[13] (A. 271-273.) The applicant never demonstrated that its activities will not unreasonably interfere with MDI Bio Lab's use of the area, a licensing criterion that is required to be met before DMR may issue an aquaculture lease. 12 M.R.S. § 6072(7-A)(C) (2024). What may seem reasonable through the lens of an industrial activity is often not reasonable through the lens of an activity that requires environmental control as an ingredient for its success. As the uncontroverted expert testimony demonstrated, the impacts to MDI Bio Lab will be staggering, both monetarily and with regard to the outcomes of its scientific study.

This staggering impact, including the unrebutted expert testimony about the uncertainty that will be injected into the on-going biomedical research, the ability of

[13] Pharmaceutical companies have high standards and conduct a facility audit to "consider the environment around a research facility and whether there are any external factors of concern to the proposed research." (A. 205.) "It is quite possible, if not likely, that the noise associated with mussel seed harvesting would be a source of concern to an auditor, whose job is to identify all relevant risks associated with conducting research with a prospective partner." (A. 205.) Indeed, MDI Bio Lab's tranquil locale provides it a competitive advantage for attracting research partners. (A.R. 1864 (Hearing Transcript).)

scientists to plan and carry out studies, the ability of MDI Bio Lab to continue to raise its unique laboratory animals for continued research, and the ability of MDI Bio Lab to pass an audit by pharmaceutical companies as a partner in discovery of new medicines demonstrates that the applicant did not meet its burden of proving that there would be no unreasonable impact to MDI Bio Lab. Put bluntly, the long-term viability of this century-old research institute is inextricably linked to its research animals and to the greater environment in which MDI Bio Lab is located. Moreover, MDI Bio Lab is in a fixed location on land and cannot relocate. In contrast, there are great swaths of ocean that could accommodate AAF's first-in-Maine experiment with these noisy aquaculture activities.

Indeed, this should have resulted in outright denial of this type of lease in this location because the applicant could not prove that the proposed project will "not result in unreasonable impact from noise . . . at the boundaries of the lease site," 12 M.R.S. § 6072(7-A)(G), nor that it will not unreasonably interfere with "other uses of the area," i*d.* § 6072(7-A)(C), such as use of the area by MDI Bio Lab. Instead, the DMR Decision erroneously approved this untested, noisy technology in a particularly sensitive location by openly disregarding one of the primary uses of the area despite significant evidence that MDI Bio Lab's activities will be significantly impacted by this facility. DMR did so without providing any rationale or explanation – unreasoned and unauthorized action that this Court must not countenance.

B. DMR's Findings on Noise are not Supported by Substantial Evidence.

Where, as here, the applicant is proposing to use a new-to-Maine mechanical harvester so close to an existing research laboratory that is more sensitive to sound than the average user of an area, DMR must require the applicant to provide evidence about the intensity, frequency, duration, and quality of noise from AAF's proposed lease-site activities.[14] DMR is required to find that the lease "will not result in unreasonable impact from noise . . . at the boundaries of the lease site" and that it "will not unreasonably interfere with . . . other uses of the area" in order to issue a lease to AAF. 12 M.R.S. §§ 6072(7-A)(C), (G) (2024). In this case, "there is no competent evidence in the record to support a decision" as to whether lease site activities will cause unreasonable impacts from noise at the boundaries of the lease site or on other uses of the area. *Friends of Lincoln Lakes v. Bd. of Env't Prot*., 2010 ME 18, ¶ 14, 989 A.2d 1128. AAF proposes to employ technology that has not been used before in Maine or elsewhere in the United States and about which it was unable to produce any specific noise data. The only specific information it provided was an unsupported statement in its application that "[a]ccording to the manufacturer the noise of the running harvest machine is very mild, less than a 4-stroke outboard engine" (A. 153.) However, Marcy Nelson of DMR confirmed at the hearing that AAF has not provided any additional information from AAF or the manufacturer to

[14] The intensity (loudness), frequency (pitch), duration, and quality of noise comprise sound. (A. 205.)

support this estimate. (A.R. 1802-1803 (Hearing Transcript).) Nor can they; Alex De Koning testified that this referenced manufacturer will not actually be building the hydraulic pump system powering the harvest machine and he has no information on the noise levels since "it has not been built." (A. 251, 256.)

DMR cannot reasonably conclude that there will be no unreasonable impacts from noise at the boundaries of the lease site because AAF provided no competent evidence about the actual noise levels associated with the lease site activity. Instead of addressing AAF's failure to meet its burden, DMR erroneously concludes that selected mitigation measures mean the relevant licensing criterion is met. (A. 91.) DMR never explains how such mitigation measures will, in fact, decrease noise to a level that will not result in unreasonable impact from noise at the boundaries of the lease site. Because there is no evidence in the record about the actual noise levels emitted from the lease activities, including the intensity (loudness), frequency (pitch), duration, and quality of such, DMR's Decision that the lease will "not result in unreasonable impact from noise . . . at the boundaries of the lease site," 12 M.R.S. § 6072(7-A)(G), and "will not unreasonably interfere with . . . other uses of the area," *id.* § 6072(7-A)(C), is unsupported by substantial evidence in the record. As a result, this Court must vacate the Decision, remand to the Department, and require AAF, and not the intervenor, provide evidence on actual noise levels from its proposed activities and the resulting impacts to MDI Bio Lab and other uses of the area.

C. DMR Impermissibly Shifted the Burden from AAF to the Intervenors.

DMR committed error of law when it impermissibly shifted the burden to the intervenor, Friends, to demonstrate that the proposed project would not result in unreasonable impacts at the boundaries of the lease site and will not unreasonably interfere with other uses of the area. It is not intervenor's burden to make this showing; rather AAF has the burden of showing the lease will meet such criteria. *See, e.g., Mook Sea Farms, Inc*., No. 2015-14, Decision at 23 (Me. Dept. Marine Res., Oct. 21, 2016), *available at* https://tinyurl.com/Mook201514 ("The applicant bears the burden of proving that the proposed lease will not unreasonably interfere with [other uses]" or result in unreasonable impacts.); *see also The Maine Maricultural Co., LLC*, No. 2015-15, Decision at 17, 21 (Me. Dept. Marine Res., July 14, 2017), *available at* https://tinyurl.com/Maricultural201515.

In analyzing the noise criterion, DMR's Decision misleadingly states that MDI Bio Lab "has never conducted its own sound level readings or mitigated for a certain sound level in the research facility." (A. 86.) In fact, MDI Bio Lab *has* made provisions to soundproof the space and has gone to great lengths to mitigate noise within the research facility. As Dr. Strickland testified, the facility on the shore of Eastern Bay has been "designed to be as quiet as possible." (A. 278.) Additional provisions that MDI Bio Lab has taken to mitigate for certain sound levels in the research space, all of which were included in unrebutted expert testimony at the

hearing, include (among others) building the microscopes and injection sites on specialized desks to make them vibration-free, isolating noise-generating equipment like housing the -80 degree freezer in a separate room of its own to buffer sounds from the animal facilities, limiting personnel within the facility at any given time, ensuring all personnel within the facility are sufficiently trained on the animals' noise sensitivity, separating other noise-generating equipment, such as pumps, into other spaces, and carefully planning maintenance or construction activities. (A. 268, 277-280.) MDI Bio Lab *has* conducted its own sound level readings just outside of the research facility to confirm the current level of ambient noise and estimated that they would "expect to experience a greater than fourfold increase in noise level from a four stroke-engine operating just at idle[.]" (A. 207.) It also designed a controlled experiment to test the impact of different levels of noise on the cortisol levels of zebrafish and their ability to spawn. (A.R. 0934 (Friends' Comments on Draft Decision).) This data will create a baseline of comparison for any future industrial development, such as AAF's proposed lease activities, and their impacts on MDI Bio Lab's organisms. (A.R. 0934 (Friends' Comments on Draft Decision).) Without information about the intensity (loudness), frequency (pitch), duration, and quality of noise from the lease site, MDI Bio Lab cannot effectively and proactively manage the negative impacts on these organisms and the strategically important research projects being conducted adjacent to the proposed lease site. (*See, e.g.,* A. 205.)

Furthermore, DMR states that "[t]he testimony regarding potential noise impacts did not adequately explain how the expected noise activity generated by the proposal would be different either in kind or degree from that which already occurs with no apparent negative effects on MDI Bio Lab's operations." (A. 86.) This is precisely what Friends raised repeatedly in its comments and through testimony. The information provided about noise impacts from the applicant was wholly insufficient to opine on the precise effects that these operations would have on MDI Bio Lab. While the Decision purports to rest that inadequacy on the shoulders of the Friends, it is, in fact, the *applicant* that is required to make this showing, not an intervenor.

This incorrect view of the seriousness with which MDI Bio Lab takes noise issues for its experiments fatally infects DMR's analysis of the impacts from noise at the boundaries of the lease site and the impacts of the proposed activities on other uses of the area. The burden of proof is on the applicant to demonstrate that their activities will not cause an unreasonable impact on noise at the boundaries of the lease site. DMR's shifting of the burden to an intervenor, Friends, is legal error, and the Court must vacate the resulting Decision.

D. <u>The Department Failed to Require the Applicant to Demonstrate that All Reasonable Measures Will Be Taken to Mitigate Noise Impacts.</u>

The Legislature authorized DMR to establish rules defining the licensing criteria enumerated in statute. 12 M.R.S. §6072(7-A) (2024) ("The commissioner shall adopt rules to establish noise, light and visual impact criteria . . . ."). DMR's

rules related to noise impacts require the *applicant* to show that "*all* reasonable measures will be taken to mitigate noise impacts from the lease activities." 13-188 C.M.R. ch. 2 § 2.37(1)(A)(9) (2019) (emphasis added). Yet, despite this clear requirement, DMR erroneously refused to impose reasonable measures suggested by Friends at DMR's request to mitigate anticipated noise impacts. In its closing argument, Friends requested the following two-part condition:

> 2) AAF is prohibited from operating its harvest machine, its power washer, and any other mechanized equipment other than normal operations of its vessel, for more than two two-week periods per year.
>
> a) Timing: These two two-week periods may only be permitted between January 1 and May 15 and between October 15 and December 31 of each calendar year to avoid disruption or cancellation of MDIBL's robust education programs, which utilize multiple outdoor classrooms between May 15 and October 15.
>
> b) Notice: For each two-week operating window, AAF must provide ninety (90) days advanced notice to MDIBL before operation.

(A.R. 0835 (Closing Argument).) Friends later modified this request to a minimum of fifteen (15) business days' notice. (A.R. 0935 (Friends' Comments on Draft Decision).) DMR refused any advance notice to MDI Bio Lab prior to operating the harvester, power washer, and other selected mechanized equipment, which was compounded by its additional rejection of the recommended mitigation measure that would limit the use of the harvester to four weeks per year. (A. 86-91.) These proposed measures conform with AAF's expected use of its harvest machine (A. 59, 249, 252), would mitigate noise impacts from the site's noisiest activities, and would result in little to no operational impediment to AAF while allowing MDL Bio Lab

time to plan its research to avoid conducting sensitive experiments while this machinery is in use or time to recalibrate such experiments, including alterations mid-experiment. (A.R. 0935-0936 (Friends' Comments on Draft Decision); A. 252.)

Despite AAF's statement that "there's quite a low chance of needing to" operate the harvest machine more frequently (A. 249-250), DMR stated that imposing this measure to mitigate noise impacts "would frustrate the purpose of the lease and functionally render it inoperable." (A. 91.) It is difficult to square how this would make the lease non-viable or inoperable as this proposed condition directly aligns with and is based upon AAF's proposed operations per Alex De Koning's testimony.[15] (*See, e.g.,* A. 249-252.) This testimony directly contradicts DMR's finding that these measures would "render it inoperable." Instead, these conditions would render it operable in the way that AAF expects to use this lease site. Rejecting both of these reasonable measures means that MDI Bio Lab's experiments will be subject to unexpected ambush at all times of year.

Because the applicant chose to locate this noisy lease directly opposite MDI Bio Lab, any determination about what mitigation measures are "reasonable" must take into account the existing established uses "in the area" of the selected site. However, DMR similarly failed to impose a condition that AAF provide reasonable

[15] While Alex De Koning testified that he was requesting approval through the lease for the ability to operate the equipment year round, if necessary, he stated "there's quite a low chance of needing to do that[,]" and stated that the intended use is for two, two-week periods per year. (A. 249-252.)

notice to MDI Bio Lab prior to operating a harvester, providing no discussion, assessment or findings of said proposed mitigation measure. The record is replete with evidence on the impacts to MDI Bio Lab's sensitive experiments and of the benefits of advanced notice to plan for sustained interruptions of sound. DMR has an obligation to evaluate whether a notice provision is a reasonable measure (it plainly is), and to implement whatever period of advance notice it deems reasonable.

DMR failed to impose *all* reasonable measures to mitigate noise impacts, as its rules require, 13-188 C.M.R. ch. 2 § 2.37(9) (2019), despite the aforementioned conditions being modeled on AAF's planned activities. Therefore, DMR cannot properly make a finding that the lease "will not result in unreasonable impact from noise . . . at the boundaries of the lease site." 12 M.R.S. §6072(7-A)(G). For these reasons, the Decision should be vacated and the matter remanded to the Department for further proceeding. In the alternative, because DMR Rule § 2.37(1)(A)(9) requires that the applicant take "all reasonable measures," to mitigate noise impacts, and because an advance notice provision is a reasonable measure, this Court should remand the decision to the agency for imposition of that condition.

IV. DMR ERRED IN FAILING TO DESIGNATE AAF'S LEASE PROPOSAL AS A DISCHARGE APPLICATION DESPITE THE PROPOSED USE OF PLASTICS LIKELY TO DISCHARGE PFOS AND PFOA INTO EASTERN BAY.

This Court reviews DMR's decision *de novo* for errors of law and applies the plain language of DMR's rules without deference to the agency's independent

interpretation. *Manirakiza*, 2018 ME 10, ¶ 7, 177 A.3d 1264; *Cent. Me. Power Co.,* 2014 ME 56, ¶¶ 18-19, 90 A.3d 451. The regulatory language at issue here is plain, and no deference is due to DMR in its interpretation.

By rule, DMR divides standard aquaculture lease applications into two categories – discharge and non-discharge applications, with differing application requirements. 13-188 C.M.R. ch. 2 §2.10(1)(B) (2019). For discharge applications, applicants must provide additional information to support the Department in making its findings related to the licensing criteria. 13-188 C.M.R. ch. 2 §2.10(1)(B) (2019). Once a regulatory agency acting in its legislative capacity has determined by rule that certain activities require the submission of additional data to comply with its statutory obligations and determine if licensing criteria may be met, in this case submission of an environmental baseline including a sediment and benthic characterization and water quality characterization, it is an abuse of discretion for an agency to ignore such requirement. *See, e.g., Friends of Maine's Mountains v. Bd. Of Env't. Prot.*, 2013 ME 25 ¶ 12, 61 A.3d 689 ("While acting in its legislative capacity, the Board recognized that the 45 dBA limit did not adequately protect the health and welfare of a project's neighbors. . . . [B]y applying the 45 dBA limit, the Board failed to meet its statutory obligation. . . [and] abused its discretion.").

The Decision authorizes AAF to install significant quantities of equipment made of HDPE (*see* A. 150), which is likely to contain PFAS; however, the record

does not reflect that such HDPE is PFOA and PFAS free.[16] Use, submergence, and power washing of this aquaculture gear on site may result in a discharge of pollutants pursuant to the Department's Rules. 13-188 C.M.R. ch. 2 § 2.10(1)(B) (2019) ("'Discharge' means, for the purpose of this Chapter only, any spilling, leaking, pumping, pouring, emptying, dumping, disposing or other addition of any pollutant including, but not limited to, the addition of feed, therapeutants or pesticides to waters of the State."). EPA already requires a wastewater discharge permit for the discharge of certain pressure washing wastewater to surface waters of the state, recognizing that pressure washing certain equipment may result in contaminated wastewater. *See, e.g.,* NPDES 2021 Issuance of the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, 86 Fed. Reg. 10269 (Feb. 19, 2021); 2021 MSGP - Permit Part 8 - Sector Specific Requirements §§ 8.Q.3.1, 8.R.2, 8.R.3, *available at* https://www.epa.gov/sites/default/files/2021-01/documents/2021_msgp_-_permit_part_8_-_sector_specific_requirements.pdf.[17] While "pollutant" is not defined in DMR's rules, its rules reference the State's waste

[16] Given the prevalence of PFAS in HDPE, the EPA imposed a method of detecting 32 different PFAS in products made from HDPE, to which Friends alerted DMR in its Comments on DMR's Draft Decision. *See* EPA OFFICE OF PESTICIDE PROGRAMS, BIOLOGICAL AND ECONOMIC ANALYSIS DIVISION, QUANTITATIVE EXTRACTION AND ANALYSIS OF PFAS FROM PLASTIC CONTAINER WALLS WITH CUT COUPONS (2024), *available at* https://www.epa.gov/system/files/documents/2024-02/quantitative-extraction-and-analysis-of-pfas-from-plastic-container-walls-with-cut-coupons.pdf; (A.R. 0939 (Friends' Comments on Draft Decision).) This Court may take judicial notice that this new method is on the EPA's website and represents that agency's position. *Seymour v. Seymour*, 2021 ME 60 ¶ 13, 263 A.3d 1079.

[17] This Court may take judicial notice of EPA's Multi-Sector General Permit for Discharges Associated with Industrial Activity. *Supra*, note 17.

discharge licensing requirements, 38 M.R.S. § 413 (2024), when describing prohibited discharges. 13-188 C.M.R. ch. 2 § 2.90(5)(A) (2019). This statutory scheme defines a pollutant as including man-made chemicals such as PFAS. 38 M.R.S. §361-A(4-A) (2024) ("'Pollutant' means dredged spoil, solid waste, junk, incinerator residue, sewage, refuse, effluent, garbage, sewage sludge, munitions, chemicals, biological or radiological materials, oil, petroleum products or by-products, heat, wrecked or discarded equipment, rock, sand, dirt and industrial, municipal, domestic, commercial or agricultural wastes of any kind.")

PFAS are also defined or regulated as pollutants, contaminants, and hazardous substances under other applicable laws such has the United States Comprehensive Response, Compensation and Liability Act of 1980 (List of Hazardous Substances and Reportable Quantities, 40 C.F.R. § 302.4 Part 302 (2024))[18]; the Maine Uncontrolled Sites Law (38 M.R.S. § 1362(1)(H) (2024)); the Safe Drinking Water Act (National Primary Drinking Water Regulations, 40 C.F.R. §§ 141.40(3), 141.901 (2024)); a Maine "Resolve, To Protect Consumers of Public Drinking Water by Establishing Maximum Contaminant Levels for Certain Substances and

[18] On May 8, 2024, the EPA published its final rule that designated PFOA and PFOS as 'hazardous substances' under the CERCLA. Designation of [PFOA] and [PFOS] as CERCLA Hazardous Substances, 89 Fed. Reg. 39124 (May 8, 2024) (codified at 40 C.F.R. pt. 302). EPA concluded that "PFOA and PFOS may present a substantial danger to public health or welfare or the environment when released into the environment." Designation of PFOA and PFOS as CERCLA Hazardous Substances. 89 Fed. Reg. 39124, 39126 (May 8, 2024). "PFOA and PFOS are also highly mobile in the environment and can migrate away from the point of initial release." *Id.*

Contaminants" (Resolves 2021, ch. 82), the Clean Water Act (*see, e.g.,* Effluent Guidelines Program Plan 15, 88 Fed. Reg. 6258 (Jan. 31, 2023)); and the Emergency Planning and Community Right-to-Know Act and the Pollution Prevention Act (Implementing Statutory Addition of Certain [PFAS] to the Toxics Release Inventory Beginning With Reporting Years 2021 and 2022, 87 Fed. Reg. 42651 (July 18, 2022); Implementing Statutory Addition of Certain [PFAS] to the Toxics Release Inventory Beginning With Reporting Year 2024, 89 Fed. Reg. 43331 (May 17, 2024)). Friends alerted DMR to this changing regulatory landscape in its comments on DMR's draft Order. (A.R. 0940 (Friends' Comments on Draft Decision).)

Despite the potential for the proposed activities to result in the discharge of PFAS into the marine environment, DMR did not treat this as a "discharge" application. (A. 49.) Instead, DMR limited its findings related to whether this was a discharge application to two limited pieces of information: (1) an inapposite 2018 letter issued by DEP determining that a discharge permit was not required for a different aquaculture lease application; and (2) the fact that DEP provided no comments on the application. (A. 49-50.) Notably, both the 2018 letter and the transmission of the application to DEP pre-dated any PFAS being named as a hazardous substance under CERCLA and as being treated as a pollutant or hazardous

substance under the Maine Uncontrolled Sites Law.[19] Moreover, while the letter from DEP was related to an "aquaculture lease application that also included the culture of shellfish and power washing" (A. 49-50.), it was only related to a narrow determination as to whether *biological materials*, such as mussel shells and mussel feces emitted from mussels constituted a discharge of pollutants. (A.R. 1026 (Letter from Gregg Wood, Div. of Water Quality Mgmt., State of Maine Dep't of Env't Prot., to Amanda Ellis, Res. Mgmt. Coordinator, Maine Dep't of Marine Res. (November 15, 2018)); *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res.,* 299 F.3d 1007, 1019 (9th Cir. 2002). This letter and the case upon which it was based did not address whether the discharge of hazardous substances, such as PFAS from proposed submerged equipment, would mandate treating this application as a discharge application. Nor did the Decision.

DMR made no findings about whether the potential discharge *of PFAS* would require this to be treated as a discharge permit (A. 49-50) despite DMR being aware of the changing regulatory landscape before it issued its final Decision (A.R. 0940 (Friends' Comments on Draft Decision)). As a result, DMR issued a Decision based upon insufficient information under its own rules, which is a violation of law and a

[19] In fact, at the time this 2018 letter was issued, DEP was actively authorizing the spreading of PFAS-containing biosolids on farm fields throughout this state, which was not banned until 2022. 38 M.R.S. § 1306(7) (2024). State-sanctioned PFAS-contamination has compounded an already concerning human and environmental health issue. The State cannot continue to ignore, and even sanction, projects and activities that actively spread PFAS into the environment.

violation of its delegated authority. Put simply, the information provided is not legally sufficient for DMR to determine whether the leasing criteria may be met for lease site activities in which a discharge of pollutants may occur.[20] While DMR could have added a condition to the lease that would have required AAF to use submerged equipment that is certified to be free of PFAS and to provide documentary evidence confirming such, which Friends raised in its comments on the draft Decision, DMR did not do so. (A.R. 0941-0942 (Friends' Comments on Draft Decision).) This approach would align with EPA's guidance to states from 2022 addressing PFAS discharges in NPDES permits, instructing states to incorporate the following condition into its National Pollutant Discharge Elimination System permits: "[p]roduct elimination or substitution when a reasonable alternative to using PFAS is available in the industrial process." Memorandum from Radhika Fox, EPA Assistant Administrator to EPA Regional Water Division Directors (December 5, 2022), available at https://www.epa.gov/system/files/documents/2022-12/NPDES_PFAS_State%20Memo_December_2022.pdf; (A.R. 0941-0942 (Friends' Comments on Draft Decision).)[21]

[20] DMR cannot rely on Maine's 2021 legislation, An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution, which was amended in 2023, to prevent such discharges. 38 M.R.S. § 1614 (2025). The Act prohibits the sale in Maine of most products containing intentionally added PFAS; however, this prohibition does not go into effect until 2032. *Id.* §1614(5). Therefore, despite the Legislature's best efforts to decrease the levels of PFAS-related pollution, this law will not serve to prevent AAF from potentially acquiring new equipment made with PFAS between now and 2032, from acquiring used equipment at any time, or from acquiring equipment in a neighboring jurisdiction.

[21] This Court may take judicial notice of Assistant EPA Administrator Radhika Fox's December 5, 2022

DMR cannot authorize activities—like the *in situ* pressure-washing of HDPE equipment—that will likely result in a discharge of those pollutants without further inquiry. To do so, as it did here, is to violate its own regulations; therefore, this Court must vacate this Decision or remand the decision to the agency for imposition of a condition mandating that all submerged gear be free of PFAS.

CONCLUSION

For the reasons stated herein, Petitioner-Appellant Friends of Eastern Bay respectfully requests that this Court grant its appeal and vacate the Department's Decision, making void the lease granted thereby. In the alternative, Friends respectfully requests this court vacate the portion of the DMR Decision purporting to authorize a floating dock and remand the DMR decision for imposition of an additional reasonable noise mitigation measure of providing advance notice to MDI Bio Lab prior to operation of its noisiest equipment and imposition of a condition that submerged equipment be free of PFAS.

memorandum. *Supra*, note 17.

Respectfully submitted this 15th day of October, 2025.

/s/ Stacey L. Caulk
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CERTIFICATE OF SERVICE

I, Stacey L. Caulk, hereby certify that on this 15th day of October 2025, I electronically filed the foregoing Brief of Petitioner-Appellant Friends of Eastern Bay with the Clerk of the Maine Supreme Judicial Court Sitting as the Law Court, and I caused an electronic copy of the foregoing Brief of Petitioner-Appellant to be served on counsel for Respondents-Appellees Maine Department of Marine Resources and Acadia Aqua Farms, LLC via electronic mail sent to the following:

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