

---

---

**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  
MAINE BUSINESS AND CONSUMER COURT**

---

**BRIEF OF RESPONDENT/APPELLEE ACADIA AQUA FARMS, LLC**

---

**PATRICK W. LYONS, Bar #5600  
VIRIDIAN LAW, P.C.  
204 Main Street  
Ellsworth, Maine 04605  
207-430-1419  
*Attorneys for Appellee Acadia Aqua Farms, LLC***

---

---

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	3
INTRODUCTION .....	6
STATEMENT OF FACTS AND PROCEDURAL HISTORY .....	6
STANDARD OF REVIEW .....	11
ARGUMENT .....	14
<b>I.    DMR has clear authority to review and approve floating platforms and rafts as part of “aquaculture activities” within an aquaculture lease area. ....</b>	<b>14</b>
<b>II.   AAF’s lease will not result in unreasonable impacts from noise at the boundaries of the lease site. ....</b>	<b>19</b>
<b>III.  DMR was right to ignore FEB’s specious arguments regarding PFOS and PFOA. ....</b>	<b>28</b>
CONCLUSION.....	29
CERTIFICATE OF SERVICE .....	31

## TABLE OF AUTHORITIES

### Cases

<i>Champlain Wind, LLC v. Bd. Of Environmental Prot.</i> , 2015 ME 156, 129 A.3d 279 .....	13
<i>City of Bangor v. Penobscot County</i> , 2005 ME 35, 868 A.2d 117.....	12
<i>Dep’t of Corrections v. Pub. Utils. Comm’n</i> , 2009 ME 40, 968 A.2d 1047 ....	13, 17
<i>Edison Co. v. Labor Board</i> , 305 U.S. 197 (1938) .....	13
<i>Forest Ecology Network v. Land Use Regulation Comm’n.</i> , 2012 ME 36, 39 A.3d 74.....	12
<i>Guar. Trust Life Co. v. Superintendent of Ins.</i> , 2013 ME 102, 82 A.3d 121....	11
<i>Gulick v. Dep’t of Env’tl. Prot.</i> , 452 A.2d 1202 (Me. 1982) .....	13
<i>H.E. Sargent, Inc. v. Town of Wells</i> , 676 A.2d 920, 923 (Me. 1996).....	13
<i>Imagineering, Inc. v. Department of Professional and Financial Regulation</i> , 593 A.2d 1050 (Me. 1991).....	14
<i>In re Maine Clean Fuels, Inc.</i> , 310 A.2d 736 (Me. 1973) .....	13
<i>LaMarre v. Town of China</i> , 2021 ME 45, 259 A.3d 764 .....	29
<i>Maquoit Bay, LLC v. DMR</i> , 2022 ME 19, 271 A.3d 1183 .....	15, 28
<i>Sager v. Town of Bowdoinham</i> , 2004 ME 40, 845 A.2d 567 .....	12
<i>Seider v. Bd. of Exam’rs of Psychologists</i> , 2000 ME 206, 762 A.2d 551 .....	12, 13, 26
<i>Seven Islands Land Co. v. Maine Land Use Regulation Comm’n</i> , 450 A.2d 475 (Me. 1982).....	13, 26
<i>Town of Jay v. Androscoggin Energy, LLC</i> , 2003 ME 64, 822 A.2d 1114.....	11

*Whitney v. Wal-Mart Stores, Inc.*, 2006 ME 37, 895 A.2d 309..... 12

**Statutes**

Administrative Procedures Act, 5 M.R.S. § 8001, et seq. .... 11

5 M.R.S. §§ 11001-11008..... 11

5 M.R.S. § 11007(4)(C) ..... 12

12 M.R.S. § 6001 ..... 17

12 M.R.S. § 6072 ..... 15,  
17, 19

12 M.R.S. § 6072(1)..... 19

12 M.R.S. § 6072(7-A) ..... 18, 27

12 M.R.S. § 6072(7-A)(C)..... 27

12 M.R.S. § 6072(7-A)(G)..... 20

12 M.R.S. § 6072-A..... 15

12 M.R.S. § 6072-B ..... 15

12 M.R.S. § 6072-C ..... 15

38 M.R.S. § 480-B(5-A) ..... 16

38 M.R.S. § 480-Q(2-B) ..... 16

38 M.R.S. § 480-Q(10) ..... 14

38 M.R.S. § 480-Q(13) ..... 16

**Other Authorities**

13-188 C.M.R. ch.2, § 2.05(1)(G) ..... 28, 29

13-188 C.M.R. ch.2, § 2.10(1).....	24
13-188 C.M.R. ch.2, § 2.10(1)(I).....	17
13-188 C.M.R. ch.2, § 2.10(3)(C).....	29
13-188 C.M.R. ch.2, § 2.37.....	18
13-188 C.M.R. ch.2, § 2.37(1)(A)(9).....	18, 21, 24
13-188 C.M.R. ch.2, § 2.37(1)(A)(10).....	18
13-188 C.M.R. ch.2, § 2.37(1)(B)(4).....	19
Maine Rules of Civil Procedure 80C.....	11

## INTRODUCTION

Respondent Acadia Aqua Farms, LLC (“AAF”) files this brief in response to Petitioners Friends of Eastern Bay’s (“FEB”) petition to this Court for review and reversal of an aquaculture lease decision of the Maine Department of Marine Resources (“DMR”) dated October 2, 2024 that granted 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 (“DMR’s Decision”). For the reasons stated herein, FEB’s appeal should be denied and DMR’s Decision affirmed in its entirety.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

The owners and operators of AAF – the de Koning family – have farmed mussels in Maine since 2005. Appendix (“App.”) at 230. Theo de Koning has been farming mussels for nearly 40 years and brings his farming expertise from a lineage of mussel farmers going back to the 1700s in the Netherlands. *Id.* at 230-31. In addition to Theo, his wife Fiona and their sons, Alex and Max, are working so the next generation of de Konings can farm mussels in Maine. *Id.* at 230.

AAF farms blue mussels on approximately 158 acres of bottom culture leases in five locations around Frenchman Bay. App. at 154. These leases have no structures or equipment other than marker buoys, as the mussels are grown on the

sea floor. *Id.* at 232. Once mussel seed is harvested following AAF’s protocol,<sup>1</sup> it is placed in the correct density on their bottom culture leases. *Id.* The mussels are monitored for growth and predation, then harvested to order and packed for market. *Id.* at 231-32. AAF employs 15 local people year-round, working both on the water and at their packing facility in Trenton, Maine. *Id.* at 230.

The proposed lease at issue here located in Eastern Bay is designed to grow mussel seed for AAF’s bottom lease sites. Historically the intertidal area has provided sufficient seed for AAF’s farms to remain well stocked. However, wild mussel seed sets have become more sporadic, lower in volume, subject to increasing predation, and varying considerably in timing.<sup>2</sup> App. at 166, 233-36. This unreliability is tied to changes in the Gulf of Maine, which is warming faster than most other water bodies. *Id.* Farming seafood is a long horizon business, and without seed, one cannot farm. In response to this threat to their business and industry, the de Konings researched alternative, more consistent ways to collect mussel seed to continue their generational family business.

The proposed “Smartfarm System” consists of floating pipes at the surface of the water with spat collection nets attached below and extending approximately

---

<sup>1</sup> AAF follows a protocol based on Marine Stewardship Council standards and has recently taken part in a five-year fishery improvement project for mussels led by the Gulf of Maine Research Institute as a collaborative effort to understand more about wild mussel populations statewide. App. at 232.

<sup>2</sup> Mussels are broadcast spawners, producing between 50 and 200 million eggs per spawn cycle. App. at 235-36. The problem is from the moment they spawn, something is eating or trying to eat the mussels. *Id.* Since these animals are so small, it is very easy for a predator, like invasive green crabs, to quickly eat large numbers of them. *Id.*

13 feet deep.<sup>3</sup> App. at 53-54. Mussel seed would be sourced from natural set on the spat collection nets, which would eventually be transferred to other AAF bottom leases for grow out. *Id.* To harvest the mussel seed, a purpose-built hydraulic machine would be placed over the pipes to brush the mussels off the nets and into a pump that transfers them to the harvesting vessel. *Id.* The harvest machine would be moored on an onsite, 20' x 20' raft from May through October. *Id.*

The proposed lease site was selected by the de Konings for a variety of reasons and only after extensive research and consideration. At the public hearing, AAF presented a hydrodynamic model developed by Dr. Sohaib Alahmed and Dr. Lauren Ross of the University of Maine that showed how water currents move in Eastern Bay. App. at 236-37. The model shows that there is a strong likelihood that a significant amount of the mussel larvae originating from the spawning mussels on AAF's existing leases will settle on the seed collector nets in the proposed lease area. *Id.* Additionally, AAF selected the proposed lease site as it is deep enough to keep predators away and is in a location with good current flow to provide plenty of food for the growing mussel seed, which allows them to outgrow their predators more quickly and get to a larger size before being planted on AAF's existing bottom leases. *Id.* at 237. Last, the de Konings selected the lease site because it was

---

<sup>3</sup> The Smartfarm System is well tested worldwide, with units deployed in Norway and Finland with 2 to 4 meters of drifting ice passing over them, as well as in locations such as Germany and Denmark with high current speeds of 2 meters per second. App. at 236. The Smartfarm System is also used in Bulgaria, Spain, the Canary Islands, and Malaysia. *Id.*

far enough from shore to minimize impacts to riparian owners and in deeper waters away from preferred fishing grounds and navigation routes. *Id.* at 237-240.

Following a pre-application meeting and scoping session in 2019, AAF submitted their final application on February 13, 2020, for a 48.22 acre aquaculture lease. App. at 33. Due to the COVID-19 pandemic, DMR was unable to schedule a lease hearing until February 9, 2022.<sup>4</sup> *Id.* at 34. FEB, Protect Maine’s Fishing Heritage Foundation (“PMFHF”), and Alynn and Frances Seymour (“Seymour Family”) submitted applications to intervene in the lease proceedings. *Id.* at 35. DMR consolidated the intervenors into one group (“the Intervenors”).<sup>5</sup> *Id.* at 36.

Prior to the hearing, the Intervenors submitted 85 exhibits to the record and two subpoenas seeking documents from AAF. *Id.* at 39-43, 98-105. They also designated five employees of the Mount Desert Island Biological Lab (“MDIBL”) as expert witnesses. *Id.* at 50. The public hearing was held on March 28 and 29, 2022, where the parties were permitted to cross-examine anyone that provided testimony and members of the public were given the opportunity to cross-examine the parties and DMR staff. *Id.* at 46, 50. AAF and the Intervenors submitted written closing arguments and rebuttals by May 23, 2022. *Id.* at 51.

---

<sup>4</sup> Given capacity limitations and concerns related to COVID-19, DMR postponed the hearing to March 28, 2022, and changed the format for members of the public from in-person to remote. The hearing remained in-person for the applicant, intervenors, and DMR staff. App. at 38.

<sup>5</sup> On January 31, 2022, DMR issued decisions on the three intervenor applications, granting the requests of FEB and the Seymour Family, but denying PMFHF’s intervenor request. App. at 35-36.

On July 24, 2024 – over two years after the record closed – DMR issued a copy of the proposed decision and the parties were given until August 6, 2024, to file responses, exceptions, or requests to correct misstatements of fact; only intervenor FEB submitted a response. App. at 51. On October 2, 2024, DMR issued a final decision for a 19.71-acre aquaculture lease, subject to the following conditions:

1. The lease holder is required to submit a sworn statement and photographs demonstrating that the hydraulic drive system on the *Stewardship* has been upgraded. Such documentation needs to also indicate whether the installation was accommodated safely and if not, demonstrate that John Deer hydraulic drive system has been muffled with a hospital grade cowl muffler. Written authorization must be granted by DMR prior to the vessel being used within the boundaries of the proposed site to verify the upgrades have been made.
2. All power washing equipment must be located within the hull of the *Stewardship*.
3. Any structure moored within the boundaries of the proposed site must be flat in color and must be gray, black, brown, blue or green in hue.
4. Conditions 2 and 3 may be re-evaluated via the lease amendment process.
5. Lobster fishing is permitted within the boundaries of the lease site.

*Id.* at 95-6. As discussed below, conditions 1 and 2 are to mitigate potential noise impacts while operating the lease. Moreover, DMR reduced the lease size from the

proposed 48.22 acres to 19.71 acres. This was done to mitigate the potential impact of the lease on navigation and fishing in Eastern Bay.<sup>6</sup> *Id.* at 59, 68.

### STANDARD OF REVIEW

Pursuant to M. R. Civ. P. 80C and the Administrative Procedures Act, this Court reviews the agency's decision directly for "an abuse of discretion, error of law, or findings not supported by the evidence." *Guar. Trust Life Co. v. Superintendent of Ins.*, 2013 ME 102, ¶ 16, 82 A.3d 121; *see also* 5 M.R.S. §§ 11001-11008. A court may reverse or modify an administrative decision if the findings, inferences, conclusions, or decision of the agency are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the

---

<sup>6</sup> There was ample testimony in the record that the lease would not unreasonably interfere with navigation or fishing. As the DMR found regarding navigation:

While some mariners may need to alter their traditional course, and vessel traffic congestion may increase, the Harbormaster Questionnaire, DMR site report, and hearing testimony, demonstrate that the proposed site would not prevent passage through the navigation channel. The approximately 990' of the navigation channel on the E-N boundary between the proposed lease site and Red Nun "14" should provide adequate navigation space for the number and type of vessels that may access the area in all weather conditions.

App. at 58-59. As for fishing:

In the Harbormaster Questionnaire received by DMR, the Harbormaster stated that there is lobster fishing in the area, but the area is not as heavily fished as other areas, particularly those to the south.

Testimony from lobstermen with direct experience fishing in the area revealed that some harvesters may currently deploy traps within the boundaries of the proposed site. However, trap deployment near the lease area appears to be concentrated to the south of the proposed site in areas that were also identified as having more suitable lobster habitat when compared to areas within the proposed site.

*Id.* at 68.

agency; (3) made upon unlawful procedure; (4) affected by bias or error of law; (5) unsupported by substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion. 5 M.R.S. § 11007(4)(C).

The burden of proof rests with the party seeking to overturn the decision of an administrative agency. *Town of Jay v. Androscoggin Energy, LLC*, 2003 ME 64, ¶ 10, 822 A.2d 1114. If the agency's decision was committed to the reasonable discretion of the agency, the party appealing the decision has the burden of demonstrating that the agency abused its discretion in reaching the decision. *Forest Ecology Network v. Land Use Regulation Comm'n.*, 2012 ME 36, ¶ 28, 39 A.3d 74. "An abuse of discretion may be found where an appellant demonstrates that the decisionmaker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstance of the particular case and the governing law." *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567. A court will not set aside an agency's interpretation of its own rules "unless the rule plainly compels a contrary result, or the rule interpretation is contrary to the governing statute." *Id.* As such, "[a]n administrative decision will be sustained if, on the basis of the entire record before it, the agency could have fairly and reasonably found the facts as it did." *Seider v. Bd. of Exam'rs of Psychologists*, 2000 ME 206, ¶ 9, 762 A.2d 551.

Additionally, review of an agency's interpretation of a statute is reviewed de novo as to whether the statute is ambiguous. *City of Bangor v. Penobscot County*, 2005 ME 35 ¶ 9, 868 A.2d 117. If a statute is unambiguous, the statute is construed directly, without deference to the agency's interpretation on the question of law. *Whitney v. Wal-Mart Stores, Inc.*, 2006 ME 37, ¶¶ 22-23, 895 A.2d 309. If a statute is ambiguous, the agency's interpretation is reviewed with great deference and will be upheld unless contrary to the plain meaning of the statute, particularly when the statute is one in which the agency itself administers. *Dep't of Corrections v. Pub. Utils. Comm'n*, 2009 ME 40, ¶ 8, 968 A.2d 1047; *Champlain Wind, LLC v. Bd. of Environmental Prot.*, 2015 ME 156, ¶ 16, 129 A.3d 279.

A finding of fact by an administrative agency may be overturned only upon a showing that it was unsupported by substantial evidence on the whole record. *Gulick v. Dep't of Env'tl. Prot.*, 452 A.2d 1202, 1207-08 (Me. 1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 741 (Me. 1973) (quoting *Edison Co. v. Labor Board*, 305 U.S. 197, 229 (1938)). The "substantial evidence" standard is identical to the "clearly erroneous" standard used to review factual findings of a trial court. *H.E. Sargent, Inc. v. Town of Wells*, 676 A.2d 920, 923 (Me. 1996); *Gulick*, 452 A.2d at 1207-1208. The fact that the record contains contested or uncontested evidence, or that different conclusions

might be drawn from the record, is not cause for a court to alter the agency's decision if there is competent evidence to support it. *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475, 479 (Me. 1982); *Seider v. Bd. of Examiners of Psychologists*, 2000 ME 206, ¶ 8, 762 A.2d 551. A court may not substitute its own judgment for that of the agency merely because the evidence could give rise to more than one result. *Gulick*, 452 A.2d at 1209; *Seven Islands Land Co.*, 450 A.2d at 479. Nor should a court "attempt to second guess the agency on matters falling within its realm of expertise." *Imagineering, Inc. v. Department of Professional and Financial Regulation*, 593 A.2d 1050, 1053 (Me. 1991).

## ARGUMENT

### **I. DMR has clear authority to review and approve floating platforms and rafts as part of "aquaculture activities" within an aquaculture lease area.**

FEB contends DMR lacks the authority to approve floating platforms and anchoring gear on the proposed lease area. They argue that only the Maine Department of Environmental Protection ("DEP") via the Natural Resources Protection Act ("NRPA") can approve such activities. This argument holds no water.

The proposed raft and anchoring gear are exempt from NRPA requirements pursuant to 38 M.R.S. § 480-Q(10). This statute provides that a NRPA permit is not required for "aquaculture activities" regulated by DMR under 12 M.R.S. §§

6072, 6072-A, 6072-B, or 6072-C. Ancillary activities, however, such as building or altering docks, or filling wetlands, are not exempt from the NRPA permit requirement. The term “ancillary activity” is not defined in DEP statutes. However, the two examples given in subsection 10 – “building or altering a dock or filling a wetland” – are substantially different from placement of a raft or anchoring gear located within the boundaries of a lease site. While a dock or upland development may support an aquaculture activity – for example, a dock might be needed to access the aquaculture site off-shore – they are not themselves directly related to the operation of the proposed aquaculture lease and are thus “ancillary.”

The proposed “Smartfarm System” consists of floating pipes at the surface of the water with spat collection nets attached below and extending approximately 13 feet deep. App. at 53-54. To harvest the mussel seed, AAF will use a purpose-built hydraulic machine. *Id.* When not in use, the harvest machine will be stored on a 20’ x 20’ raft moored within the lease. *Id.*; *see also* App. at 176-80 (showing potential lease layout prior to reduction in acreage and location and scale of 20’ x 20’ raft, along with a schematic of the raft). There is nothing ancillary about this gear and its use for aquaculture activities.

There is ample support in the record supporting that the floating platform is a necessary and fundamental part of AAF’s aquaculture operation. Its presence on the lease site when the equipment is inactive does not render the platform and the

equipment on it “ancillary” if its continued presence on the lease site is consistent with reasonable operation of the project. *See Maquoit Bay, LLC v. DMR*, 271 A.3d 1183 (holding that when an agency’s designation raises a mixed question of fact and law and the agency’s designation was reasonable, a court will defer to the agency’s designation).

FEB has not provided any example of where a NRPA permit was required for a floating platform or anchoring gear located on an aquaculture lease site. Instead, they attempt to define the 20’ x 20’ raft as a “floating dock” under 38 M.R.S. § 480-Q(2-B) as “clear evidence of legislative intent that DMR’s exclusive leasing authority does not extend to docks.” *FEB Br.* at 25. However, even if the 20’ x 20’ float were a “floating dock,” NRPA explicitly excludes the replacement of certain “floating docks” from requiring a permit. 38 M.R.S. § 480-Q(2-B). Moreover, NRPA defines a “mooring” as “equipment, such as anchors, chains and lines, for holding fast a vessel, aircraft, *floating dock* or buoy.” 38 M.R.S. § 480-B(5-A) (emphasis added). Like aquaculture activities, a permit for a mooring is not required under NRPA. 38 M.R.S. § 480-Q(13). The only “clear legislative intent” here is that aquaculture activities located within an aquaculture lease, including the use of rafts, floating platforms, and floating docks (or whatever one may call them), were intended to be exempt from NRPA review.

FEB further argues DMR's aquaculture leasing authority "nowhere authorizes it to allow a floating storage dock for the sole purpose of warehousing unused equipment." *FEB's Br.* at 22. Following FEB's reasoning, unless equipment is in constant use, it cannot be stored on an aquaculture lease site. This would require all unused equipment to be ferried daily to and from aquaculture leases, even if that equipment would be used the next day for aquaculture purposes. The plain language of 12 M.R.S. § 6001 and § 6072 does not compel such an interpretation. DMR has extensive knowledge of aquaculture operations in Maine and has determined structures used to store gear and equipment used for aquaculture are permitted on a lease site. *See Dep't of Corrections v. Pub. Utils. Comm'n*, 2009 ME 40, ¶ 8, 968 A.2d 1047 (an agency's interpretation is reviewed with great deference and will be upheld unless contrary to the plain meaning of the statute, particularly when the statute is one in which the agency itself administers).

Indeed, regarding "equipment" used in aquaculture leases, DMR requires that an applicant "submit detailed specifications on all gear, including nets, pens, and feeding equipment to be used on the site. Documentation shall include both plan and cross-sectional views of the generalized layout of the equipment." 13-188 C.M.R. ch. 2, § 2.10(1)(I). A standard aquaculture lease application requires gear information, including schematics, and a description of "on-site support structures," including "structures such as barges, sheds, etc., to be located on-site."

App. at 148-50. AAF provided this information as part of its application. *Id.* at 148-50, 169-87. A raft housing harvesting equipment located within an aquaculture lease is exactly the type of equipment and gear – “on-site support structures” – regulated by DMR and permitted within aquaculture leases.

Section 6072 of Title 12 and Chapter 2 of DMR’s regulations require an applicant to show the equipment located on the lease and the resulting activities will not unreasonably interfere with or result in unreasonable impacts on the various uses (e.g., fishing, navigation, recreation), natural resources, and riparian owners in and around a lease area. 12 M.R.S. § 6072(7-A); 13-188 C.M.R. ch. 2, § 2.37. In assessing the impacts of noise from lease operations, the rules apply to “the routine operation of all aquaculture facilities, including harvesting, feeding, and tending equipment at leases. . . .” § 2.37(1)(A)(9). As discussed below, DMR thoroughly reviewed the noise impacts of AAF’s harvesting equipment. Likewise, for visual impact, DMR’s regulations apply “to all equipment, buildings, and watercraft used at an aquaculture facility, excluding watercraft not permanently moored or routinely used at a lease location such as harvest or feed delivery vessels.” § 2.37(1)(A)(10); *see also* App. at 91-94 (DMR’s visual impact analysis of AAF’s lease, including a review of the harvest machine and 20’ x 20’ raft, finding both complied with the visual impact rules).

DMR has adequate criteria to review the impacts of aquaculture equipment located in a lease area, including floating platforms and rafts. Moreover, DMR has the authority to mitigate the impacts of such equipment, including placing limitations on “the size and shape of gear, nets, or enclosures” and “the deployment and placement of gear.” § 2.37(1)(B)(4). DMR did just that, reducing the lease size from the proposed 48.22 acres to 19.71 acres and imposing further conditions, including gear limitations, on AAF’s lease. App. at 95-96.

DMR’s statutory leasing authority is exclusive: “[t]he commissioner may lease areas in, on and under the coastal waters, including the public lands beneath those waters and portions of the intertidal zone . . . for aquaculture of marine organisms. . . . Except as provided in this Part, the commissioner’s power to lease lands under this section is exclusive.” 12 M.R.S. § 6072(1). All activities and gear approved pursuant to Section 6072 in, on, or under a lease area are exempt from NRPA and no further review of this issue by the Court is warranted.

**II. AAF’s lease will not result in unreasonable impacts from noise at the boundaries of the lease site.**

At the hearing, Alex de Koning testified that AAF has taken extensive steps to minimize and mitigate the noise levels of AAF’s vessel to the maximum extent practical. App. at 241-47. Regarding its harvesting vessel *Stewardship*, to reduce the exhaust volume of the main drive Detroit engines, AAF researched and found a hospital grade spiral muffler – known as a cowl muffler – that functions by

spiraling the exhaust gas from the center out while using small holes drilled along the intersection to encourage destructive interference of the sound waves. *Id.* at 241-42. Alex testified that now with the cowl muffler, the engines on the *Stewardship* are no longer audible from a modest distance. *Id.* at 242.

Alex further testified that, historically for the type of harvest equipment proposed for the Smartfarm System, most of the noise is created by the portable hydraulic power pack.<sup>7</sup> *Id.* at 242. Knowing this and with the desire to mitigate this source of noise, AAF will upgrade its existing hydraulic drive system on the *Stewardship* to handle the harvest equipment for the Smartfarm System. *Id.* This will allow AAF to use a hull cooled, below deck engine with water cooled hydraulic oil, a 4-inch stack muffler below deck, and an upward facing exhaust to dissipate noise. *Id.* This engine is also mounted on rubber footings to isolate the vibration from the hull. *Id.* Additionally, Alex testified that the *Stewardship's* generators are mounted below deck, have commercial mufflers, and are mounted on rubber footings to isolate vibration. *Id.*

The Maine Legislature established specific criteria for DMR to apply when determining whether to grant a standard aquaculture lease. As to noise, 12 M.R.S. § 6072(7-A)(G) requires “The lease will not result in unreasonable impact from

---

<sup>7</sup> As noted in AAF’s lease application, according to information from the manufacturer of the harvest machine, the noise produced would be less than that generated by a 4-stroke outboard engine. App. at 153.

noise . . . at the boundaries of the lease site.” The rules adopted by DMR to establish the noise impact criteria require in relevant part:

All motorized equipment used during routine operation at an aquaculture facility must be designed or mitigated to reduce the sound level produced to the maximum extent practical. . . .

An applicant shall demonstrate 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).

AAF satisfied these requirements, as it will use motorized equipment during routine operations that is designed or mitigated to reduce the sound level produced to the maximum extent practical and AAF will take all reasonable measures to mitigate noise impacts. As noted in the lease decision, AAF proposed the following noise mitigation measures for the operation of the lease:

- a. All non-portable combustion engines will be housed in secondary containment.
- b. When possible, the main engines of the harvest vessel, *Stewardship*, will be turned off within the boundaries of the proposed lease.
- c. Hospital grade cowl mufflers have been installed on the engines of the *Stewardship*, which means the engines are no longer audible from a modest distance.
- d. The hydraulic drive system on the *Stewardship* will be upgraded, so that it can handle the larger capacity of the harvest machine (specific to mussel

harvesting). The current hydraulic system is muffled below deck with an upward facing exhaust that dissipates noise. It is also mounted on rubber footings to mitigate vibration within the hull.

- e. Generators are mounted below deck on the *Stewardship* and have rubber footings to mitigate vibration.
- f. Generators used on the lease site will be outfitted with hospital grade cowl mufflers.
- g. The applicant will muffle the John Deere hydraulic drive system with a hospital grade cowl muffler or similar if the installation cannot be accommodated safely.
- h. All portable engines used on site regularly will be outfitted with higher than standard muffling whenever possible, with the explicit exception of outboard engines since increasing the muffling for those is not practically feasible.
- i. Barring a threat to the installation, product, or the environment on the lease, the applicant will not work the lease outside of daylight hours or at all on Sundays.

App. at 87. As the DMR found, these mitigation measures “reduce sound to the extent practical from the noise generating equipment proposed for the site” and “are consistent with approaches incorporated on other standard lease sites,” and in

fact “[m]any of these measures exceed mitigation approaches on other standard lease sites.” *Id.*

Based on the record, DMR concluded AAF “demonstrated that it has taken all reasonable measures to mitigate noise at the boundary of the proposed lease site, and that the noise generated by the proposed activities will not result in an unreasonable impact at the boundaries of the lease site.” *Id.* at 88. In addition, DMR imposed conditions on the lease requiring that “proof that the upgrades described in d and g [above] have been made prior to the equipment being deployed on the site” and that all power washing equipment must be located within the hull of the *Stewardship*. *Id.* at 88, 95-96.

Rather than acknowledge AAF’s mitigation approaches that go above and beyond those used on other standard lease sites, FEB argues DMR should apply noise standards not required of any lease applicant. Indeed, despite MDIBL being located over 1,500 feet away from the southern corner of the lease boundary, FEB requests AAF be held to a higher standard than other applicants due to the nature of MDIBL’s research and that AAF must provide additional evidence on noise not required under the applicable statute and regulations (e.g., provide evidence of intensity, frequency, duration, and quality of sound attributed to lease activities). *FEB Br.* at 33-34. The criteria governing noise does not contemplate decibel levels or evidence of intensity, frequency, duration, and quality of sound. It specifies only

that measures must be taken to mitigate noise at the boundaries of the proposed site such that there is no unreasonable impact.<sup>8</sup> 13-188 C.M.R. ch. 2, § 2.37(1)(A)(9).

Despite the lack of evidence showing AAF's operations pose any threat to MDIBL's operations, FEB requested DMR impose "noise mitigation conditions" that are clearly designed to make the lease inoperable. App. at 89-91. First, the proposed surety bond condition, if imposed, would make the lease non-viable, as its costs and requirements would subject AAF to unbearable financial requirements and liabilities while giving MDIBL the ability to cease AAF's operations simply by filing a claim against the surety bond based on speculative harm to MDIBL's operations. Moreover, such a condition – imposing a surety bond to the sole benefit of a third-party and not DMR – is beyond the authority of DMR to impose. *Id.* at 91.

Likewise, the proposed condition to limit AAF's ability to operate the lease to two, two-week periods, is absurd. This again would make the lease non-viable and completely frustrate the stated purpose of the proposed lease. *Id.* Maine is experiencing rapid changes to its ocean ecosystems and this lease is designed to

---

<sup>8</sup> The law also does not require applicants to submit manufacturer specifications or that the equipment must be built at the time an application is submitted. Chapter 2.10(1) requires that an application provide details and specification regarding equipment to be deployed but does not mandate specific requirements regarding the level of detail required, only that plan and cross-sectional views of the "generalized layout" be included. In this case, the harvest machine proposed to be utilized at the site exists and is a technology deployed on similar mussel farms, but AAF will use a modified version without a "power pack" to mitigate noise. DMR concluded that the information provided by the applicant regarding equipment specification was sufficient to satisfy the requirements imposed by Chapter 2.10(I). App. at 84.

give AAF more flexibility in its seed supply and seed quality in the face of climate change. Any limits on the time AAF can use this lease would have a severe negative impact on AAF's resilience as a company and make the lease inoperable.

Moreover, AAF provided evidence beyond what is required under the lease standards that show its proposed activities will not unreasonably impact MDIBL or any other user of Eastern Bay. After reviewing the concerns regarding noise in FEB's pre-filed testimony, AAF purchased a decibel measuring device and Alex de Koning took measurements at his best approximation of anticipated mussel seed harvest noise levels. App. at 242-43. Alex testified the sound measurements varied from 70 to 78 dB at 25 feet from the *Stewardship's* hull – an approximation of the noise level at the lease boundary.<sup>9</sup> *Id.* at 243. Alex also noted that repeated noise measurements taken across a variety of weather conditions at the Hadley Point and Trenton airport boat ramps (both near the proposed lease site) gave normal background noise levels of 60-70 dB.<sup>10</sup> *Id.* at 244.

Despite their credentials in certain areas of science and medicine, none of FEB's designated experts – all of which are MDIBL employees – have engineering

---

<sup>9</sup> For reference, as Alex noted at the hearing, a vacuum cleaner is about 75 dB, and a lawnmower is 80 to 90 dB. App. at 243. As was testified to at the hearing, MDIBL mows the lawn areas just outside its fish lab buildings throughout the summer months. App. at 82-83.

<sup>10</sup> Moreover, after reviewing the Intervenors' pre-filed testimony and expert witness concerns regarding noise impacts on the fish species at MDIBL, Alex traveled to the University of Maine Fish Lab to take sound recordings as a point of reference. (App. at 244). Alex testified that inside the fish room of the lab he took six measurements that ranged from 63.5 dB to 77.1 dB. *Id.* Next, he went to the Cooperative Extension diagnostic and research lab and took measurements in their fish rooms. *Id.* The saltwater mixing room, which shares a wall with the fish rooms, recorded a noise level of 77.2 dB, while in the fish rooms he took measurements ranging between 69.8 dB and 70.8 dB. *Id.*

backgrounds or any expertise in issues of noise or sound.<sup>11</sup> Moreover, the studies cited by FEB's designated experts regarding the impacts of noise on fish dealt with noise levels far and away exceeding those possible at the proposed lease boundary.<sup>12</sup> *Id.* at 245-47. If anything, these studies show sound from the proposed lease activities present no threat to the viability of MDIBL's operations.<sup>13</sup> DMR's decision makes clear it was unimpressed with FEB's expert testimony regarding noise. App. at 85-86.

Even where the record contains competing evidence from which different conclusions might be drawn, FEB can only prevail if they show there is no competent evidence in the record to support the lease decision. *Seven Islands Land Co.*, 450 A. 2d at 479; *Seider*, 2000 ME at ¶ 9. FEB has not met this burden. The fact that the record contains contested or uncontested evidence, or that different conclusions might be drawn from the record, is not cause for a court to alter the

---

<sup>11</sup> Alex de Koning graduated from the engineering program at the University of Maine. App. at 230.

<sup>12</sup> FEB Exhibit 2 studied exposing zebrafish larvae to chronic noise at 130-150 dB. (A.R. Vol. 8 at 1048). FEB Exhibit 20 does not mention volume but does refer to pile driving and seismic air guns, which have sound levels of 175 dB and 200 dB, respectively. (A.R. Vol 9. at 1214). FEB Exhibit 21 references a 103 dB control tank compared to a noisy tank of 118 dB. *Id.* at 1218. In fact, most of the noise references in this exhibit were shown to cause damage only when approaching 150 dB. *Id.* In one example it took an hour at 180 dB to show damage. *Id.* FEB Exhibit 24 compares growth rates of rainbow trout in recirculating aquaculture tanks with noise levels of 117 dB and 149 dB and found that after 5 months no significant differences were observed between the two treatments. *Id.* at 1274. Figure 2 of FEB Exhibit 27 notes ambient sea noise is expected to vary from 80 to 105 dB. *Id.* at 1291.

<sup>13</sup> DMR noted in its decision that a representative from MDIBL confirmed they had not observed changes in behavior of the animals due to existing water uses in the cove or near the laboratory such as lobster boats, cruise ships, whale watching tours, etc, and that activities like lawn mowing are part of a regular routine and tolerated by the animals as it is not unexpected or on an uncontrolled basis. (App. at 82-83). Indeed, the record shows that fishing boats, whale watching vessels, larger vessels with barges, and mussel harvesting vessels transit the area near MDIBL with some frequency. *Id.* at 83.

agency's decision if there is competent evidence to support it. *Seven Islands Land Co.*, 450 A.2d at 479; *Seider*, 2000 ME at ¶ 8.

Last, FEB alleges that DMR impermissibly redefined the criterion under 12 M.R.S. § 6072(7-A)(C) to avoid assessment of interference with other uses of the area. *FEB Br.* at 29-30. As noted in its decision, DMR does not categorically limit its consideration of “other uses of the area” to only water-related uses of the area. *App.* at 71. However, DMR views the particular use identified by FEB—namely, biomedical research programs that the MDIBL conducts in its land-based facility—to be beyond the scope of “other uses of the area” as that phrase is used in 12 M.R.S. § 6072(7-A)(C) when read in the context of the rest of the statute. *Id.*

FEB's argument about “other use of the area” rests primarily on concerns about the possible effects that noise and visual impact could have on MDIBL's operations. DMR already evaluates noise and visual impact using the criteria contained in §§ 2.37(9) and (10). DMR adopted the noise and visual impact criteria as major substantive rules, which are subject to legislative review. 12 M.R.S. § 6072(7-A). If the Legislature had intended for additional factors related to noise and visual appearance to be considered, the Legislature could have included them either in the statute or required that they be included in the noise and visual impact regulations. *App.* at 71. DMR applied the existing criteria related to noise and visual impact in its decision. *Id.* at 80-94.

### **III. DMR was right to ignore FEB’s specious arguments regarding PFOS and PFOA.**

Trying a different tack, FEB’s final argument is that the DMR should apply a federal regulation it has no authority to enforce based on speculation that the aquaculture equipment and gear AAF proposed to use “is likely to contain PFAS.” *FEB Br.* at 41-42. Their proposition is that “[u]se, submergence, and power washing of this aquaculture gear on site may result in a discharge of pollutants pursuant to Department Rules.” *Id.* at 42 (citing Rule 2.05(1)(G)). They also allege that “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.” *Id.* at 47.

First, there is no evidence in the record that the aquaculture equipment proposed for use by AAF contains any PFOA and PFOS chemicals. FEB readily admits this, noting only that AAF’s equipment “is likely to contain PFAS.” *FEB Br.* at 41. Moreover, PFOA and PFOS were not federally regulated at the time of the lease hearing; as such, AAF had no opportunity to address these arguments nor provide any evidence to rebut these claims. *See Maquoit Bay*, 2022 ME 19, ¶ 2, n. 1, 271 A.3d 1183 (explaining that the Court interprets the aquaculture lease regulations as they existed at the time the final lease application was submitted to DMR, not as the regulations are currently codified).

This Court has recently dismissed such arguments for non-finish aquaculture leases. *See Maquoit Bay, LLC*, 2022 ME 19, ¶ 20, 271 A.3d 1183 (“The [intervenors’] argument that the generators, power washers, and seafood-processing equipment that [the lease applicant] plans to use at the lease site will ‘inevitably’ result in discharges is speculative and does not persuade us to disturb DMR’s conclusion.”); *cf. LaMarre v. Town of China*, 2021 ME 45, ¶ 16, n.6, 259 A.3d 764 (when addressing a mixed question of fact and law, a court gives deference if the administrative decision maker’s characterization is reasonable). There is no evidence in the record that merits deviating from the Court’s prior decision on this issue, as AAF’s proposed operations on the lease do not constitute a discharge<sup>14</sup> and these newly enacted federal regulations are not applicable.<sup>15</sup>

## CONCLUSION

The mission of FEB-member MDIBL is noble and important. But so too is the mission of AAF – growing high quality and healthy food while providing consistent, year-round employment for its community and a livelihood for the de Koning family. The speculative and unsubstantiated harms raised by FEB pale by

---

<sup>14</sup> Under Chapter 2, “discharge” means “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.” § 2.05(1)(G); *see also* § 2.10(3)(C) (classifying applications for standard aquaculture leases as either “discharge” or “non-discharge”). Taking FEB’s argument to its logical conclusion, every existing aquaculture lease that uses equipment made of high-density polyethylene (“HDPE”), which “may contain PFAS-substances,” would require a discharge permit or be required to remove such equipment.

<sup>15</sup> *See also* A.R. Vol 8. at 1026 (a letter from DEP finding non-finish aquaculture does not require a MEPDES permit, based in part on federal case law).

comparison to the clear and present danger of climate change to our oceans and the need for resiliency in our food systems. To deny this lease or cripple it with FEB's proposed conditions would set a dangerous precedent that individuals, organizations, and businesses with enough resources can make enough noise at an aquaculture lease hearing to kill a lease that otherwise satisfies Maine statute and DMR regulations.

For all the above reasons, the DMR's Decision approving AAF's aquaculture lease should be AFFIRMED in its entirety.

Dated at Ellsworth, Maine, this 3<sup>rd</sup> day of December, 2025.

**RESPONDENT/APPELLEE,  
Acadia Aqua Farms, LLC**

/s/ Patrick W. Lyons, Esq.  
Patrick W. Lyons, Esq., Bar No. 5600  
Viridian Law, P.C.  
204 Main Street  
Ellsworth, Maine 04605  
(207) 430-1419

## CERTIFICATE OF SERVICE

I, Patrick W. Lyons, hereby certify that an electronic copy of the Brief of Respondent/Appellee Acadia Aqua Farms, LLC was served on the following counsel at the address set forth below by email on the 3<sup>rd</sup> day of December, 2025:

David Michael Kallin, Esq.  
Drummond Woodsum  
84 Marginal Way  
Portland, ME 04101-2480  
[dkallin@dwmlaw.com](mailto:dkallin@dwmlaw.com)

Stacey L. Caulk, Esq.  
Drummond Woodsum  
84 Marginal Way  
Portland, ME 04101-2480  
[scaulk@dwmlaw.com](mailto:scaulk@dwmlaw.com)

Valerie A. Wright, Esq.  
Office of the Attorney General  
6 State House Station  
Augusta, ME 04333  
[Valerie.a.wright@maine.gov](mailto:Valerie.a.wright@maine.gov)

/s/ Patrick W. Lyons, Esq.  
Patrick W. Lyons, Esq., Bar No. 5600  
Viridian Law, P.C.  
204 Main Street  
P.O. Box 119  
Ellsworth, Maine 04605  
(207) 430-1419