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 DOCKET

BRIEF OF RESPONDENT-APPELLEE MAINE DEPARTMENT OF MARINE RESOURCES

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INTRODUCTION

Petitioner-Appellant Friends of Eastern Bay ("FEB") appeals the decision of the Business and Consumer Docket ("BCD") (*McKeon, J.*) denying FEB's petition for judicial review of final agency action pursuant to M.R. Civ. P. 80C. FEB's Rule 80C petition appealed the decision by the Commissioner of Respondent-Appellee, the Maine Department of Marine Resources ("Commissioner"), to grant an aquaculture lease to Respondent-Appellee Acadia Aqua Farms, LLC ("AAF"). The Commissioner granted the lease pursuant to the Department of Marine Resources' ("Department" or "DMR") express and exclusive statutory authority to lease areas in, on, and under coastal waters for aquaculture. *See* 12 M.R.S. § 6072 (2025). FEB sought judicial review of the Commissioner's decision pursuant to the Maine Administrative Procedure Act ("MAPA"), 5 M.R.S. §§ 11001-11008 (2025), and Rule 80C.

AAF's leasing operation will cultivate shellfish in Eastern Bay, near Bar Harbor. AAF's operation will involve the use of heavy equipment that is impractical to move in and out of the lease site, so AAF will anchor a raft within the lease boundaries to store the equipment between uses. FEB claims that the Commissioner exceeded his statutory authority in approving the use of the raft for this purpose, but the approval of such a raft for aquaculture activities is

expressly authorized by statute and rule.

The Commissioner's findings that the lease satisfies the lease decision criteria regarding noise and interference with other uses of the area were supported by ample evidence in the record and by DMR's extensive knowledge and experience with aquaculture operations. The Commissioner considered the reasonableness of the noise generated by AAF's activities on a neighboring laboratory facility in light of the existing noise-generating activities in that part of Eastern Bay—including heavy boat traffic, lobster fishing, building renovations, and lawn mowing—and the lack of evidence showing any negative impact of those activities on the laboratory. The Commissioner also added significant requirements to the lease, including several requested by FEB, which support his conclusion that all reasonable noise mitigation measures will be taken. The Commissioner properly rejected a condition requested by FEB that would have effectively rendered the lease inoperable had it been granted.

The Commissioner's decision to treat the application as a non-discharge application was not legal error because it relied on the Maine Department of Environmental Protection's ("DEP") documented position that shellfish aquaculture operations like AAF's do not require a discharge permit. Federal guidance relating to PFAS, issued after the record was closed, does not affect this determination, nor does it require the Commissioner to reopen the record.

It also does not require him to add a condition to the lease prohibiting the presence of PFAS in any equipment that AAF may use.

The Court should affirm the BCD's denial of FEB's Rule 80C petition and the Commissioner's grant of an aquaculture lease to AAF.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Pursuant to 12 M.R.S. §§ 6071-6088 (2025), the Legislature established a framework in which persons may apply to DMR for leases to conduct aquaculture in the State's coastal waters. The Commissioner has exclusive authority to 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. 12 M.R.S. § 6072(1) (2025). A person who wishes to conduct commercial aquaculture may apply for a standard aquaculture lease.[1] *See* 12 M.R.S. § 6072. Standard leases may be up to 100 acres in size, are issued for a term of up to twenty years, and are renewable. *See* 12 M.R.S. § 6072(2), (12) (2025).

"When approving or denying an aquaculture lease application, DMR adjudicates individual rights based on the statutory framework and evaluation criteria that the Legislature devised." *Maquoit Bay, LLC v. Dep't of Marine Res.*,

[1] DMR typically refers to leases governed by 12 M.R.S. § 6072 as "standard" leases to distinguish them from "experimental" leases, which are governed by 12 M.R.S. § 6072-A (2025), and other types of aquaculture leases or licenses that are available under Title 12.

2022 ME 19, ¶ 17, 271 A.3d 1183. The Commissioner may grant a standard commercial lease application where:

> A. The lease will not unreasonably interfere with the ingress and egress of riparian owners;
>
> B. The lease will not unreasonably interfere with navigation;
>
> C. The lease will not unreasonably interfere with fishing or other uses of the area…;
>
> D. The lease will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the lease site and surrounding marine and upland areas to support existing ecologically significant flora and fauna;
>
> E. The applicant has demonstrated that there is an available source of organisms to be cultured for the lease site;
>
> F. The lease does not unreasonably interfere with public use or enjoyment within 1,000 feet of a beach, park or docking facility owned by the Federal Government, the State Government or a municipal governmental agency or certain conserved lands…;
>
> G. The lease will not result in unreasonable impact from noise or light at the boundaries of the lease site; and,
>
> H. Upon the implementation of rules, the lease must be in compliance with visual impact criteria adopted by the commissioner relating to color, height, shape and mass.

12 M.R.S § 6072(7-A) (2025). The Legislature authorized the Department to adopt rules defining these statutory criteria. *See id*. (Commissioner "may grant the lease if the proposed lease meets the following conditions as defined by rule"). Specifically with respect to the statutory criteria of noise, light, and

visual impact, the Legislature directed the Department to "establish" these criteria by adopting major substantive rules, which require Legislative approval. *Id.*; *see* 5 M.R.S. §§ 8071, 8072 (2025). Pursuant to this statutory authority, the Department adopted rules defining the lease decision criteria, including the criteria of noise, light, and visual impact.[2] Ch. 2.37(1)(A) (Appendix ("A.") 120-23); Resolves 2005, ch. 58 (providing Legislative approval of noise, light, and visual impact rules).

When approving a lease application, the Commissioner may establish conditions that govern the use of the leased area and impose limitations on the aquaculture activities. 12 M.R.S. § 6072(7-B) (2025). "These conditions must encourage the greatest multiple, compatible uses of the leased area, but must also address the ability of the lease site and surrounding area to support ecologically significant flora and fauna and preserve the exclusive rights of the lessee to the extent necessary to carry out the lease purpose." *Id*. The Commissioner "may establish any reasonable requirements to mitigate interference." Ch. 2.37(1)(B) (A. 123-24). Conditions are enforceable against

[2] DMR's aquaculture rules are located in Chapter 2 of the agency's rules, 13-188 C.M.R ch. 2 (2019), and its sections are cited herein as "Ch. 2.x". FEB does not dispute that the version of Chapter 2 that applied to the Decision is the version that was in effect at the time AAF's application was deemed complete in February 2020. *See* 1 M.R.S. § 302 (2025); *see also Kittery Retail Ventures, LLC v. Town of Kittery,* 2004 ME 65, ¶ 20, 856 A.2d 1183. This is the version included in the record. (A. 107-44).

the lessee, and violation of a condition may result in revocation of the lease. 12 M.R.S. § 6072(11) (2025).

In February 2020, AAF submitted a final application to DMR for a standard commercial aquaculture lease for the suspended culture of blue mussels and other organisms. (A. 33, 145-97.) AAF proposed a lease site in Eastern Bay, between Mount Desert Island to the south and the town of Lamoine to the north. (A. 212-13.) AAF proposed to cultivate mussels using a pipe farm system consisting of floating pipes at the surface of the water with spat collection nets hanging below upon which mussels will grow. (A. 169-70, 181-85, 213.) AAF also proposed to harvest the mussels using a mechanical hydraulic harvester that will be placed over the pipes to brush the mussels off the nets and into a pump that will transfer them to the harvesting vessel. (A. 52-55, 179, 186, 213.) Among the gear and equipment that AAF proposed to use at the lease site is a 20'x20' raft to be anchored in position within the lease boundaries that AAF will use to store the mechanical harvester when it is not in use. (A. 54, 92-93, 149, 176, 180, 213, 248-49.) AAF anticipates that the mechanical harvester will be in use several weeks each year, but possibly more often depending on climate change and other variables. (A. 248-52.) When the harvest machine is stored on the raft, its highest point will be 12 feet above the

water line, which is well within the 20 feet allowed by rule. (A. 180; Ch. 2.37(1)(A)(10) (A. 123)).

In September 2020 and September 2021, DMR staff conducted site visits of the proposed lease site and issued a Site Report as required by law. (A. 51-52, 212-29); *see* 12 M.R.S. § 6072(5-A) (2025). The Site Report contained information about the existing uses of Eastern Bay by riparian property owners, commercial and recreational vessels, whale watch vessels, shellfish harvesting vessels, barges, and other vessels using the marked navigational channel; two nearby boat ramps; and moorings and docks in the bay. (A. 219-20, 225-26.) The Site Report noted commercial lobster fishing in the area, particularly to the south and west of the proposed lease site, and occasional fishing for sea scallops and sea urchins. (A. 221, 228.) The Site Report also noted the presence of several other aquaculture leases in the area, including one just over a mile northeast of AAF's proposed site. (A. 222.) The MDI Biological Laboratory ("MDIBL") is located on the shore to the southeast of the lease site. (A. 213.)

FEB, which includes MDIBL as a member, applied for intervenor status in the agency proceedings. (A. 35-38; Record Volume ("R. Vol.") 3 at AR-496-514.) FEB was granted intervenor status and was consolidated with other intervenors in a group called "Concerned Citizens of Eastern Bay" for purposes

of participating in the agency proceedings. (A. 35-38; R. Vol. 3 at AR-527-31.) FEB participated in the agency proceedings, including a two-day public adjudicatory hearing at which people affiliated with AAF, people affiliated with FEB, other intervenors, members of the public, and DMR staff presented testimony, cross-examined witnesses, and submitted pre-filed evidence. (A. 46-51.) FEB had numerous opportunities to submit comments throughout the proceedings, including its submission of a written closing argument and, after the Commissioner issued a proposed draft lease decision, written comments in response to that draft. (A. 51.)

On October 2, 2024, the Commissioner issued his final decision approving AAF's application with certain modifications and conditions (the "Decision").[3] (A. 33-105). The Decision includes a discussion of each of the lease decision criteria applicable to AAF's application. (A. 55-95.)

On October 31, 2024, FEB filed a petition for judicial review of final agency action pursuant to MAPA and Rule 80C in Kennebec County Superior Court. (A. 4, 20-32.) FEB sought relief in the form of an order vacating and reversing the Decision, in whole or in part; or, alternatively, remanding the matter to add a condition to the lease. (A. 27.) On January 7, 2025, this action

[3] Specific requirements were incorporated into the final approved lease by virtue of their inclusion in the original application, the Decision, the lease agreement, the operational plan, and/or specific conditions imposed by the Commissioner. (A. 88, 95-96.)

was transferred to the BCD. (A. 6.)

After briefing and oral argument, the BCD issued a decision and order, docketed June 30, 2025, denying FEB's Rule 80C appeal and affirming the Commissioner's decision. (A. 9-19.) This appeal followed.

SUMMARY OF ARGUMENT

The Court should affirm the BCD's denial of FEB's petition for review under Rule 80C and the Decision because FEB has not shown that the Decision should be reversed, modified, or remanded based on any of the grounds available under MAPA. *See* 5 M.R.S. § 11007(4) (2025).

The Commissioner did not exceed his statutory authority by approving AAF's use of a moored raft within the lease boundaries to store mussel harvesting equipment. The raft complies with the aquaculture lease criteria in Title 12 and DMR's rules, and it is necessary to AAF's aquaculture operations because it will be used to store the mechanical harvester, which is too heavy to relocate easily. Nothing in the Natural Resources Protection Act prevents the DMR Commissioner from exercising his authority under DMR's statutes and rules to approve equipment like AAF's raft for use in aquaculture leases.

The Commissioner's decision to analyze FEB's arguments about noise and its potential effects on MDIBL under the noise criteria was not legal error. The Commissioner considered all of FEB's evidence and arguments concerning

noise and its potential impact on other uses of the area, including MDIBL's operations, and he made corresponding findings and conclusions.

The Commissioner's finding that the lease as finally granted, including modifications and conditions suggested by both AAF and FEB, satisfied the noise criteria was supported by substantial evidence in the record. In concluding that the lease will not result in an unreasonable impact from noise to MDIBL, the Commissioner properly considered the reasonableness of noise generated by AAF's operations as informed by DMR's extensive experience with aquaculture equipment. He also properly assessed reasonableness in light of existing noise-generating activities in that portion of Eastern Bay (heavy boat traffic, lobster fishing, other aquaculture farms, docks, and moorings) and in close proximity to MDIBL (e.g., boat traffic at MDIBL's dock, lobster fishing just off of MDIBL's shoreline, building renovations, and lawn mowing).

The Commissioner expressly stated in his Decision that it was AAF's burden to show that its mechanical equipment is designed or mitigated to reduce noise to the maximum extent practical, and that all reasonable measures will be taken to mitigate noise impacts from the lease activities. The Commissioner carefully considered and weighed the evidence in the record and did not impermissibly shift any burden to FEB, as FEB argues.

FEB requested several noise mitigation conditions during the agency

proceedings, and in the final lease as granted, the Commissioner included most of them. FEB challenges the Commissioner's decision not to include one of the conditions that it requested, but the record contains ample evidence to support the Commissioner's rejection of the requested condition as unnecessary and unreasonable.

The Commissioner's decision to treat AAF's application as a non-discharge application was not an abuse of discretion. The Commissioner properly rejected FEB's argument that changes in federal regulatory guidance, issued long after the evidentiary record closed in the AAF proceeding, warrant reversal or remand of the Decision. The Decision also should not be remanded to the Commissioner to add a condition requiring the use of PFAS-free equipment, which is not required by DMR's regulations. FEB's argument that such a condition is necessary is based not on record evidence, but rather, on FEB's speculation that AAF's equipment could contain PFAS and that its operations could result in a discharge of PFAS into the bay.

The Court should affirm the BCD's denial of FEB's Rule 80C petition and affirm the Commissioner's Decision granting an aquaculture lease to AAF.

ARGUMENT

I. FEB HAS NOT SHOWN THAT THE COMMISSIONER EXCEEDED HIS STATUTORY AUTHORITY IN APPROVING AAF'S USE OF A MOORED RAFT FOR AQUACULTURE ACTIVITIES WITHIN THE LEASE BOUNDARIES.

"When the Business and Consumer Docket acts in an intermediate appellate capacity pursuant to M.R. Civ. P. 80C, we review the [agency's] decision directly for errors of law, abuse of discretion, or findings of fact not supported by the record." *Watts v. Bd. of Envtl. Prot.*, 2014 ME 91, ¶ 5, 97 A.3d 115. FEB, as the party challenging the agency decision, bears the burden of persuasion on appeal. *Maquoit Bay,* 2022 ME 19, ¶ 5, 271 A.3d 1183.

A. The Commissioner's interpretation of his statutory authority to approve equipment used in aquaculture leases should be given great deference and should be upheld unless the statute plainly compels a contrary result.

Where a petitioner challenges an agency's interpretation of a statute, "[t]he administrative agency's 'interpretation of a statute administered by it, while not conclusive or binding on this court, will be given great deference and should be upheld unless the statute plainly compels a contrary result.'" *Watts*, 2014 ME 91, ¶ 5, 97 A.3d 115.

FEB makes a passing reference to the Supreme Court of the United States's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), but does not present a developed argument as to why that decision should have

an impact in this case. (Blue Brief ("Br.") 20.) FEB has thus waived any such argument. *See Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.")

In any event, the deference to agency interpretation under Maine law remains undisturbed by *Loper Bright*, which involved deference to federal agencies under the federal Administrative Procedure Act and the *Chevron* doctrine.[4] *Loper Bright* is not binding on Maine courts reviewing state agency actions. *Cf*. *Rosehill v. State*, 556 P.3d 387, 404 (Haw. 2024) (rejecting application of *Loper Bright* to state agency's statutory interpretation; *DTE Energy Inc. v. Michigan Occupational Safety & Health Admin*., No. 367604, 2024 WL 4820147, at *2 (Mich. Ct. App. Nov. 18, 2024) (per curiam) ("*Loper Bright* is a federal case dealing with federal law and has no particular relevance to this state-law dispute."). Although the Court has observed that the standard for exercising deference under Maine law is "similar" to that of *Chevron*, Maine precedent requiring deference predates that federal doctrine and, crucially, does not rest upon it. *Guilford Transp. Indus. v. Pub. Utils. Comm'n*, 2000 ME 31, ¶ 11, 746 A.2d 910. Instead, Maine courts' deference is based on the recognition

[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

that state agencies have "greater expertise" in the areas and programs that they administer and "greater experience administering and interpreting those particular statutes." *S.D. Warren Co. v. Bd. of Envtl. Prot.,* 2005 ME 27, ¶ 5, 868 A.2d 210; *see also Off. of the Pub. Advoc. v. Pub. Utils. Comm'n*, 2023 ME 77, ¶ 9, 306 A.3d 633; *FPL Energy Me. Hydro LLC v. Dep't of Envtl. Prot.*, 2007 ME 97, ¶ 24, 926 A.2d 1197.

Furthermore, deference to state agencies in statutory interpretation is ground well covered by this Court, and *stare decisis* supports its continued use in reviews of state agency decisions. *See John T. Cyr & Sons, Inc. v. State Tax Assessor*, 2009 ME 52, ¶¶ 22-23, 970 A.2d 299. Notably, since *Loper Bright* was decided, this Court has reiterated this longstanding deference to state agencies under Maine law. *See E. Me. Conservation Initiative v. Bd. of Envtl. Prot.*, 2025 ME 35, ¶ 22, 334 A.3d 706; *Bosse v. Sargent Corp.*, 2025 ME 74, ¶ 12, 340 A.3d 673.

Therefore, under familiar precedent, the threshold inquiry in a challenge to a state agency's statutory interpretation is "whether the statute is ambiguous, i.e., reasonably susceptible of different interpretations." *Off. of the Pub. Advoc.*, 2023 ME 77, ¶ 9, 306 A.3d 633; *see also E. Me. Conservation Initiative*, 2025 ME 35, ¶ 22, 334 A.3d 706. If it is not, the Court will "plainly construe the unambiguous statute." *Off. of the Pub. Advoc.*, 2023 ME 77, ¶ 9, 306

A.3d 633. If the statute is ambiguous, the court will "defer to the interpretation of a statutory scheme by the agency charged with its implementation as long as the agency's construction is reasonable." *E. Me. Conservation Initiative*, 2025 ME 35, ¶ 22, 334 A.3d 706; *see also Green v. Comm'r of Dep't of Mental Health, Mental Retardation & Substance Abuse Servs.*, 2001 ME 86, ¶ 9, 776 A.2d 612 (courts should defer where subject matter is within Commissioner's expertise).

B. The aquaculture lease statute, combined with DMR's major substantive rules, authorize the Commissioner to approve aquaculture leases that use floating structures like AAF's raft.

The statutory framework for aquaculture leasing expressly authorizes the Commissioner to approve aquaculture leases that use floating gear in their operations. *See* 12 M.R.S. § 6072(1-A) (2025) (authorizing leases using gear for suspended aquaculture).

The statute further authorizes DMR to define the specific lease decision criteria for light, noise, and visual impact through major substantive rulemaking. 12 M.R.S § 6072(7-A). The rules thus adopted by DMR authorize floating structures that will be used in aquaculture activities. For instance, the lighting requirements authorize a lessee's use of "buildings" that may be "permanently moored or routinely used" at aquaculture facilities, along with other equipment. Ch. 2.37(1)(A)(8) (A. 122). The visual impact criteria place a 20-foot height limitation on "buildings, vessels, barges, and structures" that will

be used at an aquaculture lease site. Ch. 2.37(1)(A)(10) (A. 123). Chapter 2 likewise applies noise criteria to "harvesting, feeding, and tending equipment" at aquaculture lease sites, including the potential use of "[c]entralized feeding barges, or feeding distribution systems…." Ch. 2.37(1)(A)(9) (A. 122-23).

These criteria were major substantive rules. *See* 12 M.R.S § 6072(7-A) ("The commissioner shall adopt rules to establish noise, light and visual impact criteria under paragraphs G and H, which are major substantive rules"). This means that after DMR provisionally adopted subsections 8, 9 and 10 of Chapter 2.37, it presented them to the Legislature for its review and authorization to finally adopt them. 5 M.R.S. § 8072. The Legislature did review these subsections, and it expressly authorized DMR to adopt them. Resolves 2005, ch. 58. Therefore, the Legislature authorized DMR to approve leases that include floating buildings, barges, vessels, and other structures up to 20 feet high above the water line that may be permanently moored at the lease site. FEB does not dispute that the raft as approved complies with the lease decision criteria.

C. The Commissioner had statutory authority to approve the use of the raft because it will be used for the culture or husbandry of marine organisms.

The Commissioner may grant leases "for aquaculture of marine organisms," 12 M.R.S. § 6072(1), and "aquaculture" "means the culture or

husbandry of marine organisms by any person." 12 M.R.S. § 6001(1) (2025). FEB argues that, because AAF intends to use the raft only to store the mechanical harvester when it is not in use, the raft will not be used for the "culture or husbandry of marine organisms," thereby excluding it from the scope of the Commissioner's leasing authority. (Blue Br. 21-24.) It is not always feasible for an aquaculture farmer to transport equipment to and from a lease site, making equipment storage at the lease site necessary to the lease's operations. As AAF testified in this case, "we're also looking at whether we can make the harvest machine easier to launch and retrieve so that it's only on the water for the few weeks that we need to harvest, but that's relatively tricky because it's a large machine and our boom truck crane can't take it." (A. 249.)

FEB's proposed reading of the statutory framework is unreasonably narrow and defies a common sense understanding of the need to store heavy farming equipment onsite. Furthermore, given DMR's extensive experience with aquaculture regulation, the Commissioner's interpretation of "the culture or husbandry of marine organisms" to include the use of a mechanical harvester and storage of that harvester at the lease site is reasonable and should be given deference. 12 M.R.S. § 6001(1). Therefore, the Commissioner did not exceed his statutory authority when he approved AAF's use of the raft.

D. The Commissioner was not precluded by NRPA from exercising his statutory authority to approve the use of the raft for aquaculture activities.

Aquaculture activities regulated by DMR under 12 M.R.S. § 6072 are exempt from permitting requirements under the Natural Resources Protection Act ("NRPA"), 38 M.R.S. § 480-Q(10) (2025), which is separately administered by DEP pursuant to its statutory authority, 38 M.R.S. §§ 480-A–480-KK (2025). NRPA's aquaculture exemption, which is for DEP to administer, does not extend to "[a]ncillary activities, including, but not limited to, building or altering docks or filling of wetlands…." *Id*. FEB argues that the Commissioner exceeded his statutory authority under 12 M.R.S. § 6072 by approving the raft for use in the lease because it is an ancillary "floating dock" subject to permitting review by DEP and the Bureau of Parks and Lands ("BPL").[5] (Blue Br. 24-28.)

When FEB first raised this issue in its application to DMR for intervenor status, (R. Vol. 3 at AR-504), DMR responded, "there is nothing in the law that requires the applicant to have an NRPA permit from DEP before DMR considers and acts on an aquaculture lease application. Further, aquaculture activities

[5] Like NRPA, BPL's statute provides that a submerged lands lease is not required "for the development and operation of any aquaculture facility if the owner or operator of the facility has obtained a lease from the Commissioner of Marine Resources under section 6072." 12 M.R.S. § 1862(10) (2025). "Ancillary equipment and facilities permanently occupying submerged lands on the lease site and not explicitly included in the lease granted by the Commissioner of Marine Resources" are excluded from this exemption. *Id*.

are exempt from NRPA permitting but, even to the extent a NRPA permit might be required, that determination is for DEP to make." (R. Vol. 3 at AR-529.) DMR noted that the *Uliano v. BEP* decisions[6] cited by FEB were not relevant because *Uliano* involved the proposed construction of a private pier, not a raft to be used for aquaculture activities. (R. Vol. 3 at AR-529 n.8.)

After FEB restated the issue in its pre-hearing "statement of issues," the hearing officer reiterated DMR's position at the hearing. (R. Vol. 11 at AR-1587.) Finally, the Commissioner restated the Department's position in the Decision as follows:

> Aquaculture activities are exempt from NRPA provisions…. [E]ven if a NRPA permit were required[,] that would be a determination for DEP to make. There is nothing in law that requires a lease applicant to have a NRPA permit from DEP before DMR considers and renders a final decision on a lease application. In rendering its final decision on this application, DMR makes no determination as to whether the applicant may be required to submit a NRPA application to DEP in connection with any of the structures it proposes to use.

(A. 49; *see also* A. 38 n. 15.)

The Commissioner thus approved the use of the raft in accordance with his authority under Title 12 and the applicable lease decision criteria that, as discussed above in Part I.B, allow him to approve aquaculture leases including permanently moored floating structures, buildings, and barges for aquaculture

[6] *Uliano v. Bd. of Envtl. Prot.,* 2009 ME 89, 977 A.2d 400; *Uliano v. Bd. of Envtl. Prot.,* 2005 ME 88, 876 A.2d 16.

activities, as long as they meet the lease decision criteria. As the Commissioner stated in the Decision, even if AAF were required to obtain a NRPA permit for the raft, no law requires a NRPA permit to be issued before the DMR Commissioner may act on the lease application, and FEB points to no such law. Thus, the Commissioner's determination that NRPA did not preclude him from exercising his authority under 12 M.R.S. § 6072 was not error. Indeed, it was particularly reasonable here, where the raft will be "moored on site" within the lease boundaries and will be used to store the harvest machine when it is not in use and, therefore, is not ancillary to AAF's aquaculture activities.[7] (A. 54, 92-93, 149, 176, 180, 248-49.)

For these reasons, the Commissioner did not exceed his statutory authority when he approved AAF's use of the float for aquaculture activities within the lease boundaries. The Commissioner properly refrained from making any determination about whether a NRPA permit would be required and applied the lease decision criteria pursuant to his authority under 12 M.R.S. § 6072 and DMR's regulations.

[7] As the BCD concluded, "[the Raft's] presence on the lease site when the equipment is inactive does not render the Raft and the equipment on it anymore 'ancillary' if its continued presence on the lease site is consistent with reasonable operation of the project." (A. 13.) This 20'x20' raft will be moored entirely within the lease boundaries and will be used to store the harvest machine. (A. 54, 60-61, 149, 176, 180, 248-49.) In contrast, building a dock affixed to the shore to provide access to an aquaculture lease site is one example of an ancillary activity that would likely not be exempt from NRPA review.

II. FEB HAS NOT SHOWN THAT THE COMMISSIONER'S ANALYSIS OF THE LEASE DECISION CRITERIA RELATING TO NOISE AND OTHER USES OF THE AREA WAS LEGAL ERROR OR UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The Court may not hold that agency action is arbitrary or capricious unless that action "is willful and unreasoning and without consideration of facts or circumstances." *Gordon v. Me. Comm'n on Pub. Def. Servs.,* 2024 ME 59, ¶ 11, 320 A.3d 449 (quotation marks and citations omitted). The Court will rule that an agency abused its discretion only when "an appellant demonstrates that the decision maker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law." *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567.

"[T]he substantial-evidence standard of review 'does not involve any weighing of the merits of evidence; instead, we will vacate an agency's factual findings only if there is no competent evidence in the record to support the findings.'" *Ouellette v. Saco River Corridor Comm'n*, 2022 ME 42, ¶ 20, 278 A.3d 1183 (quoting *AngleZ Behavioral Health Servs. v. Dep't of Health & Human Servs.*, 2020 ME 26, ¶ 12, 226 A.3d 762). As long as there is "is <u>any</u> competent evidence in the record to support a finding," the Court should affirm an agency decision "even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency." *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.,* 2010

ME 18, ¶¶ 12-14, 989 A.2d 1128 (emphasis added).

A. The Commissioner's interpretation of the "other uses" criterion was not error, and he made findings and conclusions of law that considered all of FEB's arguments relating to noise and its effects on MDIBL's operations.

Before granting a lease, the Commissioner must determine that "[t]he lease will not result in unreasonable impact from noise… at the boundaries of the lease site," 12 M.R.S § 6072(7-A)(G) (2025), and that the lease "will not unreasonably interfere with fishing or other uses of the area," 12 M.R.S § 6072(7-A)(C) (2025). In its Statement of the Issues, FEB claims that the Commissioner's findings on these criteria with respect to noise and "other uses of the area" were arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence. (Blue Br. 19.) Substantial evidence is discussed in the next section. FEB does not tie its arguments to the relevant legal standards for the other two alleged defects but appears to argue that the Commissioner improperly analyzed the effects of noise on MDIBL.

The Decision states, "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.A. § 6072(7-A)(C) when read in the context of the rest of the statute." (A. 71.) FEB disputes the Decision's statement that "other uses of the

area" does not extend to MDIBL's biomedical research programs that it conducts in its land-based facility. (Blue Br. 29-30.) The Commissioner's statutory interpretation of this provision that it administers is entitled to great deference, *E. Me. Conservation Initiative*, 2025 ME 35, ¶ 22, 334 A.3d 706, and is entirely reasonable given the focus of the statutory lease decision criteria on interference with water-based uses of the area, *e.g*., riparian access, navigation, and fishing. The Court should reject FEB's argument on this point.

In any event, the Court need not determine whether the Commissioner applied the "other uses" criterion correctly because, as the Decision explained, he evaluated all of FEB's arguments about noise and its effects on MDIBL's operations under the noise criteria. (A. 71.) The Commissioner's interpretation of "other uses of the area" was thus not legal error, but even if it were, it provides no basis for vacating the Decision because he considered the issue anyway. *See Maquoit Bay*, 2022 ME 19, ¶¶ 12-14, 271 A.3d 1183 (concluding that although DMR's consideration of riparian access was erroneous, aquaculture lease decision complied with statute's substantive requirements because its analysis of impacts to navigation addressed similar concerns raised by petitioner); *see also Antler's Inn & Rest., LLC v. Dep't of Pub. Safety*, 2012 ME 143, ¶¶ 6, 12, 60 A.3d 1248 (applying concept of harmless error to legal error under MAPA in Rule 80C appeal of state agency action).

B. The Commissioner's analysis of the noise criteria was supported by substantial evidence in the record.

FEB's noise argument relies heavily on evidence that it claims refutes the Decision, (Blue Br. 30-34), but the relevant question on appeal is not whether record evidence exists that is inconsistent with, or even contrary to, the Decision. Rather, the question is whether any competent evidence appears in the record that supports the Decision. *See Friends of Lincoln Lakes,* 2010 ME 18, ¶¶ 12-14, 989 A.2d 1128. There is ample competent evidence in the record to support the Commissioner's conclusion regarding the noise criteria.

The Commissioner may grant a lease only where "[t]he lease will not result in unreasonable impact from noise… at the boundaries of the lease site." 12 M.R.S § 6072(7-A)(G). As explained above, the Legislature approved the subsection of Chapter 2.37 in DMR's rules that defines the noise criteria, which state,

> 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.

Ch. 2.37(1)(A)(9) (A. 122-23.)

The record includes the following competent evidence that supports the Commissioner's determination that AAF's proposed lease activities, with the

modifications and conditions contained in the lease as granted, satisfied the noise criteria:

- AAF modified the harvest machine's design by rejecting the manufacturer's air-cooled power pack and substituting an upgraded hydraulic system on its main vessel, which will use a hull-cooled below-deck engine with water-cooled hydraulic oil to reduce noise. (A. 80-81, 152-53, 242.)

- AAF proposed to use a four-inch step muffler below deck with upward facing exhaust to dissipate engine noise. (A. 81, 87, 242.)

- AAF proposed to mount the below-deck engine on rubber footings to isolate and minimize vibrations from the hull. (A. 81, 87, 152-53, 242.)

- AAF proposed to use generators mounted below deck with commercial mufflers and rubber footings to isolate and minimize vibrations. (A. 81, 87, 242.)

- AAF proposed to use a hospital-grade spiral muffler, or cowl muffler, on its vessel's main drive engines; on any generators used on site; and on the hydraulic drive system. This type of muffler was developed by the military to mitigate noise from field hospital generators. (R. Vol. 6 at AR-792-93, 841-42; A. 81, 87, 241-42.)

- AAF proposed to outfit all portable engines on site with higher than standard muffling whenever possible, except for outboard engines. (R. Vol. 6 at AR-793, 842; A. 87.)

- AAF proposed not to conduct work at the lease site outside of daylight hours or at all on Sundays. (R. Vol. 6 at AR-793, 842; A. 87.)

- AAF proposed to turn off the main vessel's engines whenever possible, including when harvesting. (A. 81, 153.)

- AAF proposed to house all non-portable internal combustion engines in secondary containment to reduce sound levels. (A. 87, 153.)

- AAF reported that according to the manufacturer of the harvest machine, the noise it generates is less than a 4-stroke outboard engine. (A. 83, 153.) AAF likened the level of noise likely to be generated on the lease site to that of lobster fishing vessels. (A. 86, 256.)

- There is considerable commercial lobstering activity between the shore on which MDIBL is located and the lease site. (A. 86, 221, 228; R. Vol. 11 at AR-1606.)

- There is considerable motorized boat traffic in Eastern Bay including lobster boats, whale watching tours, barges, mussel harvesting vessels, other motorized vessels, two boat ramps including one at Lamoine State Park, and multiple docks and moorings, including MDIBL's own dock which at least one MDIBL employee uses to commute to work by power boat. (A. 67-69, 83, 220-22, 225.)

- AAF estimated that it would use pressure washers and graders only a few times a year depending on the accumulation rate of biofouling, and that if power washing were needed more frequently, it would be mounted below deck to mitigate noise. (A. 81, 153, 253-55.)

In DMR's experience, most of the mechanized equipment proposed by AAF is similar to equipment used on other aquaculture sites in Maine's coastal waters. (A. 84.) The Decision notes that many of AAF's proposed mitigation measures exceed the reasonable and practical mitigation measures typically used in aquaculture leases in Maine. (A. 87.) For example, most DMR-approved leases do not use hospital-grade cowl mufflers or conduct extensive upgrades

to their hydraulic systems to mitigate noise. (A. 88-89.)

DMR incorporated all of AAF's proposed design and mitigation measures for noise into the lease by virtue of their inclusion in the application, the Decision, the lease agreement, the operational plan, and/or specific conditions imposed by the Commissioner.[8] (A. 88, 95.) Therefore, all such measures are mandatory and enforceable. Guided by its experience, technical competence, and specialized knowledge about aquaculture,[9] DMR relied on competent evidence about these measures in the record to expressly find that, "[b]ased on the record, [AAF] has demonstrated that it has taken all reasonable measures to mitigate noise at the boundary of the proposed lease site…." (A. 88); *see also Maquoit Bay*, 2022 ME 19, ¶ 19, 271 A.3d 1183 (determining DMR's reliance on "multiple sources" to be "consistent with DMR's standard practice for developing the record that it uses to evaluate lease applications").

FEB focuses its noise challenge on the mechanical harvester, arguing that because Maine aquaculture farmers have less experience with this kind of equipment, DMR should have demanded that AAF produce specific information about the decibel levels that the harvester would produce and the intensity,

[8] In addition, by reducing the southwest boundary of the lease to avoid undue interference with lobstering, the Commissioner lengthened the distance between MDIBL and the lease to more than 1,590 feet. (A. 59, 68, 85, 95, 97.)

[9] *See* 5 M.R.S. § 9058(3) (2025).

frequency, or duration of sound that would be generated from each piece of equipment, especially the harvester. But DMR's application requirements do not call for that level of detail. (A. 84; Ch. 2.10(1)(I) (A. 114-15.) More important, the leasing criteria do not require DMR to base its decisions on such a specific level of detail or evidence. (A. 84; Ch. 2.37(1)(A)(9) (A. 122).)

The Decision thoroughly evaluated the record evidence about the possible impact that noise could have on MDIBL's operations and took note of the substantial noise-generating activity that already occurs on the water in the vicinity of MDIBL and AAF's lease. (A. 81-82, 85-86.) Eastern Bay, just around the bend from Bar Harbor, is a busy location frequented by commercial lobster fishing boats, whale watching tour boats, barges, mussel harvesting vessels, and other motorized vessels that use a boat ramp at Lamoine State Park, another boat ramp at a yacht manufacturer, and multiple docks and moorings in the area—including MDIBL's dock on its property, which at least one MDIBL employee uses to commute to work by power boat. (A. 67-69, 83, 220-22, 225.) In fact, the Commissioner reduced the size of the proposed lease by more than half, from 48.11 acres to 19.71 acres, in order to avoid unreasonable interference with navigation to the north of the lease and with lobster fishing to the south of the lease (close to MDIBL's facility). (A. 33, 59, 68, 85, 95, 97.) There is also an existing commercial aquaculture lease, EAST GL, located just

over one mile east of the AAF lease, which uses pressure washers, graders, and a 60-foot harvest vessel. (A. 84, 222.)

The Commissioner thus relied on competent evidence and properly exercised his discretion by considering the reasonableness of the expected impact from noise on AAF's activities in light of the noise-generating activities already taking place on the water close to MDIBL. *See* 12 M.R.S. § 6072(7-A)(G) (Commissioner may grant lease where "[t]he lease will not result in unreasonable impact from noise… at the boundaries of the lease site.") (emphasis added).

The Decision finds that the proposed aquaculture activities would be transient, routine, and seasonal, like much of the existing noise-generating activities. (A. 86.) The Decision also notes that MDIBL personnel who provided testimony acknowledged that the building housing its animal research laboratories was under renovation at that time, but that renovation plans were not designed to keep noise below any specific decibel level, and no routine decibel level measurements had been taken in the building. (A. 82, 277-78, 281-82.) They also acknowledged that they had not measured noise generated by lobster boats, cruise ships, whale watching tours, or other water-based activities, and they considered such noise to be less of a concern because it was transient. (A. 82, 276.) MDIBL had not measured noise generated by

lawnmowing on its grounds near the animal research laboratory because, MDIBL personnel testified, noise from lawnmowing was unlikely to have deleterious effects on the animals where it was part of the animals' "regular routine" and was not "unexpected." (A. 82-83, 282-83.) Although MDIBL expressed concern about the possibility that additional noise generated by AAF's lease may affect its operations, it failed to offer evidence about what effect specific types or levels of existing noise might have, if any, on its laboratory animals. (A. 85-86.)

FEB's argument that "information about the intensity (loudness), frequency (pitch), duration, and quality of noise from the lease site" is vital for MDIBL's operations, (Blue Br. 36), is undermined by the fact that MDIBL did not obtain such information before engaging in operations such as lawn care and building renovations, or in light of the existing substantial noise-generating activities that occur in Eastern Bay. While it appears that MDIBL may be embarking on experiments to try to learn more about such possible effects on its animals, (Blue Br. 36), that evidence is not present in this record. Instead, FEB's concerns are based largely on speculation.

FEB urges the Court to remand the case to DMR and order DMR to require AAF to "provide evidence on actual noise levels from its proposed activities and the resulting impacts to [MDIBL]." (Blue Br. 34.) The BCD addressed this

argument, noting that while it "may be true" that AAF could have performed additional testing on current noise levels in Eastern Bay and the noise levels to be generated by its aquaculture equipment, "[f]or the court to require testing, however, would be substituting the court's findings for DMR's findings whether noise was reduced 'to the maximum extent practical.' The court must defer to DMR's acceptance of testimony that the noise would [be] the same as a lobster boat and DMR's allocation of weight to FEB's experts." (A. 16.) This Court should likewise defer to the Commissioner's findings on this issue.

In sum, FEB points to record evidence that it claims is inconsistent with the determination reached by the Commissioner. But FEB's argument fails because the Commissioner properly relied on abundant other competent record evidence to expressly find that the lease, as finally approved with modifications and conditions, "will not result in an unreasonable impact from noise at the boundaries of the lease site." (A. 91.)

C. The Commissioner did not shift the burden from AAF to the intervenors to demonstrate that the noise criteria were met.

In the Decision, the Commissioner correctly identified the applicant's burden regarding noise, including mitigation:

> Chapter 2.37(1)(A)(9) requires, in 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; all fixed noise

> sources shall be directed away from any residences or areas of routine use on adjacent land; and an applicant shall demonstrate that all reasonable measures will be taken to mitigate noise impacts from the lease activities.

(A. 80.) The Decision demonstrates that the Commissioner carefully considered and weighed the evidence in the record, including evidence presented by AAF and by FEB members. In weighing the evidence, the Commissioner explained why certain arguments advanced by the Intervenors were not convincing, or noted conflicts in the evidence, or noted evidence that was absent. All such evidentiary analysis was proper and does not indicate or suggest that the Commissioner impermissibly shifted any burden to FEB, the Intervenor, as FEB argues.[10] It simply explains why the Commissioner ultimately made the factual findings he did and concluded that the AAF had met its burden to show that the noise criteria were met.

Indeed, in discussing AAF's proposed mitigation measures, the Commissioner reiterated his correct understanding of the burden:

> DMR considers whether the *applicant demonstrated* that all reasonable measures will be taken to mitigate noise impacts at the boundary of the proposed lease site, so that the proposal does not cause unreasonable noise impacts at the boundaries of the site. This

[10] FEB raised this argument for the first time in its reply brief to the BCD, not in its initial brief on the merits. Arguments raised for the first time in a reply brief in a Rule 80C Superior Court proceeding are deemed waived. *See Parisi v. Town of Deer Isle*, No. CIV.A.AP-03-22, 2004 WL 3196882, at *1 (Me. Super. Nov. 4, 2004). This argument should, therefore, be deemed waived in this appeal as well. In any event, it also fails for the reasons stated herein.

> is most often achieved by describing the design of the equipment, or explaining how equipment will be utilized or retrofitted to reduce sound levels if it is not contemplated within the design of the equipment itself. For example, DMR is generally aware that some manufacturers design equipment to meet certain sound specifications so further mitigation measures may not be required.

(A. 86-87 (emphasis added and removed).) As the BCD observed,

> As an agency, DMR has knowledge and expertise in aquaculture management as well as the impact of boat traffic that guided its decision here. DMR's decision notes that many of the mitigation measures proposed by AAF exceed the reasonable and practical mitigation measures that are typically used in aquaculture leases in Maine.

(A. 16.)

Therefore, the Commissioner did not impermissibly shift the applicant's burden or otherwise commit any error of law in determining that the noise criteria were met.

D. The Commissioner imposed all reasonable measures to mitigate noise, and his conclusion that an additional condition sought by FEB was unreasonable is supported by substantial record evidence.

In granting AAF its lease application, the Commissioner included all noise mitigation measures proposed by AAF in its application and during the adjudicatory hearing (which were incorporated into its operating plan) and two additional conditions relating to noise mitigation. (A. 87-88, 95.) In its closing argument and in response to the Commissioner's draft decision, FEB

asked the Commissioner to include several additional conditions to mitigate noise. (R. Vol. 6 at AR-834-35, R. Vol. 7 at AR-936.) The Commissioner discussed each of these requested conditions in the Decision, and most were incorporated into the final lease as approved. (A. 89-91.)

As discussed in Part II.B, there was ample evidence in the record to support the Commissioner's finding that AAF had demonstrated that it had taken all reasonable measures to mitigate noise. FEB argues that the Commissioner erred by not including one of FEB's requested conditions to ensure that all reasonable noise mitigation measures were taken, and that there was insufficient evidence in the record to support the Commissioner's decision not to impose the condition. (Blue Br. 37-40.)

The Commissioner considered the condition in question and rejected it because he determined that it "would limit operations on the lease site to two, two-week periods at times most conducive to MDIBL. This condition would limit most aspects of the proposed operations to four weeks a year, which would frustrate the purpose of the lease and functionally render it inoperable. Therefore, it is unreasonable." (A. 91.)

FEB argues that there is no support for the Commissioner's conclusion because AAF testified it would likely need to use the equipment for only two, two-week periods of the year anyway. (Blue Br. 39.) FEB ignores the fact that

AAF testified that the season during which it will need to use the harvest machine is from early May until the end of October. (A. 249.) The proposed condition would have restricted AAF to using the harvest machine only between January 1-May 15 and October 15-December 31, to avoid interfering with MDIBL's outdoor education programs between May 15-October 15. Therefore, the proposed condition would have prohibited AAF from using the mechanical harvester during most of the time frame in which it will need to harvest mussels. FEB also ignores AAF's testimony that while four weeks of harvesting may suffice under some conditions, as water temperatures rise and predator threats increase, harvesting will be required more often, even as much as year-round. (A. 251-52.) The record thus supports the Commissioner's findings that the requested condition was unreasonable and that the lease, as finally approved with modifications and conditions, includes all reasonable mitigation measures to the maximum extent practical. The Commissioner did not err or abuse his discretion by refusing to add an unreasonable mitigation measure as a condition.

An agency's decision to impose a condition is a factual one that must be based on evidence in the record. *See S.D. Warren Co.*, 2005 ME 27, ¶ 22, 868 A.2d 210 ("[W]hether the conditions imposed are necessary to ensure future compliance are factual determinations to be made by the [agency]."). While the

Commissioner, at his discretion, "may establish any *reasonable* requirements to mitigate interference,"[11] his determination that the requested condition was unreasonable was supported by the record. As the BCD concluded, "[g]iven the appropriate deference due to DMR's factual determinations, the court cannot find that the agency's decision on noise and proposed notice conditions was not supported by sufficient evidence." (A. 16 (citing *AngleZ Behavioral Health Servs.*, 2020 ME 26, ¶ 12, 226 A.3d. 762).)

III. FEB HAS NOT SHOWN THAT THE COMMISSIONER COMMITTED LEGAL ERROR OR AN ABUSE OF DISCRETION BY TREATING AAF'S APPLICATION AS A NON-DISCHARGE APPLICATION.

The Court will rule that an agency abused its discretion only when "an appellant demonstrates that the decision maker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law." *Sager*, 2004 ME 40, ¶ 11, 845 A.2d 567.

DMR treats aquaculture lease applications as discharge or non-discharge applications, based on the definition of discharge in DMR's regulations as, "any spilling, leaking, pumping, pouring, emptying, dumping, disposing or other addition of any pollutant including, but not limited to, the addition of feed,

[11] Ch. 2.37(1)(B) (A. 123-24) (emphasis added).

therapeutants or pesticides to waters of the State." Ch. 2.05(1)(G) & 2.10(1)(B) (A. 109, 113-14.) This definition tracks the definition of discharge used in DEP's statute. *See* 38 M.R.S. § 361-A(1) (2025).

FEB argues that the Commissioner erred as a matter of law and abused his discretion by not treating AAF's application as a discharge application requiring review by DEP and by not reopening the record to consider recent federal regulatory changes regarding per- and polyfluoroalkyl substances, often referred to categorically as PFAS. (Blue Br. 40-47.) The Commissioner neither erred nor abused his discretion.

First, although DMR treated AAF's application as a non-discharge application, it nevertheless submitted the application to DEP for review because, when AAF's application was deemed complete in February 2020, the statute then in effect provided that DEP "must be notified of all lease applications." 12 M.R.S. § 6072(6)(C) (2020).[12] Accordingly, DMR submitted AAF's complete application, which proposed the use of HPDE pipes and pressure washers, to DEP with a request for review. (A. 49, 152, 170; R. Vol. 2 at 406 (email transmitting AAF's complete application with request for review to Gregg Wood, who oversees discharge permits at DEP).) That submission

[12] The statute has since been amended to require that DEP be notified only of discharge applications. 12 M.R.S. § 6072(6)(C) (2025).

alone defeats any argument based on a failure to seek review from DEP. *See Maquoit Bay*, 2022 ME 19, ¶ 21, 271 A.3d 1183 ("The record reflects that DMR notified DEP about [the] completed application… which defeats both the [intervenors'] notice argument and their related contention that the allegedly improper notice undermined DEP's ability to consider the application of the Natural Resources Protection Act."). DEP submitted no comments on AAF's application in response. (A. 49.)

Second, in support of its decision to treat AAF's application as a non-discharge application, DMR took official notice[13] of a 2018 letter from Gregg Wood at DEP determining that a discharge permit was not required for a similar aquaculture lease application involving shellfish culture and power washing.[14] (A. 49-50; R. Vol. 8 at AR-1026.) Accordingly, DMR based its decision to treat AAF's application, which was deemed complete in February 2020, as a non-discharge application on competent record evidence available to it at that time showing that DEP did not consider power washing shellfish aquaculture equipment to be a discharge requiring a discharge permit from DEP.

[13] *See* 5 M.R.S. § 9058(1) (2025).

[14] The DEP letter cites *Association to Protect Hammersley, Eld & Totten Inlets v. Taylor Resources, Inc.,* 299 F.3d 1007 (9th Cir. 2002) as support for DEP's determination. In that case, the court held the defendant's mussel farming operation did not require a discharge permit under the Clean Water Act. *Id.* at 1016-17.

Third, FEB argues, without evidentiary support, that DMR should have treated AAF's application as a discharge application because some of AAF's equipment "is likely to contain PFAS" and power washing it "will likely result in a discharge of [] pollutants…." (Blue Br. 41, 47.) DMR's discharge determination was reasonable and should be accorded deference, particularly where FEB merely speculates that AAF's equipment may contain PFAS and power washing it may result in a discharge of pollutants. *See Maquoit Bay*, 2022 ME 19, ¶ 20, 271 A.3d 1183 (deferring to DMR's designation of lease application as non-discharge where intervenor speculated that power washing would result in discharge of pollutants); (A. 18-19).

Fourth, FEB argues that recent federal regulatory developments, which occurred long after the evidentiary record closed in this proceeding, should have caused DMR to alter its course. But absent statutory language to the contrary, an agency must apply the regulations that were in effect when an application was deemed complete. *See supra* footnote 2. The Commissioner was "not required to reopen the record due to legislative changes and must apply the law as it was at the time of the application." (A. 10 (citing *Maquoit Bay*, 2022 ME 19, ¶ 2 n.1., 271 A.3d 1183)).

The only case that FEB cites in support of its argument that the Commissioner should have considered developing federal regulatory guidance,

(Blue Br. 41), illustrates an unusual exception to this rule that does not apply here because DMR made no regulatory changes that were inconsistent with its treatment of AAF's application. *Cf. Friends of Maine's Mountains v. Bd. of Envtl. Prot.*, 2013 ME 25, ¶¶ 11-17, 61 A.3d 689. Again, as the BCD ruled, *Friends of Maine's Mountains* is "distinguishable" and did not "compel[] DMR to reopen the record to consider it as a discharge application." (A. 18 n.3.; Resp't's Sup. Ct. Br. 30-32.)

Therefore, the Commissioner committed no error or abuse of discretion in considering AAF's application to be a non-discharge application. The Commissioner was not required to reopen the record to make additional findings based on FEB's concern about the "potential discharge" of PFAS. (Blue Br. 45.)

Lastly, FEB asserts that if the Decision is not vacated, it should be remanded to DMR with instructions to add a condition to the lease requiring that all submerged gear be free of PFAS. (Blue Br. 46-47.) As noted above, whether a condition should be imposed is a question of fact that must be based on evidence in the record. *See S.D. Warren Co.*, 2005 ME 27, ¶ 22, 868 A.2d 210. More fundamentally, an agency is not required to impose conditions that are not necessary to ensure compliance with that agency's review criteria. *See Hrouda v. Town of Hollis*, 568 A.2d 824, 826 (Me. 1990). As already discussed,

the record lacks evidence that AAF's gear contains any PFAS, let alone that AAF's operations would cause a discharge of PFAS into the bay. There is no factual basis in this record for the Commissioner to conclude that the requested condition is both necessary and reasonable. The Court should deny the request for a remand.

CONCLUSION

For the reasons set forth above, Respondent-Appellee DMR respectfully requests that the Court affirm the BCD's denial of FEB's Rule 80C petition and affirm the Commissioner's Decision granting an aquaculture lease to AAF.

Dated: December 3, 2025

Respectfully submitted,

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