

STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket BCD-25-337

FRIENDS OF EASTERN BAY

Petitioner – Appellant

v.

MAINE DEPARTMENT OF MARINE RESOURCES, et al.

Respondents – Appellees

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

REPLY BRIEF OF THE APPELLANT FRIENDS OF EASTERN BAY

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ARGUMENT

I. THE PROPOSED FLOATING DOCK IS NOT EXEMPT UNDER NRPA AND FALLS OUTSIDE THE DEPARTMENT’S AQUACULTURE AUTHORITY.

1. Acadia Aqua Farms, LLC’s Arguments Concerning NRPA Exemptions, Moorings, and “Ancillary” Structures are Legally and Factually Unsound.

Aquaculture lease applicant Respondent-Appellee-Acadia Aqua Farms, LLC (“AAF”) clutters its argument with a laundry list of inapposite legal standards. For example, AAF argues that “NRPA [the Natural Resources Protection Act] explicitly excludes the replacement of ‘certain floating docks’ from requiring a permit.” (AAF Brief “Br.” 16, *citing* 38 M.R.S. § 480-Q(2-B) (2025).) While accurate, this assertion is wholly inapplicable here because there is no existing floating dock that AAF seeks to replace. NRPA does not exempt the installation of *new* floating docks – such as the one proposed in this case, a point not disputed by the parties. *See, e.g.*, 38 M.R.S. § 480-Q(2-B) (2025). To the contrary, reference to the statutory exclusion underscores the Legislature’s intent that floating docks *are* subject to regulation under NRPA. AAF also relies on the statutory exemption for moorings, arguing that because a “floating dock” is among the structures that may be attached to a mooring, it is therefore exempt. (AAF Br. 16.) However, a mooring is limited to “*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) (2025) (emphasis added). As the definition makes clear, a mooring consists of the equipment used to secure other structures; it is not

the structures themselves. AAF does not contend that the mooring proposed to secure the floating dock requires a permit. Rather, Appellant Friends of Eastern Bay (“Friends”) asserts that the floating dock secured by the mooring is subject to permitting under the NRPA and may not be authorized by the Department of Marine Resources (the “Department”).¹ 38 M.R.S. § 480-Q(10) (2025); (Blue Br. 21-28.)

AAF attempts to distinguish between types of docks, asserting that certain docks are necessary for aquaculture site access but are not directly related to aquaculture operations and therefore are merely ancillary. (AAF Br. 15.) That reasoning, however, undermines AAF’s position: a floating dock used to facilitate access to equipment, but not used directly in aquaculture operations, is likewise ancillary and subject to NRPA regulation, placing it outside the Department’s exclusive jurisdiction.

AAF contends that, under Friends’ arguments, “unless equipment is in constant use, it cannot be stored on an aquaculture lease site.” (AAF Br. 17.) This is both not true and a misunderstanding of Friends’ assertions. Friends has never argued that AAF must remove all equipment or gear from the site that is not in

¹ AAF claims that Friends “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.” (AAF Br. 16.) To be clear, Friends has never argued – contrary to AAF’s suggestions – that AAF must obtain a NRPA permit for anchoring gear. Moreover, the burden rests with AAF to submit sufficient information to support its lease application. *See, e.g., Mook Sea Farms, Inc.*, No. 2015-14, Decision at 23 (Me. Dep’t. Marine Res. Oct. 21, 2016), available at <https://tinyurl.com/Mook201514>. AAF is under no legal obligation to produce examples of instances in which a NRPA permit was required for a floating platform. Whether such NRPA permits exist is uncertain and, in any event, may be immaterial, as there may be no other lease sites presenting comparable facts.

constant use. Aquaculture operations commonly include gear that remains idle for periods of time yet is directly used in the culture and husbandry of marine organisms. The floating dock, by contrast, is not used in the culture and husbandry of marine organisms. Accordingly, an aquaculture lease may not authorize such a structure, as the Department's authority is limited to the culture or husbandry of marine organisms. 12 M.R.S. §§ 6001(1), 6072(1) (2025). If AAF seeks to place or store a structure within the lease area that is not used for those purposes, it must obtain the appropriate approval from DEP.

AAF further mischaracterizes Friends' assertions related to the harvesting machine. AAF devotes substantial discussion to the use of this equipment, asserting that "[t]here is nothing ancillary about this gear and its use for aquaculture activities" and that "[i]ts presence on the lease site when the equipment is inactive does not render [it] 'ancillary'." (AAF Br. 15 -16.) Again, Friends has not contended that the harvesting machine is ancillary to the proposed aquaculture activities at the site. Rather, Friends' position is that the floating raft – used solely to store the harvesting machine when it is not in use and not for the culture or husbandry of marine organisms – is ancillary. The raft is never employed in the active husbandry of marine organisms, unlike the harvesting machine.

2. This Court May Not Defer to the Department’s Interpretation of a Statute Administered by a Different State Agency.

AAF argues that whether the floating dock is ancillary to the culture or husbandry of marine organisms, or instead constitutes the culture or husbandry itself, presents a mixed question of law and fact to which this Court should defer to the agency’s designation. (AAF Br. 15-16.) That contention fails. Two agencies are implicated, and only one is a party to this matter. This Court may not defer to the Department’s interpretation as to whether a floating storage raft or dock is “ancillary” to the culture and husbandry of marine organisms because that determination arises under NRPA, which is administered by the Department of Environmental Protection (“DEP”), not the Department. As discussed more fully in Friends’ Blue Brief, floating docks are regulated under NRPA, and the Legislature has expressly provided that the building or alteration of docks – even when ancillary to aquaculture activities – is not exempt from NRPA permitting. 38 M.R.S. § 480-Q(10) (2025). Accordingly, such structures do not fall within the Department’s exclusive authority. The Department has acted in excess of its statutory authority, and the Department’s final lease decision granting AAF a twenty-year aquaculture lease (“Decision”) must be vacated. 5 M.R.S. § 11007(4)(C)(2) (2025).

II. THE DEPARTMENT ERRED IN CONCLUDING THE APPLICATION WAS NOT A DISCHARGE APPLICATION AND IGNORED THE PRIOR TOXIC DESIGNATION OF PFAS.

1. The Department Erroneously Concluded That This Is Not a Discharge Application by Relying on Inapplicable Legal Precedent.

Respondent-Appellee Maine Department of Marine Resources dedicates nearly a page of its brief to refuting a position that Friends does not assert – that the Department failed to seek review from the DEP. (Department Br. At 45-46.) While Friends does not dispute that notice of the application was sent to DEP, the Department never received a response. (Appendix “A.” 49.) Without a response addressing this application involving previously unreviewed technology in Maine, the Department relied solely on a 2018 DEP letter that is inapposite to the issues before the Court. (Department Br. 46.) Although it may initially appear applicable, the letter, and the legal precedent upon which it was based, addressed only whether *biological materials*, such as mussel shells and mussel feces emitted from mussels, constituted a discharge of pollutants. (Administrative Record “A.R.” 1026 (Letter from Gregg Wood, Div. of Water Quality Mgmt., State of Maine Dep’t of Env’t Prot., to Amanda Ellis, Res. Mgmt. Coordinator, Maine Dep’t of Marine Res. (November 15, 2018)); *Ass’n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res.*, 299 F.3d 1007, 1016-18 (9th Cir. 2002) (“We conclude that Taylor’s mussel shells and the byproduct from these living mussels are not ‘biological materials’ under the Act because these materials come from the natural growth and

development of the mussels and not from a transformative human process.”). As explained in Friends’ Blue Brief, the legal precedent on which the 2018 letter relies is unrelated to the discharge of hazardous substances, including PFAS contamination. (Blue Br. 44-46.) Despite the Department’s reliance on this 2018 letter to classify AAF’s application as a non-discharge application, neither the letter, the case upon which it is based, nor the Decision addresses whether the discharge of *hazardous substances* from the proposed submerged equipment would mandate treating this application as a discharge application. Friends squarely raised these issues in its brief, yet neither AAF nor the Department attempts to rebut the inapplicability of the letter or the caselaw on which it relies. Instead, both persist in citing that authority to defend the Department’s erroneous conclusion that the application is not a discharge application. That reliance is unreasonable.

AAF similarly relies on inapplicable precedent, contending that this Court has “dismissed such arguments for non-fish aquaculture.” (AAF Br. 29, citing *Maquoit Bay, LLC v. Dep’t of Marine Res.*, 2022 ME 19 ¶ 20, 271 A.3d 1183.) However, the case cited by AAF is distinguishable on its facts. In that case, DEP did respond to the Department, issuing the very letter on which the Department erroneously relies for the instant case. (A.R. 1026.) Such letter pre-dates the regulation of PFAS compounds and, regardless, as discussed *supra*, addressed the discharge of *biological materials* and not chemical compounds. (A.R. 1026; *Ass’n*

to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., 299 F.3d 1007, 1016-18 (9th Cir. 2002).) The Court did not disturb the Department’s conclusion, finding its decision to be reasonable, a decision based on a response by DEP that related to the discharge at issue – the discharge of biological materials. *Maquoit Bay, LLC v. Dep’t of Marine Res.*, 2022 ME 19 ¶ 20, 271 A.3d 1183. However, here, the Department’s designation was *unreasonable* as it was based on inapposite precedent. The Department based its decision not to treat AAF’s application as a discharge application solely on this 2018 letter² to which it took official notice. (A. 49-50.) The Department’s decision must be reversed if its findings are “[u]nsupported by substantial evidence on the whole record” or are “[a]rbitrary or capricious or characterized by abuse of discretion.” 5 M.R.S. § 11007(4)(C)(5), (6) (2025). Because the only evidence in the record to which the Department bases its decision is this inapplicable letter that is limited to the characterization of the discharge of biological materials – and NOT the discharge of hazardous substances, there is no competent or substantial evidence to support the Department’s finding. *Pine Tree Tel. & Tel. Co. v. Public Utilities Comm’n*, 631 A.2d 57, 61 n.4 (Me. 1993) (“A factual finding is clearly erroneous only if there is no competent evidence in the record to support it.”); *Carryl v Dep’t of Corrections*, 2019 ME 114, ¶ 12, 212 A.3d

² As noted above, DEP did not submit comments on this application and did not provide this 2018 letter as its opinion on whether the instant application qualified as a discharge application. (A. 49.)

336 (Because the finding relies on a report lacking evidentiary support for the underlying proposition, vacatur of the judgment is required.)

2. PFAS Compounds Were Designated as Toxic Chemicals Well Before AAF's Application Was Deemed Complete.

The Department and AAF contend that “recent regulatory developments occurred long after the evidentiary record closed in this proceeding” and, therefore, the Department was not obligated to comply with these laws. (Department Br. 47.) While PFOA and PFOS were not designated as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act until 2024, 40 C.F.R. part 302, a point raised to the Department by Friends before the Department issued the Decision, per- and polyfluoroalkyl substances (“PFAS”) were treated as a regulated pollutant under Maine law in 2021, with the passage of An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution. 38 M.R.S. § 1614 (2025); P.L. 2021 ch. 477 (emergency, effective July 15, 2021) (“[C]ontamination of soil and water in the State from perfluoroalkyl and polyfluoroalkyl substances, or PFAS, poses a significant threat to the environment the State and to the health of its citizens[.]”) Moreover, PFAS were identified as toxic chemicals as early as 2019 under federal law in the National Defense Authorization Act for Fiscal Year 2020. 15 U.S.C. § 8921 (2019) (added 172 PFAS compounds to the list of toxic chemicals regulated under the Emergency Planning and Community Right-to-Know Act). Therefore, Congress had already begun

regulating PFAS compounds as toxic chemicals before AAF's application was deemed complete, and Maine treated PFAS compounds as a regulated pollutant before the record closed in 2022. When aquaculture lease activities will result in a discharge of pollutants, which includes federally regulated toxic chemicals, the application must be designated as a discharge application – both under current law and under the law at the time the application was deemed complete in 2020.

AAF contends that, if Friends' argument were accepted, aquaculture leases that may discharge PFAS compounds would be required either to be treated as discharge applications or to be required to remove such equipment. (AAF Br. 29 n.14). Although framed as a cautionary tale, this contention merely reflects the law as it presently exists. *See, e.g.*, 38 M.R.S. §§ 361-A(4-A), 413 (2025). The Maine Legislature has already made this policy determination, and it is the obligation of the relevant state agencies to adhere to this clear statutory directive. To do otherwise, as the Department has done here, is to violate the Department's statutory and regulatory obligations; therefore, this Court must vacate this Decision or remand the Decision to the Department for imposition of a condition mandating that all submerged gear be free of PFAS.

III. THE DEPARTMENT AND AAF RELY ON IRRELEVANT NOISE EVIDENCE, MISCHARACTERIZE THE RECORD, AND IMPROPERLY SHIFT THE BURDEN OF PROOF.

1. The Record Does Not Support the Department's Conclusions Regarding Noise.

Both AAF and the Department offer information that is largely irrelevant to support their position. The Department lists various noise-producing activities in Eastern Bay, asserting that all such activities are “already taking place on the water close to MDIBL.” (Department Br. 36-37.) While some of these activities do occur in Eastern Bay, many are not proximate to Mount Desert Island Biological Laboratory (“MDI Bio Lab”), and few occur as close to MDI Bio Lab as the proposed lease site will be situated. For instance, the boat ramp at Lamoine State Park, another boat ramp at a yacht manufacturer, and the existing commercial aquaculture lease, EAST GL, are all located nearly a mile or more from MDI Bio Lab. (A.R. 0452-0453 (Site Review).) In contrast, AAF’s proposed lease site is located just over 1,590 feet from MDI Bio Lab. (A. 85.) AAF attempts to rely upon noise measurements³ taken at locations very different from, and distant to, MDI Bio Lab and the lease site to characterize the background noise levels at these sites. (AAF

³ AAF attempts to undermine Friends’ experts by stating that none have “engineering backgrounds or any expertise in issues of noise or sound.” AAF Br. 25-36. AAF did not dispute the qualification of such experts, nor did it designate any supplemental expert witnesses to rebut the opinions of Friends’ expert witnesses, as was permitted pursuant to the Procedural Order issued January 11, 2022. (A.R. 0615 (Procedural Order).) Moreover, despite AAF’s attempt to characterize a lay witness as an expert (AAF Br. 26 n.11), AAF presented no expert testimony. Although Friends did not designate a noise-engineering expert, it did present expert testimony from multiple scientists with substantial educational and professional experience working with the same sound-sensitive organisms used in MDI Bio Lab’s experiments, each of whom testified on Friends’ behalf at the hearing. (A. 200-211, 262-277.)

Br. 25.) Hadley Point and Trenton airport boat ramps, at nearly 2 and 3 miles from MDI Bio Lab (A.R. 0452 (Site Review)), would also be expected to have considerably higher background noise levels than other locations due to the airport activity.

The Department has repeatedly mischaracterized or completely ignored the evidence presented by Friends in support of its challenge. The Department stated that Friends “failed to offer evidence about what effect specific types or levels of existing noise might have, if any, on its laboratory animals.” (Department Br. 38.) AAF states that there was a “lack of evidence showing AAF’s operations pose any threat to MDIBL’s operations” and that “renovation plans were not designed to keep noise below any specific decibel level[.]” (AAF Br. 24, 37.) On the contrary, Friends designated multiple expert witnesses who testified regarding the effects of existing noise on laboratory animals and the extensive measures undertaken by MDI Bio Lab to evaluate, plan for, and mitigate those impacts. (*See, e.g.*, A. 268, 271-72, 275-280.) For example, whenever construction of any kind occurs at or near the facility, scientists are given two weeks’ advance notice to wind down ongoing research and are directed not to resume research until two weeks after construction has ceased, allowing laboratory animals time to calm, recover, and reduce stress. (A. 275.) During this period, the construction noises cause the animals to behave erratically. (A. 275.) They do not eat, and they do not produce as many eggs or viable offspring.

(A. 275.) To mitigate continual and intermittent noise impacts, experts from MDI Bio Lab described several measures employed at the facility, including mounting microscopies on vibration-free desks, isolating noise-generating equipment in separate rooms, limiting the number of personnel permitted in areas housing laboratory animals, and prohibiting access by untrained personnel. (A. 277-280.)

The Department contends that Friends' concerns are diminished because Friends did not submit sound readings related to MDI Bio Lab's existing operations or other activities in close proximity to MDI Bio Lab. Department Br. 38. This argument is misplaced. The burden of proof rests on AAF, not on an intervenor such as Friends, and AAF itself did not submit, or even produce, any sound readings at the boundaries of the proposed lease site or for the equipment that would be used there. (A. 256, 260.) Yet the Department faults the party without the burden of proof for failing to provide sound data related to MDI Bio Lab's existing operations and activities.

Beyond this impermissible shifting of the burden, there are valid reasons why the Department arguments are misplaced. Primarily, Friends *did* provide evidence of the background sound level on the shore of MDI Bio Lab at Star Point, adjacent to the proposed lease site. James Strickland, the former Director of MDI Bioscience, testified that the background sound levels were in the 35-40 decibel level range (A. 207), which differed quite dramatically from the background levels of 60-70 decibels

AAF used as its baseline by testing at particularly noisy locations quite a distance from both MDI Bio Lab and the proposed lease site. (A. 244.) MDI Bio Lab also designed a controlled experiment to test the impact of different levels of noise on the cortisol levels of zebrafish and their ability to spawn, as described in Friends' Comments on the Draft Decision. (A.R. 0934.) In addition, sound level readings are most critical when the noise-producing activities are outside MDI Bio Lab's control. For example, if MDI Bio Lab determines that an activity under its control is adversely affecting its organisms, it can immediately respond by limiting the noise or mitigating its impact. By contrast, when noise originates from sources beyond MDI Bio Lab's control – such as the harvesting machine proposed at AAF's lease site – MDI Bio Lab is constrained in its ability to respond and protect its lab animals and ongoing experiments. MDI Bio Lab therefore requires advance readings to take measures now, since it cannot “turn off” the noise once operations begin.

To mitigate the noise generated by the proposed aquaculture lease activities, Friends proposed that AAF limit its operations to four weeks per year – the same duration AAF testified it intends to operate its facility in all but exceptional circumstances. (A.R. 0835 (Closing Argument).) AAF dismisses this proposal as “absurd” (AAF Br. 24), a characterization that is irreconcilable with its own hearing testimony regarding the anticipated, routine use of the harvesting machine. (A. 249-250.) Although the Department disagreed with the specific dates proposed by

Friends – despite their overlap with AAF’s preferred harvesting window – it did not retain this reasonable condition by adjusting the timing to better align with AAF’s schedule or to provide greater flexibility. Instead, the Department rejected the limitation altogether. (Department Br. 43.) The Department may not approve an aquaculture lease unless “*all* reasonable measures will be taken to mitigate noise impacts[.]” (A. 123 (emphasis added).) Because the Department erroneously concluded that all such reasonable measures were taken, its Decision must be vacated and the matter remanded for further proceedings.

2. The Department’s Findings Do Not Satisfy the “Other Uses of the Area” Criterion.

The Department claims that the Commissioner’s failure to consider all “other uses” of the area, including MDI Bio Lab’s use of the area, is not fatal because the Department considered “noise and its effects on MDIBL’s operations under the noise criteria.” (Department Br. 31.) However, the criteria for review for each are quite different. Under the “other uses of the area” licensing criterion, the Commissioner must “examine whether the lease activities would unreasonably interfere” with MDI Bio Lab’s use of the area. (A.121.) Whereas, under the “noise” licensing criterion, the Commissioner is required to determine that the applicant demonstrated “all reasonable measures will be taken to mitigate noise impacts from the lease activities.” (A. 123.) The former prioritizes the impacts on the other uses while the latter prioritizes efforts taken by the applicant with little to no consideration

of the impact such activities would have on other uses of the area. Therefore, the *Maquoit Bay* case cited by the Department is irrelevant because this is not a situation in which the Department's analysis of whether all reasonable noise mitigation measures were taken addresses whether there is unreasonable interference with MDI Bio Lab's activities. *See, e.g., Maquoit Bay, LLC v. Dep't of Mar. Res.*, 2022 ME 19 ¶¶ 12-14, 271 A.3d 1183.

CONCLUSION

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

Respectfully submitted this 23rd day of December, 2025.

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CERTIFICATE OF SERVICE

I, Stacey L. Caulk, hereby certify that on this 23rd day of December 2025, I electronically filed the foregoing Reply Brief of the Appellant Friends of Eastern Bay with the Clerk of the Maine Supreme Judicial Court Sitting as the Law Court, and I caused an electronic copy of the foregoing Brief of Petitioner-Appellant to be served on counsel for Respondents-Appellees Maine Department of Marine Resources and Acadia Aqua Farms, LLC via electronic mail sent to the following:

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