

STATE OF MAINE

**SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

LAW DOCKET NO. KEN-23-348

**EASTERN MAINE CONSERVATION INITIATIVE, and ROQUE ISLAND
GARDNER HOMESTEAD CORPORATION**

Petitioners - Appellants

v.

STATE OF MAINE, BOARD OF ENVIRONMENTAL PROTECTION

Defendant – Appellee

and

KINGFISH MAINE, INC.

Party-In Interest

**ON APPEAL FROM THE KENNEBEC COUNTY
SUPERIOR COURT**

BRIEF OF APPELLANTS

Elizabeth A. Boepple, Esq.
Sean R. Turley, Esq.
Ellen P. Masalsky, Esq.
MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, Maine 04104-5085
(207) 773-5651
Attorneys for Petitioners-Appellants

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY	3
STANDARD OF REVIEW.....	9
ISSUES PRESENTED FOR REVIEW	11
ARGUMENT	12
I. THE SUPERIOR COURT ERRED BY UPHOLDING THE DECISION AND DETERMINING THAT THE BEP WAS NOT OBLIGATED TO CONDUCT INDEPENDENT REVIEW OF WATER QUALITY IMPACT.	12
A. The BEP is required to consider the impacts of the Project’s wastewater discharge on wildlife habitats.....	12
B. The BEP is not permitted to weigh economic considerations as part of its review under NRPA; it must conduct an independent review under NRPA’s standards.	19
CONCLUSION	24
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Anderson v. Me. Pub. Emps. Ret. Sys.</i> , 2009 ME 134, 985 A.2d 501	9
<i>Black v. Bureau of Parks & Lands</i> , 2022 ME 58, 288 A.3d 346.....	9
<i>Cent. Maine Power Co. v. Devereux Marine, Inc.</i> , 2013 ME 37, 68 A.3d 1262.....	22
<i>Cent. Maine Power Co. v. Maine Pub. Utilities Comm'n</i> , 436 A.2d 880 (Me. 1981).....	19
<i>Competitive Energy Services LLC v. Pub. Utilities Comm'n</i> , 2003 ME 12, 818 A.2d 1039.....	10
<i>Concerned Citizens to Save Roxbury v. Bd. of Env'tl. Prot.</i> , 2011 ME 39, 15 A.3d 1263.....	9
<i>Conservation Law Found., Inc. v. Dep't of Env'tl. Prot.</i> , 2003 ME 62, 823 A.2d 551	12, 21
<i>Davis Forestry Prods., Inc. v. DownEast Power Co.</i> , 2011 ME 10, 12 A.3d 1180	22
<i>Friends of Lincoln Lakes v. Bd. of Env'tl. Prot.</i> , 2010 ME 18, 989 A.2d 1128.....	17
<i>Gulf Island Pond Oxygenation Project P'ship v. Bd. of Env'tl. Prot.</i> , 644 A.2d 1055 (Me. 1994)	16
<i>Hannum v. Bd. of Env'tl. Prot.</i> , 2006 ME 51, 898 A.2d 392.....	14
<i>Int'l Paper Co. v. Bd. of Env'tl. Prot.</i> , 1999 ME 135, 737 A.2d 1047	16
<i>Kain v. Sec'y of State</i> , No. CIV.A. AP-2004-23, 2005 WL 605443 (Me. Super. Jan. 21, 2005).....	15, 16
<i>Kroeger v. Department of Environmental Protection</i> , 2005 ME 50, 870 A.2d 566.....	10
<i>Lippitt v. Bd. of Certification for Geologists & Soil Scientists</i> , 2014 ME 42, 88 A.3d 154.....	10

<i>Maine Ass'n of Health Plans v. Superintendent of Ins.</i> , 2007 ME 69, 923 A.2d 918	10
<i>Manguriu v. Lynch</i> , 794 F.3d 119 (1st Cir. 2015).....	15
<i>Med. Mut. Ins. Co. of Me. v. Bureau of Ins.</i> , 2005 ME 12, 866 A.2d 117.....	9
<i>Mosher v. State Harness Racing Comm'n</i> , 2016 ME 104, 144 A.3d 42.....	18
<i>Murphy v. Bd. of Env't. Prot.</i> , 615 A.2d 255 (Me. 1992).....	12
<i>Nancy W. Bayley, Inc. v. Maine Employment Sec. Comm'n</i> , 472 A.2d 1374 (Me. 1984)	10
<i>Save Our Seabcooke, Inc. v. Board of Environmental Protection</i> , 2007 ME 102, 928 A.2d 736.....	9
<i>Sinclair Builders, Inc. v. Unemployment Ins. Comm'n</i> , 2013 ME 76, 73 A.3d 1061	10
<i>State v. Dubois Livestock, Inc.</i> , 2017 ME 223, 174 A.3d 308.....	22
<i>State v. Hopkins</i> , 526 A.2d 945 (Me. 5 1987)	22
<i>State v. Rand</i> , 430 A.2d 808 (Me. 1981)	22
<i>Town of Jay v. Androscoggin Energy, LLC</i> , 2003 ME 64, 822 A.2d 1114	16
<i>Town of Mount Vernon v. Landherr</i> , 2018 ME 105, 190 A.3d 249.....	15

STATUTES

38 M.R.S. § 341-D(4)	9
38 M.R.S. § 414-A(1)(A)	20
38 M.R.S. § 414-A(1)(C)	20
38 M.R.S. § 464(1)	21
38 M.R.S. § 464(4)(F)(3)	20

38 M.R.S. § 464(4)(F)(5)	20
38 M.R.S. § 465-B(2)	3
38 M.R.S. § 480–A.....	14, 18, 21, 22
38 M.R.S. § 480–C.....	13
38 M.R.S. § 480–C(2)	13
38 M.R.S. § 480–D	23
38 M.R.S. § 480–D(1)	21
38 M.R.S. § 480–D(3)	20, 23

RULES

M.R. Evid. 201	16
----------------------	----

INTRODUCTION

This appeal arises from a decision (the “**Decision**”) of the Board of Environmental Protection (the “**BEP**”) granting Kingfish Maine, Inc. (“**Kingfish**”) approval under the Site Location of Development Act (“**SLODA**”) and the Natural Resources Protection Act (“**NRPA**”) to construct and operate a massive industrial recirculating aquaculture facility for raising yellowtail kingfish (the “**Project**”). The Project would be sited on a parcel of land on Chandler Bay in Jonesport, Maine (“**Jonesport**”). Chandler Bay and its surrounding marine waterbodies contain wildlife habitats for marine species and support fisheries that are critical to the economic prosperity of the surrounding communities. The Project threatens these wildlife habitats due to the significant volume of wastewater Kingfish, through their operation of the aquaculture facility, will discharge into the waters of Chandler Bay. Of particular concern is the impact on Chandler Bay’s eelgrass beds and saltwater marshes.

Petitioners-Appellants Eastern Maine Conservation Initiative and Roque Island Gardner Homestead Corporation (“**EMCI**” and “**RIGHC**,” respectively, and “**Appellants**,” collectively) are organizations committed to protecting the marine environment in Chandler Bay and are principally concerned about the impact of the Project on the marine environment. EMCI is a conservation and science-based organization that maintains several conservation easements and engages in conservation efforts in the Downeast coastal region of Maine. RIGHC owns Roque

Island and eight adjoining islands between Chandler Bay and Englishman’s Bay in the Town of Jonesport, Maine (the “**Islands**”).

The Decision is erroneous because the BEP issued the NRPA permit without properly analyzing the impact of water quality degradation on wildlife habitats in Chandler Bay caused by Kingfish’s activities. Instead, the BEP granted the SLODA and NRPA permits on the basis that the Project had already been approved for other permits—namely a Maine Pollutant Discharge Elimination System (“**MEPDES**”) permit and Waste Discharge License (“**WDL**”) (collectively the “**Discharge Permits**”)—which are considered under different standards. In doing so, the BEP failed to address in the Decision factual and legal issues that were critical to determining whether the application satisfied all applicable review criteria contained in NRPA and SLODA.

This case boils down to one simple issue: whether the BEP is obligated to perform an independent analysis of the impact of water quality degradation on wildlife habitats under NRPA. Because it is, the BEP’s approval of the Project must be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Project is proposed to be located on an approximately 91-acre parcel on Chandler Bay in Jonesport (the “**Project Site**”). Chandler Bay is a Class SB marine waterbody subject to protections under 38 M.R.S. § 465-B(2) which require it to “be of such quality” that it is “suitable for designated uses of recreation in and on the water, fishing, aquaculture, propagation and harvesting of shellfish . . . and as a habitation for fish and other estuarine and marine life.” (App. 43; 87 (quoting 38 M.R.S. § 465-B(2))). Chandler Bay and its surrounding marine waterbodies have been productive fisheries for centuries and support a robust lobster fishery to this day with residents of nearby communities relying on it for their economic survival.

The proposed Project would be the largest of its kind in the world. It would be used to raise 8,000 metric tons of yellowtail kingfish on an annual basis from on-site broodstock to harvest, conduct initial processing of the kingfish for commercial sale, and process wastewater associated with these uses. The Project will impact approximately 261,196 square feet (approximately 5.99 acres) of freshwater wetlands, including 64,004 square feet of wetlands of special significance. The largest building on the Project Site—the “grow-out facility”—is 422,465 square feet, or approximately 9.7 acres, by itself. (AR-1342.) The adjacent “hatchery & broodstock facility,” which is dwarfed by the “grow-out facility,” is 64,380 square feet, or approximately 1.5 acres. (AR-1342.)

The Project involves the intake and output of seawater from Chandler Bay using a recirculating aquaculture system (“**RAS**”), which functions by intaking seawater at a rate of 19,812 gallons a minute (or 28.7 million gallons a day); processing that water on land through a series of mechanical and chemical filters; and then discharging the processed water back into the ocean. (App. 82-84.) In order to operate the RAS, the Project includes, *inter alia*, two intake pipes measuring approximately 1,400’ in length and two outtake pipes, which are 2,800’ long and 4’ in diameter. (App. 135.) The openings to the two intake pipes are located approximately 1400’ and 1500’ into Chandler Bay. The construction of these pipes will have a direct impact on 7,136 square feet of coastal wetlands. (App. 135.)

The water used as part of the fish-growing operation is discharged back through the outtake pipes into Chandler Bay after passing through a mechanical filtration system and one of two “multiport diffuser[s].” (App. 84-86.) Through these pipes Kingfish proposes to discharge up to 28.7 million gallons of “pollutant”¹ (i.e. “treated wastewater”) per day into Chandler Bay, up to 6.5 million gallons of which will be

¹ The discharge permit issued to Kingfish defines “pollutant” as:

Pollutant means dredged spoil, solid waste, junk, incinerator residue, sewage, refuse, effluent, garbage, sewage sludge, munitions, chemicals, biological or radiological materials, oil, petroleum products or byproducts, heat, wrecked or discarded equipment, rock, sand, dirt and industrial, municipal, domestic, commercial or agricultural wastes of any kind.

(App. 74.)

“fish culture or process water.”² (App. 43.) That “culture and processing water”³ will include “suspended solids and nutrient (primarily phosphorous and nitrogen)” “that may be present at levels above ambient conditions in Chandler Bay.” (App. 85.)

On August 20, 2020 Kingfish filed an application with the Department of Environmental Protection (“**Department**”) for the Discharge Permits for the Project. (App. 43.) On March 25, 2021, Kingfish filed applications for the permits under SLODA (AR-39–181) and NRPA (AR-193–854). The Department issued approval to Kingfish for the Discharge Permits on June 25, 2021, and granted Kingfish approval for permits under SLODA and NRPA on November 12, 2022.

BEP Appeal

EMCI and RIGHC filed timely appeals of the NRPA Permit and SLODA Permit to the BEP on December 11, 2021 and December 12, 2021, respectively.⁴ (AR-1501–1509; AR-1509–1513); *see* AR-1530–1532 (ruling by BEP chair finding Appellants’ appeals timely). Through their appeals, Appellants challenged, *inter alia*, the Department’s consideration under NRPA and SLODA of the harm the discharge

² The Department defines “process wastewater” as:

Process wastewater means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct or waste product.

(App. 74.)

³ “Culture and process water” is defined as “water that interacts with RAS processes involved in growing fish” that “will be discharged into Chandler Bay.” (App. 85.)

⁴ EMCI and Roque were joined in their appeal by the Sierra Club of Maine. (AR-1408–1500.)

of pollutants from the Project will cause the wildlife habitats and fisheries that are dependent on the water quality of Chandler Bay, including the damage that is likely to result to eelgrass and the lobster and scallop fisheries. (AR-1506–1507, 1511–1512; *see* AR-24–25 (BEP summary of Appellants’ arguments on appeal).) The BEP reviewed the Appellants’ appeal as a request that the issuance of the NRPA Permit and Site Law Permit be reversed and that Kingfish’s application for those permits be denied. (AR-25.)

The BEP held a meeting on Appellants’ appeals on August 4, 2022 (the “**August 4 Meeting**”). The BEP denied EMCI and RIGHC’s appeals of the SLODA and NRPA permits by order dated August 4, 2022 (the “**BEP Order**”). (App. 20-37.) The contents of the BEP order and commentary at the August 4 Meeting establish that the BEP did not conduct its own analysis under NRPA and relied entirely on the Discharge Permits for determinations about water quality impacts. The BEP Order setting forth the basis of its Decision to issue the permits provides the following:

When the Department reviews water quality impacts under the NRPA in a case in which a Waste Discharge License application is being or has separately been evaluated, the focus of the NRPA review is impacts from regulated activities such as dredging, filling, disturbing soil, and placement of structures in, on, over, or adjacent to wetlands and waterbodies.

In this context, the direct discharge of wastewater would be analyzed in the context of the Waste Discharge License application review, and compliance with the NRPA licensing criteria is based on how the project complies with Chapter 310, protecting wetlands and waterbodies, and Chapter 335, protecting significant wildlife and fisheries habitat.

Review under the [SLODA] focuses more broadly on potential impacts to water quality from the development in general, and whether it complies with the provisions set forth in Chapter 375 § 6, which deal with potential effects on surface water quality, while the indepth review of a direct discharge from a development occurs in the analysis of the Waste Discharge License application.

(App. 26.) The BEP Order noted that when the Department issued a combined permit under SLODA and NRPA to Kingfish, it relied on “another valid Department order.” (App. 28 (“The Appellants challenge the findings underlying that Waste Discharge License in this appeal of the Site Law and NRPA permit decision, but the Board finds no error in the Department’s reliance on another valid Department order.”).) The BEP Order then explains that the Department alters its analysis under NRPA when a Discharge Permit has been issued, stating that “[d]ischarges of pollutants, such as those focused on by the appellants, are reviewed in the context of an application for a Waste Discharge License, and not the NRPA application review process.” (App. 27.)

The BEP Order also provides that:

When the Department reviews water quality impacts under the NRPA in a case in which a Waste Discharge License application is being or has separately been evaluated, the focus of the NRPA review is impacts from regulated activities such as dredging, filling, disturbing soil, and placement of structures in, on, over, or adjacent to wetlands and waterbodies. In this context, the direct discharge of wastewater would be analyzed in the context of the Waste Discharge License application review, and compliance with the NRPA licensing criteria is based on how the project complies with Chapter 310, protecting wetlands and waterbodies, and Chapter 335, protecting significant wildlife and fisheries habitat.

(App. 26.)

At the August 4 Meeting, Kevin Martin spoke on behalf of the DEP; he stated that the department considered the issuance of the Discharge Permits to be “strong sources of evidence . . . when [the Department] apply NRPA and Site Law” because issues related to discharge “have been reviewed in detail by other bureaus in the department, specifically the water bureau,” which means that “once those licenses are received, it becomes pretty simple for land bureau staff . . . that [the applicant] effectively meet[s] the standard under Site Law.” (AR Doc. 100 at 1:04:00–1:04:39 (recording of the August 4, 2022 BEP meeting).)

Superior Court Proceedings

The Appellants timely filed a Rule 80C Appeal from the BEP’s Decision. (App. 13-19.) By order dated August 23, 2023, the Superior Court (*Murphy, J.*) denied the Appellants’ appeal and upheld the August 4, 2022 Decision of the BEP. (App. 4-12.) On the issue of whether the BEP acted unreasonably by failing to independently review the Project’s compliance with the relevant NRPA and SLODA standards, the Superior Court agreed with the BEP and found that BEP permissibly relied on the Discharge Permits. In support of this conclusion, the Court found that (1) the BEP was not obligated to examine the impact of effluent discharges on wildlife because it was not an enumerated action under 38 M.R.S. § 480–C and (2) the BEP is permitted to weigh economic considerations under NRPA.

STANDARD OF REVIEW

When this Court “considers a judgment of the Superior Court, reviewing a decision of a state administrative agency pursuant to M.R. Civ. P. 80C, [it] follow[s] the standards of review governing administrative appeals. Thus, when the trial court has acted in an intermediate appellate capacity, [the Court] review[s] directly the original decision of the fact-finding agency, without deference to the ruling on the intermediate appeal by the court from which the appeal is taken.” *Anderson v. Me. Pub. Emps. Ret. Sys.*, 2009 ME 134, ¶ 2, 985 A.2d 501; *Black v. Bureau of Parks & Lands*, 2022 ME 58, ¶ 25, 288 A.3d 346. The Court “review[s] decisions made by an administrative agency for “errors of law, abuse of discretion, or findings of fact not supported by the record.” *Save Our Sebasticook, Inc. v. Board of Environmental Protection*, 2007 ME 102, ¶ 13, 928 A.2d 736. Because the BEP, pursuant to agency rules, acts as a fact finder and considers the actions of the Department *de novo*, regardless of whether it holds a hearing on the matter, the operative decision for this Court’s review is the BEP Decision. *Concerned Citizens to Save Roxbury v. Bd. of Emtl. Prot.*, 2011 ME 39, ¶¶ 17, 23, 15 A.3d 1263; 38 M.R.S. § 341-D(4).

“Statutory construction is a question of law, and, therefore, we review [the agency's statutory interpretation] *de novo*.” *Med. Mut. Ins. Co. of Me. v. Bureau of Ins.*, 2005 ME 12, ¶ 5, 866 A.2d 117. The Court shows deference to an agency’s interpretation of a statute only if the statutory language is ambiguous and the statute

falls within an agency's expertise. *Maine Ass'n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 32, 923 A.2d 918; *Competitive Energy Services LLC v. Pub. Utilities Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039; *Lippitt v. Bd. of Certification for Geologists & Soil Scientists*, 2014 ME 42, ¶ 17, 88 A.3d 154 (“The plain meaning of a statute always controls over an inconsistent administrative interpretation.”). The agency commits reversible error when it misapplies the law to the facts. *Sinclair Builders, Inc. v. Unemployment Ins. Comm'n*, 2013 ME 76, ¶ 10, 73 A.3d 1061; *Nancy W. Bayley, Inc. v. Maine Employment Sec. Comm'n*, 472 A.2d 1374, 1377 (Me. 1984).

Pursuant to 5 M.R.S.A. § 11007(4)(C), this Court has the authority to reverse or modify agency action that “violates the Constitution or statutes; exceeds the agency's authority; is procedurally unlawful; is arbitrary or capricious; constitutes an abuse of discretion; is affected by bias or an error of law; or is unsupported by the evidence in the record.” *Kroeger v. Department of Environmental Protection*, 2005 ME 50, ¶ 7, 870 A.2d 566.

ISSUES PRESENTED FOR REVIEW

Did the Superior Court err by upholding the BEP's decision and determining that the BEP did not violate NRPA or otherwise act unreasonably by failing to independently assess the Project's effluent discharges under Section 480-D(3) or by deferring to the determinations in the Department's discharge permit? Appellants respectfully submit that the answer to this question is "Yes" and that the decision of the Superior Court should be reversed.

ARGUMENT

I. THE SUPERIOR COURT ERRED BY UPHOLDING THE DECISION AND DETERMINING THAT THE BEP WAS NOT OBLIGATED TO CONDUCT INDEPENDENT REVIEW OF WATER QUALITY IMPACT.

A. The BEP is required to consider the impacts of the Project's wastewater discharge on wildlife habitats.

The BEP is required under NRPA to consider the impacts not just of the construction of the Project, but also the impacts of its operation. The Superior Court misconstrued the NRPA statute when determining that the BEP was not obligated to independently analyze the impact of water quality on wildlife habitat because Kingfish's activities did not fall into the categories enumerated under 38 M.R.S. § 480-C(2). This interpretation offends NRPA's purpose and is inconsistent with the Department's application of the statute.

Allowing the Department to consider only the impact of a structure and ignore the impact of that structure's use would contravene the purpose of the statute. NRPA "is a statutory scheme whose purpose is the protection of Maine's rivers, ponds, wetlands, mountains, wildlife habitats, and coastal sand dunes." *Conservation Law Found., Inc. v. Dep't of Env'tl. Prot.*, 2003 ME 62, ¶ 2, 823 A.2d 551. "In order to implement the stated purpose of [NRPA], the statute should be broadly construed. In fact, environmental statutes are generally given a broad, liberal interpretation in order to afford the full protection of the Act which is being construed." *Murphy v. Bd. of Env'tl. Prot.*, 615 A.2d 255, 259 (Me. 1992).

38 M.R.S. § 480-C provides that “[a] person may not perform or cause to be performed any activity listed in subsection 2 without first obtaining a permit from the department if the activity is located in, on or over any protected natural resource or is located adjacent to . . . [a] coastal wetland . . . [.]” The activities listed in Section 480-C(2) include:

- (A) Dredging, bulldozing, removing or displacing soil, sand, vegetation or other materials;
- (B) [d]raining or otherwise dewatering;
- (C) [f]illing, including adding sand or other material to a sand dune; or
- (D) [a]ny construction, repair or alteration of any permanent structure.

38 M.R.S. § 480-C(2). This section provides instructions to applicants about which activities require a NRPA permit—it does not, however, constitute instructions to the Department about what the agency considers when determining when to award an NRPA permit. In other words, Section 480-C(2) only pertains to whether a permit must be obtained and not whether a permit should be granted. Kingfish is required to obtain a NRPA permit because it will engage in several of the enumerated activities under Section 480-C(2) to construct the Project, including “dredging,” “draining,” “filling,” and “construction . . . of [a] permanent structure.” *See* 38 M.R.S. § 480-C(2). The Superior Court erroneously determined that because Section 480-C(2) does not include the discharge of wastewater, that Kingfish’s activities relating to operation of the aquaculture facility were exempt from NRPA review; however, this activity is

properly part of the Department's analysis under NRPA. While wastewater discharge was not the activity for which Kingfish needed to obtain a NRPA permit, it does factor into the Department's decision about whether to grant a NRPA permit to construct an aquaculture facility.

In *Hannum v. Bd. of Env'tl. Prot.*, this Court declined to adopt such a restrictive view of the Section 480-C(2) when an appellant attempted to make a similar argument. 2006 ME 51, ¶ 14, 898 A.2d 392. In *Hannum*, the BEP denied a NRPA application for the construction of a dock based on a finding that “[t]he proposed activity would unreasonably harm aquatic habitat and other aquatic life in that the permanent pier would increase boat traffic in the cove which will disturb the existing tern and seal colonies.” *Id.* at ¶ 12. The appellant argued that the BEP was limited to considering the impacts of the structure (the dock) and could not consider the environmental impacts associated with the *use* of the dock after it was built. *Id.* at ¶ 13. The court found that “[t]he use of the structure cannot be divorced from the structure itself” and that the Board was therefore not precluded from considering the dock's use. *Id.* (emphasis added). “Although the NRPA does not empower the Board to regulate boating directly, the purpose of the NRPA is to prevent the degradation of protected resources (including coastal wetlands) caused by human use.” *Id.*; 38 M.R.S. § 480–A. The Superior Court interpreted *Hannum* to mean that while the agency was not “prohibited from considering the harms associated with the uses” it was not obligated to do so. (App. 10.) However, this interpretation is

incorrect and overstates the holding of *Hannum* —the Hannum court considered only whether the Department was permitted to consider harms associated with uses, and this Court has not yet had the opportunity to determine whether the Department is in fact *required* to consider these harms.

Moreover, the Superior Court’s interpretation of Section 480-C(2) is inconsistent with the Department’s own application of NRPA. While the Department asserts in the instant litigation that it cannot consider activities not specifically enumerated in Section 480-C(2), in fact, the Department routinely considers long-term use when determining whether to issue permits under NRPA. The Department’s decisions in other matters are highly informative of the agency’s actual interpretation of the statute. *See Kain v. Sec’y of State*, No. CIV.A. AP-2004-23, 2005 WL 605443, at *3 (Me. Super. Jan. 21, 2005) (collecting cases) (“[d]espite the Court’s statutory limitation to review only the record, there is precedent for taking judicial notice in Rule 80C appeals.”); *Town of Mount Vernon v. Landherr*, 2018 ME 105, ¶ 14, 190 A.3d 249 (noting that the court could take judicial notice of an agency decision to determine whether relitigating an issue was barred by principles of res judicata); *Mangurin v. Lynch*, 794 F.3d 119, 121 (1st Cir. 2015) (“[C]ourts normally can take judicial notice of agency determinations.”). It is critical that this Court take judicial notice of the Department’s prior decisions to ensure that the Department’s practice in administering NRPA does

not contradict their asserted interpretation of the statute in this case.⁵ See *Town of Jay v. Androscoggin Energy, LLC*, 2003 ME 64, ¶ 10, 822 A.2d 1114 (“We give deference to an agency's interpretation of a statute it administers, but we will not uphold the agency's interpretation if the language and purpose of the statute and the agency's practice in a related case contradict it.”); *Int'l Paper Co. v. Bd. of Env'tl. Prot.*, 1999 ME 135, ¶ 13, 737 A.2d 1047; *Gulf Island Pond Oxygenation Project P'ship v. Bd. of Env'tl. Prot.*, 644 A.2d 1055, 1059 (Me. 1994) (“The agency's interpretation is not binding on the court, however, and it will not be upheld if it is contradicted by the language and purpose of the statute.”).

One recent example of the Department considering the environmental impact of long-term use occurred in Central Maine Power Company's New England Clean Energy Connect project. The Department issued a combined NRPA and SLODA permit, including conditions of approval implicating long-term use *after* construction.⁶ *In the Matter of CMP NECEC*, Site Location of Development Act Natural Resources Protection Act Order (the “**Department Order**”). These conditions include:

⁵ The court, in *Kain v. Sec'y of State*, noted that the requirements for taking judicial notice under M.R. Evid. 201 include that the “fact must, ‘not be subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned[.]’ and notes that the court ‘shall take judicial notice if requested by a party and supplied with the necessary information.’” No. CIV.A. AP-2004-23, 2005 WL 605443, at *3 (Me. Super. Jan. 21, 2005) (citing M.R. Evid. 201(b),(d)).

⁶ The NECEC permits are on appeal with the Kennebec County Superior Court. But, the imposition of the conditions referenced herein, are not being challenged except to the extent that a Party to the appeal may assert the conditions are not sufficient to mitigate the harmful impacts.

“Tapering and maintaining taller vegetation... [to] help mitigate the impact of Segment 1 of the corridor on wildlife and wildlife habitat.” Department Order at 80. This condition was clearly targeted at mitigating the negative and harmful impacts on wildlife habitat *after* construction of the 53.1 mile portion of the transmission corridor known as Segment 1 was completed – not during construction. This condition attempted to address ongoing forest fragmentation caused by the permanent installation of the transmission corridor. The Department Order provided that “[t]he tapering and taller vegetation required by this Order help minimize the impacts associated with fragmentation; they do not eliminate them. . . . Because of the impacts to wildlife, even with on-site mitigation, the Department finds additional, off-site, mitigation in the form of land conservation is required.” Department Order at 80. The Department also found that conservation of 40,000 acres in the vicinity of Segment 1 was necessary for the protection of wildlife. Department Order at 81. Again, conservation of 40,000 acres⁷ as an “off-site” mitigation is clearly a forward-looking condition and not one limited to construction activities. *See* Department Order at 80-81. In this case, as in others, the Department and the BEP considered harms associated with long-term use and imposed conditions to address those harms. *See Friends of Lincoln Lakes v. Bd. of Env'tl. Prot.*, 2010 ME 18, ¶ 23, 989 A.2d 1128 (involving an order from the Department requiring post-construction monitoring of the impact of wind turbines on wildlife habitats.) The Department cannot then

⁷ The conservation area was later increased to 50,000 acres on appeal to the BEP.

arbitrarily decide in this case to limit the scope of review under NRPA to only activities listed in Section 480-C(2). This is inconsistent with the language and the broad-sweeping protective purpose of the statute as well as the Department's own historic application of the statute.

If the Department were not required to consider the impact of a project's uses, NRPA's protections would be extremely limited. It would be absurd to find that the statute allowed the Department to issue a permit despite significant long-term environmental harm caused by a project's proposed use. Such an interpretation of Section 480-C would prevent the Department from fulfilling its most basic purpose—protecting against the destruction and degradation of the State's critical natural resources. *See* 38 M.R.S. § 480-A (“The Legislature finds and declares that the State's rivers and streams, great ponds, fragile mountain areas, freshwater wetlands, significant wildlife habitat, coastal wetlands and coastal sand dunes systems are resources of state significance . . . and that uses are causing the rapid degradation and, in some cases, the destruction of these critical resources, producing significant adverse economic and environmental impacts and threatening the health, safety and general welfare of the citizens of the State.”). The Legislature could not possibly have intended NRPA to have such a narrow scope and this interpretation must, therefore, be rejected. *See, e.g., Mosher v. State Harness Racing Comm'n*, 2016 ME 104, ¶ 8, 144 A.3d 42 (“Although we ordinarily defer to an agency's interpretation of a statute it administers, we must always consider whether a given interpretation is consistent with

the legislative intent and avoids absurd, illogical, or inconsistent results[.]” (citations omitted)); *Cent. Maine Power Co. v. Maine Pub. Utilities Comm'n*, 436 A.2d 880, 885 (Me. 1981) (“[D]eference to the agency's construction must yield to the fundamental approach of determining the legislative intent, particularly as it is manifest in the language of the statute itself This intent, once revealed, prevails.”). This Court should therefore reject the Superior Court’s interpretation of Section 480-C and find that the statute contemplates consideration of (1) activities involved in constructing a project, (2) the structure itself, and (3) proposed uses of the structure.

B. The BEP is not permitted to weigh economic considerations as part of its review under NRPA; it must conduct an independent review under NRPA’s standards.

The NRPA standards and the standards relevant to the Discharge Permits⁸ (the “**Discharge Standards**”) impose distinct requirements on applicants and require different analyses. One of the chief differences between these two sets of standards is the inclusion of a balancing test in the Discharge Standards which allows water quality impact to be weighed against economic harm—a feature that is notably and purposely absent from NRPA standards.

The Department is expressly authorized to consider economic factors and issue MEPDES and WDL permits pursuant to 38 M.R.S. § 414-A when a project causes the water quality degradation if the Department determines that economic benefits of

⁸ MEPDES and WDL permits are issued pursuant to 38 M.R.S. §§ 413–414-A (regulating the discharge of pollutants into waterways) and 38 M.R.S. §§ 464–470 (Maine’s “Water Classification Program”), these standards are hereafter collectively referred to as the “**Discharge Standards**.”.

the project outweigh the environmental harm. *See* 38 M.R.S. § 414-A(1)(C). The Discharge Standards provide that “[t]he department shall issue a license for the discharge of any pollutants only if it finds that . . . [t]he discharge either by itself or in combination with other discharges will not lower the existing quality of any body of water, unless, following opportunity for public participation, the department finds that the discharge is necessary to achieve important economic or social benefits to the State,” 38 M.R.S. § 414-A(1)(A); 38 M.R.S. § 464(4)(F)(5), provided that “the project does not cause or contribute to the failure of the water body to meet the standards of classification,” 38 M.R.S. § 464(4)(F)(3). Meanwhile under the NRPA standards, the Department must determine that a project will “not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life” 38 M.R.S. § 480-D(3).). Nowhere in the NRPA statute is there a balancing of environmental harm against economic gain.

This is a significant difference in the analyses the Department is required to perform under the two standards and illustrates that NRPA and the Discharge Standards serve separate goals. The purpose of Maine’s “Water Classification Program” is to eliminate the “discharge of pollutants into the waters . . . where appropriate;” prevent pollutants from being discharged without “first being given the degree of treatment necessary to allow those waters to attain their classification;” and ensure that water quality is sufficient “to provide for the protection and propagation

of fish, shellfish and wildlife and provide for recreation in and on the water.” 38 M.R.S. § 464(1). Meanwhile, the purpose of NRPA is to protect Maine’s natural resources—including significant wildlife habitats and coastal wetlands—from degradation and destruction. *See* 38 M.R.S. § 480-A; *Conservation Law Found.*, 2003 ME 62, ¶ 2, 823 A.2d 551 (“The Natural Resources Protection Act . . . is a statutory scheme whose purpose is the protection of Maine's rivers, ponds, wetlands, mountains, wildlife habitats, and coastal sand dunes.”). NRPA focuses exclusively on environmental impact, *see* 38 M.R.S. § 480-A; 38 M.R.S. § 480-D(1), while the Discharge Standards look at the impact of water quality degradation more holistically, with environmental impact making up only one part of the calculation. *See* 38 M.R.S. § 464(1) (“The Legislature finds that the proper management of the State's water resources is of great public interest and concern to the State in promoting the general welfare; in preventing disease; in promoting health; in providing habitat for fish, shellfish and wildlife; as a source of recreational opportunity; and as a resource for commerce and industry.”). And while the Discharge Standards contemplate the impact of water quality degradation generally, they do not contemplate a specific analysis of the impact of that water quality degradation on the wildlife habitats that are actually present—the opportunity for this analysis is provided under NRPA.

This difference in purpose is precisely why the legislature created separate standards and permitting processes. If the legislature intended water quality impact to

be measured under one set of standards, they would have done so; instead, the legislature enacted two statutes requiring applicants to seek separate permits, each requiring analysis of water quality impact under different lenses. To allow the Department to rely on a completely different set of standards would in fact have the absurd effect of invalidating the important provisions of the NRPA permit and would render 38 M.R.S. § 480-D mere surplusage. This interpretation would be inconsistent with the canon of statutory interpretation requiring that “[a]ll words in a statute are to be given meaning, and none are to be treated as surplusage if they can be reasonably construed.” *Davis Forestry Prods., Inc. v. DownEast Power Co.*, 2011 ME 10, ¶ 9, 12 A.3d 1180; *Cent. Maine Power Co. v. Devereux Marine, Inc.*, 2013 ME 37, ¶ 8, 68 A.3d 1262; *see State v. Dubois Livestock, Inc.*, 2017 ME 223, ¶ 6, 174 A.3d 308 (“We reject [statutory] interpretations that render some language mere surplusage.”). This result would also be contrary to the court’s duty to interpret statutes to avoid absurd results. *See State v. Hopkins*, 526 A.2d 945, 950 (Me. 5 1987) (finding that the Court has “the power and duty . . . to interpret statutes so as to avoid absurd results”). “The Legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction and illogicality.” *State v. Rand*, 430 A.2d 808, 817 (Me. 1981). The Legislature, in enacting NRPA, imposed a responsibility on the Department to protect “resources of state significance,” 38 M.R.S. § 480-A, and ensure that projects “meet the standards set forth” the statute, *see*

38 M.R.S. § 480-D. To effectively invalidate a portion of NRPA by utilizing a different permit's standards would be illogical and absurd.

Importing the Discharge Standards' economic balancing test into the NRPA analysis is inconsistent with NRPA's goals and impermissibly tainted the Department's evaluation of "unreasonable harm to any significant wildlife habitat" under NRPA. *See* 38 M.R.S. § 480-D(3). Because the legislature created two separate permits under NRPA and the Discharge Standards, each with their own independent assessments of water quality, wildlife habits, and natural resources, the Department is required to independently analyze permit applications in accordance with the standards provided under each.

CONCLUSION

For the foregoing reasons, Petitioners-Appellants Eastern Maine Conservation Initiative and Roque Island Gardner Homestead Corporation respectfully request that the Court reverse the judgment entered by the Superior Court and remand the case with instructions for the Superior Court to enter an order vacating the Decision of the BEP.

Dated: December 11, 2023

Respectfully submitted,



Elizabeth A. Boepple, Bar No. 4422
eboepple@mpmlaw.com
Sean R. Turley, Bar No. 6351
sturley@mpmlaw.com
Ellen P. Masalsky, Bar No. 10307
emasalsky@mpmlaw.com
Counsel for Petitioners-Appellants

MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, Maine 04104-5085
(207) 773-5651

CERTIFICATE OF SERVICE

I, Elizabeth A. Boepple, hereby certify that I have caused two copies of the brief of Petitioners/Appellants to be served on Robert L. Martin, Esq., counsel for Defendant State of Maine, Board of Environmental Protection, and Patrick I. Marass, Esq., counsel for Party-in-Interest Kingfish Maine, Inc., by depositing conformed copies thereof in the U.S. Mail, first class and postage prepaid, to the following addresses:

Robert L. Martin, Esq.
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

Patrick I. Marass, Esq.
Bernstein Shur
100 Middle St., P.O. Box 9729
Portland, ME 04104-5029

Dated: December 11, 2023



Elizabeth A. Boepple, Esq., Bar No. 4422
Counsel for Plaintiff-Appellant