STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. KEN-23-348

January 29, 2024

EASTERN MAINE CONSERVATION INITATIVE, and ROQUE ISLAND GARDNER HOMESTEAD CORPORATION,

Appellants/Petitioners

vs.

STATE OF MAINE, BOARD OF ENVIRONMENTAL PROTECTION,

Appellee/Respondent

and

KINGFISH MAINE, INC.,

Appellee/Party-In-Interest

ON APPEAL FROM THE SUPERIOR COURT (KENNEBEC COUNTY)

BRIEF OF APPELLEE/PARTY-IN-INTEREST – KINGFISH MAINE, INC.

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I. SUMMARY OF THE ARGUMENT

Appellee / Party-in-Interest Kingfish Maine, Inc. ("Kingfish") respectfully requests that this Court affirm the Board of Environmental Protection's (the "Board") Findings of Fact and Order upholding the Department of Environmental Protection's (the "Department") issuance of a combined Site Location of Development Act ("SLODA") and a Natural Resource Protection Act ("NRPA") Permit to Kingfish (the "Order").

Petitioners / Appellants Roque Island Gardner Homestead Corporation and Eastern Maine Conservation Initiative's (collectively "Petitioners") arguments urging this Court to vacate the Board's Order defy common sense and the plain language of NRPA.[1] NRPA does not compel the Department to evaluate unregulated aspects of a proposed project's operation as part of the NRPA permitting process. Nor, in this case, did the Board err or abuse its discretion when it declined to independently analyze the impacts of Kingfish's proposed effluent discharges under NRPA when the Department had already analyzed those impacts under Kingfish's Maine Pollutant Discharge Elimination System Permit and Waste Discharge License.

[1] Though Petitioners' original 80C appeal addressed both SLODA and NRPA, their brief in the Superior court and appeal from the decision below exclusively addresses NRPA. (A.7.)

Because the Board based its Order on a correct application of the law, competent evidence in the record, and did not abuse its discretion in making its findings, this Court should affirm the Board's Order.

II. STATEMENT OF FACTS & PROCEDURAL HISTORY

Kingfish is developing a recirculating land-based aquaculture facility on largely undeveloped land in Jonesport (the "Project"). (A. 21, 135.) The Project, which has been thoughtfully designed to minimize impacts on the environment to the greatest extent practicable, has received a number of state, federal, and local approvals. Each step of the way, Petitioners have—thus far unsuccessfully—sought to unwind these approvals.

As relevant here, the Project received a Maine Pollutant Discharge Elimination System and Waste Discharge License approval from the Department in June of 2021 (hereinafter referred to as the "Discharge Permit"). The Discharge Permit governs the Project's proposed wastewater effluent discharge. (A. 20.) Kingfish was required to obtain the Discharge Permit in accordance with a variety of water quality laws, including 38 M.R.S. §§ 361-A, 413-414-A, 464, 465. (the "Discharge Standards"). The Sierra Club, which is not a party here, initially appealed the issuance of the Discharge Permit to the Board. (A. 21.) The Board dismissed that appeal on standing and procedural grounds in August of 2021. (A. 21.) The Discharge Permit for the Project became final thereafter. *See* 5 M.R.S. § 11002; (A. 21.). Notably, Petitioners did not appeal the Discharge Permit to the Board.

The Project then received a combined decision from the Department in November of 2021, approving the SLODA and NRPA Permits. (A. 21.) Petitioners,

along with the Sierra Club, appealed the issuance of these Permits to the Board in December of 2021. (A. 21.)

The Board considered arguments from the parties and subsequently issued its Order on August 4, 2022, upholding the Department's issuance of Kingfish's SLODA and NRPA Permits. (*See* A. 20-37.) The Board considered and rejected Petitioners' attacks on the Project's NRPA and SLODA Permits based on purported impacts from the Project's proposed effluent discharges governed by the Discharge Permits. The Board explained that Petitioners' arguments regarding the Project's operation and effluent discharge amounted to a "challenge [of] the findings underlying that Waste Discharge Permit . . . but the Board finds no error in the Department's reliance on another valid Department order." (A. 28.) The Board explained why it was not independently re-considering the existing Department analysis of effluent impacts performed to determine eligibility for the Discharge Permits when considering the Project's water quality impacts under NRPA:

> 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.

(A. 26.) The Board otherwise went on to find that "the effluent discharge from the proposed project will not have an unreasonable adverse effect on water quality," (A. 28), and that the Project "will not unreasonably harm any . . . [habitats] . . . travel corridor, freshwater, estuarine or marine fisheries or other aquatic life, and will not cause an undue adverse effect on the natural environment." (A. 30).

Petitioners then appealed the Board's Order to the Superior Court pursuant to M.R. Civ. P. 80C. (A. 3, 6.) Although Petitioners initially fashioned their Rule 80C Appeal as challenging both the SLODA and NRPA Permits, their brief in the Superior Court narrowed their appeal to only the NRPA Permit. (*See* A. 7 ("Petitioners' challenge is centered on the agency's alleged violations of NRPA, and they mount no meaningful challenge to the lawfulness of the Site Law permit.")) After the parties filed their Rule 80C briefs, the Superior Court (*Murphy, J.*) issued its Decision and Order on August 23, 2023 affirming the Board's Order upholding Kingfish's NRPA and SLODA Permits. (A. 4, 12.) The Superior Court squarely rejected the central argument that Petitioners reassert here; namely, that in order to appropriately consider water quality impacts under NRPA, NRPA compels the Board and Department to conduct an independent analysis of water quality impacts from an effluent discharge, even where the Department has already evaluated such impacts and issued a Discharge Permit. (*See* A. 7-12; Blue Brief at 12-23.) This appeal followed.

III. STATEMENT OF ISSUES PRESENTED

1. Does NRPA compel the Board to independently analyze the Project's effluent discharge even when the Department has already analyzed those impacts when evaluating the Project's Discharge Permit?

IV. STANDARD OF REVIEW

Where, as here, the Board considered the Department's issuance of the NRPA Permit *de novo* and made its own factual findings and conclusions of law, the Board Order is the operative decision for this Court's review. *Concerned Citizens to Save Roxbury v. Bd. of Envtl. Prot*., 2011 ME 39, ¶ 17, 15 A.3d 1263; *see* 38 M.R.S. § 341-D(4) (outlining the Board's duties when reviewing a permit or license appeal). In this Rule 80C appeal, this Court's "review of state agency decision-making is deferential and limited." *Friends of Lincoln Lakes v. Bd. of Env't Prot.*, 2010 ME 18, ¶ 12, 989 A.2d 1128. The Court will review the Board's Order for "errors of law, abuse of discretion, or findings of fact not supported by the record." *Id.* (quoting *Save Our Sebasticook, Inc. v. Board of Environmental Protection*, 2007 ME 102, ¶ 13, 928 A.2d 736). "[T]he party seeking to vacate the agency decision, bears the burden of persuasion on appeal." *Id.* ¶ 15.

When interpreting statutes that are "both administered by the agency and within the agency's expertise," this Court will "apply a two-part inquiry." *NextEra Energy Res., LLC v. Maine Pub. Utilities Comm'n*, 2020 ME 34, ¶ 22, 227 A.3d 1117. First, it will determine if the statute is ambiguous, meaning whether the

language at issue is "reasonably susceptible to different interpretations." *Id.* Second, if the statute is unambiguous, the Court will apply the plain meaning of the operative language, *id.*, but if the language is ambiguous, the Court will review the agency's construction for reasonableness, affording "great deference" to the agency's interpretation, and will uphold that interpretation "unless the statute plainly compels a contrary result." *Competitive Energy Servs. LLC v. Pub. Utilities Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039.

As to factual issues, this Court must affirm the agency's findings "if they are supported by substantial evidence in the record, even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency." *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 13, 989 A.2d 1128. This "substantial evidence standard does not involve any weighing of the merits of the evidence." *Id.* ¶ 14. Rather, it requires the Court "to determine where there is any competent evidence in the record to support a finding." *Id.* This deferential approach to an agency's factual findings is grounded in the judicial branch's respect for the "constitutional separation of powers." *Id.*; *see* 5 M.R.S. § 11007(3) ("The court shall not substitute its judgment for that of the agency on questions of fact.").

V. ARGUMENT

Petitioners make one central argument in their Brief: the Board erred as a matter of law when it declined to separately assess, under NRPA, the habitat impacts

from the Project's effluent discharges. (*See, generally,* Blue Brief. at 12-23.) Accepting Petitioners argument would draft non-existent requirements into NRPA and strip the Department of the Legislature's unambiguous grant of discretion to determine a reasonable method of evaluating water quality impacts of activities regulated by NRPA. *See, e.g.*, 38 M.R.S. § 480-C ("The department shall grant a permit upon proper application and upon such terms as it considers necessary to fulfill the purposes of this article."). Petitioners' argument is wholly inconsistent with NRPA and this Court's caselaw. This Court should affirm the Board's Order for three principal reasons.

First, a plain reading of NRPA and this Court's relevant cases indicate that, in determining the scope of the Department's analysis under NRPA, the Department is only required to analyze impacts from specifically enumerated regulated "activities" when evaluating a NRPA permit. 38 M.R.S. § 480-C(2). The operation of Kingfish's Project, and the associated discharge of effluent pursuant to Kingfish's Discharge Permit, are plainly not regulated "activit[ies]" under Section 480-C(2), and it is therefore not surprising that NRPA does not compel evaluation of the impacts of activities not regulated under NRPA – those activities are regulated by the Discharge Permits.

Second, to the extent there is any ambiguity as to whether NRPA compelled the Department to independently consider the Project's effluent discharges (there is

not), this Court should defer to the Board's decision to decline such a duplicative analysis in this case. *Conservation L. Found., Inc. v. Dep't Of Env't Prot.*, 2003 ME 62, ¶ 23, 823 A.2d 551, 559 ("[W]e defer to the interpretation of a statutory scheme by the agency charged with its implementation as long as the agency's construction is reasonable."). The Board's reasons for not conducting a separate analysis of the effluent discharges here were consistent with NRPA, reasonable, and not an abuse of discretion.

Finally, Petitioners' attempts to differentiate the operative analyses under NRPA and the Discharge Standards are unavailing. Contrary to Petitioners' contentions, the Department can, and does, consider economic and other societal factors when evaluating impacts under NRPA. *See, e.g.*, 38 M.R.S. § 480-Z (allowing permittees to pay money to compensate for "unavoidable loses" to habitats under NRPA); (A. 163-64 (citing 06-96 C.M.R. ch. 310 § 5(D) (explaining under NRPA's implementing regulations that: "[w]hen considering whether a single activity is reasonable in relation to the direct and cumulative impacts on the resource, the department considers . . . the type and degree of benefit from the activity (public, commercial or personal)")).

Petitioners have failed to articulate any legal or logical reason why the Board's Order approving Kingfish's NRPA Permit should not stand. Accordingly, this Court should affirm the Board's Order.

A. NRPA Only Requires the Department to Analyze Specific "Activities"

Petitioners sweeping argument—that NRPA compels the Department to analyze a project's operational impacts—is easily dispelled through a plain reading of NRPA, 38 M.R.S. §§ 480-A to 480-JJ. This statutory scheme requires permits for certain enumerated "activit[ies]" when "the activity is located in, on or over any protected natural resource," such as a coastal wetland. 38 M.R.S. § 480-C(1)-(2). The Legislature specified what "[a]ctivities require[e] a permit" under Section 480-C(2). Those "[a]ctivities" include the following:

> A. Dredging, bulldozing, removing or displacing soil, sand, vegetation or other materials;
> B. Draining or otherwise dewatering;
> C. Filling, including adding sand or other material to a sand dune; or
> D. Any construction, repair or alteration of any permanent structure.

38 M.R.S. § 480-C(2). The Legislature declined to list any other "activity" that NRPA regulated.

NRPA goes on to provide that the Department "shall grant a permit when it finds that the applicant has demonstrated that the proposed activity meets the standards set forth" in Section 480-D(1)-(11). 38 M.R.S. § 480-D. Here, the NRPA standard that Petitioners contend the Board erred in considering provides that the "activity will not unreasonably harm any significant wildlife habitat . . . estuarine or marine fisheries or other aquatic life." 38 M.R.S. § 480-D(3); (*see* Blue Brief at 12).

Kingfish sought a NRPA Permit because, when constructing the Project, Kingfish would be "dredging," "displacing soil," and "constructi[ng] . . . [a] permanent structure," 38 M.R.S. § 480-C(2), on or over a coastal wetland. (A. 21.) Petitioners do not contend in this appeal that, in their NRPA evaluations, the Department and Board failed to appropriately evaluate impacts from Kingfish's regulated "[a]ctivities" associated with constructing the Project, including the construction itself of the intake and effluent outflow pipes.[2] (*See, generally,* Blue Brief at 12-23.) Rather, Petitioners contend that NRPA required the Board and Department to independently analyze habitat impacts associated with the effluent discharge associated with operation of the Project. (A. 27; Blue Brief at 12-18.) The Legislature did not enumerate effluent discharge as an "activity" that required NRPA approval and NRPA's plain language dispels Petitioners contention that discharge of effluent is an activity requiring analysis under NRPA.

[2] The Department and the Board closely examined the impacts from these activities to ensure they would meet the standards enumerated in Section 480-D. (*See* A. 28-30 (discussing why Kingfish's proposed activities met NRPA's standards and explaining that "[o]n the basis of this evidence, and the DMR [Department of Marine Resources] comments, the Board finds that the proposed project will not unreasonably harm any significant wildlife habitat . . estuarine or marine fisheries or other aquatic life, and will not cause an undue adverse effect on the natural environment.")) Petitioners do not challenge those findings in their opening Brief and have waived their ability to do so now on appeal. *See Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290, 293 (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)); *see also Zannino*, 895 F.2d at 17 ("[A] litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace."). Nor could Petitioners realistically challenge the Board's findings in this regard, which are based on "substantial evidence in the record." *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 13, 989 A.2d 1128.

As this Court has previously recognized, NRPA's standards under Section 480-D "*only* apply to the specific activities listed in Section 480-C(2)(A)-(D*),*" namely dredging, draining, filling, or construction. *Uliano v. Bd. of Env't Prot.*, 2009 ME 89, ¶ 17, 977 A.2d 400 (emphasis added). Indeed, NRPA provides that the Department "shall grant a permit when it finds that the applicant has demonstrated that the proposed *activity* meets the standards," meaning that "[t]he *activity* will not unreasonably harm any significant wildlife habitat . . . estuarine or marine fisheries or other aquatic life." 38 M.R.S. § 480-D(3) (emphases added).

The express enumeration of "activities" requiring a permit in Section 480-C(2) unambiguously indicates that the Legislature only sought to compel the Department to analyze the specific "activities" listed in Section 480-C(2). The Legislature could have listed permitted effluent discharges—or any other operational impact from a project—as regulated "activities" under NRPA. It did not. Its' decision not to include such operational impacts as regulated activities dispels Petitioners' arguments. *See Murphy v. Bd. of Env't Prot.*, 615 A.2d 255, 258 (Me. 1992) ("The first step [in the NRPA permit application process] requires an initial determination of whether a particular activity is subject to the jurisdiction of the NRPA under § 480–C."); *State v. McLaughlin*, 2018 ME 97, ¶ 14, 189 A.3d 262, 267 (explaining that "when the Legislature uses . . . [a defined term] and intends for the term to include . . . [additionally defined terms], it knows how to accomplish that

result.") (quotation marks omitted). To accept Petitioners argument here would vastly expand the application of NRPA to a whole universe of unspecified—and uncodified—operational activities. The plain language and structure of NRPA indicates the Legislature could not have contemplated such a result.

As the Superior Court noted, however, this interpretation does not preclude or prevent the Department or Board from considering a project's ultimate use or operations when evaluating compliance with NRPA's standards. (*See* A. 10.) This Court recognized as much in *Hannum v. Bd. of Env't Prot.*, 2006 ME 51, ¶ 14, 898 A.2d 392. The *Hannum* Court explained that "as an agency charged with administering the NRPA, we will accord deference to the Board's reasonable conclusion that it may examine the impact of the use of a structure for which a permit is required along with the impact of the structure itself." *Id.* (emphasis added). Just because the Department *can* consider a project's use impacts, however, does not mean that NRPA *compels* it to do so, particularly when those very impacts have already been fully evaluated through a separate permitting process.

NRPA expressly grants the Department broad authority to determine the kind of information that it can consider as part of the NRPA permitting process. *See* 38 M.R.S. § 480-D ("The department shall grant a permit upon proper application *and upon such terms as it considers necessary* to fulfill the purposes of this article.") (emphasis added). This unambiguous grant of discretionary authority scuttles

Petitioners' arguments that it was legal error for the Board to forego an independent—and duplicative—analysis of effluent discharges when such discharges are not an enumerated "activity" under NRPA.

Finally, the Legislature's broad grant of discretionary authority to the Department scuppers Petitioners argument that because the Department considers operation impacts under NRPA in some cases, it must consider such impacts in every single case. (*See* Blue Brief at 14-18.) The Legislature recognized that the Department needed discretion in its permit review process under NRPA and unambiguously granted the Department that discretion. *See* 38 M.R.S. § 480-D; *see also Doane v. Dep't of Health & Hum. Servs.*, 2021 ME 28, ¶ 27, 250 A.3d 1101 ("[W]hile the amount of discretion the Legislature can bestow upon a state agency is not boundless, latitude must be given in areas where the statutory enactment of detailed specific standards is unworkable."). Petitioners cite to no statute or case that holds the Department's exercise of its discretion when considering a NRPA permit in one case binds it to consider the same exact factors in a wholly different case with different parties, proposed projects, and facts. Such an interpretation would be absurd and directly contravene the Legislature's grant of discretion to the Department under NRPA. Accordingly, this Court should affirm the Board's Order.

B. The Board's Interpretation of NRPA In This Case Was Reasonable

Should this Court determine that NRPA is ambiguous regarding the purported requirement to analyze a project's operational impacts (it is not), then this Court should defer to the Board's decision not to re-examine the effluent discharges under NRPA in this case. *See Competitive Energy Servs. LLC v. Pub. Utilities Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039 ("An agency's interpretation of an ambiguous statute it administers is reviewed with great deference and will be upheld unless the statute plainly compels a contrary result.") (quotation marks omitted). The Board explained its reasoning for not independently analyzing effluent impacts under NRPA as follows:

> 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.

(A. 26.)

The Department and the Board closely considered the water quality and habitat impacts associated with Kingfish's proposed effluent discharges as part of Kingfish's Discharge Permit review. (*See* A. 26 ("[T]he in depth review of a direct

discharge from a development occurs in the analysis of the Waste Discharge License application.") It was perfectly logical—and reasonable—for the Department to forego a detailed analysis of effluent discharges under NRPA where, as here, the Department already closely scrutinized and evaluated discharges before issuing Kingfish its valid, final Discharge Permit under the MPDES program.

As this Court has recognized, "[a] particular statute is not reviewed in isolation but in the context of the statutory and regulatory scheme." *Conservation L. Found., Inc. v. Dep't Of Env't Prot.*, 2003 ME 62, ¶ 23, 823 A.2d 551. In light of Maine's overlapping environmental regulations, the Board appropriately determined that the Project's effluent discharged were fully considered in the Discharge Permit. Indeed, the Project's Discharge Permit includes extensive effluent limitations and monitoring requirements—including regular monitoring of Chandler Bay—to ensure the Project would not unreasonably harm the receiving waters in Chandler Bay. (*See* A. 38-134 (containing the MPDES Permit and Waste Discharge License for Kingfish's Project.) Because NRPA plainly does not compel the Department to consider a project's post-construction use or operation in every case, the Board's interpretation of NRPA was reasonable and should be afforded deference here. *See Conservation L. Found., Inc. v. Dep't Of Env't Prot.*, 2003 ME 62, ¶ 23, 823 A.2d 551 ("[I]f the Legislature's intent is not expressed unambiguously and the interpretation of the statutory scheme involves issues that are within the scope of the

agency's expertise, then the agency's interpretation must be given special deference.")

The Board's decision finds further support in the overall structure and language of NRPA. Through NRPA, the Legislature sought to encourage "the development and maintenance of an efficient system of administering this article to minimize delays and difficulties in evaluating alterations of these resource areas." 38 M.R.S. § 480-A. Requiring duplicative evaluations of effluent impacts would not be an "efficient system." 38 M.R.S. § 480-A. The Legislature further intended "that existing programs related to [protecting] Maine's rivers and streams . . . significant wildlife habitat, coastal wetlands and sand dunes systems continue" under the "coordination and vigorous leadership" of the Department. 38 M.R.S. § 480-A. This language indicates that the Legislature sought to harmonize the various environmental protection statutes, not require the Department to replicate analogous analyses under NRPA and other standards. From this backdrop, the Legislature could not have intended to require the Department to conduct evaluations of water quality and related environmental impacts in a way that the Department itself deemed to be inefficient and duplicative. *See Mallinckrodt US LLC v. Dep't of Env't Prot.*, 2014 ME 52, ¶ 17, 90 A.3d 428 (explaining that Courts must construe statutes in a manner that "avoid absurd, illogical, or inconsistent results.").

At bottom, the Board saw Petitioners arguments for what they are: untimely collateral attacks on Kingfish's validly issued and final Discharge Permit. (*See* A. 28, n. 2 ("[t]he Waste Discharge License order was subject to a failed appeal by appellant Sierra Club; the Board will not entertain a collateral challenge on that license decision here.")) Although cloaked in different terms here, the substance of Petitioners arguments remain an inappropriate collateral attack on the Discharge Permit, that this Court should not entertain. *See Dubois Livestock, Inc. v. Town of Arundel,* 2014 ME 122, ¶ 1, n.2, 103 A.3d 556 (refusing to entertain time-barred arguments that constituted an "after-the-fact collateral attack" on a separate permit). The Board's decision to forego another analysis of the impacts from the proposed effluent discharges finds support in NRPA, this Court's cases, and common sense. This Court should affirm the Board's Order.

C. The Discharge Standards Serve to Protect Water Quality and Habitats And Are Analogous to Those Found in NRPA

Petitioners' attempts to differentiate the operative analyses under NRPA and the Discharge Standards are unavailing. (Blue Brief at 19-23.) Petitioners selectively characterize the Discharge Standards' consideration of economic factors and oversimplify the purposes of these statutes. Contrary to Petitioners' contentions, the standards Kingfish had to meet to obtain its Discharge Permit are analogous to the lack of "unreasonable harm" standard Petitioners allege the Department and Board failed to consider under NRPA.

When the Department considers economic factors in the context of a discharge permit, the Department cannot issue a permit if it determines the discharge will "cause or contribute to the failure of the water body to meet the standards of classification." 38 M.R.S. § 464(4)(F)(3). Section 464(4)(A)(11), which relates to the classification of Maine's waters, further provides that the Department "may not issue a water discharge license" for a discharge that "would cause unreasonable degradation of marine waters." Likewise, 38 M.R.S. § 465-B(2)(C), which governs the "Standards for classification of estuarine and marine waters," expressly requires that: "Discharges to Class SB waters may not cause adverse impact to estuarine and marine life."[3] As these provisions show, the Discharge Standards do, contrary to Petitioners' protestations, "contemplate a specific analysis of the impact of that water quality degradation on the wildlife habitats that are actually present." (Blue Brief at 21.)

The Department, pursuant to its own statutes, could not have granted Kingfish's Discharge Permit if the Department determined that the Project's effluent "would cause unreasonable degradation of marine waters," 38 M.R.S. § 464(4)(A)(11), or that it would cause an "adverse impact to estuarine and marine life," 38 M.R.S. § 465-B(2)(C). In light of these inherent findings in Kingfish's

[3] The marine waters to which the Kingfish Project will discharge, in accordance with its MPDES Permit, is a Class SB marine water. (*See* A. 43.)

Discharge Permit, it was reasonable for the Department and Board to forego another, duplicative, evaluation of the Project's effluent discharges under NRPA.

Finally, Petitioners incorrectly assert that the Department does not and cannot consider economic factors when evaluating impacts under NRPA. (*See, e.g.*, Blue Brief at 19-22; Blue Brief at 20 ("Nowhere in the NRPA statute is there a balancing of environmental harm against economic gain.") This contention ignores an entire subsection in NRPA that allows parties to pay money to compensate the State for the "unavoidable losses" to certain habitats "due to a proposed activity." *See, e.g.*, 38 M.R.S. § 480-Z(3) (establishing NRPA's "Compensation fee program"). It is difficult to square the existence of this program, with Petitioners' contention that "[i]mporting the Discharge Standards' economic balancing test into the NRPA analysis is inconsistent with NRPA's goals." (Blue Brief at 23.) The Legislature, unquestionably, allowed the Department to consider economic and societal factors when evaluating NRPA permits.

Likewise, the Board's implementing regulations for NRPA in Chapter 310 provide, in relevant part, that: "When considering whether a single activity is reasonable in relation to the direct and cumulative impacts on the resource, the department considers . . . the type and degree of benefit from the activity (public, commercial or personal)." (A. 163-64 (citing 06-096 C.M.R. ch. 310 § 5(D))). The Board's own interpretation of NRPA allows it to consider societal benefits, including

the "commercial" benefit of a regulated "activity" when evaluating whether the impact from that "activity" is "unreasonable." (A. 163-64 (citing 06-096 C.M.R. ch. 310 § 5(D))). Accordingly, Petitioners' attempts to differentiate the operative analyses under NRPA and the Discharge Standards do nothing to undercut the Board's Order. Because Petitioners have failed to carry their burden to show that the Board's decision constituted an error of law, abuse of discretion, or relied on unsupportable findings, this Court should affirm the Board's Order.

D. The Court Should Decide this Appeal on the Briefs

Given the narrow legal issues that are the subject of Petitioners' Appeal, Kingfish respectfully requests the Court use its discretion to decline to hold oral argument in this matter and decide Petitioners' Appeal on the briefs alone.

VI. CONCLUSION

For all the foregoing reasons, Kingfish respectfully requests this Court affirm the Board's Order.

Dated at Portland, Maine, this 29th Day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been served in accordance with Maine Rules of Appellate Procedure 7A(i)(1) via email and First Class Mail on this 29th day of January, 2024 on:

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