**STATE OF MAINE**

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

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**LAW DOCKET NO. KEN-23-348**

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**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

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

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# REPLY 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

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## RESPONSES TO APPELLEE'S ARGUMENTS

### I. The Court May Consider the Supplemental Legal Authority Provided by Appellants.

This Court can and should consider the Site Location of Development Act ("**SLODA")** Natural Resources Protection Act ("**NRPA**") Order issued in another matter (the "**CMP Order**") provided as a Supplemental Legal Authority to Appellants' principal brief. The Board of Environmental Protection's ("**BEP**") argument that the Court cannot consider the CMP Order is twofold, they argue that: (1) Appellants waived their argument that the Department of Environmental Protection's (the "**Department**") practices are inconsistent with their interpretation of NRPA in this case because they failed to raise it before the BEP or the Superior Court, and (2) the Court lacks authority to take judicial notice of the CMP Order because it is not a part of the administrative record. The BEP is wrong on both counts.

#### *A. Appellants did not waive their argument that the Department's practices are inconsistent with their interpretation of Section 480-C(2).*

"An issue is preserved for appellate review if there is a sufficient basis in the record to alert the trial court and the opposing party to the existence of the issue." *State v. Reeves,* 2022 ME 10, ¶ 35, 268 A.3d 281, 291; *see York Hosp. v. Dep't of Health & Hum. Servs.*, 2008 ME 165, ¶ 19, 959 A.2d 67 ("In order to preserve an issue on appeal, that issue needs to be raised at the administrative agency level.").

The Appellant's central argument in this case is that the BEP's interpretation of NRPA is erroneous because the BEP was required to consider the impacts of the wastewater discharge on water quality under the NRPA Standards. Appellants have made this argument at every stage of the 80C appeal process.[1] That the BEP's asserted interpretation of NRPA—specifically 38 M.R.S. § 480–C(2)—is at odds with the Department's practice in administering the statute, is one piece of that argument. Appellants need not have outlined every detail of their argument at each stage of their appeal; this would be untenable, especially for parties who obtain legal representation at a later stage in the appeal process. It was sufficient to put the BEP on notice of arguments related to statutory interpretation that the Appellant consistently challenged the BEP's interpretation of NRPA.

Appellants raised the statutory interpretation argument before the BEP. For the BEP to now say that Appellants' framing that argument through a clear illustration of another DEP Order exemplifying the very point Appellants are making, is somehow raising a new issue, either mischaracterizes or misunderstands the crux of Appellants' argument. Appellants have at all times asserted that the DEP must review wildlife habitat and project impacts under the NRPA standards rather than assuming such standards are met because another division of the Department granted a

[1] Likewise, Appellants argued below that the Department's interpretation of 38 M.R.S. § 480–C(2)—limiting review under NRPA to only certain construction-related activities—was erroneous.

different permit under different standards. In citing the CMP Order, this Court can plainly see the point being made. It is not an argument that was ever waived.

B. *The Court can take judicial notice of the CMP Order even though it is not part of the administrative record.*

"Despite the [c]ourt's statutory limitation to review only the record, there is precedent for taking judicial notice in Rule 80C appeals." *Kain v. Sec'y of State*, No. CIV.A. AP-2004-23, 2005 WL 605443, at *3 (Me. Super. Jan. 21, 2005) (collecting cases); *see also Frustaci v. City of S. Portland*, No. CIV.A. AP-00-046, 2002 WL 747910, at *2 (Me. Super. Apr. 1, 2002), aff'd, 2005 ME 101, 879 A.2d 1001 (finding that the court could take judicial notice of documents not included in the record in an 80B appeal). M.R. Evid. 201(b) provides that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . [c]an be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." "[The Law Court] may properly take judicial notice on appeal." *State v. Fleming*, 1997 ME 158, ¶ 11, 698 A.2d 503.

In fact, courts are required to take judicial notice of facts if they meet the requirements set forth in M.R. Evid. 201(c). Court "*must* take judicial notice if a party requests it and the court is supplied with the necessary information." Me. R. Evid. 201(c) (emphasis added). It would be "an abuse of discretion not to take judicial notice if the fact is appropriate for judicial notice and the proponent provides the proper information." *Seymour v. Seymour*, 2021 ME 60, ¶ 12, 263 A.3d 1079, 1084 (*citing*

*Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1075 (9th Cir. 2010) (concluding that it was error not to take judicial notice of a Bureau of Indian Affairs opinion)).

Further, the Court can take judicial notice of the content of CMP Order—not just the existence of the order—as evidence of the Department's practice in administering NRPA. The BEP argues that even if the Court can take judicial notice of the existence of the CMP Order, it cannot take notice of the order's substance because judicial notice only allows the court to consider "indisputable facts." *See* Appellee's Br. at 18. This distinction is misguided and absurd. Just as it is an indisputable fact that the Department issued the CMP Order, it is also an indisputable fact that this order contains conditions about mitigating the impact of the corridor on wildlife habitat *after construction* (i.e. the impacts of habitat fragmentation), a clear illustration of the Department and the BEP engaging in *post* construction amelioration and mitigation of wildlife habit impacts. The BEP's argument to the contrary defies logic—it is difficult to imagine a circumstance in which the court would benefit from taking judicial notice of the existence of an order without taking some notice of the order's effect. Merely noting the existence of an order without anything more would effectively negate the very idea of judicial notice, which is to take notice of certain facts, as well as be completely unhelpful to a court's review.

The BEP relies on *Cabral v. L'Heureux*, 2017 ME 50, 157 A.3d 795, as corrected (June 29, 2017) to support its contention that this Court cannot consider the contents of the CMP Order. However, *Cabral* primarily addressed the difference between

taking judicial notice of an order versus taking notice of evidence submitted in a proceeding. *Id.* at ¶¶ 10-11 ("The doctrine of judicial notice, as defined in Rule 201 and our precedents, does not . . . open the door to the consideration of testimony and exhibits offered in separate proceedings. A clear line of demarcation exists between the *fact* that a pleading, docket entry, or order exists in separate proceedings . . . and the actual *evidence* submitted in the earlier proceedings." (emphasis in original)).The *Cabral* court noted that "[c]ourts may take judicial notice of pleadings, dockets, and other court records where the existence or content of such records is germane to an issue in the same or separate proceedings." *Id.* at ¶ 11. Because *Cabral* specifically concerned the application of the doctrine of collateral estoppel, the court determined it could "*admit pertinent findings made in a different proceeding* if those findings meet the requirements of collateral estoppel." *Id.* (emphasis added). While under *Cabral* the Court could not consider the evidence underlying a decision—e.g. the evidence submitted to the Department which formed the basis for the CMP Order—the Court would not, as the BEP suggests, be prohibited from considering the contents of an agency decision.

This Court recently considered the issue of taking judicial notice of materials submitted as supplemental legal authorities in *Off. of the Pub. Advoc. v. Pub. Utilities Comm'n*, 2024 ME 11, __ A.3d __. This case concerned the Office of the Public Advocate's ("OPA") appeal of an order issued by the Public Utilities Commission ("PUC") extending a waiver of the standard depreciation rate for the Maine Water

Company - Millinocket Division ("MWC"). *Id.* at ¶ 1. The OPA submitted supplemental legal authorities "consisting of previous Commission decisions relating to the MWC rates dating from 1997 to 2020." *Id.* at ¶ 2 n. 1. This would necessarily involve consideration of the *contents* of these decisions so the Court could ascertain other times the PUC granted MWC waivers of the standard rates and the basis for those waivers. *See id.* ("The following background is drawn from the Commission's February 2, 2023, order, other Commission decisions, and filings made in those proceedings.") The Court found that "[i]n addition to the Commission's decisions themselves, we may take judicial notice of the existence and content of the filings made in these regulatory proceedings." *Id.* at ¶ 2 n. 1. That is exactly the same reasoning that applies here and exactly the same justification for this Court to accept the CMP Order as relevant.

## II. NRPA Does Not Allow for Balancing of Economic Considerations Against Environmental Harm.

Despite Appellee's claim to the contrary, the NRPA Standards do not provide for weighing economic considerations. The BEP points to 38 M.R.S. §§ 480-D(3) and 480-Z as evidence that economic considerations are part of the Department's analysis under NRPA.[2] However, this contention is misleading because these provisions relate to *efforts*

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[2] The BEP also cites *Uliano v. Bd. of Env't Prot.*, 2005 ME 88, 876 A.2d 16 to support this contention. The full text of the relevant paragraph in *Uliano* provides:

> Whether a proposed project's interference with existing uses is reasonable depends on a multiplicity of factors, one of which is the existence of a practicable alternative. A balancing analysis inheres in any reasonableness inquiry. Therefore, the Board's

*to mitigate* environmental harm, not a *weighing of that harm against economic gain*. This distinction is critical—while NRPA does allow for the mitigation of unavoidable environmental harm by engaging in compensation projects or funding conservation projects throughout the state of Maine,[3] *see* 38 M.R.S. § 480-Z; it does not, as the BEP suggests, permit the Department to consider the economic benefits of a project more broadly. If one were to follow the BEP's argument to its logical conclusion, virtually *all* projects subject to NRPA review can be permitted despite environmental harm and damage in direct contravention of the legislative mandate in creating the Department:

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> consideration of practicable alternatives to a proposed project is a factor that should be balanced in its section 480–D(1) analysis.

*Uliano*, 2005 ME 88, ¶ 13, 876 A.2d 16 (citations omitted). The Court goes on to provide examples of the balancing conducted under Section 480-D(1).

> The Board might find, for example, that the existence of a practicable alternative does not justify the denial of a proposed project if the degree of interference the project will cause to existing uses is insubstantial. Conversely, the Board might find that the existence of a practicable alternative supports the denial of a project if it finds that the degree of the project's interference with existing uses will be substantial.

The balancing described by the Court in *Uliano* clearly does not contemplate economic considerations, as the BEP implies in their Reply Brief. *See* Appellee Br. at 23. The Department's process for determining whether a project will result in unreasonable harm under the NRPA standards may very well involve balancing of several factors, but these factors do <u>not</u> include the economic benefits of the project.

[3] *Maine In Lieu Fee Compensation Program (ILF) and Maine Natural Resource Conservation Program (MNRCP)*, MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, https://www.maine.gov/dep/land/nrpa/ILF_and_NRCP/index.html (last accessed Feb. 9, 2024) ("Fees collected by the Department through the ILF Program are allocated through the MNRCP. The MNRCP helps compensate for unavoidable impacts to protected natural resources in Maine by funding the restoration, enhancement, preservation, and creation of similar resources to maintain ecological benefits.").

> The department shall prevent, abate and control the pollution of the air, water and land and preserve, improve and prevent diminution of the natural environment of the State. The department shall protect and enhance the public's right to use and enjoy the State's natural resources and may educate the public on natural resource use, requirements and issues.

38 M.R.S. § 341-A (1).

Under 38 M.R.S. § 480-D(3), when the Department considers an application under NRPA, they first determine whether the proposed activity will "unreasonably harm" a "significant wildlife habitat." 38 M.R.S. § 480-D(3). As part of this analysis the Department "may consider proposed mitigation if that mitigation does not diminish in the vicinity of the proposed activity the overall value of significant wildlife habitat and species utilization of the habitat and if there is no specific biological or physical feature unique to the habitat that would be adversely affected by the proposed activity" including "[c]ompensating for an impact by replacing the affected significant wildlife habitat." 38 M.R.S. § 480-D(3)(E).

38 M.R.S. § 480-Z provides that the Department can establish a program to provide for "compensation of unavoidable losses" in certain areas. Under this section the Department can require an applicant to undertake a "compensation project" which "include the restoration, enhancement, creation or preservation of an area or areas that have functions or values similar to the area impacted by the activity." Alternatively, the Department "may allow the applicant to purchase credits from a mitigation bank or to pay a compensation fee." 38 M.R.S. § 480-Z. Pursuant to Section 480-Z, any funds "collected by DEP are deposited into funds allocated to

specific biophysical regions in which the impacts occurred." *Maine In Lieu Fee Compensation Program (ILF) and Maine Natural Resource Conservation Program (MNRCP)*, MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, https://www.maine.gov/dep/land/nrpa/ILF_and_NRCP/index.html (last accessed Feb. 9, 2024).

Any funds provided by applicants under these sections of NRPA are directly linked to efforts to mitigate environmental harm. The balancing test provided under the Department standards relevant to issuing a Maine Pollutant Discharge Elimination System Permit and Waste Discharge License Permit (38 M.R.S. §§ 411–424-B; 38 M.R.S. §§ 464–470 or the "Discharge Standards") is entirely different: it allows the Department to *weigh economic considerations* completely unrelated to environmental protection (e.g. creating jobs, increasing tourism, etc.) against the environmental damage a project will cause. 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 . . . *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)(emphasis added). Meanwhile under NRPA, 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). If this harm cannot be mitigated or compensated through the channels provided in 38 M.R.S. §§ 480-D(3) and 480-Z, the Department cannot approve the application. *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. The department shall grant a permit when it finds that the applicant has demonstrated that the proposed activity meets the standards set forth in subsections 1 to 11[.]"). In short, the Department's use of allowing payment in lieu of mitigation specifically tied to environmental harm under NRPA is not a trade-off of environmental harm for jobs or revenue that may accrue to the State.

## III. This Matter is not a Collateral Attack on the Discharge Permits.

This appeal is not a collateral attack on the Maine Pollutant Discharge Elimination System Permit ("MEPDES") and the Waste Discharge License ("WDL") (collectively the "Discharge Permits"). Rather, it is a challenge to the BEP's *reliance* on the issuance of these permits as evidence that the Project satisfied review under NRPA. As Appellants stated in their Principal Brief, while the Discharge Permits and the NRPA permit involve consideration of many of the same facts, the analyses under these standards are entirely different. The BEP and Kingfish's characterization of this appeal as simply a collateral attack on the Discharge Permits is nothing more than an attempt to distract from the issue at hand: whether the BEP is required to perform an independent analysis of the impact of water quality degradation under NRPA.

## IV. This Court Should Hear Oral Argument in This Matter.

In response to Kingfish's request to forgo oral argument, Appellants respectfully request that the Court hear oral argument in this matter. Appellants have raised an issue of critical importance for ensuring the Department carries out its statutory obligation to protect the air, water, and land of Maine's natural environment. This is clearly a significant issue for the Court to decide and Appellants believe the Court would benefit from hearing oral argument rather than deciding on briefs alone. This issue has significant consequences not only for the town of Jonesport and surrounding communities, but also for the future administration of NRPA and the protection of Maine's coastal waters.

## CONCLUSION

For the reasons set forth in Appellants' Principal Brief and above, this Court should 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: February 20, 2024

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 reply 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: February 20, 2024

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