STATE OF MAINE

SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

LAW DOCKET NO. KEN-23-348

EASTERN MAINE CONSERVATION INITIATIVE, *et al*.,
Petitioners-Appellants

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Respondent-Appellee

ON APPEAL FROM THE KENNEBEC COUNTY SUPERIOR COURT

BRIEF OF RESPONDENT-APPELLEE MAINE BOARD OF ENVIRONMENTAL PROTECTION

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INTRODUCTION

Appellants Eastern Maine Conservation Initiative ("Conservation Initiative") and Roque Island Gardner Homestead Corporation ("RIGHC") (collectively, "EMCI") appeal an Order of the Superior Court (Kennebec County, *Murphy, J.*) denying their M.R. Civ. P. 80C petition. Their Rule 80C petition challenges the August 4, 2022 decision (the "Decision") by the Maine Board of Environmental Protection (the "Board") affirming the issuance of a joint Natural Resources Protection Act ("NRPA") and Site Location of Development Act ("Site Law") permit by the Commissioner of the Department of Environmental Protection (the "Department" or "DEP") for a proposed aquaculture project in Jonesport, Maine (the "Project"). The petition asserts that, although the proposed discharge of wastewater from the Project's outfall pipes was thoroughly reviewed by DEP through its joint Maine Pollutant Discharge Elimination System ("MEPDES") and Waste Discharge License ("WDL") permitting process, the Board was required to conduct a second independent review of impacts of the proposed discharge under NRPA. Neither NRPA's plain language nor this Court's precedent supports EMCI's position.

The NRPA statute, 38 M.R.S. §§ 480-A–480-JJ (2023), specifies certain activities that trigger its permitting requirements, *id.* § 480-C(2), and when a permit is required, mandates review of certain impacts from those activities, *id.* § 480-D. The Project required a NRPA permit based on the construction of intake/outfall pipes

in coastal wetlands—not based on the discharge—and the Board thoroughly evaluated whether this construction (*i.e.*, the NRPA-triggering activity) would unreasonably impact fisheries and wildlife, consistent with its statutory obligations under NRPA.[1]

The Superior Court rightly held that the Board's decision to not conduct a second independent analysis of the discharge's impacts was reasonable and entitled to deference. In so holding, the Superior Court properly relied on this Court's precedent that the Department may—but is not required to—analyze "use" impacts under NRPA (*i.e.*, the type of impacts that EMCI contends the Board was required to consider here). Separately, the Superior Court properly concluded that the Board did in fact conduct an in-depth review of the potential impacts from the activity regulated by NRPA, the construction of the intake/outfall pipes in coastal wetlands.

This Court should affirm the Board and hold that the Board's Decision was not affected by legal error—because the Board's interpretation of NRPA is correct, and in any event reasonable and entitled to deference—and was based on substantial record evidence.

[1] The Project also required a NRPA permit because of the impact to freshwater wetlands from the Project's land-based facilities. This aspect of the Project is not at issue in this appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Project involves a proposal by Kingfish Maine, Inc. ("Kingfish"), to construct and operate a recirculating aquaculture system facility in Jonesport to raise yellowtail kingfish. Administrative Record ("A.R.") 39, 193. The Project would include two primary buildings, access roads, housing, a store, and an information center. Appendix ("A.") 21; A.R. 22. Building 1 would contain a broodstock facility and hatchery. Building 2 would contain a series of separate tanks to maintain and grow fish as they progress to market size. *Id*. In addition to the land-based facilities, the Project would include two approximately 1,400-foot-long water intake pipes and two approximately 2,800-foot-long outfall pipes for the intake of seawater and disposal of wastewater. A. 21, A.R. 22. After its use for fish-growing operations, seawater initially taken from Chandler Bay would be sent through a filtration and treatment system and discharged, through a diffuser, back into Chandler Bay via the two outfall pipes. *Id*. The placement of the intake and outfall pipes in Chandler Bay would have a direct impact on 7,136 square feet of coastal wetlands. A. 21; A.R. 8.

A. The DEP Licensing Process

i. The Project's Discharge Permit

On August 7, 2020, Kingfish submitted an application to the Department for a MEPDES permit/WDL (the "Discharge Permit") for a maximum discharge of 28.7

million gallons per day of treated wastewater to Chandler Bay. After reviewing the application and comments,[2] DEP issued the Discharge Permit, with conditions, to Kingfish on June 25, 2021. A. 43; A.R. 933. The Discharge Permit, among other things, analyzed the potential effects of the discharge from the outfall pipes on water quality in Chandler Bay and included numerical and narrative effluent limitations, as well as ongoing sampling and monitoring requirements intended to ensure protection of aquatic life and habitat. A. 47-51; A.R. 942. For example, the narrative standard in the Discharge Permit's special conditions provides that Kingfish "must not discharge effluent that contains materials in concentrations or combinations which are hazardous or toxic to aquatic life, or which would impair the uses designated for the classification of the receiving waters." A. 51; A.R. 946.

Any appeal of the Discharge Permit had to have been filed in Superior Court or with the Board within 30 days of its issuance. *See* 38 M.R.S. §§ 341-D(4)(A), 346(1) (2023); 5 M.R.S. § 11002(3) (2023). Neither the Conservation Initiative nor RIGHC appealed the June 25, 2021 Discharge Permit, and the period for any such appeal of that permit has long since expired.

[2] RIGHC and the Conservation Initiative submitted comments on the MEPDES/WDL application regarding, among other things, the temperature of the effluent discharged from the outfall pipes, ongoing monitoring of the discharge, and potential impacts on wildlife in the area. A.R. 1009-10, 1013.

ii. The Project's NRPA and Site Law Permit

Kingfish also applied to the Department for a Site Law permit because the Project as proposed would constitute a "development" occupying an area larger than twenty acres, *see* 38 M.R.S. §§ 485-A(1), 482(2)(A) (2023), and for a NRPA permit because the facility's construction would result in impacts to coastal and freshwater wetlands, *see* 38 M.R.S. § 480-C. Kingfish submitted its joint Site Law and NRPA permit applications to the Department on March 23, 2021. A.R. 39, 193.

In reviewing the Site Law application, DEP considered, among other things, whether point and non-point sources of pollution from the development would have "an unreasonable adverse effect on surface water quality." 06-096 C.M.R. ch. 375, § 6(B). Under Site Law regulations, "[e]vidence that a waste discharge license . . . has been or will be obtained" may demonstrate that the development will not have such an effect. *Id*. § 6(C)(2). Nonetheless, pursuant to its regulations, the Department also considered evidence of the effect of any discharge from the development on the salinity and temperature of Chandler Bay. *See id*. §§ 6(B)(1), (4); A. 29; A.R. 30.

In reviewing the NRPA application, DEP considered, among other things, the effect of the construction and location of the water intake and outfall pipes, and the associated infrastructure such as the intake structures, on Chandler Bay's environment, aquatic species, and lobstering industry. A. 137-38; A.R. 3-4. On

November 12, 2021, after an eight-month review period, the DEP Commissioner issued a combined Site Law and NRPA permit approving those Kingfish applications with conditions. A. 21; A.R. 1.

iii. The Administrative Appeals of the NRPA and Site Law Permit and the Board's Denial of the Appeals

The Conservation Initiative and RIGHC each timely filed separate administrative appeals with the Board of the DEP Commissioner's issuance of the combined Site Law and NRPA permit.[3] Among their many arguments, they contended that DEP erred by not performing a second independent analysis of the discharge within the NRPA review, *i.e.*, an analysis in addition to the one performed by DEP in 2020 and 2021 in connection with is issuance of the discharge permit. A. 43; A.R. 933. After admitting supplemental evidence and hearing argument, the Board issued its August 4, 2022 Decision denying the appeals and affirming the DEP Commissioner's issuance of the combined Site Law and NRPA permit. A. 36-37; A.R. 21. The Board concluded that the Commissioner did not err in determining that the Project would not "unreasonably harm" the habitats or fisheries of the coastal wetlands. Specifically, the Board determined that the Commissioner did not err by declining to perform a second independent analysis of the discharge under NRPA and concluded that the Conservation Initiative's and RIGHC's arguments about the

[3] Sierra Club Maine also appealed the Commissioner's issuance of the Site Law and NRPA permit to the Board. However, that entity did not participate in this Rule 80C appeal.

discharge constituted an impermissible collateral attack on the Discharge Permit after the appeal period for that permit had run. A. 28; A.R. 29 n.2. The Board also noted that, although the NRPA analysis was focused on the construction aspect of the pipes, the Commissioner also considered evidence regarding potential impacts of the discharge to the coastal wetlands in the context of the Site Law application. A. 29; A.R. 30. The Conservation Initiative and RIGHC (hereinafter, "EMCI") jointly appealed the Board's Decision to the Superior Court.

iv. The Rule 80C Appeal

After the Board filed the Department's administrative record, EMCI filed a motion pursuant to M.R. Civ. P. 80C(e) requesting that the Superior Court take additional evidence on the effluent discharge modeling for the Project. The Board and Kingfish opposed the motion. By Order dated January 23, 2023, the Superior Court (*Murphy, J.*) denied EMCI's motion, stating that they had "not persuaded the court that the additional evidence requested could not have been presented or was erroneously disallowed during the agency proceedings." The merits briefing ensued.

v. The Superior Court's Denial of EMCI's Rule 80C Appeal

By Order dated August 23, 2023, the Superior Court (*Murphy, J.*) affirmed the Board's Decision to uphold the NRPA/Site Law permit and denied EMCI's Rule 80C appeal. The court held that "the Board did not violate NRPA or otherwise act unreasonably by failing to independently assess the project's discharges under

Section 480-D(3) or by deferring to the determinations in DEP's discharge permit approval." A. 12. The court reasoned that, although the Board had discretion to consider the discharge's impacts under NRPA, it was under no obligation to independently analyze wildlife impacts of actions, such as the discharge of waste and pollutants, that are not among the activities triggering NRPA review enumerated in 38 M.R.S. § 480-C. A. 9-10. Thus, the court concluded that the Board reasonably limited the focus of its NRPA review to the impacts of NRPA-regulated activity involving "dredging, filling, disturbing soil, and placement of structures." A. 9-10. The court further concluded that the agency's decision to rely on the Discharge Permit when evaluating potential impacts of the discharge on wildlife under NRPA was reasonable, as both NRPA and the MEPDES/WDL statutory frameworks consider impacts on habitat and aquatic life, and the Discharge Permit considers such impacts specifically in the context of the discharge. A. 11. EMCI timely appealed.

STATEMENT OF THE ISSUES

I. DID THE BOARD ADEQUATELY ANALYZE IMPACTS ON HABITATS AND FISHERIES UNDER NRPA?

SUMMARY OF THE ARGUMENT

In its review of Kingfish's NRPA application, the Department thoroughly analyzed whether the activity triggering NRPA's permit requirement— construction of the intake/outfall pipes in coastal wetlands—met the applicable standards set forth in statute. 38 M.R.S. §§ 480-C, 480-D. The Commissioner and the Board

reasonably determined that the Department was not required to independently analyze potential impacts of the discharge from the Project's outfall pipes under NRPA given that such impacts were already separately addressed by the Discharge Permit and the NRPA statute focuses on impacts from certain specified activities (here, the construction of the pipes).

This interpretation of NRPA, a statute that the Department is charged with administering, is supported by the plain language of the statute and is reasonable. Conversely, EMCI's argument that the Department is *required* to independently analyze impacts from the already reviewed and permitted discharge has no basis in NRPA's statutory language, is contrary to this Court's precedent, and would allow for impermissible collateral attacks on validly issued permits in distinct permitting proceedings. Furthermore, the Department's determination, after thorough review, that the NRPA-triggering activity would not have an unreasonable impact on wildlife habitats was supported by substantial record evidence.

Accordingly, the Court should affirm the Board's Decision.

ARGUMENT

I. THE BOARD ADEQUATELY ANALYZED IMPACTS ON HABITATS AND FISHERIES UNDER NRPA.

This Court directly reviews the Board's Decision for errors of law, factual findings not supported by substantial record evidence, or abuse of discretion. 5 M.R.S. § 11007(4) (2023); *Forest Ecology Network v. Land Use Regul. Comm'n*,

2012 ME 36, ¶ 28, 39 A.3d 74; *Concerned Citizens to Save Roxbury v. Bd. of Env't Prot.*, 2011 ME 39, ¶ 17, 15 A.3d 1263.

Although issues of statutory construction are typically questions of law that would be subject to de novo review, "[w]hen a dispute involves an agency's interpretation of a statute it administers," the agency's interpretation "is entitled to great deference" so long as it is reasonable. *FPL Energy Me. Hydro LLC v. Dep't of Env't Prot.*, 2007 ME 97, ¶ 11, 926 A.2d 1197 (internal quotation marks omitted). Specifically, "[w]hen reviewing an agency's interpretation of a statute that it administers, [the court] defer[s] to the agency's construction unless the statute plainly compels a contrary result." *Passadumkeag Mountain Friends v. Bd. of Env't Prot.*, 2014 ME 116, ¶ 12, 102 A.3d 1181; *see also Murphy v. Bd. of Env't Prot*., 615 A.2d 255, 259 (Me. 1992) (deferring to the Board and DEP's interpretations because they were not "plainly contrary to the statute's language and purpose"); *S.D. Warren Co. v. Bd. of Env't Prot*., 2005 ME 27, ¶ 29, 868 A.2d 210 (stating, "[i]t does not matter whether an alternative interpretation would also have been reasonable, only that the interpretation adopted by the [Board] was not unreasonable, unjust or unlawful").

Moreover, the "substantial evidence" standard does not involve any weighing of the merits of evidence before the Board but merely requires the Court to determine if there is "any competent evidence in the record to support a finding." *Friends of*

Lincoln Lakes v. Bd. of Env't Prot., 2010 ME 18, ¶ 14, 989 A.2d 1128. Agency findings will only be vacated if there is "no competent evidence in the record to support a decision." *Id*.

As the party seeking to vacate the agency's decision, EMCI bears the burden of persuasion on appeal. *Somerset Cnty. v. Dep't of Corr.*, 2016 ME 33, ¶ 14, 133 A.3d 1006.

A. The Board reasonably focused its analysis on activity triggering NRPA review, consistent with the plain statutory language.

NRPA requires a permit before undertaking certain activities within or adjacent to protected natural resources and wetlands. 38 M.R.S. § 480-C(1)-(2).[4] Specifically, Section 480-C(2) provides:

> **2. Activities requiring a permit**. The following activities require a permit.
>
> 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.

Id. § 480-C(2)(A)-(D). The Department must grant a NRPA permit if the applicant demonstrates "that the *proposed activity* meets the standards" set forth by statute.

[4] By contrast, the Site Law is triggered by certain "development" defined in statute. *See* 38 M.R.S. §§ 482, 483-A (2023). Consequently, the Site Law regulations specifically address how DEP should consider a separately permitted discharge's contribution to the "development's" broader environmental impacts. *See* 06-096 C.M.R. ch. 375, § 6(C)(2).

38 M.R.S. § 480-D (emphasis added). These standards include a requirement that "[t]he *activity* 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." *Id.* § 480-D(3) (emphasis added).

The NRPA permitting process therefore involves two steps. First, the Department determines whether an "activity" requires a permit under NRPA; if so, the Department then determines whether the "activity" as proposed will meet the standards set forth in statute. *See* 38 M.R.S. §§ 480-C, 480-D; *Murphy*, 615 A.2d at 258-59.

Here, the Board applied a plain language reading of NRPA in analyzing whether the activity requiring a NRPA permit—construction of the intake/outfall pipes—met the standards set forth in statute. The Board's interpretation of NRPA was correct. Regardless, EMCI has not shown that the statute "plainly compels a contrary result" or that the Board's interpretation of this statute, which it is charged with administering, is unreasonable. *See Passadumkeag Mountain Friends*, 2014 ME 116, ¶ 12, 102 A.3d 1181; *S.D. Warren Co.*, 2005 ME 27, ¶ 29, 868 A.2d 210.

This Court has also recognized the agency's discretion to delineate the scope of NRPA review. In *Hannum v. Board of Environmental Protection*, this Court addressed whether the Board could consider the reasonably anticipated uses of a

dock, the construction of which triggered NRPA review, as part of its NRPA analysis. *See Hannum*, 2006 ME 51, ¶ 14, 898 A.2d 392. In concluding that the Board may—though was not required to—consider such reasonably anticipated uses as part of the NRPA analysis, this Court explicitly recognized the Board's discretion to determine the appropriate scope of the NRPA review in each matter. *See id.* (stating, "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").

This discretion is grounded in the agency's expertise and role in administering the statutory framework. *See, e.g., Red Lake Band of Chippewa Indians v. U.S. Army Corps of Eng'rs*, 636 F. Supp. 3d 33, 54 (D.D.C. 2022) (selection of scope of an environmental review is a delicate choice "that should be entrusted to the expertise of the deciding agency" (internal quotation marks omitted)). Further, agency discretion in analyzing potential impacts is built into the NRPA statute to the extent that it requires the Department to determine whether an impact may be "unreasonable." *See, e.g.*, 38 M.R.S. § 480-D(3); *Uliano v. Bd. of Env't Prot.*, 2005 ME 88, ¶ 13, 876 A.2d 16 (noting that "[a] balancing analysis inheres in any reasonableness inquiry" and that the reasonableness inquiry under NRPA "depends on a multiplicity of factors").

Here, the Board reasonably—and correctly—focused its NRPA analysis on the activity triggering NRPA review—namely, construction of the intake and outfall pipes. As demonstrated by its plain language, NRPA's distinct purpose is to regulate this type of construction activity affecting protected natural resources and wetlands. *See* 38 M.R.S. §§ 480-C, 480-D. Further, the Board reasonably—and correctly—determined that NRPA did not require the Board to consider an aspect of the Project—the discharge from the outfall pipes—that 1) is not an "activity" requiring a NRPA permit, and 2) had already been fully considered under the separate MEPDES/WDL permitting framework. As the Board explained in its Order:

> 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; A.R. 27. The Superior Court also correctly reasoned, "the agency's decision to forgo such an independent inquiry [of the discharge] was reasonable, as the impacts of the proposed discharge[] had already been reviewed in depth in the context of the discharge permit." A. 10. EMCI has not shown that the Board's interpretation of NRPA is unreasonable and that the statute "plainly compels a

contrary result." *Passadumkeag Mountain Friends*, 2014 ME 116, ¶ 12, 102 A.3d 1181; *see also Murphy*, 615 A.2d at 259. In any event, this Court should not second-guess the Board's plain language reading of the statute and reasonable exercise of its discretion to determine the appropriate scope of NRPA review in this matter.

B. The Board was not required to perform a second independent analysis of the discharge's impacts under NRPA.

EMCI's argument that the Board should have conducted a second independent analysis of the discharge's impact on wildlife habitats[5] under NRPA relies on a misreading of this Court's precedent, a waived argument, and a fundamental mischaracterization of the applicable permitting frameworks. Thus, EMCI fails to show that the Board's interpretation—that the Department was not required to independently analyze impacts from the separately analyzed and permitted discharge—is "plainly contrary to the statute's language and purpose." *See Murphy*, 615 A.2d at 259; *S.D. Warren Co.*, 2005 ME 27, ¶ 29, 868 A.2d 210.

i. EMCI Misconstrues and Misapplies *Hannum*.

First, EMCI's argument that the Board was required to conduct a second independent analysis of the discharge in its NRPA analysis misconstrues this Court's holding in *Hannum*. As noted above, this Court in *Hannum* held that the agency

[5] Although EMCI refers to "water quality" in their brief, their challenge to the NRPA permit involves "water quality" solely as it relates to impacts on wildlife habitats. *See* Blue Brief ("Br.") 1-2. They do not, for example, argue that the Board failed to adequately analyze water quality impacts under 38 M.R.S. § 480-D(5), which provides that the "activity will not violate any state water quality law, including those governing the classification of the State's waters."

may, in its discretion, consider a project's reasonably anticipated uses beyond those specific "activities" triggering NRPA review. But this Court did not hold that DEP is *required* to consider reasonably anticipated uses in every NRPA analysis. As the Superior Court correctly explained:

> In *Hannum*, the Law Court held that the standard in Section 480-D(3) allowed the Board to consider the wildlife impacts resulting from the placement of the structure itself (in that case, a dock) as well as the reasonably anticipated uses of the structure (i.e., increased boating). The *Hannum* court, however, stopped short of pronouncing that the agency had *an obligation* to consider the wildlife impacts related to the proposed structure's intended use. On the contrary, the Law Court in *Hannum* suggested that the agency's decision to consider such "use impacts" is discretionary in nature and deserving of deference. Thus, although the Board could have independently considered the wildlife impacts associated with the anticipated uses of the intake/outfall pipes—discharging effluent—it was not required to do so under NRPA.

A. 10 (citations omitted).

Moreover, EMCI overlooks a key distinction between *Hannum* and this case—the existence here of another validly issued DEP permit (*i.e.*, the Discharge Permit) that specifically analyzes the Project impacts that EMCI claims warrant separate consideration under NRPA. This distinction goes directly to the reasonableness of both the Board's interpretation of the statute and its decision to focus its NRPA analysis on activity triggering NRPA review rather than undertake an unnecessarily duplicative analysis of the discharge's impacts. *See* Point I(A) *supra*.

ii. EMCI waived their argument regarding past Department practice and improperly relies on extra-record evidence.

EMCI's argument that the Board's Decision is inconsistent with past Department practice should be summarily rejected, for several reasons.

First, EMCI waived this argument regarding past Department practice by failing to raise it before either the Board or the Superior Court. *See Foster v. Oral Surgery Assocs., P.A.*, 2008 ME 21, ¶ 22, 940 A.2d 1102 (issues raised for the first time on appeal are not preserved for appellate review); *see also New England Whitewater Ctr. v. Dep't of Inland Fisheries & Wildlife*, 550 A.2d 56, 58 (Me. 1988) (issues not raised at the administrative level are deemed unpreserved for appellate review); *Forest Ecology Network*, 2012 ME 36, ¶ 24, 39 A.3d 74 (same).

Second, EMCI's unpreserved argument relies heavily on a 2020 Department Order from a different matter involving Central Maine Power ("2020 CMP Order") that EMCI wrongly attempts to supply to this Court as "supplemental legal authority." But this agency document is not a part of the Rule 80C administrative record here and thus may not be considered by this Court. *See* 5 M.R.S. § 11006(1) (2023) (review of a licensing decision is "confined to the record upon which the agency decision was based"); *Palesky v. Sec'y of State*, 1998 ME 103, ¶ 7, 711 A.2d 129 (noting that 5 M.R.S. § 11006 limits a court's ability to consider evidence not in the record in reviewing state agency actions).

In addition to the ample opportunities afforded the public to participate in creating the administrative record by submitting comments on an application, 06-096 C.M.R. ch. 2, § 16, there was a process to supplement the record before both the Board, *see* 06-096 C.M.R. ch. 2, § 24(D), and the Superior Court, *see* 5 M.R.S. § 11006; M.R. Civ. P. 80C(d)-(f).[6] Despite these numerous opportunities, EMCI never attempted to supplement or modify the record with the 2020 CMP Order, which predates EMCI's challenge to the Project and was thus available to EMCI at all stages of this matter. EMCI may not inject it into this case and rely on it now.

EMCI's suggestion that the Court may take judicial notice of the 2020 CMP Order is also misguided. Judicial notice allows courts to consider "indisputable facts"—for example, the existence of a judicial order—but is not a vehicle for the substantive consideration of extra-record evidence from a different agency proceeding, which is what EMCI is requesting here. *Cabral v. L'Heureux*, 2017 ME 50, ¶ 11, 157 A.3d 795.

The cases cited by EMCI also do not provide support for their request. In *Kain v. Secretary of State*, No. AP-2004-23, 2005 WL 605443, at *3 (Me. Super. Ct.

[6] Indeed, EMCI previously used these processes by attempting to supplement the record when the joint Site Law/NRPA permit was on administrative appeal to the Board, *see, e.g.*, A.R. 1501 (RIGHC Board Appeal); A.R. 1509 (Conservation Initiative Board Appeal), and by attempting to modify the record with respect to other materials before the Superior Court, *see* EMCI's Motion to Allow Additional Evidence Under M.R. Civ. P. 80C(e); Superior Court Order dated January 25, 2023.

Jan. 21, 2005), the Superior Court (*Mead, J.*) recognized the general proposition that a court may take judicial notice in a Rule 80C appeal. But the court went on simply to take judicial notice of the *existence* of a Superior Court Order in a prior proceeding between the same parties. *Id.* And in *Town of Mount Vernon v. Landherr*, this Court recognized that a court may take judicial notice of a document in a different proceeding for the purpose of establishing the existence of that other proceeding and the legal effect on the pending matter before the court. 2018 ME 105, ¶¶ 14-15, 190 A.3d 249 (taking judicial notice of a document to determine its preclusive effect on the pending proceeding); *see also Manguriu v. Lynch*, 794 F.3d 119, 121 (1st Cir. 2015) (same as to mootness). Simply put, no established concept of judicial notice supports consideration of the substance of the 2020 CMP Order.

In any event, even if the Court were to consider the 2020 CMP Order, EMCI's new argument relying on that extra-record material still fails. The existence of a different matter where the Board looked at impacts beyond the scope of the NRPA-triggering activity is not inconsistent with the Board's position here, the Superior Court's holding, or this Court's precedent, all of which acknowledge that the Department may reasonably exercise its discretion to determine the appropriate scope of review under NRPA. *See* A. 11 (Superior Court Order noting that although the Board may consider impacts associated with the discharge, it was not required to do so); *Hannum*, 2006 ME 51, ¶ 14, 898 A.2d 392.

Further, unlike in the 2020 CMP Order, the Board here relied on another validly issued Department permit that analyzed impacts and imposed conditions on the precise aspect of the Project that EMCI argues should have been independently considered in the Board's subsequent NRPA analysis. Rather than undermining the Board's Decision, then, the 2020 CMP Order is entirely consistent with the Board's position in this case—that the agency may exercise its reasonable discretion to determine the scope of NRPA review on a case-by-case basis. *See Hannum* 2006 ME 51, ¶ 14, 898 A.2d 392; *see also Red Lake Band of Chippewa Indians*, 636 F. Supp. 3d at 54.

iii. EMCI mischaracterizes the applicable permitting frameworks.

As discussed above, *see* Point I(A) *supra*, NRPA regulates certain specified "activities" and requires review to determine whether certain impacts from those "activities" are unreasonable. *See* 38 M.R.S. §§ 480-C, 480-D. The Board satisfied these statutory requirements when it analyzed impacts from the NRPA-triggering activity—construction of the intake/outfall pipes in a wetland. A. 28-30; A.R. 29-31.

EMCI does not point to any specific statutory language that would *mandate* NRPA review of the anticipated uses of the outfall pipes (*e.g.*, to discharge wastewater). Nor can they, as that specific language does not exist.

Rather, EMCI argues that the Board's reliance on the Discharge Permit and decision to not independently analyze the discharge under NRPA was improper given the differences between the MEPDES/WDL statutory regimes schemes and NRPA's overarching statutory purpose. Blue Br. 19-23. But their attempts to draw relevant distinctions between the MEPDES/WDL permitting process and NRPA miss the mark.

First, EMCI is incorrect in suggesting that analysis of a discharge under the MEPDES/WDL permitting process is somehow less fulsome than it would be if conducted pursuant to NRPA. Under NRPA, certain activities may not "unreasonably harm any significant wildlife habitat" or "other aquatic life." 38 M.R.S. § 480-D(3). With respect to water quality, NRPA provides that an activity may not violate state water quality laws, including those governing the classification of waterbodies. 38 M.R.S.§ 480-D(5). Similarly, the discharge permitting process examines whether a discharge will cause a violation of state water quality standards. *See, e.g.*, 38 M.R.S. § 465-B(2). State water quality standards include both numerical and narrative standards for different types of waterbodies. *Id*.

Of particular relevance here, the narrative standards for Class SB waterbodies (such as Chandler Bay) provide that they must be suitable "as habitat for fish and other estuarine and marine life." 38 M.R.S. § 465-B(2)(A) (2023). The standards further provide that these "waters must be of sufficient quality to support all

estuarine and marine species indigenous to those waters without detrimental changes in the resident biological community" and set forth specific numeric dissolved oxygen concentrations that must be met for Class SB waters. *Id*. § 465-B(2)(B).

Thus, under the discharge permitting process, the DEP's Water Bureau looked directly at the effects of the Project's proposed discharge from the outfall pipes on "habitat for fish and other estuarine and marine life." *See* 38 M.R.S. § 465-B(2)(A)-(C). Furthermore, the Discharge Permit in this case addressed, among other things, the potential effects of the discharge on water quality in Chandler Bay, and included numerical and narrative effluent limits, as well as ongoing sampling and monitoring requirements intended to ensure protection of aquatic life and habitat. A. 47; A.R. 942. For example, as previously described, the narrative standard special conditions in the Discharge Permit provide that Kingfish "must not discharge effluent that contains materials in concentrations or combinations which are hazardous or toxic to aquatic life, or which would impair the uses designated for the classification of the receiving waters." A. 51; A.R. 946. As the Superior Court correctly explained,

> As part of the discharge permitting process . . . the agency considers whether the discharge will lower water quality to a level insufficient to support and preserve indigenous marine species. This is not so different from the inquiry under NRPA, which assess whether an activity "unreasonably harm[s]" marine habitat and aquatic life. 38 M.R.S. § 480-D(3).

A. 11.

EMCI also suggests that analysis of a discharge under NRPA is categorically different than the MEPDES/WDL analysis of the same discharge because the Board cannot consider "economic considerations" when assessing impacts under NRPA but can do so for MEPDES/WDL permitting. Blue Br. 19. The entire premise of this argument, however, does not hold water.

As the Superior Court correctly reasoned, NRPA does not preclude the weighing of economic considerations and "provides room for the agency to weigh economic considerations," A. 11-12, through the statute's focus on avoiding "unreasonable" impacts and mitigating harm, *see, e.g.*, 38 M.R.S. § 480-D(3); *see also* 06-096 C.M.R. ch. 310, § 5(A) (explaining that the presumption of a practical alternative for activities in wetlands of special significance does not apply to certain water-dependent activities). And as this Court has explained, the reasonableness inquiry "depends on a multiplicity of factors" and "[a] balancing analysis inheres in any reasonableness inquiry." *Uliano*, 2005 ME 88, ¶ 13, 876 A.2d 16. Accordingly, NRPA, like the MEPDES/WDL permitting program, contemplates that some impacts may be acceptable. Moreover, EMCI's contention regarding an absence of economic considerations under NRPA is directly contradicted by 38 M.R.S. §§ 480-D(3) and 480-Z, which allow for the consideration of monetary compensation for unavoidable wildlife impacts under NRPA.

Finally, EMCI argues that the Board's and the Commissioner's interpretation of NRPA would lead to absurd results by "invalidating the important provisions of the NRPA permit and [rendering] 38 M.R.S. § 480-D mere surplusage." Blue Br. 22. But this argument is based on the same faulty premises, discussed above, regarding purported distinctions between the MEPDES/WDL and NRPA permitting regimes. Rather, it is EMCI's interpretation, not the Department's, that would lead to absurd results by allowing an untimely collateral attack on a final, validly issued Discharge Permit based on arguments concerning the already-analyzed and already-permitted discharge. EMCI had an opportunity to raise concerns—and did raise concerns—about impacts from the proposed discharge during the approximately eight-month DEP review of the Discharge Permit. *See* A.R. 1009-10. But they never appealed the Discharge Permit, and the time to do so has long expired. EMCI's arguments on appeal amount to an attempt to collaterally attack findings in the Discharge Permit that they failed to appeal. This Court should not allow EMCI to circumvent the 30-day appeal period set forth in 38 M.R.S. § 341-D(4)(A) and take a "second bite" at the discharge issue in this matter.

For these reasons, the Board's Decision to focus its NRPA analysis on the NRPA-triggering activity and not conduct a second analysis of impacts from the permitted discharge was correct and legally supported. In any event, the Board's interpretation is entitled to deference because it was reasonable and consistent with

the NRPA statute and this Court's precedent in *Hannum*. *See Passadumkeag Mountain Friends*, 2014 ME 116, ¶ 12, 102 A.3d 1181.

C. The Board's Decision is supported by substantial record evidence.

Again, the Board thoroughly reviewed and analyzed the potential for the NRPA-triggering activity—the construction of intake/outfall pipes in a coastal wetland—to unreasonably harm habitat or fisheries, consistent with its NRPA statutory obligations.[7] And its conclusion that the NRPA-triggering activity would not result in unreasonable impacts is based on substantial and competent record evidence. *See Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14, 989 A.2d 1128.

The Board considered comments from state agencies, such as the Department of Marine Resources ("DMR") and the Department of Inland Fisheries and Wildlife ("IF&W"), as well as other interested parties, in reviewing the NRPA application. A. 29; A.R. 30. The Board Order noted that DMR and IF&W both commented on the Project's potential fisheries and habitat impacts. *Id*. IF&W expressed concerns regarding peatland habitat and DMR expressed concerns regarding the potential for lobstering gear entanglement. A. 29; A.R 30. During the application process, Kingfish attempted to address these concerns, and DMR responded that the construction of the pipes "should have little or no long-term impact to the Lobster

[7] Although EMCI does not appear to be challenging the Board's Decision based on the substantial evidence standard, to the extent their challenge could be so construed, it should still be rejected.

Industry landings or biology" and that "[t]his project, as proposed, should not result in significant adverse impacts to marine resources." *Id*.

The Board also reviewed comments on impacts from the length and location of the intake/outfall pipes and concluded that Kingfish located and designed the pipes to reduce coastal wetland impacts to the greatest extent feasible, while weighing other factors such as the distance necessary to facilitate effluent dispersion. A. 29; A.R. 30, 1040-42. The record further indicates that Kingfish proposed, among other things, detailed construction methods and sequencing for the construction of the pipes to reduce sea floor habitat impacts. A.R. 89-90. Kingfish also proposed various mitigation measures, such as silt booms and turbidity curtains, and the Department imposed conditions in the joint NRPA/Site Law permit relating to specific work windows on the construction to protect wildlife. A.R. 4.

In sum, as the Superior Court noted, "the agency *did* undertake an independent assessment of the wildlife impacts associated with the placement of the intake/outfall pipes, the construction process, dredging, etc." A. 8 (citing A.R. 3-4, 29-31). Accordingly, EMCI has failed to meet their burden of demonstrating that there was "no competent evidence in the record to support" the Board's findings. *See Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14, 989 A.2d 1128.

CONCLUSION

For the reasons stated above, this Court should affirm the Board's Decision.

Dated: January 29, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 29 day of January 2024, I mailed two copies of the Appellee's Brief to the parties listed below, by United States Mail, first class, postage prepaid, addressed as follows:

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