

STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION



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March 9, 2022

**SENT VIA ELECTRONIC MAIL ONLY**

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**Re: Chair ruling on proposed supplemental evidence in appeals of Kingfish Maine, Inc. permit**

Dear Participants:

On December 13, 2021, Eastern Maine Conservation Initiative, Roque Island Gardner Homestead Corporation, and Sierra Club Maine filed with the Board of Environmental Protection (Board) separate timely appeals of and requests for a hearing on the November 12, 2021, Order of the Commissioner of the Department of Environmental Protection (Order). That Order conditionally approved the applications of Kingfish Maine, Inc. (Kingfish) for a combined Site Location of Development Law (Site Law) and Natural Resources Protection Act (NRPA) permit and associated Water Quality Certification to construct a proposed aquaculture facility in Jonesport.

This letter provides the Board Chair's ruling on the proposed supplemental evidence that was included with the appeals.

## CRITERIA FOR ADMITTANCE INTO RECORD

The record on which the Board decides an appeal is limited to the record considered by the Department of Environmental Protection (Department) staff in its review of the application, as set forth in Chapter 2, § 24(D) of the Board's rules (*Rule Concerning the Processing of Applications and Other Administrative Matters*). Additional evidence, or supplemental evidence, may be admitted into the record by the Board during the appeal, or during a hearing of the appeal, if such a hearing is held. Pursuant to Chapter 2, § 24(D)(2), the Board may allow the record to be supplemented on appeal when it finds that the evidence offered is relevant and material and that:

- a) the person seeking to supplement the record has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; or
- b) the evidence is newly discovered and could not, by the exercise of reasonable diligence, have been discovered in time to be presented earlier in the process.

In a letter dated February 4, 2022, the Board, through its Executive Analyst, identified proposed supplemental evidence offered by appellants. In accordance with Chapter 2 § 24(C)(2)(b) and the Executive Analyst's letter, Kingfish commented on the admissibility of that proposed supplemental evidence.

The aquaculture project proposed by Kingfish, requires multiple, separate licenses from the Department. These include the Site Law and NRPA permit issued as one approval on November 12, 2021, a Waste Discharge License issued on June 25, 2021, and an Air Emissions License issued on August 17, 2021. Applications for these separate licenses are evaluated by the bureau in the Department with expertise in the subject matter of the application, (here, the Bureau of Land Resources, the Bureau of Water Quality, and the Bureau of Air Quality respectively). In some instances, a licensing project manager for a particular application may seek information or review from other programs to aid in the evaluation of that pending application, and that information is added to the licensing record for the application being processed. However, the record considered by the Department staff in its review of one application does not encompass the entirety of all information submitted to the Department on a particular topic or all aspects of a proposed project. Any person may, during the processing of an application, submit to Department staff comments and information they wish to be considered with respect to an application. Here, comments and information could have been submitted to the Department for consideration during processing of the applications for the Site Law and NRPA permit between April and November 2021.

The documents offered in the appeals that exist in the files of other bureaus from their consideration of other applications but not within the record of information considered by the Department staff in the context of the Site Law and NRPA applications are considered proposed supplemental evidence subject to the criteria laid out in Chapter 2, § 24(D)(2).

## RULINGS

### I. Eastern Maine Conservation Initiative

Rulings on the admissibility of the Eastern Maine Conservation Initiative's (Conservation Initiative) proposed supplemental evidence are as follows.

- a. **Kingfish Maine's near- and far-field discharge modeling report – Chandler Bay.** Kingfish Maine's near- and far-field discharge modeling report, which is referenced on pages 1 and 4 of the appeal, is neither in the underlying licensing record for the Department Order nor was it submitted with the appeal as required for consideration for admittance pursuant to Chapter 2 § 24(B)(3). Even if the appellant had properly included the report with the appeal, the material is not relevant to the Department Order under appeal and therefore fails to meet the first prong of the criteria for admittance into the record. The references to Kingfish Maine's near- and far-field discharge modeling report – Chandler Bay in the appeal are stricken and will be redacted from the appeal documents circulated to Board members.
- b. **Baseline water quality data.** The Conservation Initiative's request on page 2 of the appeal to supplement the record to include baseline water quality data for Chandler Bay is made without submitting the data. I understand the Conservation Initiative's intention to be for the Board to reopen the record to obtain new evidence not currently in existence. At this point, new evidence may only be considered if it currently exists and is admitted as proposed supplemental evidence pursuant to criteria specified above or through a hearing held by the Board on the appeal, if such a hearing is held. Board hearings on appeals are discretionary with the Board, Chapter 2, §§ 24(A), 7(B), and are further governed by Chapter 2, §§ 24(B),(F) and 7(B)-(C). The Board, after considering the administrative record and oral arguments on appeal, will decide whether to hold a hearing based on whether there is credible conflicting technical information regarding a licensing criterion and whether holding a hearing would likely assist the Board in understanding the evidence. A decision regarding whether to hold a hearing will not be made prior to scheduling and holding oral arguments before the full Board. Therefore, the reference to baseline water quality data for Chandler Bay on page 2 of the appeal is stricken and will be redacted from the appeal documents circulated to Board members.
- c. **Appendix A.** Although not properly labeled and in no place referenced in its appeal, the Conservation Initiative offers Appendix A – EMCI Easement Locations. Appendix A is a screenshot from a Department of Agriculture, Conservation and Forestry webpage listing the names and geospatial data coordinates for several conservation easements, presumably the easements the Conservation Initiative claims to maintain in Chandler Bay. The data presented in the undated Appendix A is understood to have been in existence in advance of the Commissioner's licensing decision in this matter and therefore is not newly discovered and was not brought to the attention of the Department at the earliest possible time. For the foregoing reasons, Appendix A is not admitted and will be redacted from the appeal documents circulated to Board members.
- d. **Appendix B.** Appendix B – References re Red Tide Algal Blooms, which appears to be a list of reference documents, was not submitted with the appeal as required for consideration for admittance pursuant to Chapter 2 § 24(B)(3). Even if the appellant had properly included the

referenced documents with the appeal, those materials are not relevant to the Department Order under appeal and therefore would fail to meet the first prong of the criteria for admittance into the record. Appendix B and all reference and argument related to it in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.

- e. **Electronic links.** Pursuant to Chapter 2, § 24(B)(2), electronic links to documents will not be accepted. Therefore, the electronic link on page 4 of the Conservation Initiative's appeal is stricken and will be redacted from the appeal documents circulated to Board members.

## II. Roque Island Gardner Homestead Corporation

Rulings on the admissibility of the Roque Island Gardner Homestead Corporation's (Homestead Corporation) proposed supplemental evidence are as follows.

- a. **Natural Resources Inventory of the Roque Island Archipelago, Maine (2020).** The Natural Resources Inventory of the Roque Island Archipelago, Maine (2020), also referred to in the appeal as the "Famous survey," and which is referenced in paragraphs 11 and 12 of the Homestead Corporation's appeal was not in the underlying licensing record for the Department Order and was not submitted with the appeal as required for consideration for admittance pursuant to Chapter 2 § 24(B)(3). The references to Natural Resources Inventory of the Roque Island Archipelago, Maine (2020) and the Famous survey in the appeal are stricken and will be redacted from the appeal documents circulated to Board members.
- b. **Electronic links.** Pursuant to Chapter 2, § 24(B)(2), electronic links to documents will not be accepted. Therefore, the electronic link on page 6 of the Homestead Corporation's appeal is not admitted and will be redacted from the appeal documents circulated to Board members.

## III. Sierra Club Maine

Rulings on the admissibility of the Sierra Club Maine's (Sierra Club) proposed supplemental evidence are as follows.

- a. **Jonesport Maine Model Summary Report.** The Jonesport Maine Model Summary Report referenced in footnote 2 the Sierra Club's appeal is neither in the underlying licensing record for the Department Order nor submitted with the appeal as required for consideration for admittance pursuant to Chapter 2 § 24(B)(3). The references to the Jonesport Maine Model Summary Report in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.
- b. **NOAA Fisheries graphic.** The graphic presented on page 8 of the Sierra Club's appeal is undated and not labeled as proposed supplemental evidence. Kingfish Maine commented that "[the NOAA Fisheries graphic] is part of publicly available data sets through National Oceanic and Atmospheric Administration (NOAA) and was last updated in July[] 2021, while the Kingfish [Site Law] and NRPA application was still under review by the Department." A significant portion of the Sierra Club's appeal argument relates to the terms and conditions of the Waste Discharge License that was previously issued to Kingfish Maine by the

Commissioner in a separate proceeding. The NOAA Fisheries graphic is not relevant to the Department Order under appeal and, in any case, the Sierra Club has not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time. Therefore, the NOAA Fisheries graphic and references thereto in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.

- c. **Environmental Review of Fish and Wildlife Observations and Priority Habitats graphic.** The Environmental Review of Fish and Wildlife Observations and Priority Habitats graphic presented on page 10 of Sierra Club’s appeal is, as Kingfish Maine comments, already in the licensing record for the Department Order. Therefore, a ruling on the admissibility of this material is not necessary.
- d. **High Value Plant & Animal Habitats graphic.** The High Value Plant & Animal Habitats graphic presented on page 11 of Sierra Club’s appeal is, as Kingfish Maine comments, already in the licensing record for the Department Order. Therefore, a ruling on the admissibility of this material is not necessary.
- e. **Lobster graphic and photograph.** The lobster graphic and photograph presented on page 15 of Sierra Club’s appeal are not labeled with a date, source, or indication that they are presented as proposed supplemental evidence, as required by Chapter 2, § 24(B)(2). Although Kingfish Maine comments on the presumed source and date of these graphics, the argument made using these materials is not material to the Department Order, and in any event Sierra Club has not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time. Therefore, the lobster graphic and photograph and references thereto in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.
- f. **ROV Survey Report.** The ROV Survey Report images presented on pages 17 and 18 of Sierra Club’s appeal are, as Kingfish Maine comments, already in the licensing record for the Department Order. Therefore, a ruling on the admissibility of these materials is not necessary.
- g. **Undated beach and aerial images.** The two images presented on page 20 of Sierra Club’s appeal are not labeled with a date, source, or indication that they are presented as proposed supplemental evidence, as required by Chapter 2, § 24(B)(2). Sierra Club has not explained the relevancy of these images and has not demonstrated that it has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time. Therefore, the two images on page 20 of the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.
- h. **Attachment 1 – White Paper on Industrial Finfish Aquaculture.** Sierra Club’s Attachment 1 is dated December 13, 2021, subsequent to the issuance of the Department Order; thus, the evidence is newly discovered and could not, by the exercise of reasonable diligence, have been discovered in time to be presented earlier in the process. The stated purpose of the document is “to inform decision-makers, citizens and the many stakeholders who rely on a sustainable working waterfront and marine ecosystem as to the risks and benefits of industrial-scale finfish RAS and discuss the opportunity costs in terms of wild fish recovery.” I find the stated purpose of the document is generally material and relevant to the Department Order and therefore

satisfies the criteria for admittance. Sierra Club's Attachment 1 – White Paper on Industrial Finfish Aquaculture is admitted into the record.

- i. **Attachment 2 – Northwest Oyster Die-offs Show Ocean Acidification Has Arrived.** Sierra Club's Attachment 2 is dated November 21, 2011, well prior to the issuance of the Department Order. Sierra Club has not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time. Moreover, the arguments made regarding the proposed supplemental evidence are not material to the Department Order. Therefore, Attachment 2 and references thereto in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.
- j. **Attachment 3 – Ocean Acidification.** Attachment 3 is not labeled with a date or source; however, Kingfish Maine comments that the publication date for the source website is April 2018, which is well prior to the date of the Department Order. As is the case with Attachment 2, Sierra Club has not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time, and in any event the arguments made regarding the proposed supplemental evidence are not material to the Department Order. Therefore, Attachment 3 and references thereto in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.
- k. **Attachment 4 – Interactions between finfish aquaculture and American lobster in Atlantic Canada.** The scientific journal article presented by Sierra Club as Attachment 4 indicates that it was available online as of May 16, 2021, prior to the issuance of the Department Order. Sierra Club has not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; therefore, Attachment 4 and references thereto in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.
- l. **Attachment 5 – DECD Statement on Economic Impact Kingfish.** As stated above, the record on which the Board decides an appeal includes the record considered by the Department staff in its review of the application. Attachment 5 is a March 5, 2021, letter from the Commissioner of the Department of Economic and Community Development (DECD) to Department of Environmental Protection Commissioner Melanie Loyzim. The DECD letter was submitted to Commissioner Loyzim in the context of processing the procedurally distinct Waste Discharge License application and the Department's evaluation of applicable waste discharge program licensing criteria and related water quality standards. The DECD letter is not relevant to the Department Order under appeal and was not considered by Department staff responsible for processing the underlying Site Law and NRPA applications. In addition, Sierra Club did not present the DECD letter to the Department in the context of the Site Law and NRPA applications which it could have during the pendency of those applications and prior to the issuance of the Department Order. Therefore, Attachment 5 is not admitted and will be redacted from the appeal documents circulated to Board members.
- m. **Attachment 6 – Ocean Acidification Weakens Mussels' Grip.** The article presented by Sierra Club as Attachment 6 is dated March 13, 2013 and was therefore available to be submitted to the Department staff prior to the issuance of the Department Order. Sierra Club has not shown due diligence in bringing the evidence to the attention of the Department at the

earliest possible time; therefore, Attachment 6 and references thereto in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.

- n. **Attachment 7 – Acidifying seawater sees oysters in race to grow shells.** The article presented by Sierra Club as Attachment 7 is dated June 14, 2003 and was therefore available to be submitted to the Department staff prior to the issuance of the Department Order. Sierra Club has not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; therefore, Attachment 7 and references thereto in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.
- o. **Attachment 8 – Capabilities.** The article presented by Sierra Club as Attachment 8 is not dated; however, a copyright date of 2017 appears on the final page of the document. Based on the limited information available to the Board in evaluating the timeliness of this proposed supplemental evidence, I find that the document was available to be submitted to the Department staff prior to the issuance of the Department Order and that Sierra Club has not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time. Therefore, Attachment 8 and references thereto in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.
- p. **Attachment 9 – Shell-shocked: How different creatures deal with an acidifying ocean.** The article presented by Sierra Club as Attachment 9 is dated January 5, 2012 and was therefore available to be submitted to the Department staff prior to the issuance of the Department Order. Sierra Club has not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; therefore, Attachment 9 and references thereto in the appeal are not admitted and will be redacted from the appeal documents circulated to Board members.
- q. **Electronic links.** Pursuant to Chapter 2, § 24(B)(2), electronic links to documents will not be accepted. Therefore, the electronic links on pages 6, 7, 8, 23, 24, 26, and 28 of Sierra Club’s appeal are not admitted and will be redacted from the appeal documents circulated to Board members.

## **RESPONSES TO THE MERITS OF THE APPEAL**

Pursuant to Chapter 2, § 24(C)(4), the deadline for the filing of a response to the merits of the appeals is **March 29, 2022, at 5:00 p.m.** Because three separate appeals of the Department Order were filed, each appellant may submit a response to the merits of the other appeals. The licensee may respond to all three appeals separately or in a consolidated manner. An appellant may not provide further argument on their appeal and no new evidence will be accepted by the Board.

## **FILING DOCUMENTS**

All filings in this matter must be copied to the current service list of parties to the appeal proceeding. The filing of any submission or the service of any document or communication upon a party to the appeal proceeding is deemed complete when the document or communication is sent to the party or the party’s designated representative by electronic mail, postal mail, in-hand delivery, or telefax. Electronic mail is preferred, provided the signed original document is received by the Board within three working

days of the filing date. Any participant may request of the Board a paper copy of any filing in this matter. In the absence of such request, the Board and Board staff will provide service by electronic mail only. The Board staff or Chair may require the service of any document or communication upon a party to the appeal proceeding to be completed by paper copy using postal mail.

Filings with the Board must be directed to:

Mark C. Draper, Chair  
Board of Environmental Protection  
c/o Ruth Ann Burke  
17 State House Station  
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If you have any questions, you may contact Board Executive Analyst William F. Hinkel at [bill.hinkel@maine.gov](mailto:bill.hinkel@maine.gov) (207) 314-1458 or Assistant Attorney General Peggy Bensinger at [peggy.bensinger@maine.gov](mailto:peggy.bensinger@maine.gov) (207) 626-8578.

Sincerely,



Mark C. Draper, Chair  
Board of Environmental Protection

cc: Service List of Parties to the Appeal (January 15, 2022)