



BOARD ORDER

KINGFISH MAINE, LLC ) SITE LOCATION OF DEVELOPMENT  
Jonesport, Washington County ) NATURAL RESOURCES PROTECTION ACT  
) WATER QUALITY CERTIFICATION  
APPEALS OF: )  
SIERRA CLUB; ROQUE ISLAND )  
GARDNER HOMESTEAD )  
CORPORATION; and EASTERN )  
MAINE CONSERVATION INITIATIVE )  
)  
L-28995-26-F-Z (DENIAL) ) APPEALS  
L-28995-4C-G-Z (DENIAL) ) BOARD FINDINGS OF FACT AND ORDER  
L-28995-TH-H-Z (DENIAL) )  
L-28995-2F-I-Z (DENIAL) )  
L-28995-2G-J-Z (DENIAL) )

The Board of Environmental Protection (Board) has considered the appeals of Sierra Club of Maine (Sierra Club), Roque Island Gardner Homestead Corporation (Homestead Corporation), and Eastern Maine Conservation Initiative (Conservation Initiative) (collectively “Appellants”) of the permit issued to Kingfish Maine, Inc. (Kingfish or the Licensee) (Order #L-28995-26-A-N / L-28995-4C-B-N / L-28995-TH-C-N / L-28995-2F-D-N / L-28995-2G-E-N) (Department Order). These appeals were considered pursuant to the applicable provisions of the Site Location of Development law, 38 M.R.S. §§ 481 through 489-E (Site Law); the Natural Resources Protection Act, 480-A through 480-JJ (NRPA); Section 401 of the Clean Water Act (33 U.S.C. § 1341); and the Department of Environmental Protection’s (Department) rules, including Chapter 310, *Wetlands and Waterbodies Protection*; Chapter 315, *Assessing and Mitigating Impacts to Existing Scenic and Aesthetic Uses*; Chapter 335, *Significant Wildlife Habitat*; Chapter 375, *No Adverse Environmental Effect Standards of the Site Location of Development Act*; and Chapter 2, *Rule Concerning the Processing of Applications and Other Administrative Matters*. In addition to the appeals filed, the Board considered the underlying record, the supplemental evidence admitted into the record, and the responses to the appeals, and FINDS THE FOLLOWING FACTS.

A. PROCEDURAL HISTORY

History of Project:

On August 7, 2020, Kingfish submitted an application to the Department for a new Maine Pollutant Discharge Elimination System (MEPDES) permit/Waste Discharge License (WDL) for a daily maximum discharge of 28.7 million gallons per day of treated wastewater to Chandler Bay in Jonesport, a discharge that would be from a proposed

land-based Recirculating Aquaculture System (RAS). The Department conditionally approved the discharge in a combined MEPDES permit (#ME0037559 and WDL W009238-6F-A-N) (hereafter Waste Discharge License) on June 25, 2021. On July 22, 2021, Sierra Club filed with the Board a timely appeal of the Waste Discharge License. In an August 12, 2021 letter, the Board's Presiding Officer in that matter dismissed the appeal for failure to demonstrate standing to file an appeal and failure to comply with the Board's requirements for the content of appeals.

Kingfish applied for an Air Emissions License on April 5, 2021, for the operation of six emergency generators associated with the proposed aquaculture facility. The Department conditionally approved the Air Emissions License on August 17, 2021. The appeal period has expired for both the Air Emissions License and the Waste Discharge License, so they are no longer subject to appeal.

On March 30, 2021, Kingfish applied for a Site Location of Development permit to construct the recirculating aquaculture facility. Kingfish also applied for a Natural Resources Protection Act permit, as the water intake and outfall pipes would result in direct impacts to coastal wetlands and the overall facility would result in impacts to freshwater wetlands. On November 12, 2021, the Department issued a combined permit under the Site Law and NRPA approving the proposal. On December 13, 2021, Appellants each submitted timely appeals of the Site Law and NRPA permit decision to the Board.

## B. PROJECT DESCRIPTION

Kingfish proposes to construct and operate a RAS facility to raise saltwater finfish species, yellowtail kingfish (*Seriola lalandi*). The proposed facility would include two primary buildings, access roads, housing, a store, and an informational center. Building 1 would contain a broodstock facility and a hatchery. Building 2 would contain a series of separate tanks to maintain and grow fish as they progress to market size. In addition to broodstock and grow out facilities, the proposed project includes intake/outfall pipes and treatment facilities associated with process seawater supply and wastewater discharge as well as backup power generation facilities and conventional utility infrastructure.

The proposed project would result in approximately 21.9 acres of impervious area. The project would result in 261,196 square feet of freshwater wetland impacts, including 64,004 square feet of impact to wetlands of special significance that contain a peatland. The facility would include two approximately 1,400-foot-long intake pipes and two approximately 2,800-foot-long outfall pipes. The intake/outfall pipes would result in 7,136 square feet of direct impacts to coastal wetland.

### C. STANDING

Pursuant to Chapter 2, § 1(B), an aggrieved person is any person whom the Board determines may suffer a particularized injury as a result of a licensing or other decision. A particularized injury is an injury that adversely and directly affects one's personal rights to the use and enjoyment of the resource or their property. Two appellants, Homestead Corporation and Conservation Initiative, represented by their respective Board Chairs, identified ownership or other interests in areas with a potential to be adversely affected by the project. Homestead Corporation owns Roque Island and eight nearby islands, in proximity to the project. Conservation Initiative asserts they maintain several easements on inner islands in Chandler Bay across from the Kingfish project. In addition to a potential particularized injury to lands held in ownership or other interests, both Board Chairs representing these entities identify potential injuries that might adversely affect their personal use and enjoyment as members of their respective entities.

Appellant Sierra Club asserts it is an organization which works to protect Maine's wilderness heritage, promote smart growth, and safeguard Maine's clean water and coastline on behalf of over 20,000 Sierra Club members and supporters in Maine, including 31 members and supporters in Jonesport. Contrary to the other appellants, Sierra Club does not have ownership or other interests in areas surrounding the project that may constitute a particularized injury to the entity. Rather, Sierra Club claims a particularized injury through declarations of standing from identified members, namely, James Merkel, Holly Faubel, Jessica Goldblatt, Lindsay Smith, Jason Herrick, and Holly O'Neal, as well as through other unnamed members.<sup>1</sup> Sierra Club states "member Jim Merkel enjoys visiting Chandler Bay for purposes of swimming, sailing, and fishing . . . Similarly, member Holly Faubel frequently goes to this area for birdwatching . . . Other members enjoy observing the natural beauty of this area and recreating. Sierra Club identifies potential harms due to these uses."

The Board finds that each of these three appellants has articulated sufficient use of impacted resources or alleged a specific interest that may be adversely affected by the proposed project. As such, each appellant has demonstrated a possibility of particularized injury sufficient to meet the Department's definition of an aggrieved person and confer standing. Accordingly, the Board finds that the Appellants have demonstrated standing to bring this appeal before the Board.

### D. APPELLANTS' ARGUMENTS AND BASES FOR APPEAL

The Appellants each challenge the Department's conclusions regarding NRPA and Site Law licensing criteria, and collaterally challenge the findings and conclusions in the previously issued Waste Discharge License and Air Emission License. Appellant Sierra

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<sup>1</sup> Sierra Club includes the appeals of Homestead Corporation and Conservation Initiative as declarations of standing. Sierra Club also includes two declarations of standing from S. Nickolas Papanicolaou and Richard Aishton, representing ownership interests of Roque Island and Homestead Corporation. The Board analyzes these declarations in conjunction with Homestead Corporation and Conservation Initiative.

Club raises challenges to the Department Order's findings regarding potential impacts to scenic character, water quality, wildlife and fisheries, and wetlands. Sierra Club also challenges the Department's analysis of the proposed project with regard to solid waste disposal and air quality. Homestead Corporation primarily challenges the findings regarding the proposed project's potential impacts to water quality and other secondary impacts resulting from the discharge. Homestead Corporation also raises concerns regarding scenic impacts, and impacts resulting from noise and odor from the facility. Lastly, Homestead Corporation argues it was not apprised of the project in time to object, which the Board interprets as a contention that Kingfish did not provide adequate notice to the Homestead Corporation. Conservation Initiative similarly challenges the Department's findings regarding the proposal's potential impacts to water quality from the discharge and contends additional notice and community outreach was necessary for this project. Conservation Initiative raises concerns regarding impacts to wildlife and fisheries and challenges the Department's allowance of the use of the in-lieu fee wetland compensation program to address impacts resulting from the project.

#### E. REQUEST FOR HEARING

Appellants Sierra Club and Homestead Corporation request that the Board hold a public hearing on their appeals. Sierra Club did not provide with its request for a hearing the required offer of proof regarding the testimony or other evidence that would be presented at such a hearing. Homestead Corporation states that it requests a hearing to review unanswered questions about the potential impacts of the Kingfish project, including nitrogen levels affecting the ecosystem, water acidity, air quality, noise, light, and effluent modelling and composition. In addition, Homestead Corporation requests that a full "Environmental Impact Study" be conducted before the Board makes final findings.

Pursuant to Chapter 2, § 24(A), the decision to hold a hearing is discretionary with the Board. The Board may conduct a hearing if there is credible conflicting technical information regarding a licensing criterion and it is likely that a hearing will assist the Board in understanding the evidence. Appellant Sierra Club did not supply an offer of proof as required by Chapter 2 or identify any expert or technical witnesses likely to introduce credible conflicting technical information. Appellant Homestead Corporation describes several subject areas it would like to be topics at a hearing, but it does not describe any witnesses, testimony, or evidence it would present. In light of the lack of identification of evidence that the appellants would present at a hearing on these appeals, and the record developed by the Department in the underlying licensing proceeding, the Board finds that Appellants' arguments, to the extent they are relevant to the Site Law and the NRPA, can be adequately considered by the Board based on the record before it, without an evidentiary hearing. Accordingly, the Board denies the Appellants' request for a public hearing.

Regarding Homestead Corporation's request for a full "Environmental Impact Study," the Board interprets the request as one for an Environmental Impact Statement, which is a detailed written statement required in some instances in the federal licensing process,

pursuant to 42 U.S.C. 4332 (2)(C), the *National Environmental Policy Act* (NEPA). The Board notes that Environmental Impact Statements are only required by the federal government for “major federal actions.” The Department is not a federal agency and Maine does not have a state-specific equivalent to NEPA. Moreover, the Board does not have the authority to require the generation of an Environmental Impact Statement. Appellant Homestead Corporation’s request is denied.

#### F. REMEDY REQUESTED

Sierra Club argues that the Department failed to base its findings under NRPA and Site Law on substantial evidence, and therefore its conclusions were arbitrary and capricious. It asks that the permit be suspended in order to give the applicant time to incorporate a zero-effluent design into its facility. It requests that the Department review and modify the permit to restrict the use of the diesel generators to emergency use. They request that the permit be modified with the insertion of language which would nullify non-emergency uses of the generators allowed in the Air License. Conservation Initiative joins Sierra Club’s request and further asks the Department to “create a new standard for land-based aquaculture based on the zero effluent technology available.”

The Board notes that the Department does not dictate, absent limited conditions, the basic design or operation of the facilities for which it reviews permit applications. Rather, applications are reviewed, as proposed, for whether they comply with the statutory and regulatory licensing criteria. In addition, while the Board possesses authority to modify the Department Order on appeal, such a modification typically relates directly to the findings and conclusions of the Department Order, or conditions on the permit, and not the basic design and operations of the project. Accordingly, the Board will consider the assertions of the Appellants challenging the sufficiency of the evidence and the conclusions of the Department as a request to grant the appeal, reverse the decision of the Department, and deny the Site Law and NRPA permit applications of Kingfish Maine, LLC.

#### G. BOARD ANALYSIS AND FINDINGS OF FACT

##### 1. Procedural Challenge - Notice

Appellants Homestead Corporation and Conservation Initiative each raise a procedural challenge regarding the adequacy of notice provided by the Licensee. Homestead Corporation states it “was not appraised of the project in time to object to the [application for the Waste Discharge License], as it has not been considered an abutter. Nevertheless, [Homestead Corporation] is in fact a direct abutter via the fast moving and complex waters of Chandler Bay. The distance from the Project’s effluent depends on how accurate the applicant’s current models are.” (Homestead Corporation appeal, at p. 3). Similarly, Conservation Initiative contends that “...as property holders in this direct area, while we are not land-abutters, we are water-abutters (directly across from this location) and were not notified by Kingfish Maine at the beginning of this project, as required by

law, which significantly handicapped us in [participating] in a timely manner.” (Conservation Initiative at p.2).

Applicants for permits are required to provide public notice of the filing of their application in accordance with Chapter 2, §§ 1(A) and 14. In addition, for certain applications, including applications for Site Law permits, public informational meetings are required pursuant to Chapter 2, § 13. Chapter 2 requires applicants provide notice, via certified mail, to “abutters” and must publish the notice once in a newspaper circulated in the area in which the project is located. Chapter 2 § 1(A) defines “abutter” as a person “who owns property that both (1) adjoins and (2) is within 1 mile of the delineated project boundary, including owners of property directly across a public or private right of way.”

Consistent with these requirements, Kingfish included in the permit applications it filed with the Department a copy of the public notice it sent out of its intent to file an application for air emissions, NRPA, and Site Law licenses, along with certified mail receipts. It also submitted attendance records for a March 18, 2021 public informational meeting it conducted. Kingfish’s submissions demonstrated that it provided the notice of the applications that are the subject of this appeal, the NRPA and Site Law applications, to owners of property that adjoins the boundary of the proposed project. While Homestead Corporation and Conservation Initiative posit that as “water-abutters” they were entitled to receive notice by mail, this position is unsupported by Department rules. The Board finds that to interpret the Chapter 2 language that requires a property must adjoin the delineated project boundary in order to necessitate notice to property owners on these islands is overly broad and contrary to the rule. The Board finds that appellants Homestead Corporation and Conservation Initiative are not abutters as defined by rule and were not entitled to direct notice by certified mail.

The Board notes that the purpose of the notice requirement is to ensure that interested persons have an option to present evidence in support of or in opposition to a project during the review of the application and that aggrieved persons have an opportunity to appeal agency decisions. Evidence in the record demonstrates that the chair of one appellant group, Homestead Corporation attended the public information meeting on March 18, 2021, on behalf of another appellant group, Conservation Initiative, indicating that both were aware of the NRPA and Site Law applications at least following the public information meeting, and prior to submittal of the applications in March of 2021. Further, in May 2021, during the review period for the Site Law and NRPA applications, the chair of Conservation Initiative, copying the chair of Homestead Corporation commented on the Waste Discharge License for this project. Accordingly, the Board finds that appellants Homestead Corporation and Conservation Initiative demonstrated awareness of the NRPA and Site Law application, availed themselves of prior opportunities to comment on the project, and exercised their ability to appeal in a timely manner; thus, these appellants were not disadvantaged by a lack of direct written notice in this proceeding. The Board finds that Licensee complied with public notice requirements of Department rules.

## 2. Substantive Challenges – Water Quality.

### Regulatory Framework:

Both the NRPA and the Site Law contain licensing criteria directed at protecting existing water quality. The NRPA, in 38 M.R.S. § 480-D (5), requires an applicant to demonstrate that the proposed activity would “not violate any state water quality law, including those governing the classification of the State’s waters.” The Site Law, in 38 M.R.S. § 484 (3), requires that a developer demonstrate that it “has made adequate provisions for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect . . . water quality . . .”

Department rules expound on and interpret each standard in these two statutory frameworks. Chapters 310, 315, and 335 address how the licensing criteria of the NRPA are met. When the Department reviews water quality impacts under the NRPA in a case in which a Waste Discharge License application is being or has separately been evaluated, the focus of the NRPA review is impacts from regulated activities such as dredging, filling, disturbing soil, and placement of structures in, on, over, or adjacent to wetlands and waterbodies. In this context, the direct discharge of wastewater would be analyzed in the context of the Waste Discharge License application review, and compliance with the NRPA licensing criteria is based on how the project complies with Chapter 310, protecting wetlands and waterbodies, and Chapter 335, protecting significant wildlife and fisheries habitat.

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

Under federal law, Section 401 of the Clean Water Act, 33 U.S.C. § 1341 requires that any applicant for a federal license or permit to conduct any activity that may result in a discharge into waters of the United States obtain a Water Quality Certification (WQC) to ensure that the discharge will comply with applicable State water quality standards. Discharges subject to this requirement include both discharges of pollutants (pursuant to Section 402 of the Clean Water Act) and discharges of dredge and fill material (pursuant to Section 404 of the Clean Water Act). For the past two decades, the federal government has delegated to Maine, through its MEPDES program, authority to regulate discharges of pollutants under the federal law, Section 402 of the Clean Water Act. Discharges of dredge and fill material is undelegated and remains regulated by the Army Corps of Engineers. The Department provides WQC for Army Corps of Engineers permits in conjunction with its NRPA / Site Law licenses, which is the trigger for certification in this proceeding.

Analysis of Issues on Appeal:

Appellants raise numerous contentions regarding impacts to water quality, directly referencing alleged impacts from the effluent discharge itself and also arguing there were deficiencies in Kingfish's evidence on specific Site Law and NRPA standards regarding effects resulting from the effluent discharge. For instance, the Conservation Initiative questions the accuracy of Kingfish's modeling of dispersion of effluent (Conservation Initiative at p.1), requests additional baseline water quality data (Conservation Initiative at p.1-2), and expresses concern regarding the possibility of negative impacts including red tide algal blooms (Conservation Initiative at p. 2-3). Homestead Corporation similarly asserts that the discharge would create a substantial risk of toxic algae blooms (Homestead Corporation at p. 2), and challenges Kingfish's background data and modeling inputs (Homestead Corporation at p.3). Sierra Club asserts nitrogen from the discharge will result in the formation of visual algal blooms adversely affecting scenic character (Sierra Club at p. 5), expresses concern regarding proximity of significant wildlife habitat and threatened and endangered species, and other fisheries or marine habitats to the location of the modelled effluent plume (Sierra Club at p. 6-15) and directly challenges the Commissioner's findings on water quality impacts from discharge constituents, such as nitrogen and pH, that were made in the Waste Discharge License that was issued (Sierra Club at p. 21-26).

As discussed above, discharges of pollutants, such as those focused on by the appellants, are reviewed in the context of an application for a Waste Discharge License, and not the NRPA application review process. To the extent an effluent discharge is considered in a joint NRPA and Site Law application review, it is considered under the Site Law and its interpretative regulations, specifically here, Chapter 375, § 6 *No Unreasonable Adverse Effect on Surface Water Quality*. Section 6 of Chapter 375 discusses the potential for both point and non-point sources of pollution to cause pollution to surface water and thereby includes in its scope of review consideration of relevant evidence on whether the development will discharge any water pollutants which affect the state classification of a surface water body. The rule also requires that best practicable treatment of point sources of water pollutants be utilized, and that any effect on surface water temperatures be in compliance with Department regulations.

Accordingly, the Department requires Site Law applicants for developments discharging wastewater to submit evidence that a waste discharge license has been or will be obtained. Effectively, the Department's Bureau of Land Resources, the bureau responsible for implementing Site Law and NRPA requirements defers, in matters such as the consideration of impacts resulting from regulated discharges of pollutants, to the Bureau of Water Quality, the bureau tasked with analyzing waste discharge license applications, and implementing the delegated Clean Water Act authority through its MEPDES program. Here, Kingfish applied for and received a waste discharge license as required by the MEPDES program and submitted evidence of that approved Waste Discharge License during the review of the Site Law permit application.



Appellants challenge the findings underlying that Waste Discharge License in this appeal of the Site Law and NRPA permit decision, but the Board finds no error in the Department's reliance on another valid Department order<sup>2</sup>, and will not consider a challenge to the findings made in that license in the context of this appeal. With regard to arguments made by appellants directly addressing the Waste Discharge License findings or arguments whose premise relies on assumptions contrary to findings and conclusions in that Waste Discharge License, the Board finds those challenges outside the scope of the Board's review of the NRPA and Site Law permit and does not address them further. The Board finds that the Licensee complied with the Department's regulations by submitting evidence of a valid Waste Discharge License and on that basis finds that the effluent discharge from the proposed project will not have an unreasonable adverse effect on water quality.

### 3. Substantive Challenges – Wildlife and Fisheries

While appellants Sierra Club and Conservation Initiative both primarily raise wildlife and fisheries concerns associated with the waste discharge, and issues addressed in that licensing process, some issues they raise are appropriately subject to review under the NRPA or Site Law licensing criteria. Sierra Club challenges the Department's findings concerning impacts to endangered and threatened species (Sierra Club at p. 7), which may be affected by the construction activities for the intake outfall pipes including the associated dredging or filling. Sierra Club also challenges the Department's findings pertaining to impacts on fisheries and other aquatic life (Sierra Club at p. 13), from the presence and operation of the intake/outfall pipes. Similarly, Conservation Initiative, in addressing impacts to fisherman, argues that the potential for the intake and outfall pipes to eradicate local scalloping areas and for construction to impact nearby eel grass wetland is grounds to overturn the Department's decision. Separately, Conservation Initiative challenges the Department's allowance of the use of an in-lieu fee payment as compensation for impacts to protected natural resources.

#### Impacts from Construction of Intake/Outfall Pipes

Though not explicitly stated in the appeals, the Appellants' assertions regarding impacts on endangered and threatened species generally and other aquatic life can be reasonably discussed as challenges to the NRPA findings regarding the impacts of the construction of the intake and discharge pipes and the associated disturbance of subtidal habitat. Sierra Club identifies three species of concern with regard to these potential impacts, razor-billed auk, harlequin duck, and the purple sandpiper, and other aquatic life such as lobster, scallops, mussels, and other shellfish. One concern expressed is the potential for the intake pipe to suction in spat and larva, and "decimate all upper and mid-water eggs, spat and juvenile fish carried in on the tides."

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<sup>2</sup> The 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.

The Board finds that while the record demonstrates that some endangered and threatened species may be present in relative proximity to the proposed project, the Appellants, with one exception, fail to identify specific impacts to the listed species. The presence of threatened and endangered species in the vicinity of a project is not, per se, an unreasonable impact under the NRPA. The Board must consider the evidence on the presence of relevant species, the nature of the proposed activity, and possible impacts to determine the likelihood of harm to threatened and endangered species.

To assist in developing and analyzing evidence on threatened and endangered species, and wildlife and fisheries impacts in general, the Department solicits comments from sister agencies with subject matter expertise, such as the Department of Marine Resources (DMR) and the Department of Inland Fisheries and Wildlife (MDIFW). Staff of these agencies review the application and other evidence, based on their expertise, and will express concerns regarding aspects of the proposal when warranted. The Board notes that each agency availed themselves of the opportunity to comment on the project and, while MDIFW expressed concerns regarding peatland habitat, and DMR expressed concerns regarding potential for gear entanglement, neither agency expressed any concerns regarding any threatened or endangered species. In the application and supporting materials, Kingfish provided initial correspondence with sister agencies identifying potential areas of concern and described how structures were located to avoid those concerns, including maintaining setbacks and directing stormwater flow away from those resources. In addition, Kingfish provided a detailed description of the proposal to which DMR commented, “The construction of the pipeline and effluent discharge should have little or no long-term impact to the Lobster Industry landings or biology;” “[t]he effluent discharge for temperature and salinity does not appear to be of concern to juvenile or adult scallops;” and “[t]his project, as proposed, should not result in significant adverse impacts to marine resources . . .” The Board finds that the evidence in the record supports the Department’s findings on the effects of the discharge on fisheries.

Regarding the appellants’ arguments concerning the Department’s findings on impacts from the construction of the intake/outfall pipes in the coastal wetland and associated subtidal disturbance, the Board has reviewed the Kingfish submissions on impacts from the location and length of the pipelines. The Board finds that Kingfish located and designed the construction of the pipelines to reduce coastal wetland impacts to the greatest extent feasible, while weighing other factors such as distance necessary to facilitate effluent dispersion. In the application and responses to Department comments, Kingfish provided detailed construction methods and sequencing for the construction of the pipelines. Factors relevant to reducing potential impacts include the construction of the pipeline above the seafloor, reducing impacts to wildlife movement, and the use of EConcrete for anchoring, potentially mitigating traditional impacts.<sup>3</sup> Lastly, Kingfish proposes to use appropriate annual and between-tidal work windows, sedimentation control techniques such as silt booms and turbidity curtains during excavation and backfill, and sediment barriers during dewatering. On this basis, the Board finds that the

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<sup>3</sup> The Department Order requires monitoring of ensure the effectiveness of EConcrete as habitat creating material and specifies that the Department may require additional compensation.

Kingfish’s proposal minimizes impacts and those impacts that will occur will be temporary and unlikely to cause a significant disturbance to relevant species if performed as proposed in the application and in conformance with accepted work windows conditioned in the Department Order. On the basis of this evidence, and the DMR comments, the Board finds that the proposed 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, and will not cause an undue adverse effect on the natural environment.

#### Use of In-Lieu Fee Compensation

Appellant Conservation Initiative raises concerns regarding the Department’s approval of the use of an in-lieu fee payment as a form of compensation for environmental impacts. Conservation Initiative states that “money will not restore an ecology, particularly a fragile one. The Department is responsible for protecting the environment and agencies should not be receiving financial gain for allowing the depletion of our natural resources.” (Conservation Initiative at p. 3.)

The Legislature established the in-lieu fee method of compensation for impacts, in 38 M.R.S. § 480-Z, and authorized the Department to “establish a program providing for compensation of unavoidable losses” to areas enumerated in the statute as a result of activities regulated by NRPA. The in-lieu fee program that has been established pursuant to this authorization may be used as an alternative to traditional compensation processes, such as the applicant creating a new wetland. Under this program, fees are deposited into the Maine Natural Resource Conservation Program to fund the restoration, enhancement, preservation, and creation of similar resources to maintain ecological benefits. The Department chooses a third party to carry out this process. The program allows the Department to manage the locations of and maximize the ecological benefits of compensatory mitigation and restore, enhance, preserve, or create resources that best match the natural characteristics and values that were impacted. The Board finds the Appellants’ characterization of the program inaccurate and its contention of error in the Department order on this issue to be without merit.

#### 4. Substantive Challenge – Solid Waste

Appellant Sierra Club argues that the Licensee has failed to demonstrate adequate provisions for solid waste disposal as required by 38 M.R.S. § 484(6) and Chapter 375, § 16. Sierra Club argues that “because Juniper Ridge Landfill does not yet have a special waste license to accept the waste” (Sierra Club at p.27) the Licensee has not demonstrated that such waste will be adequately disposed. In addition, Sierra Club states that “... the Department has erred in its assessment of the Coast of Maine compost [facility’s]ability to properly dispose of 5 tons daily of waste product . . .”(Sierra Club at p.27).

Chapter 375, § 16 expounds upon and interprets the Site Law standard requiring that an applicant demonstrate that it has made adequate provisions for solid waste disposal. Submission requirements include (1) an estimate of the types and quantities of solid waste generated by the development and the proposed method of disposal and (2) a letter from the operator of a solid waste management facility stating that adequate capacity exists for solid waste generated by the development and that the development may utilize the solid waste facility.

The Board has reviewed Section 18 of Kingfish's Site Law permit application, which includes the relevant submissions pertaining to solid waste disposal. Kingfish identified the types and some volumes of waste and included letters from Casella Waste Systems and Agri-Cycle Energy/ Exeter Agri-Energy. Each letter states that the entity has adequate capacity to accommodate the wastes that will be generated from the project and a willingness to provide the capacity to Kingfish. The evidence shows that during the processing of the application, the Department elucidated further details through comments and correspondence including clearer estimates of quantities for each type of solid waste and the proposed entities for disposal. That evidence reflects that Kingfish intends to dispose of 990 cubic yards of construction and demolition debris at Juniper Ridge Landfill, operated by Casella, 0.5 tons per day of municipal solid waste at PERC, and 25 tons per day of solid waste from treatment process water at Juniper Ridge Landfill. During the processing of the application, the evidence reflects the plan shifted to transport five tons per day of fish processing by-product to the Coast of Maine compost facility. Department staff confirmed that each proposed facility is currently in compliance and has sufficient capacity to accommodate wastes proposed from Kingfish.

While Sierra Club is correct in stating that Juniper Ridge Landfill will need to acquire a special waste license for ongoing disposal of solid waste from treatment of process water, a licensee is not required by Site Law to have these arrangements finalized in order to be granted approval. The Board finds that Chapter 375 requires that an applicant must only submit a proposed method of disposal with letters of intent from each entity proposed. Notwithstanding, the Department, using its discretionary authority to establish any reasonable requirement as a condition for approval, added a safeguard in the event proposed methods failed to transpire, stating, "if Juniper Ridge Landfill does not receive the special waste license . . .the applicant must find an alternative disposal site and submit the new proposal to the Department for review and approval prior to any disposal." The Board notes that requiring special waste licensure prior to operation could lead to conflicts with the Department's solid waste regulations. To obtain an ongoing special waste acceptance license, a landfill must, under Chapter 400 § (3)(B)(5) and Chapter § 401 (4)(C)(1)(b), submit test results of the characterization of the waste. Thus, in effect, the waste characterization and the application for disposal cannot be performed in accordance with Department rules until the project is in operation and the waste has been generated. The Board finds the Kingfish submissions, together with the more detailed proposals in subsequent communications, compliant with Department regulations and the appropriate balance between the flexible and practical purpose of Site Law as set forth in

38 M.R.S § 481, while ensuring compliance with the Maine Hazardous Waste, Septage and Solid Waste Management Act, 38 M.R.S. §§ 1301 through 1319-Y.

5. Substantive Challenges - Air Quality

Appellant Sierra Club challenges the Department’s findings on whether the Licensee adequately demonstrated the development will not adversely affect air quality as required under the Site Law. Specifically, Sierra Club argues that the Department Order “leaves out any discussion of the gas fired boiler,” (Sierra Club at p. 29) and “failed to adequately discuss adverse environmental effects from the emissions of eight diesel generators.” (Sierra Club at p. 30). Chapter 375 § 1 elaborates on the requirements under the air quality standard of no unreasonable adverse effect under the Site Law. The rule requires that an applicant must demonstrate that best practicable treatment of point sources will be utilized and that point source emissions meet state ambient air quality standards and state emissions standards. The rule provides that evidence that an Air Emissions License has been or will be obtained affirmatively may demonstrate compliance with this requirement.

Kingfish obtained an Air Emissions License from the Department, #A-1157-71-A-N, on August 17, 2021, and requested that the Department consider that as evidence that it met the Site Law standard. The Board finds that Kingfish met the submission requirements and review standards of Chapter 375, and the Site Law standard in 38 M.R.S. § 484(3) . While Appellants point out the lack of discussion in the Department Order, the Board notes that Site Law rules contemplate a more cursory review of air emissions in the review of a Site Law application for a project in which there has been or will be a more robust Air Emissions License review. In this case, the Air Emissions License contains detailed review of the emission sources and their impacts. In that license, the Department, after analysis, made findings that emissions from the proposed project will receive best practicable treatment, will not violate applicable emissions standards, and will not violate applicable ambient air quality standards in conjunction with emissions from other sources.<sup>4</sup> The Board finds that in light of the rule’s provision that an Air Emissions License can be the evidence supplied to meet this Site Law criterion, the Board may accept that as credible evidence in support of the Department’s finding that the proposed project will not result in an unreasonable adverse effect on air quality under the Site Law review..

6. Substantive Challenges – Other Site Standards

Appellant Homestead Corporation challenges the Department’s findings under several Site Law standards in a series of arguments, stating “Prevailing southwesterly winds would amplify both industrial noise and odor emanating from the Kingfish Maine operation ... Once built, the facility will be strikingly visible, day and night, from the

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<sup>4</sup> The Air Emissions License, Department Order A-1157-71-A-N, is not before the Board in this appeal. To the extent appellants challenge findings and conclusions made in that license decision, the Board finds those contentions untimely and does not address them.

entirety of the western shore of Roque and Little Spruce Islands, as well as other high points of land on the islands,' (Homestead Corporation at p. 2) and "Impacts of noise, from tractor trailer trucks and the facility itself, light pollution and potential for smell will adversely affect the entire region." (Homestead Corporation at p.7). The Board identifies these arguments as challenging the Department's findings on the application under three Site Law standards: no unreasonable effect on scenic character; control of noise; and adequate provisions for control of odor. The Board addresses each in turn.

### Scenic Character

Homestead Corporation contends that the Department erred in its finding that the development will not adversely affect the scenic character of the area, arguing that the impacts to specifically the views from the western shore of Roque and Little Spruce Islands will be significantly affected. Applicants for a NRPA permit and a Site Law permit are required to address licensing standards related to scenic character. The NRPA requires that an applicant demonstrate that the proposed project will not unreasonably interfere with scenic and aesthetic uses of protected resources, and the Site Law more generally requires an applicant to demonstrate the development will not adversely affect the scenic character of the surrounding area. Under the Site Law, Chapter 375 § 14 expounds upon the statutory standard, requiring an applicant to demonstrate that: (1) the design of the proposed development takes into account the scenic character of the surrounding area; (2) a development which is not in keeping with the surrounding scenic character will be located, designed and landscaped to minimize its visual impact to the fullest extent possible; and, (3) structures will be designed and landscaped to minimize their visual impact on the surrounding area. Under the NRPA, Chapter 315 elaborates on the standard, and scenic impacts under are to be evaluated from those public resources and public lands used by the public which are defined as "scenic resources." Chapter 315 also lays out factors to be considered when reviewing impacts to scenic uses, specifically the consideration of landscape compatibility, scale contrast, and spatial dominance of the project.

Although not explicitly applicable to Site Law, the Board finds the landscape elements provided for consideration under the NRPA's Chapter 315 parallel to and instructive to the "keeping with the surroundings" and "designed and landscaped" principles of Chapter 375. Specifically, the Board notes that color, form, line, and texture as sub-elements in gaging compatibility with existing surroundings and determinations of size, scope, and dominance of an activity within a viewshed are equally reliable factors in achieving the goals of the Site Law standard.

The Licensee submitted both the DEP's Visual Evaluation Field Survey Checklist and a narrative submission on visual quality and scenic impacts to demonstrate that the project meets the applicable standards. The Licensee primarily addressed visual considerations from the Atlantic Ocean, a scenic resource; however, the submission includes discussion pursuant to Site Law of visual effects from landward perspectives. As noted above, the

Homestead Corporation appeal primarily addresses the “strikingly visible” facility from the shore of nearby islands and by extension the surrounding ocean uses.

The Licensee noted its efforts to create a “pleasing scenic effect” with the design of the structural components necessary to achieve operational objectives. The evidence reflects that strategies employed by Kingfish included utilizing rural and agricultural forms consistent with existing character of the area, designing buildings with different massing, rooflines, and orientation to create a foreground campus of structures, varying wall planes to retain visual interests, and screening building components with preserved trees and new plantings. From landward perspectives, the Licensee notes an improved condition from existing unkept yards and buildings.

Based on maps submitted by Department staff and accepted into the record by the Board, the islands’ viewpoints of concern that are cited by the appellants, where the uses of the coastal wetland are likely to primarily occur, range in distance from the proposed project approximately 1.5 to 2.5 miles from the primary project site and approximately 1 to 2 miles from the discharge outfalls.

The Board finds Kingfish’s methods of mitigating visual impacts to be in line with the acceptable measures detailed in Chapters 315 and 375. Specifically, features such as colors, textures, and materials were designed to facilitate landscape compatibility with the existing character of the area and the existing state of the shoreline. The proposal, through those means and use of vegetative buffers, is adequately in keeping with the existing scale of the viewshed and avoids unreasonable spatial dominance, especially considering the distances to the viewpoints of concern described by the appellants. The Board has also reviewed photo simulations in the record and finds them to be an adequate representation of the visual impact to existing uses from the ocean and shoreline vantage points and consistent with these conclusions. Accordingly, the Board finds that the Licensee has adequately taken into account the scenic character of the surrounding area and appropriately designed and landscaped the project to minimize visual impacts to the fullest extent possible. Therefore, the Board finds that the proposed project will not unreasonably harm existing scenic or aesthetic uses and will not have an unreasonable effect on scenic character.

#### Control of Noise

Homestead Corporation argues that the Department decision is in error because it did not adequately consider noise impacts from the facility itself and truck traffic generated by the facility. The Department rules interpreting the Site Law, Chapter 375 § 10, provide specific standards for the review of noise impacts. Within that Chapter, section 10(C)(5) lists types of noise that are exempt from the Department’s regulation of noise from Site Law developments. In this list, Section 10(C)(5)(c) exempts noise from registered and inspected vehicles and Section 10(C)(5) (i) exempts sounds associated with aquaculture from Site Law review or regulation. Accordingly, in the Department Order, the Commissioner found that no regulated sources of noise were identified.

Upon review of the Site Law and Chapter 375, the Board finds that the sounds associated with aquaculture and registered and inspected vehicles are exempt from consideration and therefore the Department Order properly found that there are no regulated sources of noise in the proposed development that will result in an unreasonable effect on the natural environment.

#### Control of Odor

Homestead Corporation contends that odors emanating from the development will adversely affect the region, and therefore argues that the Department Order is in error in finding that Kingfish has made adequate provisions for controlling odors. Interpreting the Site Law, Chapter 375 § 17 requires an applicant to make adequate provisions for controlling odors. The rule requires any development likely to be the source of offensive odors to identify any source of odor, estimate the area which would be affected by the odor, and identify proposed systems for enclosure of odor-producing materials and processes, or proposed uses of technology to control, reduce, or eliminate odors. The Department Order did not directly address control of odor in its findings, presumably exercising agency discretion in determining that the proposal was not likely to be the source of offensive odor and therefore was not required to demonstrate that they had made adequate provision for the control of odors. However, the Board agrees with the Appellants that the project possesses a potential to emit odors. The processes inherent in recirculating aquaculture systems involve potential sources of odor and therefore should be addressed.

The Board reviewed the evidence in the record pertaining possibly to adverse impacts from odors. In analyzing the issue raised by the Appellant, and the evidence in the record, the Board notes that Kingfish did identify the feed supply and stored treated sludge as potential sources of odor, and proposes to locate those sources centrally in the facility and away from adjoining properties. The Licensee also proposes to equip atmospheric tanks containing potential sources of odor with vents utilizing carbon canisters. The Board notes that the record reflects that the parcel of property on which the project is located is 93 acres in size.

Appellants Homestead Corporation challenge the Department's Order on odors from the project generally, simply identifying the potential for the project to smell, and possibility that winds may carry that odor to areas impacting the Appellants.

As required by Chapter 375, § 17, the Licensee identified the potential sources of odors, their relative location, and their potential, after use of control technology, to emit offensive odors. The Board finds that, given the size of the actual facility, the large parcel of property on which it is located, and the location and control methods for sources of odor, the project as proposed will not be a source of odors adversely affecting the natural environment for Appellants or closer adjoining properties. Accordingly, the Board finds the Licensee has made adequate provisions for controlling odors.



## H. CONCLUSIONS

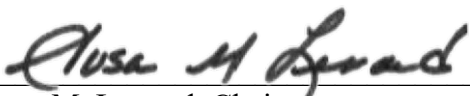
Based on the Board's analysis and findings of fact above, the Board makes the following conclusions.

1. The Appellants filed timely appeals in accordance with Chapter 2, § 24(A).
2. The Appellants are aggrieved persons pursuant to Chapter 2, § 1(B) and have standing to bring their appeals before the Board.
3. A public hearing is not warranted for this appeal.
4. The proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.
5. The proposed 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.
6. The proposed activity will not violate any state water quality law, including those governing the classification of the State's waters.
7. The developer has made adequate provision for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities.
8. The developer has made adequate provision of utilities, including water supplies, sewerage facilities and solid waste disposal, required for the development, and the development will not have an unreasonable adverse effect on the existing or proposed utilities in the municipality or area served by those services.

THEREFORE, the Board DENIES the appeals of Sierra Club of Maine, Roque Island Gardner Homestead Corporation, and Eastern Maine Conservation Initiative, and AFFIRMS the Department Order, L-28995-26-A-N/ L-28995-4C-B-N / L-28995-TH-C-N / L-28995-2F-D-N / L-28995-2G-E-N. All findings, conclusions, and conditions of the underlying Departmental Order, # Order L-28995-26-A-N/ L-28995-4C-B-N / L-28995-TH-C-N / L-28995-2F-D-N / L-28995-2G-E-N, that are not addressed in this Order are incorporated herein.

DONE AND DATED AT AUGUSTA, MAINE, THIS 4<sup>th</sup> DAY OF AUGUST, 2022.

BOARD OF ENVIRONMENTAL PROTECTION

By:   
Susan M. Lessard, Chair