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Via email:
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Holly Iossa, Chair
Jonesport Board of Appeals
70 Snare Creek Lane
Jonesport, ME 04649

Re: Appeal of Kingfish Maine's Application (#800) to the Town of Jonesport Planning Board to Construct and Operate an Industrial Facility in the Rural Residential District and Shoreland Zone

Dear Chair Iossa and members of the Jonesport Board of Appeals:

We write on behalf of Protect Downeast, which has appealed, on behalf of its members,[1] the November 29, 2022 decision (hereinafter the "**Decision**") by the Town of Jonesport Planning Board to approve the application (the "**Application**") filed by Kingfish Maine ("**Kingfish**") to construct and operate an industrial aquaculture farm (the "**Industrial Facility**") on Natt Point (the "**Property**") by finding that Kingfish satisfied the standards set forth in the Town's Land Use and Development Ordinance ("**LUDO**") and Shoreland Zoning Ordinance ("**SZO**").

The purpose of this letter is to substantively respond to the arguments raised in the letter Kingfish sent to the Board on January 20, 2023 (the "**Kingfish Letter**"), which in part replied to our appeal letter dated December 29, 2022 (the "**Appeal Letter**"). The Kingfish Letter, as has been the case with each opportunity it is given, also expounded on irrelevant proceedings. We will not waste the Board's time taking Kingfish to task over these attempts to confuse this Board as it did in the Planning Board proceedings except to once again point out that two of the Maine Department of Environmental Protection ("**DEP**") permits Kingfish claims are final are in fact on appeal before the Kennebec Superior Court, the outcome of which could result in the revocation of or significant alteration to those permits. As we will explain below, any arguably substantive objections raised in the Kingfish Letter to our appeal of the Decision are without merit and should be rejected by the Board.

[1] Those members include the named appellants: Cynthia Beauvais, Karl Ebert, Owen Moody, and Carrie Peabody.

I. Preliminary Matters

A. Standard of Review

Protect Downeast and Kingfish agree that the appropriate standard of review governing the Board's consideration of this appeal is appellate. What appellate review means in practice is that the Board:

> [R]eview[s] the record of the proceedings before the previous tribunal, review[s] the evidence presented to that body, review[s] the tribunal's written or recorded findings, hear oral or written argument of the parties, and determine[s] whether the lower tribunal erred in reaching its decision.[2]

Although Protect Downeast has reconsidered its position on the standard of review, it stands behind the arguments raised in the Appeal Letter that the Decision must be vacated because it is "clearly contrary" to the terms of the LUDO and SZO.

B. Standing

Kingfish, in its typical and unnecessarily diminutive rhetorical fashion, declined to challenge Protect Downeast's standing to bring this appeal to the Board. Because there is no dispute on this issue, the Board should find that Protect Downeast has standing on behalf of its members to prosecute this appeal.

II. Argument

A. The conflict provision in the LUDO requires the Board to vacate the Decision because it is clearly intended to resolve conflicts in the LUDO by applying the more restrictive standard.

As explained in detail in the Appeal Letter, the LUDO contains a conflict provision that instructed the Planning Board to generally resolve conflicts between more restrictive and less restrictive provisions by applying the stricter standard (the "**Conflict Provision**"):

> Section 11. CONFLICTS WITH OTHER ORDINANCES
> Where provision of this Ordinance conflict with the provisions of other regulations or ordinances, **whichever imposes the more stringent restrictions shall prevail**.[3]

In its letter, Kingfish raises several objections to Protect Downeast's argument on this point, none of which cure the fatal defects with the Decision.

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[2] *Stewart v. Town of Sedgwick*, 2000 ME 157, ¶ 8, 757 A.2d 773.
[3] LUDO § 11 (emphasis added).

1. *The authorization of "functionally water-dependent uses" is not an "exception" to the prohibition on industrial and commercial structures that applies to the Property under the LUDO.*

As Protect Downeast points out in the Appeal Letter, the Application is unambiguous in describing the "industrial" and "commercial" uses of the Property through the processing of yellowtail kingfish on site and the preparation and packaging of that processed fish for market:

> The facility would hatch, grow, and **process fish** in newly constructed buildings. . . . The rest of the growth period and **processing and shipping** will be in the primary building (Building 2).[4]

Kingfish does not dispute that it is proposing an industrial and commercial operation. In fact, Kingfish's intention to make industrial and commercial uses of the Property is clearly depicted in the video tour of its facility in the Netherlands.[5]

Figure 1: Screenshot from "Tour of Zeeland Facility" video provided by Kingfish to the Planning Board. Text and graphic overlays have been superimposed thereon to highlight the apparent processing and packaging of fish depicted in the video.

Kingfish does not refute that the activities depicted in the video are analogous to the uses Kingfish plans to make of the Industrial Facility; nor does it challenge Protect Downeast's interpretation of the portion of the Application describing industrial and commercial uses of the Property.[6]

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[4] Record Index, Tab #20, "Kingfish Maine Application w. Exhibits, at 24 (emphasis added); *see* Appeal Letter at 16–19.

[5] Record Index, Tab #66, LT Jonesport PB – From A. Kendall Re: Kingfish Maine, Inc. Planning Board Application #800 w/ Attachments, "66. Linked Video – Tour of Kingfish Zeeland Facility."

[6] As it did through the proceedings before the Planning Board, Kingfish decided to offhandedly dismiss Protect Downeast's argument on this issue instead of engaging with its substance. *See* Kingfish Letter at 10 ("Much of Appellant's discussion on this point is strained to the point of being objectionable, were it relevant, but it is not.") It strikes Protect Downeast as strange that Kingfish would not directly refute Protect

Instead, Kingfish argues that it is entirely irrelevant whether or not the Industrial Facility involves industrial and commercial uses of the Property because the authorization in LUDO § 19.B for "functionally water-dependent uses" overrides—and provides an exception to—the prohibition on industrial and commercial structures in sections 13.E and 13.F of the LUDO.

This argument is without merit. Rather than deal directly with the substance of Protect Downeast's contention that the Industrial Facility is comprised of prohibited "industrial" and "commercial" structures, Kingfish attempts to sidestep the issue by asking the Board to ignore the conflict that arises when the LUDO is applied to the Industrial Facility on the grounds that the drafters of the LUDO could not possibly have intended to create "a fundamental conflict between two provisions . . . so closely related to each other."[7] Notably, Kingfish does not cite to any case law or rules of ordinance construction to support its position; it simply asks the Board to accept this argument on its face. The Board should decline Kingfish's invitation.

First, nothing in the LUDO indicates that the permission to conduct a "functionally water-dependent use" operates an "exception" to the prohibition on "industrial" and "commercial" structures. These provisions are presented separately on the land use table in LUDO § 15, with one pertaining to the "use" of property and the others regulating "structures." If the legislative body of the Town wanted one provision to operate as an exception to the other, despite their different subject matter, it could have organized the land use table to accomplish that objective. Because the land use table cannot be reasonably interpreted to present a "functionally water-dependent use" as an express exception to other prohibitions on that table, Kingfish's argument must be rejected.

Second, while a conflict does arise when these provisions are *applied* to the Industrial Facility, Protect Downeast does not claim that there is a "fundamental conflict" *in theory* between the permission to conduct "functionally water-dependent uses" in LUDO § 19.B and the prohibition on "industrial" or "commercial" structures in sections 13.E and 13.F. In fact, Protect Downeast believes that there is a "reasonable interpretation" that "yields harmony"[8]—just not the interpretation proposed by Kingfish.

The Maine Supreme Judicial Court instructs that when there is a conflict in the terms of an ordinance, "[e]ach section of an ordinance should be read so as to harmonize with the entire legislative scheme of which it is a part."[9] As explained in *Cram v. Inhabitants of Cumberland County:* "Statute provisions, unless absolutely conflicting, are to be construed so as to make them operate harmoniously as a whole, giving each its appropriate effect—*not using one section to evade or abrogate another.*"[10] The way to do that is not to, as Kingfish suggests, read the water-dependent provision as

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Downeast's interpretation of the Application and the video tour if Kingfish is, in fact, as confident in its position as it would like the Board to believe.

[7] Kingfish Letter at 6.

[8] *Davis v. SBA Towers II, LLC*, 2009 ME 82, ¶ 22, 979 A.2d 86; *see Yeadon Fabric Domes, Inc. v. Maine Sports Complex, LLC*, 2006 ME 85, ¶ 20, 901 A.2d 200 ("When two statutes appear to be inconsistent, we should harmonize them if at all possible.").

[9] *Stewart v. Inhabitants of Town of Durham*, 451 A.2d 308, 310 (Me. 1982); *accord Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." (quotation marks omitted).)

[10] 148 Me. 515, 517, 96 A.2d 839, 841 (1953) (emphasis added). Although *Cram* concerns statutory construction, the Law Court has made it clear that the rules governing statutes generally apply when

an "exception" that "evad[e]s" the prohibition on industrial and commercial structures.[11] Reading the LUDO in that manner constitutes a clear violation of the Conflict Provision. Instead, the Board should have interpreted the LUDO to permit "functionally water-dependent uses" when those uses do not involve "industrial" or "commercial" structures—thereby adopting an interpretation that both aligns with the canon of construction recited above and the Conflict Provision.

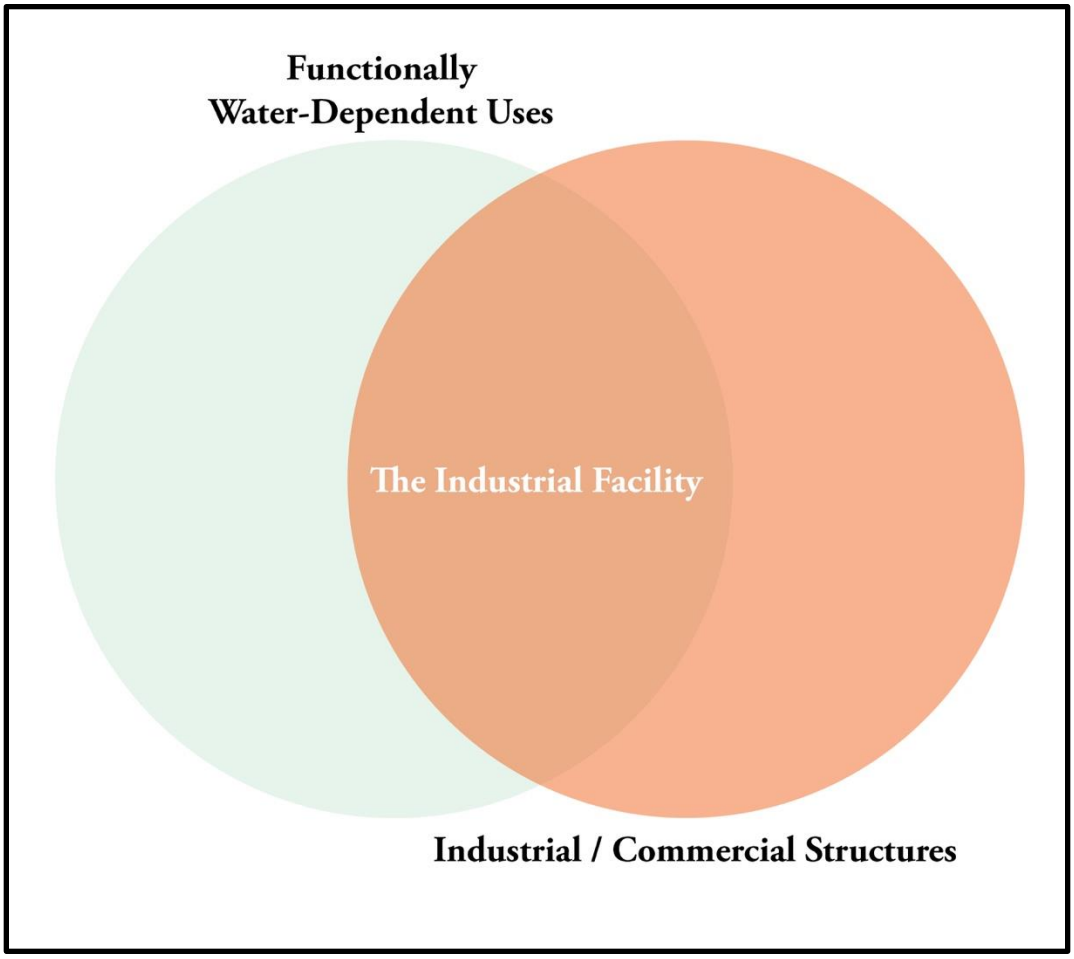

Figure 2: A visual representation of the property interpretation of LUDO § 15. The prohibition on industrial and commercial structures, depicted in orange, and the permission for "functionally water-dependent uses," shown in green, overlap, but because the Conflict Provision required the application of the stricter provision if and when there is a conflict, the Industrial Facility is subject to the prohibitions on industrial and commercial structures.

But that is not what the Planning Board did or what Kingfish proposes. Instead, the Planning Board interpreted the provisions on water-dependent uses and industrial/commercial structures as mutually exclusive—i.e., either an activity is an allowed "functionally water-dependent use" or it is prohibited if it involves "industrial" or "commercial" structures. By reading these provisions as mutually exclusive and not applying the Conflict Provision, the Planning Board violated the canon of construction regarding the harmonious interpretation of different provisions and failed to impose

interpreting zoning ordinances. *Zappia v. Town of Old Orchard Beach*, 2022 ME 15, ¶ 10, 271 A.3d 753 ("The meaning of terms or expressions in zoning ordinances is a question of statutory construction.").

[11] *See Cram,* 148 Me. at 517, 96 A.2d at 841.

the stricter standard as required. Consequently, the Board must vacate the Decision as clearly contrary to that ordinance's terms.

2. The rules of construction cited to by Kingfish do not nullify the express terms of the Conflict Provision.

Kingfish's next argument is that a series of rules for interpreting ordinances and statutes should take precedence over—and effectively nullify—the Conflict Provision.[12] What Kingfish fails to mention is that these canons of construction do not apply if the language in the ordinance is unambiguous; when an ordinance provision is "clear on its face," the Board should "look no further than its plain meaning."[13] But Kingfish omits this critical first step by failing to identify any *ambiguous* provision in the LUDO that the Board may interpret through the use of the rules of construction.[14] Because the prohibition on industrial and commercial structures is unambiguous, the rules referenced in the Kingfish Letter are irrelevant to the Board's review of the Decision.

Notwithstanding the fact that *none* of the rules of construction recited by Kingfish apply in this matter, we believe it is important to point out to the Board that Kingfish's claim that conflicts between ordinance provisions must be resolved by applying the more *specific* provision is especially problematic. The Maine Supreme Judicial Court has considered this exact issue on two occasions when the ordinance under review contained a conflict provision, and both times the Court rejected the idea that because one provision was more specific, it automatically controlled, even though it was less restrictive than the other provision. In *Logan v. City of Biddeford,* the Court resolved a conflict between ordinances when there was a conflict provision by applying the stricter standard, even though that stricter provision was contained in the town's "general ordinance" and the more permissive standard was provided in its shoreland zoning ordinance.[15] Similarly, in *Two Lights Lobster Shack v. Town of Cape Elizabeth,* the Court upheld the decision of a planning board to deny an application by applying the more stringent regulation even though that standard applied generally to properties within a zoning district and the standard that would have authorized the proposed land use appeared in the provisions regulating a subset of properties within an overlay zone.[16]

While Kingfish is not wrong that as a matter of *statutory* interpretation, a Court *may* resolve a conflict by applying the more specific standard,[17] that rule does not translate into the zoning context because, unlike statutes, ordinances like the LUDO contain conflict provisions that expressly instruct municipal boards to impose the stricter standard. Kingfish has failed to cite to *any* cases in which a board or court applied this rule in the context of interpreting an ordinance, let alone in a situation in which the ordinance under review contained a conflict provision. Consequently, the

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[12] *See* Kingfish Letter 7–8.

[13] *Rudolph v. Golick*, 2010 ME 106, ¶ 9, 8 A.3d 694.

[14] A statute or ordinance is ambiguous if "it can reasonably be interpreted in more than one way without departing from the language" of that statute or ordinance." *Cornith Pellets, LLC v. Arch Specialty Ins. Co*., ¶ 30, 2021 ME 10, 246 A.3d 586. Here, the Conflict Provision and the prohibitions on industrial and commercial structures in the LUDO are *unambiguous* because the *only* reasonable interpretation is that they prohibit Kingfish from constructing industrial or commercial structures on the Property.

[15] 2006 ME 102, ¶¶ 10–14, 905 A.2d 293.

[16] 1998 ME 153, ¶¶ 5–8, 712 A.2d 1061.

[17] *See, e.g., Ziegler v. Am. Maize-Products Co*., 658 A.2d 219, 222 (Me. 1995). Even when applied to statutes, that rule of construction is not absolute; rather, it is "merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 646–47 (2012).

Board should follow the Conflict Provision and apply the stricter standard that prohibits industrial and commercial structures in the residential district in which the Property is located and vacate the Decision on those grounds.

3. *The clear intent of the Conflict Provision is to resolve conflicts (a) within the LUDO and (b) between the LUDO and other ordinances and regulations.*

Because the Board must apply the Conflict Provision as intended by the Town's legislative body, Kingfish's claim that it does not govern conflicts within the LUDO is unfounded. Although the Conflict Provision does not expressly reference potential conflicts between the LUDO's provisions, the clear legislative purpose animating the Conflict Provision is to provide a rule of interpretation that applies to *any* conflict involving a provision in the LUDO, no matter its source.

The first step in "construing statutes and ordinances, including zoning ordinances, is to . . . discern the intent of the legislative bodies that enact them."[18] That is because "[t]he intent, rather than the letter of a statute . . . should prevail."[19] As the Law Court explained in *Olson v. Town of Yarmouth:*

> As is the case with statutes, our single goal in interpreting an ordinance is to give effect to the Town's intent in enacting the ordinance. We first determine if the language of the ordinance is plain and unambiguous. Our interpretation of the plain language is guided by taking into account the subject matter and purposes of the statute, and the consequences of a particular interpretation. We must construe the terms of [the ordinance] reasonably, by considering the purposes and structure of the Ordinance to avoid absurd or illogical results.[20]

Because the intent of a statute or ordinance provision is paramount, "the literal meaning of the language employed in a statute should be followed only when the policy and intent of the [legislative body] is implemented by such construction,"[21] and "[t]he strict literal import of words must sometimes yield to legislative intent."[22] Ultimately, "[s]trict construction cannot be used to defeat the clear intent of the statute nor to construe the statute in an unreasonable manner."[23]

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[18] *Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶ 18, 772 A.2d 256; ."); *Schwanda v. Bonney*, 418 A.2d 163, 165 (Me. 1980) ("Legislative intendment always controls; this is a fundamental precept of statutory construction."). Unlike the canons of construction referenced in the Kingfish Letter, the rule requiring the Board to determine the legislative intent behind the Conflict Provision always applies because the "single goal in interpreting an ordinance is to give effect to the Town's intent in enacting the ordinance." *Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 16, 179 A.3d 920; *see Portland Reg'l Chamber of Commerce v. City of Portland*, 2021 ME 34, ¶ 24, 253 A.3d 586.

[19] *Middleton's Case*, 136 Me. 108, 3 A.2d 434, 435 (1939).

[20] 2018 ME 27, ¶ 16, 179 A.3d 920 (quotation marks and citations omitted); *Waddell v. Briggs*, 381 A.2d 1132, 1135 (Me. 1978) "We must look to the end which our Legislators sought in the enactment of the law and approve a construction which will not nullify its purpose."); *Natale v. Kennebunkport Bd. of Zoning Appeals*, 363 A.2d 1372, 1374 (Me. 1976) ("In construing ordinances and statutes, this Court seeks the purpose of the enactors as it may have been objectively manifested.").

[21] *Emple Knitting Mills v. City of Bangor*, 155 Me. 270, 274, 153 A.2d 118, 121 (1959).

[22] *Prudential Ins. Co. of Am. v. Ins. Com'r,* 293 A.2d 529, 538 (Me. 1972); *see State v. Niles*, 585 A.2d 181, 182 (Me. 1990) ("A court can even ignore the literal meaning of phrases if that meaning thwarts the clear legislative objective.").

[23] *Town of Union v. Strong*, 681 A.2d 14, 18 (Me. 1996).

Here, the purpose of the Conflict Provision is made plain by its broad scope, which is to resolve conflicts in favor of the stricter standard regardless of whether that stricter standard is located in one of the Town's ordinances or another statute. Given the breadth of the Conflict Provision and its instruction that it applies even when the stricter standard is statutory, it is simply unreasonable to interpret it not to apply to conflicts within the LUDO.[24] The legislative body of the Town clearly intended to maximize the scope and effect of the Conflict Provision, and it would be an error to read it as narrowly as Kingfish suggests. What Kingfish is asking the Board is to adopt is a "[s]trict construction" that "defeat[s] the clear intent" of the Conflict Provision, which is prohibited by clear case law.[25] Because the Planning Board did not follow the intent of the Conflict Provision when it decided that the prohibition on "industrial" and "commercial" structures in the LUDO did not apply to the Industrial Facility, the Board must find that the Decision is "clearly contrary" to the LUDO.

B. The Board must vacate the Decision because the Planning Board misinterpreted the water quality standard in the SZO.

Kingfish and Protect Downeast have a fundamental disagreement about the critical distinctions between the water quality standard contained in the SZO and the statutory standards relied upon by the DEP when it issued Kingfish a Maine Pollution Discharge Elimination System permit (the "**Discharge Permit**"). It would be a waste of ink and this Board's time to simply repeat in full the interpretation of these standards Protect Downeast provides in its Appeal Letter or to refute each and every mischaracterization of this issue set forth in the Kingfish Letter. That said, we believe it would be useful to highlight the key distinctions between the arguments raised by Protect Downeast and Kingfish in order to illustrate the degree to which Kingfish—and, by extension, the Planning Board—misunderstands this critical issue.

Kingfish believes the water quality standard contained in the SZO and the standards relied upon by the DEP when deciding to issue a discharge permit are identical.[26] As set forth in the Appeal Letter, they absolutely are not. The water quality standard in SZO § 15.R is unambiguous and unqualified:

> No activity shall deposit on or into the ground or discharge to the waters of the State any pollutant that, by itself or in combination with other activities or substances will **impair designated uses of the water classification of the water body**.[27]

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[24] There would be a reasonable argument to make if the Conflict Provision was *limited* to conflicts within ordinances and the proposed interpretation involved *extending* it to conflicts between an ordinance and a statute. But in this instance, it is sufficiently broad to cover not only conflicts within and between ordinances but also between an ordinance and a statute, thereby indicating a purpose more expansive than its literal meaning.

[25] *See Strong*, 681 A.2d at 18.

[26] Kingfish Letter at 11 ("The standards utilized by the Maine DEP and the standard to be applied by this Planning Board under section 15.R "Water quality" provisions of the SZO are the same.")

[27] SZO § 15.R.
38 M.R.S.A. § 465-B(2).

Thus, *if* there is evidence of impairment to the designated uses of Chandler Bay, which there is,[28] then the Industrial Facility violates that standard and the Board erred in approving the Application.[29]

But unlike the Planning Board, the DEP may still issue a permit for a use that discharges pollutants into a waterbody and results in harm to that waterbody if (a) the resulting harm does not change the *classification* of the waterbody and (b) the DEP finds there is a sufficient economic benefit to the state—not the local community—to outweigh the potential harm. As explained by the DEP in the Discharge Permit:

> **When, as here, the Department determines that a new or increased discharge will result in a lowering of existing water quality**, the Department may still issue a discharge license if it finds, "following opportunity for public participation, that the action is necessary to achieve important economic or social benefits to the State" and that the standards of classification of the water body are met and that the discharge **does not cause or contribute to the failure of the water body to meet the standards of classification**. 38 M.R.S. §§ 414-A(1)(C), 464(4)(F)(5).[30]

Consequently, the DEP issued the Discharge Permit not because it found *zero* potential harm to the designated uses of Chandler Bay, but rather because it has the authority to balance that harm with other concerns and determined, in its opinion, that the economic benefits for the state outweighed the potential environmental harm to Jonesport:

> Therefore, considering the information in A, B, and C above and pursuant to 38 M.R.S. §§414- A(1)(c), 464(4)(F)(5), **the Department finds that the new proposed discharge from Kingfish will result in a lowering of existing water quality as it related to eelgrass as an indicator for nitrogen, and that this lowering of water quality is necessary to achieve important economic or social benefits to the State.[31]**

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[28] That evidence exists in the documented impact the Industrial Facility will have on eelgrass, which is explained *by the DEP* in the Discharge Permit, and the cascading consequences of that impact on the ecology of Chandler Bay, which are discussed in detail on pages 23 and 24 of the Appeal Letter. It is therefore entirely irrelevant whether there is *other* evidence that the harm to Chandler Bay will not be so extreme as to use *all* of the waterbody's remaining assimilative capacity, which is what Kingfish points to in its letter to dispute the evidence relied on by Protect Downeast. *See* Kingfish Letter 14–16.

[29] Kingfish seems to concede that there is evidence that a "marginal lowering of water quality" will occur as a result of the Industrial Facility, but that such harm to Chandler Bay does not constitute an impairment of designated uses of that waterbody. Kingfish Letter at 13. This hair-splitting is a distraction. As outlined in the Appeal Letter, the term "impair" means to "weaken or damage something." "Impair" Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriamwebster.com/dictionary/good, accessed December 20, 2022. Because the discharge of pollutants from the Industrial Facility is very likely to disrupt critical habitats in Chandler Bay and hurt commercial fisheries that rely on those habitats, there is an *impairment* to designated uses of the bay that violates the SZO's water quality standard.

[30] Record Index, Tab #20, Kingfish Maine Application w. Exhibits, at 345 (Discharge Permit, "Final Fact Sheet" at 25) (emphasis added); *see* Appeal Letter at 21.

[31] Record Index, Tab #20, Kingfish Maine Application w. Exhibits, at 348 (Discharge Permit, "Final Fact Sheet" at 28) (emphasis added); *see* Appeal Letter at 22.

The SZO grants the Planning Board no such authority, which means that it erred in approving the Application despite the clear evidence of impairment[32].

During the course of the proceedings before the Planning Board, a series of questions were prepared for the DEP to address in hopes of clarifying the relationship between the water quality standard in the SZO and the regulatory framework the DEP follows. One of the questions raised was whether the DEP would have refused to issue Kingfish the Discharge Permit were it not for the requirement that the DEP balance economic benefits with environmental harm:

> Would the MEDEP have denied the discharge permit for Kingfish, were it not for the State's stated desire to achieve important economic or social benefits to the State? Not sure how this action reconciles with the MEDEP's mission to protect Maine waters. Should this not be two independent decisions? Please explain.[33]

If Kingfish is correct that the balancing triggered by the "antidegradation" provision in 38 M.R.S.A. 484(F)(5) is totally irrelevant to the DEP's decision to issue the Discharge Permit, one would expect the DEP's answer to be a simple "no." But that is not how the DEP responded. Instead, the DEP dodged the question, indicating, as Protect Downeast has argued this entire time, that the DEP was *required* to balance economic and environmental concerns when deciding to issue a Discharge Permit:

> It is a statutory requirement that the Department review socioeconomic impacts of a proposal when under Antidegradation analysis. Alternatives and best practicable treatment are also evaluated. See page 25 of 44 of the Fact Sheet.[34]

As the DEP makes clear in its answer, there is a "statutory requirement" that it take into account "socioeconomic impacts" when deciding to issue a Discharge Permit once the antidegradation analysis has been triggered, which it has here. But the SZO contains no analogous provision that allowed the Board to overlook harm to the designated uses of Chandler Bay. Therefore, *any* evidence of harm to the designated uses of Chandler Bay *required* the Planning Board to deny the Application. Its failure to do so means that the Decision is "clearly contrary" to the SZO and must be vacated.

C. The Planning Board misinterpreted SZO § 16.D.7.

In response to Protect Downeast's argument that the Planning Board acted clearly contrary to the SZO by not reading SZO § 16.D.7 to regulate activities beyond the Commercial Fisheries/Maritime District, Kingfish raises a single objection—i.e., that such an interpretation must be rejected because it would render a portion of that standard "meaningless."[35] That is patently false. SZO § 16.D.7 states:

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[32] The Planning Board's attempt to mitigate the harm Kingfish will cause to the waters of Chandler Bay via conditions attached to the permit of additional testing sites and a third-party monitor may produce more information, but it does nothing to alter the fact that Kingfish's discharge *will* lower the water quality.
[33] Record Index, Tab #65, LT MDEP – From Jonesport Planning Board enclosing: Questions, at 2.
[34] Record Index, Tab #65, LT MDEP – From Jonesport Planning Board enclosing: Questions, at 2.
[35] Kingfish Letter at 18.

> After the submission of a complete application to the Planning Board, the Board shall approve an application or approve it with conditions if [the Planning Board] makes a positive finding based on the information presented that the proposed land use . . . **will not adversely affect existing commercial fishing or maritime activities in a Commercial Fisheries/Maritime Activities District.**[36]

As explained in the Appeal Letter, the only reasonable way to interpret this standard is to prohibit activities—regardless of their location—that will "adversely affect existing commercial fishing or maritime activities" that *are* located in the Commercial Fisheries/Maritime District.[37] This reading makes sense because of how the sentence is constructed, with "in" referencing the subject immediately preceding that preposition—the "existing commercial fishing or maritime activities"—and not the location of the activity causing the harm. Such an interpretation does not render the reference to the district in which existing commercial fisheries and maritime activities are centralized "meaningless"; rather, it interprets the standard in accordance with its plain terms, which required the Planning Board to consider the harm caused *to* activities in the Commercial Fisheries/Maritime District regardless of the location of the source of that harm. The Planning Board did not err by ignoring the location of the existing commercial fisheries and maritime activities; it did so by refusing to consider the potential harm to those activities resulting from a land use not located in the Commercial Fisheries/Maritime District.

Kingfish's categorization of Protect Downeast's argument on this point is not only incorrect but violates a canon of construction on which Kingfish erroneously relies elsewhere in its letter, which is that interpretation should be avoided that leads to absurd results.[38] It is beyond dispute that activities *off-shore* can, and, in this case, likely will,[39] impact the fishing and maritime activities based *on land* in the Commercial Fisheries/Maritime District. But Kingfish's interpretation of SZO § 16.D.7 to require that the source of the harm is located *within* that district is absurd because it ignores this reality entirely, thereby rendering the Planning Board powerless to prevent a proposed activity that substantially interfered with existing commercial fisheries in that district if that activity was located off-shore. Such an absurd interpretation cannot stand.

Because (a) Protect Downeast's interpretation of SZO § 16.D.7 aligns with its plain meaning and neither makes any portion of it meaningless or leads to an absurd result and (b) the Planning Board (and Kingfish) misinterpreted that provision as outlined above and in the Appeal Letter, and (c) the Planning Board acted in a manner clearly contrary to the SZO when it decided that the section 16.D.7 did not apply the Industrial Facility. Consequently, the Board must vacate the Decision.

III. Conclusion

For the reasons set forth above and in the Appeal Letter, the BOA must reverse the Decision and should remand this matter to the Planning Board with instructions to deny the Application.

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[36] SZO § 16.D.7 (emphasis added).

[37] Appeal Letter at 24–25.

[38] Kingfish Letter at 7; *see, e.g., Dickau v. Vt. Mut. Ins. Co.*, 2014 ME 158, ¶ 21, 107 A.3d 621 ("[W]e may reject any construction . . . that creates absurd, illogical, unreasonable, inconsistent or anomalous results if an alternative interpretation avoids such results.").

[39] The evidence of this potential harm flagged by the DEP is outlined on page 25 of the Appeal Letter.

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