

STATE OF MAINE
KENNEBEC COUNTY, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No.

**SIDNEY BLOCK, ELEANOR DANIELS,
EILEEN WOLPER, and
ANIMAL OUTLOOK,**

Plaintiffs-Petitioners,

v.

AMANDA BEAL, Commissioner of
The Maine Department of
Agriculture, Conservation, and
Forestry,

and

**MAINE DEPARTMENT OF
AGRICULTURE, CONSERVATION,
AND FORESTRY, ANIMAL WELFARE
PROGRAM,**

Defendants-Respondents.

**PETITION FOR REVIEW OF
AGENCY FAILURE OR REFUSAL
TO ACT PURSUANT TO M.R. CIV.
P. 80C**

**RE: In Re: Citizen Petition for
Rulemaking**

and

**COMPLAINT FOR
DECLARATORY RELIEF**

INTRODUCTION

The Plaintiffs-Petitioners, Sidney Block, M.D., Eleanor Daniels, Eileen Wolper, and Animal Outlook (the “**Petitioners**”), by and through their counsel Kimberly J. Ervin Tucker, Esq., hereby file this “Complaint and Petition for Review” against Amanda Beal, Commissioner of the Maine Department of Agriculture, Conservation, and Forestry (“**DACF**”) and the DACF’s Animal Welfare Program, pursuant to M.R. Civ. P. 80C and 57, 5 M.R.S § 8058 and 14 M.R.S. § 5951 et seq.

This case arises because DACF has failed or refused to uphold Maine’s animal

welfare laws in the State’s aquaculture facilities, defying the Maine Legislature’s mandates. Specifically, DACF has: (i) failed or refused to initiate rulemaking and/or adopt rules to establish animal-welfare standards for these facilities; (ii) has failed to investigate these facilities for animal cruelty; and (iii) has failed to enforce Maine’s animal cruelty laws against these facilities. DACF has failed or refused to act despite receiving a petition submitted by more than 150 registered voters (the “**Citizen Petition**”).

Now, pursuant to 5 M.R.S.A. § 11001 et seq. of the Maine Administrative Procedure Act (“**MAPA**”) and Rule 80C of the Maine Rules of Civil Procedure (“**Rule 80C**”), Petitioners challenge DACF’s failure or refusal to initiate rulemaking, in response to a petition submitted by more than 150 registered voters (the “**Citizen Petition**”), to address the welfare of animals kept in Maine’s aquaculture facilities. Pursuant to these same statutes, Petitioners challenge DACF’s failure or refusal to investigate animal cruelty or enforce Maine’s animal cruelty laws in the State’s aquaculture facilities. Pursuant to 5 M.R.S § 8058, 14 M.R.S. § 5951 et seq. and Rule 57 of the Maine Rules of Civil Procedure (“**Rule 57**”), Petitioners challenge DACF’s refusal or failure to adopt rules regulating animal welfare in aquaculture facilities as required by law.

As grounds for this Petition-Complaint, Petitioners allege as follows:

PRELIMINARY STATEMENT

1. By clear statutory delegation, DACF must “ensure the humane and proper treatment of animals” in Maine pursuant to 7 M.R.S. § 3902.
2. To carry out its statutory mandate, DACF must “develop, implement, and administer a comprehensive program that upholds the animal welfare laws of the State,” and must “investigate complaints of cruelty to animals and enforce cruelty-to-animal

laws.” (7 M.R.S. §§ 3902, 3906-B(11)).

3. Because “‘animal’ means every living, sentient creature not a human being,” DACF must ensure the humane and proper treatment of all animals in Maine, including fish kept for aquaculture. (7 M.R.S. § 3907; 17 M.R.S. § 1011(2)).

4. Indeed, DACF has a specific responsibility to determine best management practices (“**BMPs**”) for animal husbandry in agricultural industries such as aquaculture. (17 M.R.S. § 1031(2)(D)).

5. It is crucial that DACF establish BMPs in aquaculture because, to “uphold the animal welfare laws of the State” in such facilities, the agency must investigate whether facilities are complying with BMPs and enforce Maine’s animal-cruelty laws against non-compliant facilities. (7 M.R.S. § 3902; 17 M.R.S. § 1031(2)(D)).

6. Despite the Legislature’s mandate, as aquaculture has expanded into one of Maine’s leading industries, DACF has failed to “develop” any rules specifying BMPs for the treatment of animals in aquaculture, let alone “implement” and “administer” state laws to “ensure the humane and proper treatment” of the “living, sentient” animals in the state’s aquaculture facilities. (7 M.R.S. §§ 3902; 3907; *see* 01-001 C.M.R. ch. 701 and 702).

7. To date, DACF possesses only one public record pertaining to an inspection, audit, enforcement, or similar action against any aquaculture facility or business. *See* Compl. Ex. 2, App. 9; Compl. Ex. 8.

8. Indeed, DACF has disavowed accountability for the welfare of animals in aquaculture facilities and attempted to shift responsibility to other agencies. *See* Compl. Ex. 1, Dep’t of Agric., Conservation, and Forestry, Animal Welfare Program Final Investigative Report on Cooke Aquaculture, Complaint #20687 at 1, 4 (“**DACF Cooke**

Report”) (recommending that another state agency look into developing oversight in animal care at aquaculture facilities).

9. Because of DACF’s failure to protect animals kept for aquaculture, 152 registered voters exercised a right that Maine’s Constitution enshrines, and that MAPA explicates, by petitioning DACF to initiate rulemaking to: (1) develop protocols for overseeing animal welfare in Maine’s aquaculture facilities, including procedures and practices for inspections and staff training; and (2) develop standards of care, namely BMPs, for the welfare of fish in aquaculture facilities (the “**Citizen Petition**”). The Citizen Petition is attached as Compl. Ex. 2.

10. Under 5 M.R.S. § 8055, “[w]henver a petition to adopt or modify a rule is submitted by 150 or more registered voters of the State, the agency **shall initiate** appropriate rulemaking proceedings within 60 days after receipt of the petition.” (Emphasis added.)

11. DACF received the Citizen Petition on August 3, 2022 and was therefore required to initiate the rulemaking process by October 3, 2022. *See* Compl. Ex. 3 (shipping receipt).

12. On September 1, 2022, DACF sent a letter to Piper Hoffman of Animal Outlook by email and proffered two unlawful reasons for declining to initiate rulemaking (the “**DACF Response Letter**”): (1) that Petitioners improperly requested the adoption of policies; and (2) that the Citizen Petition did not provide the text of all proposed rules. The DACF Response Letter is attached as Compl. Ex. 4.

13. On September 20, 2022, Animal Outlook replied to the DACF Response Letter, emphasizing that DACF had no authority to deny a petition signed by 150 or more

registered voters and was required to initiate its rulemaking process by October 3, 2022. Animal Outlook also explained that DACF’s reasons for denying the Citizen Petition were, in themselves, unlawful because: (1) “statements of policy” are expressly included in the definition of rules and, in any event, many of the Citizen Petition’s rulemaking demands were not demands for statements of policy; and (2) that petitions are not—and cannot be—required to include the proposed text of a rule, but that the Citizen Petition nevertheless included the complete text of sample BMPs from Florida’s Department of Agriculture and Consumer Services (“FDACS”). Animal Outlook’s letter to DACF, dated September 20, 2022 (the “**AO Reply Letter**”) is attached as Compl. Ex. 5.

14. DACF has not responded to the AO Reply Letter and has failed or refused to initiate the rulemaking process, let alone enforce Maine’s animal-cruelty laws in the State’s aquaculture facilities.

15. DACF’s failure or refusal to initiate rulemaking in response to the Citizen Petition is (1) “[n] violation of . . . statutory provisions;” (2) in excess of DACF’s statutory authority; (3) based on DACF’s erroneous interpretation of the law; and (4) arbitrary, capricious, and characterized by abuse of discretion. (5 M.R.S. 11007(4)(C)).

16. In addition, DACF’s failure to adopt rules to protect animals kept for aquaculture violates the Legislature’s mandates requiring DACF to “develop, implement, and administer a comprehensive program” ensuring the humane treatment of all animals in Maine and, specifically, to determine BMPs for animal husbandry in aquaculture. (7 M.R.S. § 3902; 17 M.R.S. § 1031(2)(D)).

17. Finally, DACF’s failure to investigate and enforce cruelty to animals kept for aquaculture violates the Legislature’s mandate in 7 M.R.S. § 3906-B(11).

18. Petitioners therefore seek redress from this Court as detailed herein.

PARTIES

19. Petitioner SIDNEY BLOCK, M.D. is a registered voter in Maine. Dr. Block has lived and practiced medicine in Maine since 1975 and is a resident of Waldo County. In signing the Citizen Petition, Dr. Block exercised his state constitutional right, and his statutory right under 5 M.R.S. § 8055, to petition DACF for redress of his grievances. Dr. Block signed the Citizen Petition on August 13, 2021, demanding that DACF initiate rulemaking to rectify the absence of protections for animals kept in Maine's aquaculture facilities. His signature was verified, certified, and submitted pursuant to 5 M.R.S. § 8055(3) and 21-A M.R.S. § 354(7), along with the oath of the petition circulator. Dr. Block has been aggrieved by DACF's failure or refusal to act in response to his petitioning the agency.

20. Petitioner ELEANOR DANIELS is a registered voter in Maine. She has lived in Maine since 1973 and is a resident of Waldo County, where she operates a local business. In signing the Citizen Petition, Ms. Daniels exercised her state constitutional right, and her statutory right under 5 M.R.S. § 8055, to petition DACF for redress of her grievances. Ms. Daniels signed the Citizen Petition on August 13, 2021, demanding that DACF initiate rulemaking to rectify the absence of protections for animals kept in Maine's aquaculture facilities. Her signature was verified, certified, and submitted pursuant to 5 M.R.S. § 8055(3) and 21-A M.R.S. § 354(7), along with the oath of the petition circulator. In addition, Ms. Daniels participated in collecting signatures for the Petition. Ms. Daniels has been aggrieved by DACF's failure or refusal to act in response to her petitioning the agency.

21. Petitioner EILEEN WOLPER is a registered voter in Maine. She has lived in Waldo County, Maine for 33 years, where she has raised her son, served as a nurse at the community hospital, and volunteered actively at her local church. In signing the Citizen Petition, Ms. Wolper exercised her state constitutional right, and her statutory right under 5 M.R.S. § 8055, to petition DACF for redress of her grievances. Ms. Wolper signed the Citizen Petition on August 12, 2021, demanding that DACF initiate rulemaking to rectify the absence of protections for animals kept in Maine’s aquaculture facilities. Her signature was verified, certified, and submitted pursuant to 5 M.R.S. § 8055(3) and 21-A M.R.S. § 354(7), along with the oath of the petition circulator. Ms. Wolper has been aggrieved by DACF’s failure or refusal to act in response to her petitioning the agency.

22. Petitioner ANIMAL OUTLOOK is a national nonprofit, tax-exempt 501(c)(3) organization, incorporated in the State of Delaware, whose mission is to “build a better tomorrow for all animals.” In particular, Animal Outlook works to protect farmed animals such as fish kept for aquaculture. To that end, Animal Outlook investigates animal cruelty and works alongside state and federal agencies, as well as law enforcement officers, to report cruelty and support enforcement efforts. Because DACF has abdicated its responsibility to protect animals in Maine’s aquaculture facilities, the agency has frustrated Animal Outlook’s mission to protect animals. Moreover, if DACF were fulfilling its statutory mandate, Animal Outlook would be using its resources to investigate animal cruelty in Maine’s aquaculture facilities and report this cruelty to assist DACF with enforcement efforts. Instead, Animal Outlook has been forced to divert resources away from investigating and reporting animal cruelty in Maine so that Animal Outlook could educate Maine’s citizens about the absence of animal welfare protections in aquaculture.

In addition, Animal Outlook has diverted resources to work alongside Maine’s registered voters and petition DACF to adopt rules that, by Legislative mandate, the agency should already have adopted.

23. Defendant COMMISSIONER AMANDA BEAL is the Commissioner of the Maine Department of Agriculture, Conservation, and Forestry and has served in this capacity since 2019. Commissioner Beal is charged with carrying out all laws delegating responsibility to her or DACF, including laws that require the adoption and enforcement of rules. Specifically, DACF’s enabling statute provides that “[t]he commissioner shall adopt, consistent with the Maine Administrative Procedure Act, . . . rules for carrying out this Title and all other statutes delegating responsibility to the commissioner or the department.” 7 M.R.S. § 12. It further provides that “[t]he commissioner is the chief executive charged with the enforcement of all statutes delegating responsibility to the commissioner or the department and shall be vigilant in discovering violations thereof.” *Id.* § 2. In specific part, Maine’s Animal Welfare Act provides that the Commissioner has the authority to “adopt any rules necessary or useful to carry out this chapter” and “shall investigate complaints of cruelty to animals and enforce cruelty-to-animal laws.” 7 M.R.S. §§ 4016, 3906-B(11).

24. Defendant ANIMAL WELFARE PROGRAM (“**AWP**”) is a division of DACF. AWP’s stated mission mirrors DACF’s statutory mandate regarding animal welfare: “to ensure the humane and proper treatment of animals by developing, implementing, and administering a comprehensive program that upholds the animal

welfare laws of the state through communication, education, and enforcement.”¹

JURISDICTION AND VENUE

25. Pursuant to Rule 80C, this Court has jurisdiction under 5 M.R.S. § 11001, which provides that “[a]ny person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court.”

26. Pursuant to Rule 57, this Court also has jurisdiction under 5 M.R.S. § 8058, which provides that “[j]udicial review of an agency rule, or of an agency’s refusal or failure to adopt a rule where the adoption of a rule is required by law, may be had by any person who is aggrieved in an action for declaratory judgment in the Superior Court.”

27. Venue is proper in Kennebec County, Maine under 5 M.R.S. § 11002 because the agency has its principal office in Kennebec County.

BACKGROUND

DACF’s Statutory Mandate

28. Maine’s Legislature has charged DACF with “ensur[ing] the humane and proper treatment of animals.” 7 M.R.S. § 3902.

29. Giving teeth to this statutory command, the Legislature has mandated that “the commissioner [of DACF] shall develop, implement and administer a comprehensive program that upholds the animal welfare laws of the State,” and “shall investigate complaints of cruelty to animals and enforce cruelty-to-animal laws.” 7 M.R.S. § 3902; 7 M.R.S. § 3906-B(11).

30. DACF openly acknowledges its statutory responsibility, recognizing that

¹ *Animal Welfare*, DEP’T OF AGRIC., CONSERVATION, AND FORESTRY, https://www.maine.gov/dacf/ahw/animal_welfare. This mission statement mirrors the language in 7 M.R.S. § 3902, which delegates the regulation of animal welfare to DACF.

within DACF, the Animal Welfare Program “develops and implements policies and programs to effectively address complaints of animal cruelty.”²

31. In fact, DACF has publicly touted its responsibility to protect the welfare of the state’s animals, proclaiming in a recent annual report that “Maine has been a leader in the animal welfare world for many years and it is our intention to continue those efforts using education and enforcement.”³

32. Maine’s Animal Welfare Act, which delegates oversight to DACF, defines “animal” broadly as “every living, sentient creature not a human being.” 7 M.R.S. § 3907(2); *see also* 17 M.R.S. § 1011(2).

33. Therefore, DACF’s responsibility to “ensure the humane and proper treatment of **animals**” means “**every living, sentient creature**” in Maine, including the living, sentient fish⁴ kept for aquaculture. 7 M.R.S. § 3902.

34. In addition, the Legislature has delegated DACF particular responsibilities for ensuring the humane and proper treatment of animals kept for agricultural purposes.

35. Specifically, the Legislature provided that DACF shall determine “best management practices [(“BMPs”)] for animal husbandry” in agricultural operations, with which these operations must comply. *Id.*; 17 M.R.S. § 1031(2)(D).

36. Definitions pertaining to “agriculture” are ubiquitous throughout Maine law, and they make clear that agricultural operations encompass aquaculture. *See, e.g.*, 10

² Maine’s Animal Welfare Program Review for 2019, DEP’T OF AGRIC., CONSERVATION, AND FORESTRY, http://ldc.mainelegislature.org/Open/Rpts/hv4764_a5m34_2019.pdf.

³ *Maine’s Animal Welfare Program Review for 2018*, DEP’T. OF AGRIC., CONSERVATION AND FORESTRY, http://ldc.mainelegislature.org/Open/Rpts/hv4764_a5m34_2018.pdf (last visited Feb. 22, 2021).

⁴ *See generally, e.g.*, Culum Brown, *Fish Intelligence, Sentience and Ethics*, 18 *Animal Cognition* 1 (2015), <https://www.researchgate.net/publication/263290864> (reviewing evidence and concluding that “fish perception and cognitive abilities often match or exceed other vertebrates” and that “fish experience pain”).

M.R.S. § 963-A (defining “agricultural enterprise” to “include[] . . . aquaculture”); 7 M.R.S. § 152 (“defining “agricultural products” to include “any . . . plant, animal or plant or animal products that supply humans with food, feed, fiber or fur,” excepting only “trees grown and harvested for forest products”); 94-457 C.M.R. Ch. 312, § 1 (defining “agricultural production” to include the cultivation, production and harvesting of “agricultural products” including “marine life”).⁵

37. Since aquaculture is a form of agriculture, DACF must determine BMPs for animal husbandry in the aquaculture industry. 17 M.R.S. § 1031(2)(D).

38. DACF must then “implement and administer” Maine’s animal welfare laws by investigating violations of BMPs and taking appropriate enforcement action. 7 M.R.S. §§ 3902, 3906-B(11).

DACF’s Failure to Ensure the Humane and Proper Treatment of Animals in Aquaculture

39. DACF has abdicated its duty to “develop, implement and administer a comprehensive program that upholds [Maine’s] animal welfare laws” in the State’s aquaculture facilities.

40. In 2019, Animal Outlook first reached out to DACF about animal cruelty in aquaculture after investigating the Cooke Aquaculture hatchery in Bingham, Maine (“**Cooke**”).

41. During that investigation, between January 22, 2019 and April 10, 2019,

⁵ The United States Department of Agriculture proffers the same view as Maine that aquaculture is a form of agricultural operation. *See* Aquaculture is Agriculture: USDA’s Role in Supporting Farmers of Fish and Shellfish, U.S. DEP’T OF AGRIC. (last visited Oct. 15, 2022), available at: <https://www.usda.gov/topics/farming/aquaculture/aquaculture-agriculture#:~:text=improve%20USDA.gov-.Aquaculture%20is%20Agriculture%3A%20USDA's%20Role%20in%20Supporting%20Farmers%20of%20Fish,healthy%20seafood%20products%20are%20increasing.>

Animal Outlook documented hours of video evidence depicting hatchery workers abusing and neglecting salmon confined at the facility. Animal Outlook then brought a complaint to DACF's Animal Welfare Program, presented its evidence, and requested the agency take legal action. *See* Compl. Ex. 2, App. 4–6 (the “**2019 Cooke Complaint**”).

42. In response to Animal Outlook's complaint, DACF stated:

Our Program has had no experience investigating land-based aquaculture or Salmon up to this point. **We determined that this type of operation was not regulated by any state agency in Maine** and the animal cruelty accusations would need to be investigated by AWP.

DACF Cooke Report, Compl. Ex. 1 at 1 (emphasis added).

43. DACF acknowledged that Cooke employees, as captured on video, were: striking the heads of fish on random solid objects; hurling fish 20–30 feet through the air; stomping on fish; and leaving fish to suffocate out of water. *See* September 18, 2019 Letter from Mr. Liam Hughes, former Director of Animal Welfare for DACF, to Greg Lambert, Fresh Water Production Manager of Cooke (the “**Hughes Letter**”). The Hughes Letter is attached as Compl. Ex. 6.

44. DACF further acknowledged that methods of euthanasia documented on video were “not being done properly” and “could damage the fish and make them more at risk for infections and damage.” DACF Cooke Report, Compl. Ex. 1 at 2.

45. Nevertheless, DACF concluded that training and staffing changes were appropriate remedies for the acts documented at Cooke and elected not to file charges. *See* DACF Cooke Report, Compl. Ex. 1 at 3.

46. Moreover, DACF concluded the Cooke Report by writing, “It is my recommendation that another state agency that specializes in aquatic animals look into developing oversight in animal care at this type of Aquaculture facility.” DACF Cooke

Report, Compl. Ex 1 at 4.

47. DACF’s “recommendation that another state agency . . . develop[] oversight in animal care” belies DACF’s statutory responsibility “to ensure the humane and proper treatment of animals” in Maine and shows that DACF intended to abdicate this responsibility. *Compare* DACF Cooke Report, Compl. Ex 1 at 4 *with* 7 M.R.S. § 3902.

48. Because of DACF’s statements, on March 6, 2021, Animal Outlook submitted a request to DACF under Maine’s Freedom of Access Act (“FOAA”), 1 M.R.S. § 408-A, to determine whether DACF had taken any steps to carry out its legislative mandate to “develop, implement and administer a comprehensive program that upholds [Maine’s] animal welfare laws” in aquaculture facilities (the “**2021 FOAA Request**”). Compl. Ex. 2, App. 8.

49. Specifically, in the 2021 FOAA Request, Animal Outlook asked DACF for “all documents and records dated or transmitted between January 1, 2018 and the date of fulfillment of this request pertaining to **any inspection, audit, enforcement, or similar action taken by the Department of Agriculture, Conservation, and Forestry on any aquaculture facility or business.**” (Emphasis in original.) Compl. Ex. 2, App. 8.

50. On March 8, 2021, Shannon Ayotte, DACF’s FOAA Officer, responded by email, “Please find attached, the Cooke report. This is the **only record** our Department possesses in response to your request.” (Emphasis added.) Compl. Ex. 2, App. 9 (“**2021 DACF FOAA Response**”).

51. Ms. Ayotte also advised Animal Outlook to contact Maine’s Department of Marine Resources for records pertaining to aquaculture. *See* 2021 DACF FOAA Response, Compl. Ex. 2, App. 9.

52. On September 29, 2022, Animal Outlook submitted a second FOAA request to DACF (the “**2022 FOAA Request**”), requesting “all documents and records dated or transmitted between March 8, 2021 and the date of fulfillment of this request pertaining to **any inspection, audit, enforcement, or similar action taken by the Department of Agriculture, Conservation, and Forestry on any aquaculture facility or business.**” (Emphasis in original.) Animal Outlook’s 2022 FOAA Request is attached as Compl. Ex. 7.

53. On October 11, 2022, Shannon Ayotte responded, “We possess no records within the parameters of your request.” Ms. Ayotte’s October 11, 2022 email is attached as Compl. Ex. 8 (“**2022 DACF FOAA Response**”).

54. DACF’s public record of inaction, coupled with its statements to Animal Outlook, show that the agency has taken *no* steps to “ensure the humane and proper treatment of animals” kept for aquaculture. 7 M.R.S. § 3902.

55. As a first step towards fulfilling its statutory mandate, DACF must “develop” rules adopting BMPs for animal husbandry in aquaculture and protocols for investigating compliance with these BMPs; then, the agency can “implement and administer” its protocols to investigate animal cruelty, enforce Maine’s animal-cruelty laws, and ultimately “uphold[] the animal welfare laws of the State.” *Id.* §§ 3902, 3906-B(11).

56. Indisputably, DACF has not taken even the first step.

The Citizen Petition

57. Given DACF’s failure to ensure the humane and proper treatment of animals in aquaculture, 152 of Maine’s registered voters were compelled to take matters

into their own hands, and they petitioned DACF to fulfill its statutory mandate. *See* Citizen Petition, Compl. Ex. 2.

58. Maine’s Constitution promises that “the people have a right at all times . . . to give instructions to their representatives, and to request, of either department of the government by petition or remonstrance, redress of their wrongs and grievances.” ME. CONST. ART. I, § 15.

59. Furthering this state constitutional right, MAPA provides that “[a]ny person may petition an agency for the adoption or modification of any rule.” 5 M.R.S. § 8055 (emphasis added).

60. On August 1, 2022, 152 registered voters, supported by eight interested organizations—Animal Outlook, Organic Consumers Association, Regeneration International, Friends of Harriet L. Hartley Conservation Area, Animal Equality, Farm Sanctuary, Maine Seaweed Exchange, and Aquatic Life Institute—sent DACF the Citizen Petition.

61. All signatures on the Citizen Petition were verified, certified, and submitted pursuant to 5 M.R.S. § 8055(3) and 21-A M.R.S. § 354(7), along with the oath of the petition circulator.

62. The Citizen Petition demanded that DACF initiate rulemaking to address animal welfare in Maine’s aquaculture facilities.

63. Specifically, the Citizen Petition demanded that DACF: (i) develop procedures and practices for inspecting aquaculture facilities and investigating reports of cruelty; and (ii) develop substantive BMPs for animal husbandry in Maine’s aquaculture facilities, with which these facilities must comply.

DACF Had No Discretion to Deny the Citizen Petition

64. 5 M.R.S. § 8055 sets forth when agencies may and may not deny rulemaking petitions.

65. Since “any person” may petition an agency to adopt “any rule,” agencies typically have discretion to deny a petition, provided that the agency “shall notify the petitioner in writing of its denial, stating the reasons therefor.” 5 M.R.S. § 8055(3).

66. However, 5 M.R.S. § 8055(3) makes clear that “[w]henver a [properly verified and certified] petition to adopt or modify a rule is submitted by 150 or more registered voters of the State, the agency **shall initiate** appropriate rulemaking proceedings within 60 days after receipt of the petition.” (Emphasis added.)

67. Accordingly, Maine’s Legislature provided—in the plain text of 5 M.R.S. § 8055(3)—that when a sufficiently large number of registered voters undertake the requisite process to certify, verify, and submit a Petition for rulemaking, an agency is required to initiate the rulemaking process.

68. Therefore, MAPA gives Maine’s registered voters the power to rein in an agency and compel action when an agency abdicates its mandate, as DACF did here.

69. If agencies had discretion to deny petitions by 150 or more registered voters, the entire second sentence of 5 M.R.S. § 8055(3) would be rendered surplusage.

70. The agency need not *enact* the rules demanded in a petition; rather, the agency must initiate the rulemaking process (which involves, *e.g.*, gathering public comments).

71. An agency can always seek a judicial ruling that initiating rulemaking would be improper.

72. Put differently, a 150-voter petition places the burden on an agency to justify its inaction.

73. Because more than 150 registered voters petitioned DACF to initiate rulemaking, the agency was required to initiate this process within sixty (60) days of its receipt of the Citizen Petition.

74. DACF therefore denied the Citizen Petition “[i]n violation of . . . statutory provisions.” 5 M.R.S. § 11007(4)(C)(1).

DACF’s Reasons for Denying the Citizen Petition Were Unlawful

75. Even if agencies had legal authority to deny rulemaking petitions signed by 150 or more registered voters, DACF provided no lawful reason to deny the Citizen Petition in this case.

76. The Citizen Petition includes two primary demands, both of which are legitimate, enforceable, and obligatory.

77. Specifically, the Citizen Petition demands that DACF take formal accountability for preventing cruelty to animals in Maine’s aquaculture facilities and, to that end: (i) develop procedures and practices for inspecting aquaculture facilities and investigating reports of cruelty; and (ii) develop substantive rules adopting BMPs for animal husbandry in Maine’s aquaculture facilities, with which these facilities must comply. *See* Citizen Petition, Compl. Ex. 2.

78. DACF proffered two reasons for denying the Citizen Petition: (i) that Petitioners improperly requested the adoption of policies, and “agency policies are not rules”; and (ii) that the Citizen Petition did not provide proposed rule text. *See* DACF Response Letter, Compl. Ex. 4.

79. Rejecting the Citizen Petition based on either justifications is “[i]n excess of the statutory authority of the agency,” “[a]ffected by . . . error of law,” and “[a]rbitrary or capricious or characterized by abuse of discretion.” 5 M.R.S. § 11007(4)(C).

80. DACF’s first objection, that “policies are not rules,” is incorrect as a matter of law; “statements of policy” are expressly included in the definition of rules. 5 M.R.S. § 8002(9)(A).

81. Only “explanatory” statements of policy are not considered rules, but, by definition, statements of policy directed **at the agency itself** are not “explanatory” statements. *See* 5 M.R.S. § 8002(9)(B)(4) (stating that explanatory statements of policy are those “intended solely as advice to assist **persons** in determining, exercising or complying with their legal rights, duties or privileges) (emphasis added); *id.* § 8002(8) (defining “person” as “any individual, partnership, corporation, governmental entity, association or public or private organization of any character, **other than the agency conducting the proceeding**”) (emphasis added).⁶

82. All “statements of policy” proposed in the Petition were directed at DACF and are, therefore, standard “statements of policy” that fall squarely within the definition of a rule. *See* Citizen Petition, Compl. Ex. 2 (demanding that DACF issue policy statements providing that it will establish and implement training and inspection protocols).

83. Regardless, many of the Citizen Petition’s rulemaking demands were not for statements of policy.

84. Specifically, BMPs are not policies, but rather rules that “make[] specific the [animal cruelty] law administered by [the] agency,” and directly determine whether

⁶ The DACF Response Letter omitted the relevant language in 5 M.R.S. 8002(9)(B)(4) when citing this provision.

aquaculture operations will be liable—criminally and civilly—for animal cruelty. 5 M.R.S. § 8002(9)(A); 17 M.R.S. § 1031(2)(D).

85. Indeed, DACF has previously used rulemaking to enact standards of care for animal welfare. *See* 2021 ME Regulation Text 12162 (establishing standards for the proper care and housing facilities of animals).

86. Regarding DACF’s second objection to the Citizen Petition, petitions are not—and cannot be—required to include the proposed text of a rule.

87. As an initial matter, while DACF’s form for submitting petitions allows petitioners to propose rule text, it does not provide notice that petitions are **required** to include “proposed text,” and that failure to propose a rule’s text is a basis for DACF to deny a petition. *See* Citizen Petition, Compl. Ex. 2.

88. Further, DACF could not lawfully include such a requirement.

89. While Maine’s agencies can designate the “form” and “procedure” for the submission of petitions, imposing substantive requirements for petitions is “[i]n excess of the statutory authority of the agency.” 5 M.R.S. 11007(4)(C)(2).

90. Maine’s agencies—whose very purpose is to utilize their expertise—cannot abdicate their statutory obligation to draft rules based on that expertise, and then foist this obligation onto ordinary Maine citizens who lack such expertise.

91. Indeed, if Maine voters were required to draft the text of proposed rules to petition an agency, Maine law would improperly favor a small subset of voters with higher education and subject matter expertise—people who would often be associated with the regulated industry—even though Maine’s Constitution and MAPA are designed to advance the interests of all persons. *See* ME. CONST. ART. I, § 15; 5 M.R.S. § 8055.

92. Regardless, the Citizen Petition included the full text of BMPs from FDACS. *See* Citizen Petition, Compl. Ex. 2, App. 10.

93. Therefore, at minimum, while DACF should not need and is not entitled to receive canned language for its proposed rule from individual lay voters, the Citizen Petition did include proposed text for BMPs in aquaculture.

COUNT I
Denial of the Citizen Petition Violates 5 M.R.S. § 8055

94. Petitioners repeat and incorporate paragraphs 1–93 of this Petition-Complaint as though fully set forth herein.

95. Under 5 M.R.S. § 8055, “[w]henver a petition to adopt or modify a rule is submitted by 150 or more registered voters of the State, the agency **shall initiate** appropriate rulemaking proceedings within 60 days after receipt of the petition.” (Emphasis added.)

96. On August 1, 2022, 152 of Maine’s registered voters submitted the Citizen Petition to DACF, demanding that DACF enact rules to protect the welfare of animals in Maine’s aquaculture facilities. DACF received the Citizen Petition on August 3, 2022.

97. Violating 5 M.R.S. § 8055, DACF failed or refused to initiate rulemaking by October 3, 2022.

98. 5 M.R.S. § 11001(2) provides that “[a]ny person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court.”

99. Petitioners, as signatories and organizers of the Citizen Petition, have been harmed by DACF’s decision to not initiate rulemaking in response to their Citizen Petition.

100. Further, 5 M.R.S. § 11007(4)(C)(1) authorizes courts to reverse an agency’s decision that is “[i]n violation of constitutional or statutory provisions.”

101. Because DACF’s failure or refusal to act in response to the Citizen Petition is “[i]n violation of constitutional or statutory provisions,” namely 5 M.R.S. § 8055, the Court should reverse DACF’s decision and require the agency to initiate rulemaking.

COUNT II
(In the Alternative)
Denial of the Citizen Petition was Affected by Error of Law

102. Petitioners repeat and incorporate paragraphs 1–101 of this Complaint as though fully set forth herein.

103. To justify denying the Citizen Petition, DACF proffered that “Petitioners improperly requested the adoption of policies,” and “agency policies are not rules.” DACF Response Letter at 1.

104. This justification is erroneous as a matter of law because “statements of policy” are expressly included in the definition of rules. 5 M.R.S.A. § 8002(9)(A).

105. Only “explanatory” policy statements fall outside the definition of rules. However, to the extent DACF interpreted the Citizen Petition as demanding “explanatory” policy statements, DACF committed legal error because policies directed at the agency are never “explanatory” statements. 5 M.R.S. § 8002(9)(A) (stating that explanatory statements must be “intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges”); *id.* § 8002(8) (defining “persons” as those “other than the agency”).

106. Because DACF misconstrued the legal definition of “rules”—namely which policy statements are excluded from this definition—it erroneously denied the Citizen Petition.

107. 5 M.R.S. § 11001(2) provides that “[a]ny person aggrieved by the failure or

refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court.”

108. Petitioners, as signatories and organizers of the Citizen Petition, have been harmed by DACF’s decision to not initiate rulemaking in response to their Citizen Petition.

109. Further, 5 M.R.S. § 11007(4)(C)(4) authorizes courts to reverse an agency’s decision that is “affected by error of law.”

110. Because DACF’s failure or refusal to act in response to the Citizen Petition on the basis that agency policies are not rules is “affected by error of law,” this Court should reverse DACF’s decision and require the agency to initiate rulemaking.

COUNT III
(In the Alternative)
Denial of the Citizen Petition was in Excess of DACF’s Statutory Authority

111. Petitioners repeat and incorporate paragraphs 1–110 of this Complaint as though fully set forth herein.

112. To justify its refusal to initiate rulemaking, DACF proffered (inaccurately)⁷ that the Citizen Petition did not include text for proposed rules. *See* DACF Response Letter, Compl. Ex. 4 at 2.

113. Maine’s voters have a right, under the State’s Constitution, to petition the government for “redress of their wrongs and grievances.” ME. CONST. ART. I, § 15.

114. The MAPA further enables “any person” to petition agencies to adopt rules. 5 M.R.S. § 8055.

115. While agencies can determine the “form” and “procedure” for the submission of petitions, they have no statutory authority to place substantive burdens on Maine voters’ exercise of their constitutional and statutory rights to petition them to adopt

⁷ As discussed above, the Citizen Petition included the text of BMPs that FDACS enacted in Florida.

rules. 5 M.R.S. § 8055(2).

116. Specifically, Maine’s agencies do not have the authority to require voters—who are laypeople—to draft proposed rules in order to exercise their constitutional and statutory rights.

117. Indeed, such a requirement would favor voters with technical, industry knowledge—people who would often be associated with the regulated industry.

118. Accordingly, by denying the Citizen Petition on the (factually inaccurate) basis that it did not include text for proposed rules, DACF exceeded its statutory authority.

119. 5 M.R.S. § 11001(2) provides that “[a]ny person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court.”

120. Petitioners, as signatories and organizers of the Citizen Petition, have been harmed by DACF’s decision to not initiate rulemaking in response to their Citizen Petition.

121. Further, 5 M.R.S. § 11007(4)(C)(2) authorizes courts to reverse an agency’s decision that is “[i]n excess of the statutory authority of the agency.”

122. Because DACF’s failure or refusal to act in response to the Citizen Petition on the basis that the Petition did not include proposed text is “[i]n excess of the statutory authority of the agency,” this Court should reverse DACF’s decision and require the agency to initiate rulemaking.

COUNT IV
(In the Alternative)
Denial of the Citizen Petition was Arbitrary, Capricious, and Characterized by Abuse of Discretion

123. Petitioners repeat and incorporate paragraphs 1–122 of this Complaint as though fully set forth herein.

124. The Citizen Petition’s rulemaking demands were legitimate, enforceable,

and obligatory, and DACF's denial of these demands was arbitrary and capricious and characterized by abuse of discretion.

125. DACF's first justification for denying the Citizen Petition was that "Petitioners improperly requested the adoption of policies," and "agency policies are not rules." DACF Response Letter, Compl. Ex. 4 at 1.

126. DACF's denial of the Citizen Petition on this basis was arbitrary, capricious, and characterized by abuse of discretion because the requests for policy statements were legitimate rulemaking demands and, in any event, the majority of rulemaking demands were not requests for policy statements.

127. The "policy" demands were demands for rules governing the agency's procedures and practice, which fall squarely within the definition of a rule. 5 M.R.S.A. § 8002(9)(A) (defining rules to include "statements of policy").

128. In addition, the Citizen Petition demanded that DACF establish BMPs for animal husbandry in Maine's aquaculture facilities.

129. These standards of care are not policies; they "make[] specific the [animal cruelty] law administered by [the] agency" and directly determine whether aquaculture operations will be liable—criminally and civilly—for animal cruelty. 5 M.R.S. 8002(9)(A); 17 M.R.S. § 1031(2)(D).

130. Indeed, DACF has previously enacted standards of care for animal welfare through rulemaking. *See, e.g.*, 2021 ME Regulation Text 12162 (establishing standards for the proper care and housing facilities of animals); 01-001 C.M.R. ch. 701.

131. DACF's second justification for denying the Petition was that the Citizen Petition did not include text for proposed rules. *See* DACF Response Letter, Compl. Ex. 4

at 2.

132. DACF's denial of the Petition on this basis was arbitrary and capricious because: (i) while DACF's form for submitting petitions allows petitioners to propose rule text, neither the form, nor any Maine law, provides notice that petitions are required to include text—let alone that failure to propose a rule's text is a basis for agencies to deny a petition; and (ii) the Citizen Petition includes the complete text of aquaculture BMPs from FDACS.

133. Lastly, DACF's statement that it has "no particular expertise" in aquaculture is an arbitrary and invalid reason for denying the Citizen Petition. DACF Response Letter, Compl. Ex. 4 at 2.

134. Maine's Legislature requires DACF to protect animals in aquaculture facilities, and if DACF is not currently equipped to do so, it is the agency's responsibility to develop the expertise it needs to carry out its statutory mandate.

135. Accordingly, DACF's justifications for denying the Petition were not only (i) affected by legal error and (ii) in excess of its statutory authority, they were also (iii) arbitrary and capricious and characterized by abuse of discretion, warranting reversal.

136. 5 M.R.S. § 11001(2) provides that "[a]ny person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court."

137. Petitioners, as signatories and organizers of the Citizen Petition, have been harmed by DACF's decision to not initiate rulemaking in response to their Citizen Petition.

138. Further, 5 M.R.S. § 11007(4)(C)(6) authorizes courts to reverse an agency's decision that is "[a]rbitrary or capricious or characterized by abuse of discretion."

139. Because DACF's failure or refusal to act in response to the Citizen Petition

is arbitrary, capricious, and characterized by abuse of discretion, this Court should reverse DACF's decision and require the agency to initiate rulemaking.

COUNT V
(Declaratory Relief)
DACF Has Failed to Adopt Rules as Required by Law

140. Petitioners repeat and incorporate paragraphs 1–139 of this Complaint as though fully set forth herein.

141. Petitioners are entitled to declaratory relief requiring DACF to adopt rules to protect animals kept in Maine's aquaculture facilities.

142. Pursuant to 5 M.R.S. § 8058, “[i]n the event that the court finds that an agency has failed to adopt a rule as required by law, the court may issue such orders as are necessary and appropriate to remedy such failure.”

143. Maine's Legislature has mandated that DACF “ensure the humane and proper treatment of animals” in Maine. 7 M.R.S. § 3902.

144. This responsibility extends to “every living, sentient creature not a human being,” including fish kept for aquaculture. *Id.* § 3907 (defining “animals”).

145. To carry out its mandate, DACF must “develop, implement, and administer a comprehensive program that upholds the animal welfare laws of the State,” and must “investigate complaints of cruelty to animals and enforce cruelty-to-animal laws.” *Id.* §§ 3902, 3906-B(11).

146. As a first step, DACF must determine “best management practices for animal husbandry” in aquaculture; then, the agency can investigate whether facilities are failing to comply with BMPs and thereby violating Maine's animal-cruelty laws. 17 M.R.S. § 1031(2)(D).

147. Indisputably, DACF has not taken this first step to fulfill its statutory mandate.

148. 5 M.R.S. § 8058 provides that “[j]udicial review of an agency rule, or of an agency’s refusal or failure to adopt a rule where the adoption of a rule is required by law, may be had by any person who is aggrieved in an action for declaratory judgment in the Superior Court.”

149. Petitioners have been harmed because DACF abdicated its statutory obligation to adopt rules protecting the welfare of animals in Maine’s aquaculture facilities.

150. Petitioner Animal Outlook has been harmed because its mission is to “build a better tomorrow for all animals,” and DACF’s failure to protect fish in Maine’s aquaculture facilities frustrates this mission.

151. In addition, because of DACF’s refusal to adopt rules to address animal welfare in aquaculture, Petitioner Animal Outlook has diverted resources to, *inter alia*, (i) demand and review public records, (ii) educate the public about animal cruelty in Maine’s aquaculture facilities, and (iii) collect, certify, and verify signatures to petition DACF.

152. If DACF had fulfilled its statutory mandate and adopted such rules, Animal Outlook would be using resources to investigate cruelty in aquaculture facilities and assist DACF’s enforcement efforts.

153. The individual Petitioners, as signatories and organizers of the Citizen Petition, have been harmed by DACF’s decision to not adopt rules as demanded in their Citizen Petition.

154. Accordingly, this Court should grant declaratory relief requiring DACF to adopt rules, specifically rules adopting BMPs for animal husbandry in aquaculture, as required by law.

COUNT VI
(Abdication of Enforcement Responsibility)
DACF Has Failed to Enforce Maine’s Cruelty Laws in Aquaculture Facilities

155. Petitioners repeat and incorporate paragraphs 1–154 of this Complaint, as though fully set forth herein.

156. 7 M.R.S. § 2 provides that the “commissioner [of DACF] is the chief executive charged with the enforcement of all statutes delegating responsibility to the commissioner or the department and shall be vigilant in discovering violations thereof.”

157. In addition, Maine’s Animal Welfare Act provides that the Commissioner of DACF “shall investigate complaints of cruelty to animals and enforce cruelty-to-animal laws.” 7 M.R.S. § 3906-B(11).

158. To date, DACF possesses only one public record pertaining to an inspection, audit, enforcement, or similar action against any aquaculture facility or business. *See* 2021 DACF FOAA Response, Compl. Ex. 2, App. 9; 2022 DACF FOAA Response, Compl. Ex. 8.

159. In the only documented incident, DACF declined to pursue charges despite video evidence of egregious cruelty and “recommend[ed] that another state agency . . . look into developing oversight in animal care at this type of Aquaculture facility.” *See* DACF Cooke Report, Compl. Ex. 1 at 4.

160. 5 M.R.S. § 11001(2) provides that “[a]ny person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court.”

161. Petitioners have been harmed because DACF abdicated its statutory obligation to enforce Maine’s animal-cruelty laws in the State’s aquaculture facilities.

162. Petitioner Animal Outlook has been harmed because its mission is to “build a better tomorrow for all animals,” and DACF’s failure to enforce Maine’s cruelty laws to protect fish in aquaculture frustrates this mission.

163. In addition, because of DACF’s refusal to enforce Maine’s animal-cruelty laws in aquaculture facilities, Petitioner Animal Outlook has diverted resources to, *inter alia*, (i) demand and review public records, (ii) educate the public about animal cruelty in Maine’s aquaculture facilities, and (iii) collect, certify, and verify signatures to petition DACF. If DACF had fulfilled its statutory mandate, Animal Outlook would be using resources to investigate cruelty in aquaculture facilities and assist DACF’s enforcement efforts.

164. The individual Petitioners, as signatories and organizers of the Citizen Petition, have been harmed by DACF’s failure or refusal to initiate rulemaking in response to their Petition, which is a necessary step towards enforcing Maine’s cruelty laws in aquaculture facilities.

165. 5 M.R.S. § 11007(4)(C)(1) authorizes courts to intervene where an agency’s failure or refusal to act is “[i]n violation of constitutional or statutory provisions.”

166. Because DACF’s failure or refusal to act and enforce Maine’s animal-cruelty laws in aquaculture facilities is “[i]n violation of constitutional or statutory provisions,” namely 7 M.R.S. §§ 2 and 3906-B(11), the Court should enter judgment requiring the agency to fulfill its statutory mandate.

RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request that the Court enter judgment in their favor and against Defendants and:

1. Reverse DACF's denial of the Citizen Petition;
2. Require DACF to initiate rulemaking as set forth in the Citizen Petition;
3. Order that DACF must adopt rules to protect the welfare of fish kept in Maine's aquaculture facilities;
4. Require DACF to enforce Maine's animal-cruelty laws in aquaculture facilities; and
5. Award any further relief that the Court deems just and proper.

Dated this 22nd day of February, 2023.



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Pro hac admission pending