

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

Mark C. Draper, Chair

Cynthia S. Bertocci
Executive Analyst

Ruth Ann Burke
Board Clerk

November 20, 2019

Mr. Michael Lannan
Tech Environmental
33A Front Street
Belfast, ME 04915

RE: Nordic Aquafarms, Inc., Site Location/NRPA, Waste Discharge, and Air Emissions
Applications; Response to Letter of November 15, 2019 pertaining to Sound Data

Dear Mr. Lannan:

The Presiding Officer is in receipt of your letter dated November 15, 2019 in which you identify what you believe to be deficiencies in Nordic's Site Law application pertaining to sound/noise. In your letter, you stated your understanding that the Board voted at its meeting on November 7, 2019 to include noise as an issue for the hearing. You included a list of the information you believe should be provided for an assessment of sound impacts from Nordic's proposed project, and you requested that the deadline for filing testimony on noise be extended to allow submission of the information you requested and your assessment of it.

The Third Procedural Order did not include noise as a hearing issue and, contrary to your understanding, the Board did not vote to add noise as a hearing issue at its meeting on November 7, 2019. In its appeal of the Third Procedural Order, Upstream Watch questioned whether the issues of "air pollution including dust, noise, odor and blasting" were included under the umbrella of "impacts to existing uses from construction and operations, including blasting and odor" listed in the Third Procedural Order. At the Board meeting, Department staff recommended that Nordic's Chapter 115 Air Emissions application be included as an issue for the hearing. The Fourth Procedural Order issued on November 8th documented the Board's decisions on the appeals of the Third Procedural Order:

Excerpt from Section 1 of the Fourth Procedural Order:

- C. With respect to air emissions from the proposed project, following oral argument by Upstream Watch and Nordic, the Board asked Department staff to address the air emissions concerns voiced by Upstream Watch. Department staff commented that Upstream Watch has raised issues that would benefit from further examination, possibly including modeling, and recommended that Nordic's Air Emissions application be included as a hearing issue. In response to questioning, staff commented that Nordic's Air Emissions application is limited to a request for a Chapter 115 permit for eight diesel generators. The Board then voted 4-0 in favor of a motion to include Nordic's Air Emissions application as a hearing issue.
- D. While the Board added testimony on Nordic's Air Emissions application to the list of hearing issues, parties are advised that examination of Nordic's Air Emissions application is limited to the licensing criteria set forth in Chapter 115 of the Department's rules. The issues of noise and odor that were included in Upstream Watch's submissions regarding air emissions are not licensing criteria under Chapter 115.

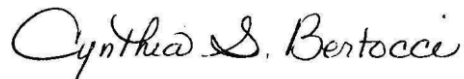
To further clarify, pursuant to the Third Procedural Order, noise from the proposed development is not an issue for the hearing. Parties may submit written comments on whether the proposed project meets the noise criteria under Site Law, but the parties should be aware that pursuant to the Site Law, 38 M.R.S. §484 (3)(A), construction noise generated between the hours of 7 a.m. and 7 p.m. or during daylight hours, whichever is longer, is exempt from review by the Board. Odor is listed in the Third Procedural Order as one of the issues that may be addressed at the hearing under the Site Law criteria, as further set forth in Chapter 375, §17 of the Department's rules.

Consistent with the Board's vote on November 7th and the Fourth Procedural Order, noise from Nordic's proposed project is not a subject for the Board's hearing on Nordic's applications. The Board's granting of the appeal on November 7th was limited to standards relevant to the Chapter 115 Air Emissions application. The hearing topic concerning impacts to existing uses from construction and operations includes blasting and odor. The Presiding Officer determined that the requested topics of noise, recreational uses, and scenic and aesthetic uses would not be topics for the hearing.

With respect to your request that the Presiding Officer ask the applicant to submit additional information pertaining to sources of sound and provide additional time for the filing of testimony on the issue of noise from the proposed facility, the Presiding Officer declines to do so. Much of the requested information pertains to construction that would occur during daylight hours and which, as stated in the Fourth Procedural Order, is specifically exempted from regulation under the Site Law. Although Chapter 375, §10 of the Department's rules contains provisions pertaining to construction noise during daylight hours, the Site Law itself, in 38 M.R.S. § 484(3)(A) states that "noise generated between the hours of 7 a.m. and 7 p.m. or during daylight hours, whichever is longer, by construction of a development approved under [the Site Law] may not be regulated under this subsection [No Adverse Effect on the Natural Environment]." Where, as here, there is a conflict between the governing statute and a rule implementing it, the statute controls, and the exception set forth in statute takes precedence over the rule's stated restrictions. Also, in this case the statutory exemption for daytime construction noise was enacted by the Legislature after that section of the rule was in place, so the Legislature is presumed to be aware of the rule when it enacted the exemption. The Board cannot, therefore, consider evidence on the issue of daytime construction noise. Evidence pertaining to operational noise and nighttime construction noise may be submitted in writing while the record is open, but the topic is not a hearing issue.

Your letter will be considered as comment on the application's conformance with the relevant noise standards.

Sincerely,



Cynthia S. Bertocci, Executive Analyst
Board of Environmental Protection

cc: Service List