



STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
17 STATE HOUSE STATION, AUGUSTA, MAINE 04333-0017

BOARD ORDER

IN THE MATTER OF

NORDIC AQUAFARMS, INC	) APPLICATIONS FOR AIR EMISSION,
Belfast and Northport	) SITE LOCATION OF DEVELOPMENT,
Waldo County, Maine	) NATURAL RESOURCES PROTECTION ACT, and
	) MAINE POLLUTANT DISCHARGE ELIMINATION
A-1146-71-A-N	) SYSTEM (MEPDES)/WASTE DISCHARGE LICENSE
L-28319-26-A-N	)
L-28319-TG-B-N	)
L-28319-4E-C-N	) NINTH PROCEDURAL ORDER
L-28319-L6-D-N	)
L-28319-TW-E-N	)
W-009200-6F-A-N	)

This procedural order documents rulings on several matters that have recently come before the Presiding Officer for decision in the matter of Nordic Aquafarm, Inc.’s applications for an Atlantic salmon land-based aquaculture facility proposed to be located in Belfast and Northport.

**1. Motion to Strike Pre-filed Rebuttal Testimony and Eliminate a Hearing Topic**

By letter dated January 24, 2020 Joanna Tourangeau, on behalf of Nordic Aquafarms, Inc. (Nordic), filed “Objections and Motions to Strike Intervenor’s Pre-filed Rebuttal Testimony and to Eliminate a Hearing Topic.” The motion was clarified in a subsequent email from Ms. Tourangeau. In its motion, Nordic: (a) objected to portions of Paul Bernacki’s testimony, (b) objected to Upstream Watch/Northport Village Corporation’s submission of Mr. Lannan’s comments on noise as “pre-filed testimony,” and (c) requested elimination of stormwater management as a hearing topic.

Responses to Nordic’s motion were filed by Intervenor Group Mabee/Grace/Lobstering Representatives (MGL) in a January 29, 2020 letter from Kim Ervin Tucker and by Upstream Watch/Northport Village Corporation (Upstream/NVC) in a January 29, 2020 letter from Kristin Racine.

- A. Testimony of Mr. Bernacki. In its motion, Nordic argues that portions of Mr. Bernacki’s testimony are not responsive to direct testimony and portions address issues, such as Title, Right or Interest, that are not hearing topics. Nordic also objects to Mr. Bernacki’s statement that he is incorporating his prior submitted comments by reference.

In its response to the motion, Intervenor Group MGL argues that the portions of Mr. Bernacki's testimony that Nordic objects to do not specifically address the issue of Title, Right or Interest and are relevant to other hearing topics. With respect to incorporation by reference, MGL argues that Nordic's witnesses have similarly referred in their testimony to documents that Nordic did not submit as exhibits. MGL's response to the motion identifies four documents that Mr. Bernacki submitted as written comments that it requests be included as exhibits to his testimony.

Ruling: With respect to Nordic's motion to strike portions of Mr. Bernacki's testimony, I find that Nordic's motion is overly broad. Portions of the testimony objected to challenge the adequacy of Nordic's application and, as such, are permissible. However, other portions focus predominately on the matter of Title, Right or Interest, which is not a hearing issue. Accordingly, the following portions of Mr. Bernacki's testimony are stricken:

- Page 3, last paragraph, introductory sentence beginning with "As grounds for postponement..." through the second bullet of the paragraph ending, "boundary line if flats conveyed")) on page 4;
- Page 4, the bullet beginning, "Failure of actual TRI..." and ending, "trenching and blasting);
- Page 4, last paragraph beginning, "Following are representative narrative data..." through the middle of page 6 and ending, "...including after apparent alterations have been made to the original plans by someone."; and
- Page 7, second full paragraph, second sentence beginning with, "My review of the records in the Waldo County Registry..." and ending with, "do not include any intertidal property."

The link at the top of page 3 is also stricken.

With respect to incorporation of Mr. Bernacki's previously filed written comments by reference, it is my understanding that counsel for Nordic and counsel for MGL have discussed with counsel for the Board the four documents identified in MGL's response to the motion. These documents were submitted to the Department as written comment prior to Mr. Bernacki's filing of testimony as a witness, in emails dated January 13, 2020, January 14, 2020, January 14, 2020, and January 16, 2020. These documents, which are listed below, are admitted as exhibits to Mr. Bernacki's testimony. Because the other parties were not sent copies of the e-mails submitting those documents and the documents were not included in Mr. Bernacki's pre-filed written testimony, the other parties may comment on them orally in their testimony at the hearing and/or may file a response in the form of exhibits by the start of the hearing. The documents admitted to the hearing record are:

- Penobscot River Mercury Study, Chapter 5, April 2013, by K.M. Keager; consisting of 158 pages. Nordic's pre-filed testimony also references the Penobscot River Mercury Study without attaching it. The study as a whole is in the Department's possession and has been consulted by Department staff.

Therefore, the study as a whole will be considered to be in the administrative record and Chapter 5 will be considered to be an exhibit to Mr. Bernacki's testimony for the hearing.

- Assessment and Report on Supplemental Sediment Testing Submitted on Behalf of Sprague Operating Resources LLC's Application for Maintenance Dredging in Searsport, Maine. Dr. Kevin M. Yeager, September 27, 2014; consisting of three pages.
- Sandia Report: Offshore Wind Guidance Document: Oceanography and Sediment Stability (Version 1) Development of a Conceptual Model; Jason Magalen, Craig Jones, and Jesse Roberts, June 2014; page 1 through page 65.
- Statement of Joseph T. Kelley, Ph.D. Concerning the Proposal to Dump Dredge Spoils from the Searsport Fnp into the Belfast Bay Pockmarks, June 9, 2015; consisting of 10 pages.

The Board staff will make the necessary copies of these documents for the Board members, Board counsel, Board staff and DEP staff; however, MGL must send electronic versions to the other parties by Monday, February 3, 2020 at 5:00 p.m.

- B. Mr. Lannan's Written Comments on Noise. Nordic objects to the fact that Upstream/NVC witness Michael Lannan's comments on noise, W1 and associated exhibits, were submitted as sworn pre-filed testimony contrary to the Board's prior rulings that noise is not a hearing topic. Nordic requested clarification that Mr. Lannan's submission be considered solely as written comment on a non-hearing issue.

In its response to the motion, Upstream/NVC argues that Mr. Lannan's submission is intended to be written comment which could be filed at any time; and the fact that it was submitted as a sworn statement indicates Mr. Lannan's willingness to be questioned on it. Upstream/NVC understands that Mr. Lannan's submission on noise will be treated as written comment.

Ruling: Regardless of its form, Mr. Lannan's submission of W1 and associated exhibits will be treated as comment on Nordic's applications.

- C. Request to Eliminate Stormwater Management as a Hearing Issue. In its filing Nordic commented that none of the intervenors submitted direct or rebuttal testimony on stormwater and requested that stormwater management be eliminated as a hearing issue with the time allotted to other issues.

Upstream/NVC objects to the request. Upstream/NVC argues that Nordic presented pre-filed testimony on its Stormwater Management Plan, stormwater management is an important issue, and that Upstream/NVC intends to cross-examine Nordic's witness on this issue. Department staff also has advised the Board that it intends to ask questions at the hearing on this topic.

Ruling: The request to eliminate stormwater management as a hearing issue is denied. Parties to the proceeding have a right to cross-examine the witnesses of the other parties

on all pre-filed testimony. Board members may also have questions regarding stormwater management at the site.

## **2. Request to Cross Non-Witnesses**

In accordance with the Eight Procedural Order, parties submitted requests for time to cross-examine witnesses. In its submission, MGL requested that the Board compel Nordic to provide access to additional persons with “direct knowledge and expertise referenced in the [Nordic’s] direct testimony.”

Ruling: The request is denied. Each party has the right to select its witnesses. Cross-examination may be used to test the participating witnesses’ knowledge of matters testified to and the supporting exhibits. There is a provision in Chapter 3, §13 for a party to request that a subpoena be issued in the name of the Department to require the attendance of a witness to provide testimony if the conditions set forth in the rule are met.

## **3. State Agency Review Comments**

On January 30, 2020 the Department of Marine Resources submitted comments on Nordic’s proposed project as currently configured. Additionally, a second memorandum of analysis by DEP staff member John Hopeck pertaining to groundwater was entered into the record on January 27, 2020.

These comments have now been posted on the Department’s website and are provided electronically to the parties with this order.

Given that these comments became available for review shortly before the start of the hearing, the parties will be permitted to address them orally at the hearing. If further time is required to review and comment, the parties may request additional time to submit written comments following close of the hearing.

## **4. Request to Stop Processing for Lack of Title, Right or Interest**

By electronic mail dated January 8, 2020, MGL requested that the Board cease the processing of Nordic’s applications based on argument that Nordic does not have sufficient Title, Right or Interest to the intertidal land proposed for the placement of Nordic’s water and wastewater pipelines. In support of its argument, MGL filed a transcript of a January 2, 2020 telephonic oral argument by the attorneys in a proceeding in U.S. District Court in the matter of Jeffrey R. Mabee and Judith B. Grace v Janet Eckrote and Richard Eckrote which MGL argues supports its position on the title to the intertidal land at issue.

By letter dated January 17, 2020, Ms. Tourangeau responded on behalf of Nordic. Ms. Tourangeau responded that resolution of the ownership issue remains with Waldo County Superior Court.

Ruling: The request to suspend processing of Nordic’s applications is denied. The materials submitted by MGL do not change the Board’s decision. The Board has reviewed MGL’s

position on Title, Right or Interest on more than one occasion and will not revisit the matter at this time.

**5. Links and References to Materials Not in the Record**

Board members and Department staff will disregard links provided in the parties' pre-filed testimony and exhibits. As set forth in the Second and Fourth Procedural Orders, links are not permitted. Similarly, with the exception of references to the pending applications, references to documents not attached as exhibits to testimony will be disregarded by the Board members and Department staff. The parties should refrain from referencing materials in the links or such references at the hearing and in post-hearing briefs.

Any appeal from this ruling must be filed by Monday, February 3, 2020 at noon and will be considered by the Board at its meeting on Thursday, February 6, 2020.

DONE AND DATED AT AUGUSTA, MAINE THIS 31st DAY OF JANUARY, 2020.

BOARD OF ENVIRONMENTAL PROTECTION



BY: \_\_\_\_\_  
Robert S. Duchesne, Presiding Officer