

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

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July 26, 2023

SENT VIA ELECTRONIC MAIL ONLY

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Re: Remand and related judicial actions; Petition of Upstream Watch to revoke; Motion of Mabee-Grace, *et al.* to vacate; and Petition of Friends of the Harriet L. Hartley Conservation Area to intervene in future proceedings related to the licenses issued to Nordic Aquafarms, Inc.

To The Service List:

This letter outlines the process and defines the scope of the Board of Environmental Protection (“Board”) proceedings following judicial orders of remand (“Remand Orders”) from the Maine Law Court and the Maine Superior Court, Business & Consumer Docket (“BCD”).¹ In addition, this letter addresses filings already submitted by Jeffrey R. Mabee and Judith B. Grace, the Maine Lobstering Union, commercial crab and lobster license holders David Black and Wayne Canning (collectively “Mabee-Grace”), Friends of the Harriet L. Hartley Conservation Area (“Friends”), and Upstream Watch.

Court instructions on remand

The Law Court issued its Remand Order to the BCD with instructions that the BCD further remand to the Board “so that the [Board] may determine the impact, if any, of *Mabee I* [*Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79] on the challenged approvals” that were issued by the Board on November 19, 2020 (“Nordic permits”). The Law Court left it to the Board to “determine the scope of the proceedings on remand.” The BCD issued its Remand Order consistent with the Law

¹ Law Court Docket No. BCD-22-48 and Superior Court Docket No. BCD-APP-2021-009.

Court's Remand Order, noting that the Board "may determine its scope of proceedings on remand including whether it will take additional evidence."

Board process

To facilitate the Board's consideration of the limited question on remand and to allow input on that question, all parties to the Law Court appeal and other intervenors from the underlying Board licensing proceeding may file briefs and argue orally before the Board as set forth below.

Department staff will provide a briefing for the Board at a public meeting in advance of the Board's consideration of the remand to ensure that the Board has the necessary procedural context to consider the briefs and the question on remand. The staff briefing will not introduce new evidence or recommend a decision on the remand at that time. At a subsequent meeting, the Board will hear oral argument and staff will provide a recommendation in the form of a proposed Board Order.

Scope of proceedings and additional evidence

The Law Court did not vacate the Nordic permits and instead directed the Board to consider and address a narrow legal question. Given the robust administrative record already developed with respect to the Nordic permits and the narrow scope of review directed by the Remand Orders, no additional evidence will be solicited or allowed in this remand proceeding. The Board will take official notice of certain agency and judicial proceedings and actions. As allowed under Chapter 3, § 20(C), the Board takes official notice of the following:

1. The Remand Orders in Law Court Docket Nos. BCD-2022-48/WAL-22-299 and Superior Court Docket No. BCD-APP-2021-009;
2. The Law Court opinion in *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79, which is commonly referred to as the "quiet title action"; and
3. The Commissioner's Suspension Order dated June 21, 2023, including the fact of matters referenced by the Suspension Order such as the City of Belfast's eminent domain actions and related Superior Court challenges to those actions in BELSC-RE-2021-0007.

Objections to the substance or materiality of these officially-noticed documents shall be made, if at all, in the briefs.

Briefing schedule and scope

Briefs may be filed on the limited legal question of the impact, if any, of *Mabee I* on the Board's approvals of the Nordic permits. The deadline for submitting a brief is **5:00 p.m. on August 15, 2023**. Briefs are limited to 10 pages, may not include attachments or appendices, and may not reference any new evidence. Evidence in the underlying licensing record and the documents of which the Board has taken official notice may be referenced if directly relevant to the limited issue before the Board. Briefs that do not comply with these filing requirements may be rejected. In consideration of the narrow scope of the Remand Orders and prior Board proceedings in this matter, no additional reply briefs or other filings are permitted.

Oral argument

After the briefs have been filed and the staff briefing has taken place, the Board will schedule this matter for oral argument and the Board's deliberation and decision on the limited question before it. Department staff serving the Board in this proceeding will assemble a packet of materials for the Board, including the staff recommendation. Once available, the Board packet and an agenda with the meeting location and start time will be sent to the service list. The Board packet and the meeting agenda will be posted on the Board's webpage <https://www.maine.gov/dep/bep/index.html> for interested persons and members of the public. Parties to the Law Court appeal and intervenors from the underlying Board licensing proceeding that file briefs with the Board in this proceeding will be allowed to make a brief oral argument to the Board with respect to their briefed positions. As with the written briefs, oral arguments must be limited to the narrow legal question the Law Court posed of the Board.

Filings already submitted by Mabee-Grace, Friends, and Upstream Watch

Friends previously filed with the Board a motion to intervene in Board proceedings related to the BCD's Remand Order. An opportunity for a hearing is not required and no hearing is contemplated for this limited proceeding on remand; therefore, this is not an adjudicatory proceeding for which intervention is applicable. However, as noted above Friends was a party to the Law Court appeal, and as such will be allowed to submit a brief and orally argue its briefed position before the Board.

On July 5, 2023, Mabee-Grace and Friends previously filed with the Board a motion to vacate the Nordic permits, which I interpret as a request to revoke the Nordic permits. On July 7, 2023, Upstream Watch filed with the Board a request to revoke the Nordic permits. The Board lacks authority to revoke licenses or permits issued by the Department, including the Nordic permits issued by the Board. Pursuant to 38 M.R.S. § 342(11-B) and Chapter 2, § 25, authority to consider revocation of permits rests with the Commissioner of the Department. The Commissioner separately acted on a prior request of Mabee-Grace and Friends to revoke the Nordic permits, and in the exercise of her discretionary authority, determined that revocation was not warranted.² Therefore, the Mabee-Grace, Friends and Upstream Watch renewed requests to revoke the Nordic permits are hereby referred to the Commissioner.

² Commissioner's Suspension Order dated June 21, 2023, ¶ 17.

FILING OF DOCUMENTS AND SERVICE LIST

All filings in this matter must be copied to the enclosed service list.³ It is the responsibility of each appeal participant's representative to circulate appeal filings to other members of its organization as it sees fit. The filing of any submission or the service of any document or communication upon a party to the appeal proceeding is deemed complete when the document or communication is sent to the party or the party's designated representative by electronic mail, U.S. mail, in-hand delivery, or telefax. Electronic mail to the Board is preferred, provided the signed original document is received by the Board within five working days of the filing date.

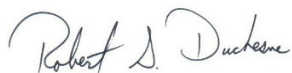
Filings with the Board must be directed to:

Robert Duchesne, Presiding Officer
Board of Environmental Protection
c/o Ruth Ann Burke
17 State House Station
Augusta, ME 04333-0017
ruth.a.burke@maine.gov

It is noted that counsel for Nordic and for Mabee-Grace and Friends submitted separate e-mail requests to the Board Executive Analyst to include additional client contacts to the service list. The general practice of the Board is to have each party to a proceeding designate a single representative to and from whom all correspondence is sent., The service list will include only counsel for parties or a party's designated representative, and it is the responsibility of counsel or the designated representative to circulate communications, to their clients as they see fit.

If you have any questions, you may contact Board Executive Analyst William F. Hinkel at bill.hinkel@maine.gov or (207) 314-1458 or Assistant Attorney General Peggy Bensinger at peggy.bensinger@maine.gov (207) 626-8578.

Sincerely,



Robert Duchesne
Presiding Officer
Board of Environmental Protection

cc: Service List (July 26, 2023)

³ The service list was revised on July 26, 2023, to update the U.S. mailing address for Lawrence Reichard.

Enclosure(s)

Board of Environmental Protection
In the Matter of the Court Ordered Remands to the Board
Law Court Docket No. BCD-2022-48; Superior Court Docket No. BCD-AP-2021-009
Nordic Aquafarms, Inc.
Service List
Revised July 26, 2023

Board of Environmental Protection

Filings with the Board must be directed to Ruth Ann Burke and, unless otherwise specified, are due by 5:00 p.m. on the filing date. Untimely filings may be rejected.

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