



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) FIFTEENTH PROCEDURAL ORDER
L-28319-L6-D-N)
L-28319-TW-E-N)
W-009200-6F-A-N)

The Board of Environmental Protection (Board) held an adjudicatory hearing in Belfast from February 11 through February 14, 2020 on Nordic Aquafarms, Inc.'s (Nordic's) applications for permits for an Atlantic salmon land-based aquaculture facility proposed to be located in Belfast and Northport. At the conclusion of the hearing, the record was left open for specific documents as set forth in the Eleventh Procedural Order including receipt of the Department of Marine Resources' (DMR) assessment of the impacts of Nordic's proposed dredging and the parties' comments on that assessment. This procedural order rules on requests contained in, and objections to, the parties' comments on DMR's April 7, 2020 assessment (Assessment) of potential impacts from Nordic's proposal to dredge in the coastal wetland. This order also rules on additional filings received on May 3 and May 4, 2020 pertaining to financial capacity.

1. DMR's Assessment of Nordic's Proposed Dredging in the Coastal Wetland

Title 38 M.R.S. §480-D(9) of the Natural Resources Protection Act states:

If the proposed activity involves dredging, dredge spoils disposal or transporting dredge spoils by water, the applicant must demonstrate that the transportation route minimizes adverse impacts on the fishing industry and that the disposal site is geologically suitable. The Commissioner of Marine Resources shall provide the department with an assessment of the impacts on the fishing industry of a proposed dredging operation in the coastal wetlands. The assessment must consider impacts to the area to be dredged and impacts to the fishing industry of a proposed route to transport dredge spoils to an ocean disposal site.

In its usual role as a sister agency, DMR provided comments on Nordic's proposed project in a memorandum to Department staff dated January 24, 2020. On February 14, 2020, prior to the conclusion of the Board's hearing on Nordic's applications, DMR announced that, in response to public requests, it would hold a public hearing on Nordic's proposal to dredge in the coastal wetland. The Board subsequently held its hearing record open to allow for DMR's Assessment following the hearing DMR had scheduled, and the parties' comments on that Assessment.

On March 2, 2020, DMR held its hearing in Belfast. At the end of the hearing, DMR provided an additional ten days for written comment to be submitted to DMR.

On April 7, 2020 DMR filed its Assessment in a memorandum to the Department's Project Manager titled, "Addendum Comments on impacts to fishing activity during construction of intake and discharge pipes and haul route for transport of excavated material." Appended to the Assessment was a map of Nordic's proposed haul route prepared by Cianbro dated February 13, 2020. DMR also submitted five other appendices to its Assessment: Rebuttal Testimony of David Black January 16, 2020; David Black's written testimony before DMR dated March 4, 2020; Statement of David Black dated February 12, 2020; handwritten statement and printed Statement of Wayne Canning; and email from Lawrence Moffet to DMR dated March 2, 2020 commenting on Nordic's proposal.

2. Nordic's Response to DMR's Assessment

Following receipt of the Assessment and the appendices, Nordic provided its comment by email dated April 9, 2020, concurring with the Assessment.

3. Comments on DMR's Assessment Filed by Intervenors

The deadline for intervenors to comment on DMR's Assessment was 14 days after the filing of Nordic's comments, or April 23, 2020, at 5:00 p.m. Intervenors Jeffrey R. Mabee, Judith B. Grace, and Lobstering Representatives (MGL), Upstream Watch, and Northport Village Corporation filed timely comments on the Assessment.

A. Submissions by Intervenor MGL. MGL commented on the Assessment in emails from Ms. Kim Ervin Tucker dated April 23, 2020 at 11:56 a.m., 4:21 p.m., 4:25 p.m., 4:28 p.m., 4:33 p.m., 4:37 p.m., and 4:48 p.m. Some of these emails were received significantly later than the time reflected in the header of the email.

Renewed Request to Stay Processing. MGL's 11:56 filing is not comment on DMR's assessment, but rather a renewal of MGL's prior requests that the Board stay processing of Nordic's applications pending additional sediment sampling and the filing of additional or amended applications. MGL argues that Nordic is required to file a separate MEPDES application for a discharge to surface waters associated with its proposal to dredge in the coastal wetland. Nordic objected to this motion by email at 2:20 p.m.
Response: MGL's renewed request will be addressed in a separate ruling.

MGL's 4:21 p.m. filing. In this filing MGL adopts Upstream Watch's comments on the Assessment. MGL also makes a number of objections to DMR's hearing process and alleges due process violations. MGL argues that Nordic has revised its dredging proposal and restates MGL's prior arguments that Nordic must conduct additional testing and obtain a permit for the discharge of dredge material. MGL requests that the Board admit Dr. Dianne Kopec's comments of March 2, 2020 (submitted to DMR at its hearing) into the Board's record. MGL also argues for incorporation of DMR's entire hearing record into the Board's record and requests additional time to further respond to the Assessment.

MGL's 4:25 p.m. filing (received at 4:41 p.m.). This filing transmitted the following documents for inclusion in the Board's record:

- Email to DMR Commissioner Patrick Keliher dated March 2, 2020 requesting an adjudicatory hearing on Nordic's applications, and incorporating a January 23, 2020 email to Denis-Marc Nault at DMR providing information on mercury contamination in Penobscot Bay to DMR;
- March 2, 2020 letter from Ms. Tucker to Commissioner Keliher requesting that DMR conduct an adjudicatory hearing on Nordic's proposed project;
- Exhibit A: Statement of Wayne Canning;
- Exhibit B: Statement of David Black dated 7/10/2019;
- Exhibit C: Table of Lobster Landings from 1964 through 2018;
- Exhibit D: Summary of Other Grounds for Denying this Lease Application;
- Exhibit E: Penobscot River Mercury Study Map; and
- David Black's Rebuttal Testimony 1/16/2020

Nordic objects to this filing arguing that it consists of argument on the process and not comment on the Assessment.

MGL's 4:28 p.m. filing (received at 5:30 p.m.). This filing consists of a March 2, 2020 email to DMR Resource Management Coordinator Amanda Ellis commenting on DMR's process, including Ms. Ellis' March 2, 2020 email response to Andrew Stevenson on DMR's hearing. MGL attached Dr. Kopec's comments to DMR dated March 2, 2020 for inclusion in the Board's record.

MGL's 4:33 p.m. (received at 5:37 p.m.). MGL submitted the following documents that MGL filed with DMR for inclusion in the Board's record. Exhibits A through E are the same documents submitted in MGL's 4:25 email that was received at 4:41 p.m.

- Exhibit A: Statement of Wayne Canning;
- Exhibit B: Statement of David Black dated 7/10/2019;
- Exhibit C: Table of Lobster Landings from 1964 through 2018;
- Exhibit D: Summary of Other Grounds for Denying this Lease Application;
- Exhibit E: Penobscot River Mercury Study Map; and
- Petition to Intervene in the Board's proceeding filed by Maine Lobstering Union, David Black, and Wayne Canning dated 7/10/19.

MGL's 4:37 p.m. filing (received at 5:39 p.m.). This filing forwards a March 3, 2020 email from Ms. Tucker to Board staff, copied to numerous state and federal agency staff and interested persons. Ms. Tucker's email comments on DMR's process, describes what

MGL believes are changes to Nordic's proposed project, argues that further analysis is required including additional sediment sampling and analysis for mercury, and that the Board's hearing record should be reopened. The email attaches Dr. Kopec's March 2, 2020 comments to DMR and a map of Nordic's proposed dredge spoils haul route prepared by Cianbro dated February 13, 2020 for inclusion in the Board's record. The email also forwards and comments on Mr. Paul Bernacki's March 3, 2020 email to the U.S. Army Corps of Engineers and several state agency staff in which Mr. Bernacki comments on the description of Nordic's proposal to dredge in the coastal wetland that was presented at DMR's hearing and how he believes it differs from that presented in Nordic's applications to the Department.

MGL's filing of 4:48 p.m. (received at 5:38 p.m.). MGL filed a copy of DMR's hearing notice published in the Bangor Daily News on February 14, 2020 for inclusion in the Board's record. Nordic objects to admission of the hearing notice as new evidence outside of the scope of the allowance for comments on the Assessment.

- B. Submissions by Intervenor Upstream Watch. Upstream submitted its comments via emails dated April 23, 2020 at 12:47 p.m. and 12:48 p.m. Upstream supplemented its comments in an email filing from attorney Kristin Racine at 2:32 p.m. with a citation to the U.S. Supreme Court opinion, County of Maui, Hawaii v. Hawaii Wildlife Fund, No. 18-260, 590 U.S. (2020). Upstream comments on DMR's hearing process, the scope of the Assessment, and cites what it believes are discrepancies and inconsistencies within the Assessment. Upstream also argues that Nordic's applications are incomplete and that an additional MPDES permit application is required. Upstream contends that Nordic submitted new evidence regarding its proposed dredging and requests that John Krueger's comments to DMR on March 2, 2020 be admitted to the Board's record. Nordic objects to Upstream's comments on DMR's hearing process and to admission of Mr. Krueger's comments.
- C. Submissions by Intervenor Northport Village Corporation. Michael Lannan commented on the Assessment on behalf of Intervenor Northport Village Corporation by email dated April 23, 2020. NVC comments on what it believes are deficiencies in DMR's hearing process as well as the assessment of potential impacts of Nordic's proposed project. NVC further comments on its concerns with Nordic's proposed project and what it believes are deficiencies in Nordic's applications. Upstream argues that DMR needs to conduct an environmental assessment of Nordic's proposed project before the project can be properly evaluated or conditioned.

4. Nordic's Objections to Intervenor's Filings

In emails filed April 23, 2020 at 2:20 p.m., 4:55 p.m., and 4:56 p.m., Nordic objects to the inclusion of various filings by the intervenors regarding DMR's hearing process; arguments that Nordic would require an additional MEPDES permit for its proposed dredging; the submittal of new evidence including the testimony of Dr. Dianne Kopec, John Krueger, and DMR's hearing notice; and submissions filed after the 5:00 p.m. deadline.

5. Rulings on Intervenors' Submissions

- A. Renewed Request to Stay Proceedings. As stated above, arguments by intervenors MGL, Upstream, and NVC that Nordic's proposal to dredge in the coastal wetland requires a separate MEPDES permit and that the Board's proceeding should be placed on hold pending the filing of a separate MEPDES application will be addressed separately.
- B. Comment and Arguments Pertaining to DMR's Hearing Process. Intervenors MGL, Upstream, and NVC all commented on what they argue are procedural deficiencies in DMR's process, including the hearing of March 2, 2020 and the public notice thereof.

Comments on DMR's process are not comments on the substance of DMR's April 7, 2020 Assessment for which the Board's hearing record was held open. Further, the Board will not direct DMR or judge the process it undertook before providing its Assessment. While many of intervenors' objections to DMR's process are woven into the comments filed by the intervenors and cannot be readily redacted, the Board will disregard them in its assessment of Nordic's applications. The following MGL submissions which primarily address DMR's hearing process are not admitted to the Board's evidentiary record:

- Email to DMR Commissioner Patrick Keliher dated March 2, 2020 requesting an adjudicatory hearing on Nordic's applications, and incorporating a January 23, 2020 email to Denis-Marc Nault incorporating information on mercury in Penobscot Bay;
 - March 2, 2020 letter from Ms. Tucker to Commissioner Keliher requesting an adjudicatory hearing on Nordic's proposed project; and
 - MGL's 4:28 filing (received at 5:30) consisting of a March 2, 2020 email to DMR Resource Management Coordinator Amanda Ellis commenting on DMR's process and including Ms. Ellis' March 2, 2020 email response to Andrew Stevenson regarding DMR's hearing.
- C. Requests to Supplement the Board's Record with Comments filed with DMR. As stated above, at the conclusion of the Board's hearing, the record was held open for DMR's Assessment of the potential impacts of Nordic's proposed dredging, and the parties' responses to that Assessment.

- Request for Entire Hearing Record. In its 4:21 p.m. filing, MGL argues that DMR's entire hearing record should be entered into the Board's record on Nordic's applications and additional time provided for comment on the Assessment. This request is denied. As set forth in the Eleventh Procedural Order and reiterated in the Thirteenth Procedural Order, the Board's hearing record was held open only for specific submissions, in this case DMR's Assessment of potential impacts of Nordic's proposed dredging in the coastal wetland and the parties' comments on that Assessment. The Board did not hold its record open to incorporate all comments filed with DMR and other documents pertaining to DMR's process.

- Dr. Dianne Kopec's March 2, 2020 Comments to DMR. MGL requests that Dr. Kopec's comments on mercury contamination in Penobscot Bay be admitted to the Board's record. Intervenors MGL, Upstream, and NVC contend that at DMR's hearing Nordic provided new evidence regarding its proposal for dredging in the coastal wetland and the management and transportation of dredge spoils. Nordic's presentation at DMR's hearing is not before this Board. DMR's April 7, 2020 Assessment of Nordic's proposal appears to provide some additional details on Nordic's proposal beyond what was filed in the permit applications pending with the Board, including the proposed haul route. While the Board previously denied MGL's request to admit Dr. Kopec's comments (Thirteenth Procedural Order), upon further consideration the Board finds that Dr. Kopec's comments on mercury contamination are relevant to consideration of potential impacts from Nordic's proposed dredging. Dr. Kopec's March 2, 2020 comment letter is admitted as written comment. The fact that it is written comment, and not sworn testimony, and it was not subject to cross-examination, will go to the weight of the evidence.
- John Krueger's March 2, 2020 Written Comments from DMR's Hearing. Upstream appended John Krueger's comments to its comments on DMR's assessment and requests that they be admitted to the Board's record. A review of Mr. Krueger's March 2nd comments indicates that they largely focus on potential impacts from Nordic's proposed wastewater discharge and in some instances reiterate or expand upon Mr. Krueger's testimony before the Board. Mr. Krueger's comments do not address potential impacts from dredging and, therefore, are not admitted to the record.
- DMR's Hearing Notice. MGL submitted a copy of the DMR hearing notice that was published in the Bangor Daily News on February 14, 2020. As stated in section 5(B) of this order, the Board will not review DMR's process in the Board's evaluation of Nordic's applications. DMR's hearing notice is not admitted to the Board's record.
- MGL's 4:37 filing (received at 5:39 p.m.). In brief, this filing consists of an email from Ms. Tucker to Board staff, copied to various state and federal agency staff and interested persons, in which MGL comments on DMR's process, Nordic's proposed dredging, and requests additional sampling and analysis and reopening of the Board's record. MGL also attaches Dr. Kopec's March 2, 2020 comments to DMR and a map of Nordic's proposed dredge spoils haul route prepared by Cianbro dated February 13, 2020 and requests that they be included in the Board's record. The email also comments on and forwards Mr. Paul Bernacki's March 3, 2020 email to U.S. Army Corps of Engineers and state agency staff.

Nordic's proposed haul route was attached to DMR's April 7, 2020 Assessment and, therefore, is already in the record. Dr. Kopec's March 2, 2020 comments are admitted as set forth above. Portions of Ms. Tucker's email and Mr. Bernacki's email address Nordic's dredging proposal and are admitted to the record. However, as stated above, comments on DMR's process will not be considered by the Board in its review of Nordic's applications.

- Additional Attachments to MGL's Filings. The following exhibits attached to MGL's filings at 4:25 and 4:33 are already in the Board's record and do not require a ruling on admissibility:
 - Exhibit A: Statement of Wayne Canning
 - Exhibit B: Statement of David Black dated 7/10/2019
 - Exhibit C: Table of Lobster Landings from 1964 through 2018
 - Exhibit D: Summary of Other Grounds for Denying this Lease Application
 - Exhibit E: Penobscot River Mercury Study Map
 - David Black's Rebuttal Testimony 1/16/2020
 - Petition to Intervene in the Board's proceeding filed by Maine Lobstering Union, David Black, and Wayne Canning dated 7/10/19

6. Filings on Financial Capacity

The Board received several emails on May 3 and May 4 regarding an entry on Nordic's Facebook page. These filings include additional comment on Nordic's financial capacity and a request that the Board reopen its record to receive additional evidence on financial capacity.

Ruling: The Board's record is closed, and the emails are not admitted to the record. The Board will act on Nordic's applications based on the record before it.

7. Adherence to Deadlines and Multiple Filings

As noted above, four of MGL's filings had email date times prior to the 5:00 p.m. deadline but were not received until after 5:00 p.m. The reason for the discrepancy is unclear. In this instance, MGL's filings have not been rejected on the basis that they were untimely. Parties are reminded that, in accordance with Chapter 3, section 3(D) of the Department's *Rules Governing the Conduct of Licensing Hearings*, "the risk of material not being received in a timely manner is on the sender, regardless of the method use." Parties should confirm timely receipt of submissions. In the future, late filings will not be accepted.

The Board requests that the parties file one single document when a filing is permitted or required, as opposed to multiple filings on a particular topic. Multiple filings, especially with some duplication, greatly increase the workload of Board members and staff and do not lend themselves to a clear, cohesive argument or comment by the party.

DONE AND DATED AT AUGUSTA, MAINE THIS 4th DAY OF MAY, 2020.

BOARD OF ENVIRONMENTAL PROTECTION



BY: _____
Robert S. Duchesne, Presiding Officer