

**STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
BOARD OF ENVIRONMENTAL PROTECTION**

	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 SYSTEM
	:(MEPDES)/WASTE DISCHARGE
A-1146-71-A-N	:LICENSE
L-28319-26-A-N	:
L-28319-TG-B-N	:
L-28319-4E-C-N	: <b>NVC/UPSTREAM WATCH APPEAL</b>
L-28319-L6-D-N	: <b>OF SIXTH PROCEDURAL ORDER</b>
L-28319-TW-E-N	: <b>SECTION 2.A.</b>
W-009200-6F-A-N	:
	:
	: JANUARY 6, 2020

This is an APPEAL from the decision of the Presiding Officer's decision in his Sixth Procedural Order at Section 2. A. NOISE. In this appeal Upstream raises two issues:

1. The ruling is contrary to the vote taken by the Board deciding the appeal of Upstream Watch on this issue on November 8, 2019; and
2. Staff and the Board are incorrect as a matter of law when they hold that daytime construction noise is "not subject to Department regulation under Site Law".

These issues are important because the Nordic project, if approved, would cause construction to occur over a period of four or five years, without stop, in an otherwise traditionally residential and agricultural area (that the City re-zoned Industrial to accommodate Nordic) and will subject residents and farm animals to a cacophony of shrill sounds making habitation unpleasant, real estate unmarketable, and maintaining livestock impossible, to the farmers' great loss and damage. Therefore, resolution of the issue of whether daytime construction noise is subject to regulation by the Board is important.

**1. The ruling is contrary to the 4-0 vote taken by the Board concerning the Appeal of Upstream Watch on this same issue on November 8, 2019.**

The Board conceded that blasting and odor are proper Hearing topics under the Site Location of Development Law (SLODA). Nordic asserted, and the Board agreed that daytime construction noise was not a proper Hearing topic because it is "excluded" from regulation by the Department under SLODA.

On November 5, 2019, Upstream Watch filed an appeal with the Board from a ruling dated November 1, 2019 excluding noise from the list of Hearing topics. The Board heard that Appeal on November 8, 2019. By a vote of 4-0 the Board sustained Upstream Watch's Appeal. The subject matter of that Appeal is what is herein revisited. Parenthetically, Upstream requested a transcript of the Appeal proceeding which Staff provided in the form of an audio recording the same day, for which courtesy Upstream is grateful.

Upstream began its argument by reminding the Board that air issues are interrelated and inseparable as a practical matter. Otherwise, should Nordic set off a blast on its

proposed site, and a farmer tending his sheep be knocked over by the percussive energy of the blast, and should the farmer's nostrils fill with the Sulphur-like odor of the explosion, all that is fodder for regulatory consideration, but should the same farmer, at the same time hear a big bang, scaring him and scattering his flock in terror, as far as the law is concerned, that didn't happen. All of it, the percussive force, the odor and the noise, moves through the air simultaneously, but the noise is unregulated, according to the ruling being appealed.

After discussion, during which the Presiding Officer noted that previously he had moved to exclude noise from the list of Hearing topics, the Presiding Officer asked Mr. Crawford of the DEP Air Staff for his recommendation.

Mr. Crawford said: "So, you know, and I recommend that the Board does in fact take this up during the public hearing that would be restricted simply to those generators."

The Presiding Officer: "That – so I take that as a recommendation from the Department. Any other discussion? I make my own comment. And that is that at this point, I'm leaning towards overruling the Presiding Officer because you know how he gets. Do you have a motion?"

Speaker: "Motion to \_\_ over the appeal."

Presiding Officer: "Do I have a second? Do I have a second? Any further discussion? Those in favor of honoring the appeal and over ---"

Speaker: "Granting the appeal."

Presiding Officer: “—granting the appeal and over the Presiding Officer? It is unanimous. Thank you. No further business? There is no further business before us, the meeting is adjourned. Thank you for coming.”

Although the above transcript, produced from the video recording of the Hearing, is not perfect, it reasonably reflects the recollections of those from Upstream in attendance. A full transcript is attached, Schedule A.

At the conclusion of the Hearing, the Board had voted 4-0 to include noise, from the eight generators only, in the Hearing. That seemed clear to all in attendance and seems to be confirmed by the audio recording and transcript. Yet, a few hours later, with no further Board proceedings having occurred, things changed. The Fourth Procedural Order provided, at paragraphs H. and I. the following:

H. 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. The Board conceded that blasting and odor are proper Hearing topics under the Site Location of Development Law (SLODA). Nordic asserted, and the Board agreed that daytime construction noise was not a proper Hearing topic because it is “excluded” from regulation by the Department under SLODA. Department staff commented that Upstream Watch has raised issues that would benefit from further examination, possibly including modelling, and recommended that Nordic’s Air Emissions application be included as a Hearing issue. In response to questioning, staff commented that Nordic’s 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.

I. While the Board added testimony on Nordic's air emissions to the list of hearing issues, parties are advised that examination of Nordic's Air Emissions application is limited to 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 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 the 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, Sec. 17 of the Department's Rules.

Read together, these paragraphs say:

1. Odor is a proper Hearing topic. Paragraph H
2. Odor is not a proper Hearing topic. Paragraph I
3. Air emissions from the 8 generators are a proper Hearing topic.

4. Although Blasting and air emissions are proper Hearing topics, the noise simultaneously generated by blasting and air emissions are not proper Hearing topics.

The ruling contradicts itself regarding odor.

The ruling contradicts itself regarding blasting.

The ruling separates blasting from noise although you can't have one without the other.

- 2. Staff and the Board are incorrect as a matter of law when they hold that daytime construction noise is “not subject to regulation under Site Law”.**

Noise:

Nordic asserts that noise is “exempt from regulation” and thus does not constitute a proper topic for inclusion in a SLODA permit application. Upstream Watch disagrees.

Noise is not, as Nordic claims, “exempt” from regulation. The pertinent regulation is 38 M.R.S. 434 (3)

3. No adverse effect on the natural environment. The developer has made adequate provision for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities.

- A. In making a determination under this subsection, the department may consider the effect of noise from a commercial or industrial development. Noise from a residential

development approved under this article may not be regulated under this subsection, and 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 this article may not be regulated under this subsection. [PL 1993, c. 383, §21 (NEW); PL 1993, c. 383, §42 (AFF).]

B. In determining whether a developer has made adequate provision for the control of noise generated by a commercial or industrial development, the department shall consider board rules relating to noise and the quantifiable noise standards of the municipality in which the development is located and of any municipality that may be affected by the noise. [PL 1993, c. 383, §21 (NEW); PL 1993, c. 383, §42 (AFF).]

C. Nothing in this subsection may be construed to prohibit a municipality from adopting noise regulations stricter than those adopted by the board. [PL 1993, c. 383, §21 (NEW); PL 1993, c. 383, §42 (AFF).]

D. [PL 1995, c. 700, §6 (RP).]

Section 3A above contains two sentences. The first pertains to commercial or industrial development and provides that “the Board may consider the effect of noise”. The second sentence pertains to residential development and provides that noise from residential development is not “regulated under this section”. The first pertains to commercial and Industrial development; the second pertains to residential development. Nowhere in the statute does it say that noise is “exempt” from regulation. That term is never used.

Were Section 3A read differently, there would be no need to have section 3B. Since there is a Section 3B, and since the legislature is presumed to intend what it does, the two sentences in Section 3A must relate to different kinds of construction; commercial/industrial on the one hand and residential on the other. And commercial/industrial may be regulated by the Board. For a further explication of this issue, please see Schedule B appended hereto and made a part hereof.

A construction noise exemption for a project of this size and scope could very well result in unbearable living conditions for years for nearby residents of Belfast and Northport without careful review, a commitment to construction mitigation, and planning. Mercifully, the legislature gave the Board the authority to prevent such a result.

Nordic proposes to construct a power plant, a wastewater treatment plant, a water treatment plant, a food processing plant, millions of gallons of process tanks, hundreds if not thousands of miles of utility piping, ducting, wiring, etc., millions of cubic feet of soil excavation, countless cement trucks, supply deliveries, equipment deliveries, and a major road diversion and construction project and a significant pump station and outfall project. Each one of these could cause an adverse impact and suggesting in their report that the site is large and that there is plenty of space for sound to dissipate is not a mitigation strategy. It provides no solace when the entire site is essentially earmarked to be developed.

Although the Board appears to have ruled on this, arguably reversing the vote taken on Upstream's appeal on December 2019, the Board should find an appropriate moment to reconsider its ruling. Upstream reserves this issue for appeal if the permits are awarded.



Further, consider the legislative history of the law in question. The intent of the legislature is clear, and the intent is not to exempt daytime construction from regulation.

In the Board letter dated, November 20, 2019, the Board took the following position:

*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.*

There is no conflict. In subsection A., there are two distinct thoughts in two different sentences, separated by a period. The first sentence discusses commercial and industrial development and the second sentence discusses residential development. The clause referring to construction appears in the second sentence (residential) and is separated by a comma. Therefore, construction in the second sentence refers to residential construction only.

This makes sense, as residential construction is reasonably consistent and normalized, and of a known and usually modest duration. By its very nature, commercial or industrial construction is very different, large, loud, of substantial and often indeterminate duration and compliance with the intent of 38 M.R.S. Sec. 484(3) as described in the first sentence (“The developer has made adequate provision for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses...”) in a commercial or industrial setting can only be determined on a case-by-case basis.

Consider the legislative history of this Act.

In 1991, when noise was still included in 38 M.R.S. Sec. 482-A, residential construction noise was broken out into its own separate line item. Commercial and Industrial noise was discussed as Statutory inconsistencies from Chapters 680 and 890 in 1989 were remedied in 1991. At that time the pertinent section of Title 38 MRSA §482-A was amended to read:

**§482-A. Noise effect**

*2. **Consideration of local ordinance.** In determining whether a developer has made adequate provision for the control of noise generated by a commercial or industrial development, the ~~board~~ department shall consider ~~its own regulations~~ rules adopted under this section and the quantifiable noise standards of the municipality in which the development is located and of any municipality ~~which~~ that may be affected by the noise.*

*4. **Construction noise; residential developments.** Between 7 a.m. and 7 p.m. or during daylight hours, whichever is longer, noise generated by construction of developments approved under this article is exempt from regulation under this section. Noise from residential developments approved under this article is exempt from regulation under this section.*

Note that, in 1991, the word “exempt” was added to the new “**Construction noise; residential development**” subsection, so Staff’s and the Board’s use of the word “exempt” is understandable. At one time, the word exempt had been added as shown above, but the word “exempt” was deliberately removed in 1993 when the noise Site Law in 38 M.R.S. Sec. 482-A was repealed and replaced by new language in M.R.S. Sec. 484. Please also note that at that time the construction noise exemption was not specific to the type of facility. In 1993 the construction sentence was purposely moved to a position after

the introduction of residential development to make it clear that it now refers only to the residential development.

**1993 - Chapter 383 of Public Law as passed by 116<sup>th</sup> Legislature**

In 1993, 38 MRSA §482-A was repealed, and 38 MRSA §484 sub-§3, ¶¶A to C was enacted to read:

**§484 sub-§3, ¶¶A to C.**

A. In making a determination under this subsection, the department may consider the effect of noise from a commercial or industrial development. Noise from a residential development approved under this article may not be regulated under this subsection, and 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 this article may not be regulated under this subsection.

B. In determining whether a developer has made adequate provision for the control of noise generated by a commercial or industrial development, the department shall consider board rules relating to noise and the quantifiable noise standards of the municipality in which the development is located and of any municipality that may be affected by the noise.

C. Nothing in this subsection may be construed to prohibit a municipality from adopting noise regulations stricter than those adopted by the board.

Specifically, ¶¶A. was largely adapted from §482-A sub-§4, with the following amendments:

A. In making a determination under this subsection, the department may consider the effect of noise from a commercial or industrial development. Noise from a residential developments approved under this article is ~~exempt from regulation~~ may not be regulated under this subsection, and noise generated between the hours of 7 a.m. and 7 p.m. or during daylight hours, whichever is longer, ~~noise generated~~ by construction of a developments approved under this article is ~~exempt from regulation~~ may not be regulated under this subsection.

Specifically, ¶¶B. was largely adapted from §482-A sub-§2, with the following amendments:

B. In determining whether a developer has made adequate provision for the control of noise generated by a commercial or industrial development, the department shall consider ~~rules adopted under this section~~ board rules relating to noise and the quantifiable noise standards of the municipality in which the development is located and of any municipality that may be affected by the noise.

Specifically, ¶¶C. was adapted from §482-A sub-§3, with the following minor amendment:

*C. Nothing in this subsection may be construed to prohibit a municipality from adopting noise regulations stricter than those adopted by the board.*

In §484 sub-§3, ¶¶A, the intentional addition of the phrase, “*In making a determination under this subsection, the department may consider the effect of noise from a commercial or industrial development*”, demonstrates that the intent of ¶¶A was not to exempt commercial and industrial developments from regulation of construction noise, but to clarify, ahead of the residential development provisions, that the department maintains the very necessary public health and safety option to consider noise from commercial and industrial development.

Further evidence is found in the change in language regarding construction noise from residential developments beyond 7 a.m. and 7 p.m, where the phrase “*is exempt from regulation*”, is replaced with “*may not be regulated*”. Even if the second sentence of the condition in its new form, where residential was pulled to the front of the compound sentence, might be fairly read as intending to cover to both residential and commercial/industrial developments, the changed language made regulation permissive and not absolute; therefore, giving needed flexibility to the government to regulate commercial developments that warrant construction noise regulation during daytime hours.

The legislature could not have foreseen this massive Nordic Aquafarms proposal, with all of its component noise-generating activities and facilities, but it is wonderful that the legislature was so wise that today, the government has the authority to protect public health, public safety, preserve property values and for the nearby residents, the ability to use their land for productive family supportive purposes.

Logic and the legislative history suggest that the ruling regarding the Appeal of Upstream Watch should be reconsidered.

Respectfully Submitted, this 6<sup>th</sup> day of January, 2020.

INTERVENOR,  
UPSTREAM WATCH



By \_\_\_\_\_

Amy Grant, President  
Upstream Watch  
67 Perkins Road  
Belfast, Maine 04915  
agrant7108@gmail.com

CERTIFICATION

I hereby certify that a copy of the foregoing was electronically mailed this 6th day of January, 2020 to those indicated on the attached Service List.

A handwritten signature in cursive script that reads "Amy Grant".

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Amy Grant



SCHEDULE A

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

NORDIC APPEALS

\_\_\_\_\_, 2019

WORD-4-WORD TRANSCRIPTION (207) 441-8055

1 MR. DESCHAINED: We now have our quorum, so thank you for  
2 your patience. And we're only like two  
3 minutes late. So we will reconvene the  
4 Board of Environmental Protection and  
5 we'll start by re-introducing the Board  
6 members who were here previously. And  
7 I'll start with the one who wasn't. So,  
8 Rob, if you would introduce yourself?

9 MR. SANFORD: Rob Sanford.

10 MR. DESCHAINED: Um hmm. Mr. Parker?

11 MR. PARKER: Joe Parker.

12 MR. DESCHAINED: And I'm Presiding Officer for this  
13 afternoon's hearing. I'm Bob Deschaine.  
14 And we can -- oh, and we have members  
15 here also I should recognize -- Peggy  
16 Sidesinger is -- Bensinger -- beg your  
17 pardon -- is here from the Attorney  
18 General's Office; Madeline Loisme, the  
19 Deputy Commissioner for DEP; and  
20 Ruthanne Burke is our clerk and  
21 assistant. And I hope I got that right  
22 or came reasonably close. And Cindy  
23 Bertacci is our executive analyst and  
24 can walk us through where we're going  
25 here.

1 MR. BERTACCI: Thank you, Presiding Officer Deschaine.  
2 I'm close enough now. Can you folks  
3 hear? Good. This afternoon, the Board  
4 is considering two appeals of Presiding  
5 Officer Deschaine's. They're a  
6 Procedural Orders in which he ruled on  
7 the issues and agreed was subject to the  
8 Board's hearing on applications for a  
9 land-based agricultural facility in  
10 Belfast. And you have before you in  
11 your packet beginning on page 153, the  
12 clear Procedural Order, which contains  
13 Presiding Officer's rulings. And you  
14 also have copies of the appeals that  
15 were filed and the applicant's response  
16 to those appeals. When the Board  
17 decides to hold a public hearing on a  
18 permit application, it generally narrows  
19 conditions that would be the topics to  
20 be addressed at the hearing down through  
21 the full range of licensing criteria  
22 that an applicant must meet to obtain  
23 permits. This narrowing of issues  
24 allows the Board to focus the hearing  
25 time on those issues that are most in

1                   contention and which the Department  
2                   staff and the Board feel that live  
3                   testimony for witnesses, for cross  
4                   examination of those witnesses would be  
5                   most beneficial in determining whether  
6                   or not the licensing criteria will be  
7                   met. The applicant must still  
8                   demonstrate that its proposed project  
9                   will meet all of the licensing criteria.  
10                  In this case, following the narrowing of  
11                  the issues as set forth in the  
12                  Procedural Order, we estimate that the  
13                  hearing time will be approximately three  
14                  days. With respect to the narrowing of  
15                  the issues, this took place after two  
16                  rounds of input from the parties and  
17                  input from Department staff regarding  
18                  the various licensing criteria and the  
19                  ones that the parties were most  
20                  interested in addressing, as well as  
21                  input from Department staff on those  
22                  matters which they found would be very  
23                  useful to have the opportunity to  
24                  question the witnesses. For the other  
25                  licensing criteria, the applicant must

1 meet the -- the Minerva cite law and  
2 waste discharge applications, as well as  
3 the air applications. The interveners  
4 and members of the public may submit  
5 written comments and evidence. And all  
6 of the written comments will be  
7 considered by the staff and Board in  
8 ultimately making its licensing  
9 decisions. I'd like to draw your  
10 attention to the third Procedural Order  
11 at this point in time. On page 152, you  
12 will see the list of issues that the  
13 Presiding Officer has identified for the  
14 hearing. They're organized by this  
15 Application for Development, natural  
16 resources application and permits for  
17 Maine, including discharge elimination  
18 systems, waste discharge application.  
19 And at the top of the -- page 153, you  
20 will find the ruling on title  
21 [INAUDIBLE] --

22  
23 READING OF FIRST APPEAL OMITTED

24  
25 MR. DESCHAIINE: We have a second appeal.

1 FEMALE SPEAKER: The second appeal before the Board this  
2 afternoon is filed by Interveners  
3 Upstream Watch and Northport Village  
4 Corporation. And they are requesting  
5 that the air emission license be a  
6 subject of testimony at the hearing.  
7 Under the Procedural Order before the  
8 Board, only aspects of the site, Minerva  
9 application and the wastewater discharge  
10 application are actually identified as  
11 -- issues. And in front of you, you  
12 have in your packet the appeal and  
13 Nordic's response to that appeal.

14 MR. DESCHAINED: Um hmm.

15 FEMALE SPEAKER: And I will give you testimony.

16 MR. DESCHAINED: Okay. If we can go directly to the  
17 Appellant; Upstream Watch?

18 MALE SPEAKER: What page is that on?

19 MALE SPEAKER: 224?

20 FEMALE SPEAKER: It begins on --

21 MALE SPEAKER: 224.

22 FEMALE SPEAKER: Upstream Watch is on 223 and 224; and  
23 the response begins on page 273.

24 ATTORNEY: Good afternoon; Attorney -- for this  
25 award is very important to us

1 [INAUDIBLE] -- much harder than people  
2 recognize on what's --  
3 MR. DESCHAINED: Yeah.  
4 MS. BERTACCI: Can -- excuse me -- can you please pull  
5 the microphone a little closer to you?  
6 Thank you.  
7 ATTORNEY: I don't know if we are here truly as a  
8 [INAUDIBLE] -- or with an appeal or a  
9 request for clarification. The area is  
10 in its own a very complicated claim to  
11 [INAUDIBLE] -- that's why Michael Lannon  
12 is here with me. This -- he's the  
13 President of Tech Engineering. That's  
14 their wheelhouse. I have friends in the  
15 law profession who said to me at one  
16 point -- when I asked him to explain air  
17 [INAUDIBLE] -- he said yeah, it covers  
18 anything that moves through the air or  
19 might think about moving through the air  
20 in any form. It only a little bit of an  
21 exaggeration. Some of the things that  
22 you approve are things that are often  
23 considered under the Air Act. And where  
24 we run into problems and the reason  
25 we're here is that there's an

1 interrelationship between the things  
2 that you are allowed for hearing and  
3 some of the things that are not  
4 specifically allowed. I initially  
5 thought, Judge, we've been denied this  
6 [INAUDIBLE] -- air [INAUDIBLE] -- but  
7 Michael then [INAUDIBLE] -- said gee, I  
8 don't know; how do you get to the things  
9 that are allowed because of the end  
10 relationship? And we're talking about  
11 the others. And there is now a dispute  
12 [INAUDIBLE] -- others. So I hope we're  
13 not here on an appeal. I hope we're  
14 here on a matter of clarification to get  
15 -- to use the time expeditiously. With  
16 your approval, Mr. Deschaine, I thought  
17 perhaps we could ask Michael to explain  
18 the different relationship of what --  
19 what he would explain, so we understand  
20 what fits and what we're looking at.  
21 Would that be okay?

22 MR. DESCHAINED: It would. And if I could maybe help you  
23 with that, I think one of the things  
24 that I was confused about when I was  
25 reading the response from the Appellant



1 is the difference between what would be  
2 covered under the Procedural Order under  
3 the conversation about side law versus  
4 the -- what the Air Bureau would do on  
5 its licensing permits because those are  
6 really two separate criteria that we're  
7 -- and we'll have to rule on both. I  
8 think there was some interest in seeing  
9 what points you had to raise about the  
10 air license.

11 MR. LANNON: I can [INAUDIBLE] -- in the -- in the  
12 scope of [INAUDIBLE] -- the -- primarily  
13 the entire air emissions section is --  
14 is the appendix, which is the air  
15 application. So those right away are  
16 already sort of tied together because  
17 when we're talking -- when we're talking  
18 about the potential impacts to the area  
19 nearby, we're really talking about all  
20 the potential things and how they fit  
21 together. The way I kind of see this  
22 hearing process playing out -- you know,  
23 the [INAUDIBLE] -- way would be that  
24 when -- when some things change -- you  
25 know, that affects other things. So

1                   it's part of the discussion and part of  
2                   the -- the presentations and your  
3                   questions is if you do one thing, you  
4                   then would -- you would adjust it to fix  
5                   that, and then it affects another one.  
6                   A good example would be the -- the power  
7                   plant that's subject of the air  
8                   emissions discussion. When I first  
9                   looked at it, I said oh, it's located in  
10                  their own site. That's great from a  
11                  noise perspective because it's -- it's  
12                  -- it's kind of shielded somewhat. And  
13                  then I said okay, well, the buildings  
14                  are pretty large next to them. What's  
15                  the potential for down [INAUDIBLE] --  
16                  from the stacks? So I took a look at  
17                  that and said well, what height are they  
18                  -- you know, we asked the questions and  
19                  -- and based on that, we looked at well,  
20                  what does that mean for water -- because  
21                  the way that -- the way that they're  
22                  related to putting in an application for  
23                  minor source is that they took a  
24                  restriction off the amount of fuel,  
25                  right? Now the restriction is an annual

1 restriction. In the Clean Air Act, we  
2 have annual limits and then we have  
3 shorter term limits -- 24-hour and  
4 one-hour limits. By taking the annual  
5 restriction, that helps with building  
6 the size of the facility. So it's -- it  
7 would be down from an annual  
8 perspective, but the reality is -- is  
9 there are eight engines and seven of  
10 them are operating at any one time where  
11 they are making power for [INAUDIBLE] --  
12 or -- or for Richardson Power. So all  
13 of those emissions from -- from the  
14 perspective of short-term periods are  
15 still there. So -- you know, in the --  
16 in the way that the [INAUDIBLE] --  
17 regulations work, I believe from -- from  
18 this that we're supposed to be looking  
19 at this in terms of relationship of  
20 things. So I said well, what is that  
21 going to mean on a short-term basis? So  
22 I ran a quick [INAUDIBLE] -- I didn't  
23 include anything other than those --  
24 those stacks. And we saw -- you know, a  
25 fairly large area with a one-hour

1 nitrogen oxide from seven out of eight  
2 of the engines -- you know, greatly  
3 exceeds the fence-line in industry areas  
4 potentially. This is just me making the  
5 assumption -- the point of it is not to  
6 -- to determine compliance or me to  
7 recommend what --

8 MR. DESCHAINÉ: Um hmm.

9 MR. LANNON: -- whether it is going to be [INAUDIBLE]  
10 -- or not, but to give an idea of why  
11 this needs to be discussed a little bit  
12 more because now if you raise the stack  
13 up -- okay -- directivity in a stack for  
14 noise -- it -- it comes down at a  
15 45-degree angle because of the way that  
16 the sound is emitted through the end  
17 opening. I won't get into the details  
18 of that.

19 MR. DESCHAINÉ: Um hmm.

20 MR. LANNON: But my point is -- is that if they raise  
21 that, then that is now a noise concern  
22 that might impact the neighbors. When  
23 you raise or lower, there might be a  
24 dust concern that -- that comes out of  
25 this. Another example of what I looked

1 at was the potential for particular  
2 emissions --

3 MR. DESCHAINED: Um hmm.

4 MR. LANNON: -- which is also included in there.

5 MR. DESCHAINED: Okay. Let me just interrupt for a  
6 moment --

7 MR. LANNON: Yeah.

8 MR. DESCHAINED: -- to pass the microphone.

9 MR. LANNON: Sure.

10 FEMALE SPEAKER: So in trying to determine what the exact  
11 question is, I think it is -- I  
12 understand the confusion in that the  
13 site location -- the site law does have  
14 some aspects of this in it. But you are  
15 focusing on and you -- it seems that you  
16 want to be able to examine witnesses and  
17 you want live testimony on air  
18 emissions. And -- and that is an air  
19 emission license application. Is that  
20 correct?

21 ATTORNEY: If I may [INAUDIBLE] -- looking at the  
22 scope of review of [INAUDIBLE] -- and  
23 then determining whether those pose a  
24 problem that would have an unreasonable  
25 adverse affect on ambient air quality,

1                   which was pointed out for a source for a  
2                   particular matter, the Department  
3                   consider all relevant evidence to that  
4                   effect. So it seems like -- whether  
5                   it's a good idea or a bad idea, it seems  
6                   like we're all in the -- in the pool  
7                   together.

8 MR. DESCHAINED: Um hmm.

9 FEMALE: Right. But that wasn't one of the  
10                   issues that the Presiding Officer named  
11                   as an issue for the hearing -- the air  
12                   emissions. The Presiding Officer named  
13                   odor, but not air emissions.

14 MR. LANNON: That's where we --

15 FEMALE SPEAKER: Yeah. That's all I'm --

16 MR. DESCHAINED: That --

17 MR. LANNON: That's where we -- he and I differ in  
18                   the way we read it because I read it as  
19                   basically things that would affect  
20                   nearby uses including odor and -- odor  
21                   and [CROSSTALK] --

22 MR. DESCHAINED: Yeah, that can't be --

23 FEMALE SPEAKER: Lasting --

24 MR. LANNON: -- so -- so you have all of these  
25                   things, but -- by the way, we have these

1 other specialty topics that we're  
2 including in there because again the  
3 impact from the -- to the local uses is  
4 interrelated.

5 MR. DESCHAINED: Thank you. I think the question we're  
6 trying to get to is what kind of time  
7 should we consider allocating during the  
8 actual live portion of the hearing. And  
9 I noticed that in the Procedural Order  
10 3, it included site location impacts do  
11 exist in uses from construction and  
12 operations; and including blasting and  
13 odor. So that's already something  
14 that's been carved out for having live  
15 testimony, live rebuttal, etcetera. So  
16 we -- I've allocated time for that. The  
17 question before us is should we open up  
18 some additional time for the air license  
19 itself and then under how -- and what  
20 will we be discussing and -- we ought to  
21 make a decision about how much time we  
22 allot for that.

23 MR. LANNON: We -- I believe you should open it up  
24 for that and the rationale for that is I  
25 -- I think the reason why you have this

1 -- this process is because this is a  
2 huge application --

3 MR. DESCHAINED: Um hmm.

4 MR. LANNON: -- which likely requires new additions  
5 in order to be approved. And as part of  
6 that, some of them would be related to  
7 the air.

8 MR. DESCHAINED: Um hmm.

9 MR. LANNON: I think that there are -- there's no  
10 problem with them justifying what they  
11 did from where they fit in the -- in the  
12 perfect cycle, but there are some of  
13 their emissions just because of the  
14 sheer size of the facility that might  
15 require conditions that would be in a  
16 larger permit, but should be in this one  
17 just because of the specifics --

18 MR. DESCHAINED: Um hmm.

19 MR. LANNON: -- of this project.

20 MR. DESCHAINED: Yeah. Just to clarify, the reason it  
21 wasn't put in the original order is  
22 because there wasn't a lot of issues  
23 raised when we asked the -- the various  
24 parties whether they wanted that  
25 included. I think you've raised some --



1                   some interesting points that weren't  
2                   raised earlier. I would put the  
3                   Department on notice that we're going to  
4                   look for some feedback from staff on  
5                   this, as well.

6 MR. LANNON:       Yeah, I think one of the reasons for  
7                   that is that to this point, a lot of the  
8                   information that you would need to do  
9                   some of this modeling for air, odor,  
10                  noise, and dust really hasn't been  
11                  provided from the applicant directly.  
12                  Even in some of the studies that were  
13                  done through the air and for the noise,  
14                  there were some results presented.  
15                  There isn't really any information on  
16                  that -- comment on [INAUDIBLE] --

17 MR. DESCHAINED:   Um hmm.

18 MR. LANNON:       Even on the last response from DEP, they  
19                   just talk generically about the 180  
20                   sources of noise that were not included  
21                   in it. So I think that we can minimize  
22                   the time of the hearing if we receive  
23                   more of this information up front and  
24                   then we can get to the point where  
25                   hopefully --

1 MR. DESCHAINED: Um hmm.

2 MR. LANNON: -- they're doing -- what they're doing  
3 is on the same page. And that would  
4 really help. But right now to do what I  
5 did here, I was making some assumptions  
6 of -- of things that will take longer to  
7 do it that way. And so I'd also  
8 included a request for some information  
9 on --

10 MR. DESCHAINED: Um hmm.

11 MR. LANNON: -- on that. I -- I have proposed that  
12 they provide within their match lines of  
13 their areas on site -- and it could be  
14 that way or it could be another way. I  
15 think it would be helpful for them. We  
16 really just need some more of that --

17 MR. DESCHAINED: Um hmm.

18 MR. LANNON: -- information to be able to streamline  
19 the hearing process.

20 MR. DESCHAINED: It's good and I appreciate the good  
21 feedback, too. Did you have anything  
22 further or can I go to questions by the  
23 Board?

24 ATTORNEY: Well, sir, I was only going to add that  
25 the complexity of this is clear and it

1                    might be useful for the Board to have  
2                    these -- our smart guy and their smart  
3                    guy, so you could ask them directly and  
4                    not have to hear it through the lawyers  
5                    who, if I may be the example, are not  
6                    always smart and clear.

7 MR. DESCHAINED: I'm surrounded by two really smart ones,  
8                    so -- are there questions from the  
9                    Board? No questions from the Board. If  
10                   we could hear from -- thank you very  
11                   much --

12 ATTORNEY:        Sure.

13 MR. DESCHAINED: If we can hear from the applicant?

14 SPEAKER:        Thank you again, Presiding Officer  
15                   Deschaine and members of the Board. I  
16                   think what we heard just then was  
17                   actually a discussion about a  
18                   disagreement with a provision in the  
19                   existing law that separates minor  
20                   emissions from major emissions. They  
21                   concede up front that -- that this is a  
22                   -- this is a minor source and so as a  
23                   matter of course it would not require or  
24                   involve monitoring -- or modeling. The  
25                   -- the Department staff has been in

1 front of the Board for months saying  
2 that there -- Chapter 115 -- that they  
3 have all the information that they need  
4 and that's because this is a minor  
5 source and it meets all of those things.  
6 Having a discussion about whether or not  
7 it's appropriate that the rules allow  
8 you to have a minor source because of an  
9 annual fuel limit is not really an  
10 individualized application issue for the  
11 Board to take up in the capacity -- in  
12 their rule as reviewing this  
13 application. That's instead a question  
14 of is that the right distinction between  
15 minor and major in -- in your rules.  
16 But there's no question that is the  
17 distinction between minor and major in  
18 your rules. And so again, we go back to  
19 we feel that Presiding Officer Deschaine  
20 did a very good job of taking the  
21 unenviable task of taking four single  
22 span -- four single space cages of  
23 potential issues and determining which  
24 ones should have live testimony. This  
25 can be submitted in writing, but there's

1 no question that Hearing Officer  
2 Deschaine's -- Presiding Officer  
3 Deschaine's decision talks -- does not  
4 make the Chapter 115 with the ARAT --  
5 whether or not the ARAT's confusing or  
6 not, it is not the Site Location  
7 Development Act, it's not the Natural  
8 Resources Protection Act. And the  
9 distinction in the air rules is that  
10 this is a minor source. So that's why  
11 there isn't information on modeling  
12 because modeling is not required.

13 MR. DESCHAINED: Um hmm. Question -- questions from the  
14 Board? Seeing none -- thank you, Rog --  
15 I would like to ask the staff -- DEP --  
16 to comment on this.

17 FEMALE: To the Appellant?

18 MR. DESCHAINED: To the Appellant.

19 FEMALE: Brief?

20 MR. DESCHAINED: To the -- Jeff, if you could just wait a  
21 second. Does the Appellant -- the  
22 Appellant want to do any brief rebuttal  
23 to that because we did offer that  
24 opportunity to Ms. Tucker?

25 FEMALE: Just very briefly if I can --

1 MR. DESCHAINÉ: Um hmm.

2 SPEAKER: -- because I know time -- it doesn't  
3 really matter what you call it. The --  
4 the facility has to comply with the  
5 Clean Air Act. Okay? And that's what  
6 is written in -- in the regulations;  
7 Chapter 115. And then if there were  
8 reasons that somebody should evaluate  
9 emissions for -- on a case by case basis  
10 for a minor source, that is also a  
11 reasonable request that -- that should  
12 be done of the applicant. I think the  
13 -- the [INAUDIBLE] -- that we put in  
14 again demonstrates that based on what  
15 they've provided so far, there is  
16 greatly -- potentially exceeding it if  
17 they were to move forward in that  
18 regard. That's the first thing. And  
19 the second thing is whenever I'm working  
20 with a client who wants to take a  
21 synthetic minor, I do not propose that  
22 they do it in 49.8 of 50 to the  
23 threshold because you take any sort of  
24 realistic variation in operation into  
25 account, such as the non-submissions

1 from a start-up -- and if there's SCR on  
2 it -- has two or three times the  
3 emissions it has when it's operating  
4 when it's warm. That one example alone  
5 puts them over the 50 and then would  
6 make them be a larger source. And then  
7 they would have to monitor -- I don't  
8 want to get into that kind of stuff at  
9 all here.

10 MR. DESCHAINED: Good.

11 MALE SPEAKER: What I want to get into ultimately is  
12 based on the size of the facility in  
13 general, the projection area impacts to  
14 the community nearby, that these are the  
15 conditions that should be in there and  
16 this is the rationale for that.

17 MR. DESCHAINED: Um hmm.

18 MALE SPEAKER: And that's really something that needs  
19 to be done on an intermittent basis.

20 MR. DESCHAINED: Great. Thank you. Any other questions  
21 for the Board?

22 FEMALE SPEAKER: Yeah.

23 MALE SPEAKER: So I was just wanted to add that it is  
24 in our interest and I think in  
25 everyone's interest to get all these

1 issues resolved here.

2 MR. DESCHAINED: Um hmm.

3 MALE SPEAKER: It is possible that from its condition  
4 -- if construction continues and it  
5 exceeds [INAUDIBLE] -- And then there's  
6 a potential for a collateral attack on  
7 that. I'm not sure that serves the  
8 interest of everybody here. We would  
9 really like to cooperate with you to get  
10 everything heard here and resolved once  
11 and for all.

12 MR. DESCHAINED: Um hmm. Yes.

13 MALE SPEAKER: Thank you very much for your time.

14 MR. DESCHAINED: Great. And if we could have the  
15 Department come on up?

16 MALE SPEAKER: Good afternoon, Judge [INAUDIBLE] --

17 MR. DESCHAINED: Okay. Your comment on what you've  
18 heard?

19 MALE SPEAKER: Okay. Well, we believe that certainly  
20 this is an issue of concern. We  
21 understand that everyone is concerned.  
22 I think it's important to recognize that  
23 the Department's Chapter 115 would not  
24 require mandatory modeling for this  
25 facility, but the same Chapter 115 does



1 provide the Department the ability to  
2 require modeling in cases of concern  
3 with -- under discussions. So I think  
4 it's important to recognize that major  
5 or minor modeling may still be  
6 indicated. Given that the public  
7 concern and the perhaps less than  
8 conclusive modeling provided by the  
9 Appellant, I believe that -- you know,  
10 providing an opportunity at the public  
11 hearing would responsibly provide  
12 [INAUDIBLE] --

13 MR. DESCHAINED: Great. Thank you. I think it's a  
14 two-part question. We have to decide  
15 how much time we're going to allocate  
16 for this. But when we go to live  
17 testimony and cross examination, then  
18 all the interveners must be prepared to  
19 do that, as well. So we're putting them  
20 on notice that when you're preparing for  
21 these hearings, you must prepare for  
22 this, as well. With that in mind, do  
23 you think it's probably worthy that we  
24 go ahead with --

25 MALE SPEAKER: I believe so.

1 MR. DESCHAINED: Yeah? Okay. Thank you. Questions from  
2 the Board? Mr. Parker?

3 MR. PARKER: There we go. As the process evolves,  
4 they will provide an application for --  
5 a license review, correct?

6 MR. DESCHAINED: Yeah.

7 SPEAKER: They were provided an application for  
8 the eight generator heads, yes.

9 MR. PARKER: Based on the evidence being provided?

10 MALE SPEAKER: Yeah.

11 MR. PARKER: And then we'll be provided information  
12 based on that application, correct?

13 SPEAKER: Correct.

14 MR. PARKER: Okay. So I don't think we have to have  
15 [INAUDIBLE] -- hearing for that  
16 information prior to what you did and  
17 what you make a decision on [INAUDIBLE]  
18 -- then they have the ability to  
19 question or appeal that decision to us  
20 if --

21 MR. DESCHAINED: No, no.

22 MR. PARKER: -- the right to [INAUDIBLE] -- correct?

23 FEMALE SPEAKER: I might clarify that. So the air  
24 application is pending along with the  
25 site law, and the NRPA, and the waste

1 discharge license applications. All of  
2 those applications will be decided by  
3 this Board in the first instance. So  
4 the Department will not be making a  
5 decision on that that would be appealed  
6 to this Board. All of those -- all of  
7 those applications are before the Board.  
8 And the question here is which issues  
9 should the Board spend time at the  
10 hearing on with live witnesses as  
11 opposed to paper submissions. And the  
12 Presiding Officer initially ruled that  
13 the air emission license should be  
14 decided on the papers; not live  
15 witnesses. But then the interveners  
16 have raised some new issues and the  
17 Department staff is saying that it  
18 recommends that we do live witnesses on  
19 the air emission license at the Board's  
20 public hearing. So that's the  
21 Department's recommendation. So the  
22 question now is up to the Board. Do you  
23 think that live witnesses are warranted  
24 on -- on the air emission license?  
25 That's the question before the Board.

1 MR. DESCHAINED: Um hmm.

2 FEMALE SPEAKER: And did you want to address that?

3 FEMALE SPEAKER: I have a question.

4 MR. DESCHAINED: Do you have a question?

5 FEMALE SPEAKER: To Jeff? Mr. Crawford, could you  
6 explain what the -- the parameters of  
7 the air application cover? Is it just  
8 the eight generators? I note that in  
9 the appeal, there are some issues  
10 pertaining to noise, and odor, and  
11 things like that. Could you just -- you  
12 know, refresh our memory -- [CROSSTALK]  
13 -- on what the scope of that is?

14 MR. CRAWFORD: -- clarification for the Board and  
15 individuals behind me, the air  
16 application we received was only for  
17 eight generator sites -- 2,000 kilowatt.  
18 We received no applications for any  
19 other fuel running equipment, any other  
20 sources of air emissions. So -- you  
21 know, and I recommend that the Board  
22 does in fact take this up during a  
23 public hearing that would be restricted  
24 simply to those generators.

25 MR. DESCHAINED: Um hmm. That -- so I take that as a

1 recommendation from the Department. Any  
2 other discussion? I make my own  
3 comment. And that is that at this  
4 point, I'm leaning towards overruling  
5 the Presiding Officer because you know  
6 how he gets. Do you have a motion?

7 SPEAKER: Motion to -- over the appeal.

8 MR. DESCHAINED: Do I have a second? Do I have a second?  
9 Any further discussion? Those in favor  
10 of honoring the appeal and over --

11 FEMALE SPEAKER: Granting the appeal.

12 MR. DESCHAINED: -- granting the appeal and over  
13 Presiding Officer? It is unanimous.  
14 Thank you. No further business?  
15 There's no other business before us, so  
16 this meeting is adjourned. Thank you  
17 for coming.

18

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OFF THE RECORD

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21 (Wherefore the above-entitled interview was concluded  
22 on this date.)

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I, Michele Grant, do attest and hereby certify that  
the preceding is a true transcript of a digital recording  
of an appeal hearing before the Department of  
Environmental Protection on \_\_\_\_\_, 2019.

\_\_\_\_\_  
Michele Grant, Transcriptionist  
Word-4-Word Transcription Service

## SCHEDULE B

In the Board letter dated, November 20, 2019, the Board took a contrary position.

- A. *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. (emphasis supplied)*

*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.*

There is no conflict. Again, in subsection A., there are two distinct thoughts in two different sentences, separated by a period. In the first sentence discusses commercial and industrial development and the second discusses residential development. The clause referring to construction appears in the second sentence (residential) and is separated by a comma. Therefore, construction in the second sentence refers to residential construction only.

This makes sense, as residential construction is fairly consistent and normalized, and of a known duration. Commercial or industrial construction can be very different, and compliance with the intent of 38 M.R.S. Sec. 484(3) as described in the first sentence (“The developer has made adequate provision for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses...”) in a commercial or industrial setting can only be determined on a case-by-case basis.

Consider the legislative history of this Act.

In 1991, when noise was still included in 38 M.R.S. Sec. 482-A, residential construction noise was broken out into its own separate line item. Commercial and Industrial noise was discussed in Statutory inconsistencies from Chapters 680 and 890 in 1989 were remedied in 1991. The pertinent section of Title 38 MRSA §482-A was then amended to read:

#### **§482-A. Noise effect**

*2. **Consideration of local ordinance.** In determining whether a developer has made adequate provision for the control of noise generated by a commercial or industrial development, the ~~board~~ department shall consider ~~its own regulations~~ rules adopted under this section and the quantifiable noise standards of the municipality in which the development is located and of any municipality ~~which~~ that may be affected by the noise.*

*4. **Construction noise; residential developments.** Between 7 a.m. and 7 p.m. or during daylight hours, whichever is longer, noise generated by construction of developments approved under this article is exempt from regulation under this section. Noise from residential developments approved under this article is exempt from regulation under this section.*

Note that, in 1991, the word “exempt” was added to the new “**Construction noise; residential development**” bullet, so it is understandable why the Board keeps using the word “exempt”. At one time, the word exempt was added as shown above, but the word “exempt” was deliberately removed in 1993 when the noise Site Law in 38 M.R.S. Sec. 482-A was repealed and replaced



by new language in M.R.S. Sec. 484. Please also note that at that time the construction noise exemption was not specific to the type of facility. In 1993 the construction sentence was purposely moved to a position after the introduction of residential development to make it clear that it now refers only to the residential development.

### **1993 - Chapter 383 of Public Law as passed by 116<sup>th</sup> Legislature**

In 1993, 38 MRSA §482-A was repealed, and 38 MRSA §484 sub-§3, ¶¶A to C was enacted to read:

#### **§484 sub-§3, ¶¶A to C.**

A. In making a determination under this subsection, the department may consider the effect of noise from a commercial or industrial development. Noise from a residential development approved under this article may not be regulated under this subsection, and 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 this article may not be regulated under this subsection.

B. In determining whether a developer has made adequate provision for the control of noise generated by a commercial or industrial development, the department shall consider board rules relating to noise and the quantifiable noise standards of the municipality in which the development is located and of any municipality that may be affected by the noise.

C. Nothing in this subsection may be construed to prohibit a municipality from adopting noise regulations stricter than those adopted by the board.

Specifically, ¶¶A. was largely adapted from §482-A sub-§4, with the following amendments:

A. In making a determination under this subsection, the department may consider the effect of noise from a commercial or industrial development. Noise from a residential developments approved under this article ~~is exempt from regulation~~ may not be regulated under this subsection, and noise generated between the hours of 7 a.m. and 7 p.m. or during daylight hours, whichever is longer, ~~noise generated~~ by construction

of a developments approved under this article is exempt from regulation may not be regulated under this subsection.

Specifically, ¶¶B. was largely adapted from §482-A sub-§2, with the following amendments:

B. *In determining whether a developer has made adequate provision for the control of noise generated by a commercial or industrial development, the department shall consider ~~rules adopted under this section~~ board rules relating to noise and the quantifiable noise standards of the municipality in which the development is located and of any municipality that may be affected by the noise.*

Specifically, ¶¶C. was adapted from §482-A sub-§3, with the following minor amendment:

C. *Nothing in this subsection may be construed to prohibit a municipality from adopting noise regulations stricter than those adopted by the board.*

In §484 sub-§3, ¶¶A, the intentional addition of the phrase, “*In making a determination under this subsection, the department may consider the effect of noise from a commercial or industrial development*”, demonstrates that the intent of ¶¶A was not to exempt commercial and industrial developments from regulation of construction noise, but to clarify ahead of the residential development provisions, that the department maintains the option to consider noise from commercial and industrial development.

This is further exemplified in the discussion of construction noise from residential developments beyond 7 a.m. and 7 p.m, where the phrase “*is exempt from regulation*”, is replaced with “*may not be regulated*”. Even if the second sentence of the condition in its new form where residential was pulled to the front of the compound sentence is intended to pertain to both residential and commercial/industrial developments, the phrasing was very clearly changed to adjust the absoluteness of the condition; therefore, giving more flexibility to unique developments that do warrant construction noise regulation beyond non-daytime hours in the rules.

**Board of Environmental Protection**  
**Nordic Aquafarms, Inc. / Site Law, NRPA, MEPDES/WDL, and Air Applications**  
**Service List revised November 22, 2019**

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**Official Copy for Filings *by 5:00 pm*  
to Robert Duchesne, Presiding  
Officer c/o Ruth Ann Burke**

Robert Duchesne, Presiding Officer  
Board of Environmental Protection  
c/o Ruth Ann Burke  
17 State House Station  
Augusta, ME 04333-0017  
Phone (207) 287-2811  
Fax (207) 287-2814  
[Ruth.a.burke@maine.gov](mailto:Ruth.a.burke@maine.gov)

**[BEP]**

Cynthia Bertocci, Executive Analyst  
Board of Environmental Protection  
17 State House Station  
Augusta, ME 04333  
Phone (207) 287-2452  
[Cynthia.s.bertocci@maine.gov](mailto:Cynthia.s.bertocci@maine.gov)

**[Assistant Attorneys General]**

Office of the Attorney General  
6 State House Station  
Augusta, ME 04333-0006  
Fax (207) 626-8812

Peggy Bensinger  
Phone (207) 626-8578  
[Peggy.bensinger@maine.gov](mailto:Peggy.bensinger@maine.gov)

Scott Boak  
Phone (207) 626-8566  
[Scott.boak@maine.gov](mailto:Scott.boak@maine.gov)

Laura Jensen  
Phone (207) 626-8868  
[Laura.jensen@maine.gov](mailto:Laura.jensen@maine.gov)

**[DEP—all correspondence to the  
postal and/or email address below]**

Dept of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017  
Email:  
[NordicAquaFarms.DEP@maine.gov](mailto:NordicAquaFarms.DEP@maine.gov)

Nicholas Livesay, Director  
Bureau of Land Resources  
Phone (207) 530-0965

Beth Callahan, Project Manager  
Bureau of Land Resources  
Phone (207) 446-1586

Dawn Hallowell, Licensing and  
Compliance Manager  
Bureau of Land Resources  
Phone (207) 597-2624

Brian Kavanah, Director  
Bureau of Water Quality  
Phone (207) 287-7700

Gregg Wood, Director  
Division of Water Quality Management  
Bureau of Water Quality  
Phone (207) 287-7693

Cindy L. Dionne, Project Manager  
Bureau of Water Quality  
Phone (207) 287-7823

Jeff Crawford, Director  
Bureau of Air Quality  
Phone (207) 287-7647

Jane Gilbert, Air Licensing Unit Manager  
Bureau of Air Quality  
Phone (207) 287-2455

Patric Sherman, Project Manager  
Bureau of Air Quality  
Phone (207) 287-7645

Kevin Martin  
Compliance and Procedures Specialist  
Office of the Commissioner  
Phone (207) 287-4305  
[Kevin.martin@maine.gov](mailto:Kevin.martin@maine.gov)

**Board of Environmental Protection**  
**Nordic Aquafarms, Inc. / Site Law, NRPA, MEPDES/WDL, and Air Applications**  
**Service List revised November 22, 2019**

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**[Federal Agencies]**

Peter Tischbein  
US Army Corps of Engineers  
442 Civic Center Drive, Suite 350  
Augusta, ME 04330  
Phone (207) 623-8367  
[Peter.tischbein@usace.army.mil](mailto:Peter.tischbein@usace.army.mil)

**[Applicant – Nordic Aquafarms, Inc.]**

Erik Heim (email only)  
[Erik.heim@nordicaquafarms.com](mailto:Erik.heim@nordicaquafarms.com)

Marianne Naess (email only)  
[mn@nordicaquafarms.com](mailto:mn@nordicaquafarms.com)

Ed Cotter (email only)  
[ec@nordicaquafarms.com](mailto:ec@nordicaquafarms.com)

Jacki Cassida (email only)  
[jc@nordicaquafarms.com](mailto:jc@nordicaquafarms.com)

Joanna B. Tourangeau  
Drummond Woodsum  
84 Marginal Way, Suite 600  
Portland, ME 04101-2480  
Phone (207) 772-1941  
FAX (207) 772-3627  
[jtourangeau@dwmlaw.com](mailto:jtourangeau@dwmlaw.com)

Elizabeth Ransom  
Ransom Consulting, Inc.  
400 Commercial Street, Suite 404  
Portland, ME 04101  
Phone (207) 772-2891  
Phone (603) 436-1490 (NH Office)  
[Elizabeth.ransom@ransomenv.com](mailto:Elizabeth.ransom@ransomenv.com)

**[Intervenors]**

**Maine Lobstering Union, Wayne Canning, and David Black**

Kim Ervin Tucker  
48 Harbour Pointe Drive  
Lincolntonville, ME 04849  
Phone (202) 841-5439  
[k.ervintucker@gmail.com](mailto:k.ervintucker@gmail.com)

**Jeffrey R. Mabee and Judith B. Grace**  
[k.ervintucker@gmail.com](mailto:k.ervintucker@gmail.com)

**Upstream Watch**

David Losee  
7 Highland Avenue  
Camden, ME 04843  
Phone (207) 230-8013  
[David@loseelaw.com](mailto:David@loseelaw.com)

**Eleanor Daniels  
Donna Broderick**

95 Sirota Drive  
Searsmont, ME 04973  
Phone (207) 322-6464  
[ellie@greenstore.com](mailto:ellie@greenstore.com)  
[dl\\_broderick@hotmail.com](mailto:dl_broderick@hotmail.com)

**Northport Village Corporation**

Michael T. Lannan  
Tech Environmental  
Phone (207) 323-4850  
[mLannan@TechEnv.com](mailto:mLannan@TechEnv.com)

Northport Village Corporation  
813 Shore Road  
Northport, ME 04849  
Phone (207) 338-0751  
[nvcmaine@gmail.com](mailto:nvcmaine@gmail.com)

**University of New England**

Barry A. Costa-Pierce  
1075 Forest Avenue  
Portland, ME 04103  
[cbostapierce@une.edu](mailto:cbostapierce@une.edu)

Charles Tilburg  
11 Hills Beach Road  
Biddeford, ME 04005  
[ctilburg@une.edu](mailto:ctilburg@une.edu)

Carrie Byron  
11 Hills Beach Road  
Biddeford, ME 04005  
[cbyron@une.edu](mailto:cbyron@une.edu)

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**Nordic Aquafarms, Inc. / Site Law, NRPA, MEPDES/WDL, and Air Applications**  
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**Gulf of Maine Research Institute**

Donald W. Perkins, Jr.  
350 Commercial Street  
Portland, ME 04101  
[don@gmri.org](mailto:don@gmri.org)

**The Fish Are Okay**

Diane Hunt Braybrook  
1 Delemos Street  
Belfast, ME 04915  
Phone (207) 930-5979  
[dbraybrook@yahoo.com](mailto:dbraybrook@yahoo.com)

**Lawrence Reichard**  
[lreichard@gmail.com](mailto:lreichard@gmail.com)