Intervenors Jeffrey R. Mabee, Judith B. Grace, Lobstering Representatives (MGL)
Comments Filed on DMR's Assessment

MGL's Filing April 23, 2020 at 4:21 p.m.

Bertocci, Cynthia S

From: Kim Ervin Tucker <k.ervintucker@gmail.com>

Sent: Thursday, April 23, 2020 4:21 PM
To: Bertocci, Cynthia S
Cc: Barry A. Costa-Pierce; Bensinger, Peggy; Bertocci, Cynthia S; Boak, Scott; Brewer, Angela D; Burke, Ruth A; Carrie Byron; Charles Tilburg; David Losee; DEP, Nordic Aqua Farms; Diane Hunt Braybrook; Donald W. Perkins, Jr.; Donna Broderick; Ed Cotter; Eleanor Daniels; Elizabeth M. Ransom; Erik Heim; Jacki Cassida; Jensen, Laura; Joanna B. Tourangeau (JTourangeau@dwmlaw.com); Kristin M. Racine; Lawrence Reichard; Marianne Naess; Martin, Kevin; Michael Lannan; Northport Village Corporation; Peter Tischbein; Wood, Gregg; Keliher, Patrick; Mendelson, Meredith; Wayback Farm
Subject: DMR Assessment
Attachments: Kopec comments to DMR on NAF 3-2-2020.pdf

The MGL Intervenors and the Friends of the Harriet L. Hartley Conservation Area ("Friends"), adopt the comprehensive assessment submitted by Upstream Watch as their own, to avoid repetition in the record of the deficiencies referenced in that filing.

In addition, the MGL Intervenors and Friends state the following additional due process violations relating to the BEP and DMR faux process. The NRPA dredging provisions in 38 M.R.S. § 480-D(9) require a "public hearing" — meaning an adjudicatory hearing — be conducted by DMR as part of its assessment. DMR failed to conduct such a hearing or to comply with the statutory requirements for attempting to avoid this requirement. The Commissioner of DMR may determine to not hold an "public hearing" — but then must issue a public notice of his determination to do his assessment based on written and oral comments only. If, after such notice is issued by the Commissioner, five (5) persons request a "public hearing" within thirty (30) days, the DMR ***must hold a public hearing***. A public hearing means and adjudicatory hearing no just a solicitation of oral and written comments — otherwise Section 480-D(9) makes no sense as written.

Prior to the March 2, 2020 DMR "public hearing" five persons, including the MGL Intervenors, filed a written request with the Commissioner of DMR requesting an adjudicatory hearing. Upon submission, this request triggered the mandatory adjudicatory hearing requirement in NRPA Section 480-D(9); however, DMR ignored his requirement and repeatedly had AAG Randlett tell participants at the March 2 meeting that no adjudicatory hearing was required — even though three additional participants in that meeting also requested an adjudicatory hearing be conducted by DMR.

The meeting conducted by DMR on March 2, 2020 was held with only seventeen (17) days notice. The notice of "public hearing" hastily issued by DMR on February 14, 2020, in response to the objections raised by the MGL Intervenors to the failure of DMR to comply with the

requirements of 38 M.R.S. § 480-D prior to submission to the BEP of DMR's two inadequate and incomplete assessments of the impacts of the NAF proposal on fisheries and the fishing industry, is attached to this filing and submitted as an exhibit to this objection. It is not limited to the two topics that were imposed on the night of the "hearing".

When interested parties arrived for the March 2 DMR "public hearing" — which was in reality just a solicitation of public comment on two limited subjects relating to the fishing industry not general fisheries impacts — NAF's agents and DMR Deputy Commissioner Meredith Mendelson announced that, after a day of *ex parte* meetings together, NAF had revised its plan to dispose of dredge spoils from the installation of its pipelines. Now, NAF proposes upland disposal of 20,000 cy of dredge spoils (not 5,000 cy), taken in 110 to 130 barge-loads to Mack Point in Searsport. This radical change and the haul route for de-watering and dredge spoils transport were presented for the first time at this March 2 DMR meeting — giving no notice to impacted fishermen or the municipalities.

Because of this change MGL Intervenors and others present demanded additional time to file written comments. After initial resistance, Dep. Com Mendelson granted this request stating en (10) additional days would be given to file written comments. However, the notice sent out to lobstermen only resulted in 9 days of time to file such comments, improperly limited the subject of comments that could be filed in a manner inconsistent with NRPA § 480-D(9), and failed to provide an opportunity for the mandatory adjudicatory hearing in NRPA.

After the 3-2-2020 DMR "hearing" and the subsequent flawed additional comment notice, MGL Intervenors submitted objections to DMR.

The Commissioner of DMR refused the request of five persons, including MGL, for an adjudicatory hearing subsequently by email and ignored he her objections filed.

Additional comments submitted by DMR to BEP excluded all comments received and failed to address the impact of mercury — cherry-picking comments from only four lobstermen and excluding the comments and objections submitted relating to the buried HoltraChem mercury — including the comments submitted by the MGL Intervenors and Dr. Dianne Kopec. All of these comments are properly part of the administrative record in the DMR proceedings and all of the DMR record is an integral part of the Administrative record for the BEP proceedings.

All of the comments were proffered by interested parties and Intervenors under the Maine Administrative Procedures Act. There is no legitimate basis for exclusion of these comments from the DMR or BEP Administrative Record. To this date, Intervenors have no access to what comment and exhibits were submitted to and ignored by DMR before the last Nault assessment was submitted to BEP — an assessment that utterly ignores the presence of buried HoltraChem mercury and its potential impact on fisheries and themishing industry. This is not just irresponsible it is a violation of due process. We cannot be required too file comments without all of the information submitted. Such a request reduces this process to a sham.

The exclusion of evidence submitted during noticed "public hearing" (a/k/a solicitation of public comment by DMR) — whether excluded by DMR or the Presiding Officer for BEP — is improper and a denial of due process requirements established by the Maine Administrative Procedures Act and NRPA. DMR was acting in its advisory capacity under NRPA — to provide BEP-DEP with an assessment statutorily mandated by NRPA. Manipulation-by-omission of the Administrative Record is a violation of the Intervenors' and public's due process rights and the very purpose of the NRPA statute and the Board's role to encourage public participation in the environmental permitting processes of this State.

Pretending the HoltraChem mercury buried in this part of the Bay does not exist will not prevent an environmental and economic disaster in this State and region and will not avoid a violation of the Clean Water Act. Excluding the comments filed with DMR by Dr. Dianne Kopec is an egregious violation of due process and the responsibility of both DMR and the Board to safeguard the precious and irreplaceable natural resources of this State.

Penobscot Bay deserves better. The law requires more.

I have previously filed — on multiple occasions — requests that the Board require NAF to file amended applications under NRPA and a new additional application for a second MEPDES permit and discharge license for NAF's new proposal to de-water 20,000 cy of dredge spoils in Penobscot Bay — a new point source discharge of pollutants into the navigable waters of the United States not covered by the prior-filed NRPA application or MEPDES permit application. Notice of these changes in this project need to be provided to Searsport and all interested parties and municipalities. Shoving this project through, without proper due process, under cover of pandemic is an abuse of discretion and demonstrates a level of contempt for the purposes underlying NRPA and the Clean Water Act that will undermine public confidence in the fairness of this Board and these proceedings. The failure to include all evidence and to do a proper adjudicatory hearing based on the actual project proposal, after submission of all required applications and sediment testing, is arbitrary and capricious and an abuse of discretion.

What possible basis in fact or law is there for not including all timely filed comments submitted to DMR in the Record considered by the Board and available to the public, Intervenors and Interested Parties? What possible public purpose is served in the Board failing to consider these comments? When comments are submitted, but excluded — requiring FOAA requests to be submitted to obtain them — it is a violation of due process. When we are expected to file response without all comments and without a response to FOAA requests for those comments it a a violation of due process.

I have submitted multiple FOAA requests to DMR since February 14 but have received no responses to date to those requests other than 5-day receipt letters. They are " till working on them" — This is another attempt to evade the requirements of law and violation of the MGL Intervenors's Due Process rights. This is another attempt to manipulate the Administrative Record for the inevitable Rule 80C appeal. We object to this manipulation and denial of necessary

information and demand all comments filed be included in the record and provided to all Intervenors, Interested Parties and the public by posting on the DEP Major Projects website. We request additional time to file comments after all comments and FOAA responses are provided.

By separate emails I will file in the BEP record all of the objections that I have filed with DMR regarding the inadequacy of its assessments. Those should be placed in the Administrative Record of the BEP as Comments to the DMR Assessments. Because DMR has failed to respond to my requests for additional information under FOAA, I cannot adequately file any other response to their last assessment.

For example, I note that the description of the project and the dredging proposal provided by Mr. Nault of DMR in his last (post 3-2 meeting) assessment to BEP, appears in no filing or application before the BEP submitted by NAF — or provided to BEP from DMR based on submissions that NAF provided o DMR. When I asked Mr. Nault and DMR for the source of this description no response was forthcoming.

Permitting by ambush is not sanctioned by Maine law — but it is the best description of the process that has evolved in this project. It is not the process that Maine law requires and describes. To that end, the MGL Intervenors request that this process be brought into conformity with the letter and spirit of NRPA, the Maine APA and the Clean Water Act while the Board takes additional time for its deliberations.

No Board deliberations should proceed until the applications are amended and the additional applications required to obtain permits to dredge and de-water as now proposed by NAF after 3-2-2020. Finally, DMR should be directed to address the mercury issues raised by the MGL Intervenors and others, including Dr. Kopec — one of he neutral experts who has advised the federal court in the Mallinckrodt litigation.

Additional emails will be sent forwarding the DMR objections, which are incorporated in this submission as hough stand herein.

Comments

DMR Public Hearing Regarding Fishing Industry Impacts of Proposed Project for Nordic Aquafarms Inc. in Belfast, Maine

Date: March 2, 2020

TO: Sarah Cotnoir
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FROM: Dianne Kopec, PhD
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I am writing to discuss background information on mercury contamination in Penobscot Bay relevant to the proposed Nordic Aquafarms, Inc. project in Belfast, Maine. Between 2007 and 2014 I was the Staff Biologist for the Penobscot River Mercury Study (PRMS), a court-ordered study that examined mercury contamination, from the former HoltraChem chlor-alkali plant in Orrington, Maine, in the lower Penobscot River and Penobscot Bay. In the 2013 PRMS Phase II report summarizing our findings I was the lead author on Chapters 14 and 16 documenting mercury contamination in the lobster, fish, shellfish, invertebrates, and birds of the aquatic and terrestrial food webs impacted by the HoltraChem discharges, and co-author of an additional 14 chapters. I also authored three peer-reviewed journal articles on our findings and co-authored an additional five journal articles.

Existing data on the concentration of mercury in the nearshore sediment south of Belfast should be considered when reviewing the planned dredging operations associated with construction of the intake and discharge pipes from the proposed Nordic Aquafarms plant in Belfast. Between 2006 and 2012 the Penobscot River Mercury Study (PRMS) examined mercury contamination in the lower Penobscot River and Penobscot Bay from the former HoltraChem chlor-alkali plant in Orrington, Maine. Sediment core samples were collected in 2009 from multiple sites in Penobscot Bay and the river (Yeager 2013). The sediment cores were analyzed for total mercury in 1 to 2 cm slices from the surface down to a depth of 40 cm, then in 5 cm slices to a depth of 90 cm, providing a thorough account of the mercury concentrations at the chosen sample sites.

Included in the 2009 sediment work were cores from three sites sampled approximately 2 km north of the proposed Nordic Aquafarms (NAF) pipeline dredging area. Those cores, listed below in Table 1, provide sediment mercury concentrations from the surface sediment down to

a depth of 90 cm for the nearshore area south of Belfast. Core 08A is close to shore, core 08C is approximately 1 km offshore and core 7A is roughly 4 km offshore.

Table 1. Total mercury (Hg) concentrations in sediment sampled in the nearshore area south of Belfast in 2009.

Core #	Surface Sediment Hg 0 – 3 cm; mean (ng/g dw)	Deep Peak sediment depth (cm)	Deep Peak Hg (ng/g dw)
ES **08A** 09V	347	15-16	495
ES **08C** 09V	299	15-16	370
ES **07A** 09V	304	6-7	346

Several findings given in Table 1 are important to note. The surface sediment mercury concentrations from the three sites were over six times greater than background sediment mercury concentrations for estuaries along the central Maine coast, reported by Bodaly (2013) as 25 – 50 ng/g dw. Further, the peak sediment mercury concentrations were not at the surface, but rather at a depth of 6 to 15 cm.

Surface sediment concentrations are most relevant to mercury contamination of biota, unless the sediment is disturbed. Most sediment mercury is in the inorganic form which has limited accumulation in organisms. Mercury in surface sediment is exposed to methylating bacteria in an environment amenable to transforming the inorganic mercury into organic methyl mercury, which is highly bioavailable, and which biomagnifies in aquatic food webs. If the sediments are disturbed and mixed, then the inorganic mercury sitting in the deeper sediment can also be methylated and enter the food web. Mercury concentrations in surface sediment are directly related to mercury concentrations in benthic foraging marine organisms.

The Penobscot River Mercury Study also examined mercury in lobster, and other shellfish, fish, and bird species. Mercury concentrations in lobster sampled to the south of Belfast were two to four times lower than found in lobster from the DME lobster closure zone near the mouth of the Penobscot River. Lobster were sampled in 2008, 2009 and 2010 in the area of Kellys Cove, south of Belfast, as part of Phase II of the study. Lobster from the Kellys Cove area had the lowest mercury concentration in tail muscle found in any of the northern Penobscot Bay sample sites (average of 100 ng/g ww, adjusted for carapace length, Kopec and others 2019), though still double the mercury concentrations in tail muscle from lobster sampled in Frenchman Bay in 2017, outside of the aquatic influence of the HoltraChem discharges (median mercury concentration 39 ng/g ww; Amec Foster Wheeler 2017) . The mercury concentrations in lobster tail sampled from the current DMR lobster closure zone averaged 200 to 400 ng/g ww (Kopec and others 2019), two to four times greater than found in lobster from Kellys Cove.

Similarly, surface sediment concentrations (0 – 3 cm) in the south Belfast area were, on average, half of the average surface sediment concentration found in the DMR lobster closure zone (11 sites, average total mercury concentration 679 ng/g dw, 0-3 cm). However, within the lobster closure zone, surface sediment concentrations ranged from 332 to 916 ng/g dw (Yeager

2013). This wide range in surface mercury concentrations reflects variation in sediment characteristics and deposition patterns, and current and circulation patterns within Penobscot Bay. Note that the lower end of the range of surface sediment mercury concentrations in the lobster closure zone is equivalent to the surface sediment concentrations reported for the sampled area given in Table 1, north of the proposed NAF pipeline dredging operation. No data are available on the actual sediment mercury concentrations along the proposed route of the NAF pipelines.

It is important to conduct thorough sediment core analyses of the specific area proposed for dredging to install the NAF intake and discharge pipelines. This work should follow the coring and analytical methods used in the Penobscot River Mercury Study in order to generate an accurate description of the sediment mercury concentrations at all relevant depths. Cores should be sectioned for mercury analysis in 1 cm slices to a depth of 20 cm, then in 2 cm slices to a depth of 40 cm, then in 5 cm slices to a depth of 90 cm. This method will ensure a full characterization of the distribution of mercury in the sediment underlying the proposed pipeline route and allow the regulatory agencies to make informed decisions on any risks to biota associated with the proposed dredging and how best to dispose of any dredge spoils.

There are many economic and environmental advantages to land-based aquafarms, but like all new operations the preparatory work must be thorough and site-specific to ensure that unintended harm to the broader environment does not occur. Please contact me if you have any questions.

References:

Amec Foster Wheeler 2017 . 2017 Biota Monitoring Report. Penobscot River Phase III Engineering Study. Prepared for U.S. District Court. Project No. 3616166052.

Bodaly, R.A. 2013. Background concentrations of mercury in central Maine estuaries. Phase II Report, Penobscot River Mercury Study, Chapter 17, submitted to Judge John Woodcock, United States district Court, District of Maine

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Yeager, K.M. 2013. Total mercury sedimentary inventories and sedimentary fluxes in the lower Penobscot River and estuary, Maine. Submitted to Judge John Woodcock, U.S. District Court. District of Maine