



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

MELANIE LOYZIM
COMMISSIONER

IN THE MATTER OF

NORDIC AQUAFARMS, INC.)
Belfast and Northport, Waldo County)
)
L-28319-26-A-N)
L-28319-TG-B-N) LICENSE SUSPENSION PROCEEDING
L-28319-4E-C-N) DECISION AND ORDER
L-28319-L6-D-N)
L-28319-TW-E-N)
A-1146-71-A-N)

On November 19, 2020, the Board of Environmental Protection (Board) issued to Nordic Aquafarms, Inc. (Nordic or licensee) a Site Location of Development Law and Natural Resources Protection Act license, # L-28319-26-A-N / L-28319-26-A-N / L-28319-26-A-N / L-28319-26-A-N / L-28319-26-A-N (Site Law /NRPA Permit), an Air Emissions license #A-1146-71-A-N (Air License), and a wastewater discharge license/Maine Pollutant Discharge Elimination System Permit # ME0002771/W009200-6F-A-N (MEPDES Permit) (collectively the Licenses). Pursuant to 38 M.R.S. § 342(11-B) and Chapter 2, §§ 25 and 27 of the Department of Environmental Protection’s (Department) Rules, on March 9, 2023, Upstream Watch (Upstream) submitted a petition to suspend or revoke the Licenses issued to Nordic, and on April 10, 2023, Jeffrey Mabee, Judith Grace, and The Friends of Harriet L. Hartley Conservation Area (Mabee/Grace/Friends) submitted a petition to revoke the Licenses. Based on the record in this proceeding, including the petitions, responses of the licensee, comments submitted by interested persons, and pertinent information in the underlying licensing record, the Commissioner makes the following findings and conclusions.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND:

- 1. On November 19, 2020, the Board, as part of and on behalf of the Department, issued the Licenses approving construction and operation of a land-based recirculating aquaculture system for the production of Atlantic salmon, including associated wastewater discharge and air emissions. At full buildout, the proposed project would create 37.9 acres of developed area, including 27.4 acres of impervious area and would result in 196,030 square feet of permanent and temporary alteration of freshwater wetlands, 645,283 square feet of permanent and temporary alteration of coastal wetlands, 2,037 linear feet of permanent and temporary alteration to streams, and 127,000 square feet of temporary alteration of Tidal Waterfowl and Wading Bird Habitat, a significant wetland. In addition, the project is licensed to discharge a monthly average of 7.7 million gallons per day of treated wastewater to Belfast Bay, a Class SB water, and operate eight generator engines with an annual fuel limit.

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2. On February 16, 2023, the Maine Supreme Judicial Court, sitting as the Law Court, issued a decision in *Jeffrey R. Mabee, et al. v. Nordic Aquafarms Inc., et al.*, 2023 ME 15 (290 A.3d 79) (the quiet title action). In that decision, the Law Court held that a deed conveying land over which Nordic later obtained the right to an easement to cross with intake and discharge pipes did not convey the intertidal land with the upland. The Law Court's decision states that the intertidal land was eventually conveyed to Mabee/Grace. In addition, the Law Court held that Mabee/Grace hold an enforceable "residential purposes only" servitude that runs with the land (Residential Purposes Restriction) on the related upland property. The Law Court's decision also states that a conservation easement over the intertidal land created by Mabee/Grace in 2019 (Conservation Easement), which was granted to Upstream, who later assigned it to Friends, is enforceable.
3. Prior to the Law Court's decision in the quiet title action, the City of Belfast (the City) initiated an action to condemn and take by eminent domain the property interests adjudicated in that proceeding, including portions of the intertidal area proposed to be utilized by the project and the Residential Purposes Restriction affecting adjacent upland. The City then granted to Nordic a permanent easement for aquaculture piping, installation, operation, and maintenance, and a temporary easement allowing construction. Mabee/Grace appealed Belfast's action to Superior Court, *Mabee, et al. v. City of Belfast, et al.* (BELSC-RE-2021-0007) (eminent domain appeal). On March 2, 2023, the Superior Court entered a stipulated judgment in the eminent domain appeal regarding the Conservation Easement; that stipulated judgement states that the City's eminent domain actions did not amend or terminate the Conservation Easement, which can only be accomplished by a court in an action involving the Attorney General as a party. By order dated May 5, 2022, the Superior Court stayed the proceedings in the eminent domain appeal pending the outcome of the Law Court's quiet title decision. Following the Law Court's decision in the quiet title action, the Superior Court has recently restarted the proceedings in the eminent domain appeal.
4. On March 9, 2023, pursuant to 38 M.R.S. §342(11-B) and Chapter 2, §§ 25 & 27 of the Department's Rules, Upstream Watch (Upstream) filed a petition to revoke or suspend the Licenses issued to Nordic on November 19, 2020. Upstream's petition cited as criteria for revocation section 27(B) ("The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts") and section 27(E) ("There has been a change in any condition or circumstance that requires revocation or suspension of a license"). Upstream contends that Nordic misrepresented its rights over the intertidal and upland parcels and failed to disclose all relevant facts regarding ownership of the land in question and its availability for Nordic's use as proposed. Upstream also argues that the Law Court's decision in the quiet title action constitutes a change in circumstances or condition which is a basis for revocation of Nordic's permits.

5. On April 7, 2023, Nordic filed a response to Upstream’s petition. In the response, Nordic agrees that the Law Court ruling in the quiet title action constitutes a change in circumstances; however, Nordic argues that this change in circumstances justifies suspension but not revocation of the Licenses. Nordic argues that it made no misrepresentation to the Department during the licensing proceeding and that the Law Court’s decision does not render Nordic’s assertions misrepresentations. Nordic further argues that revocation is improper because changes in a license holder’s title, right, or interest (TRI) do not necessitate revocation of the Licenses, referencing the City’s eminent domain action and the ensuing appeal that is pending in Superior Court. Nordic expressly waived its right to a hearing with regard to a potential suspension and requested that the Department suspend the Licenses and toll all associated deadlines, terms, and conditions of the Licenses in conjunction with the suspension.
6. On April 10, 2023, Mabee/Grace/Friends filed a “Reply to Nordic’s Response to Upstream Watch’s Petition” and a separate petition to suspend or revoke the Nordic Licenses. Mabee/Grace/Friends asserts the Department should immediately suspend the Nordic Licenses which should extend until revocation is ordered. Mabee/Grace/Friends purports to “correct errors of fact and law contained in [the Nordic response to Upstream],” reiterates the allegations of misrepresentations made by Upstream, and raises additional allegations concerning an upland parcel associated with the project.
7. On April 17, 2023, Nordic filed a response to the Mabee/Grace/Friends petition. Nordic re-asserts it did not misrepresent relevant facts in the licensing proceeding and restates its support of the Department’s TRI sufficiency finding. In addition, Nordic contends that the change in circumstances, including the ongoing nature of litigation and the implications of recent decisions, does not support the Department using its enforcement authority to revoke the Licenses; rather, it supports suspension and tolling of conditions and deadlines.
8. In addition to the petitions and responses contemplated by Chapter 2, the Department received subsequent submissions from the petitioners and comments from interested persons who were former intervenors in the Board hearing process. These submissions primarily address the request from Nordic to toll terms, conditions, and deadlines and establish a new effective date of the Licenses based on the “Final Ownership Decision Date” and removal of a suspension. The petition process set forth in the rule consists of a petition and a response, followed by the Commissioner’s decision on whether to initiate the requested proceeding. The rule prohibits petitioners from supplementing petitions; however, responses to terms proposed by the licensee and additional filings by other persons are not explicitly prohibited by Section 25(B). In this case, the Commissioner exercised her discretion in considering the additional submissions.

9. On April 28, 2023, Commissioner Loyzim issued a letter to Nordic, through Nordic's representatives and counsel, initiating suspension proceedings. In that letter, the Commissioner determined that the Law Court's quiet title decision, together with the pending Superior Court litigation over the City's eminent domain actions, represents a change in circumstances that may warrant a suspension of the Licenses. The Commissioner did not initiate revocation proceedings, which in effect dismissed that aspect of the petitions. The Commissioner provided Nordic until May 5, 2023, to either confirm its prior waiver of a hearing or to request a hearing. Nordic confirmed its waiver of the right to a hearing on May 3, 2023.

II. GOVERNING STATUTES AND RULES:

10. Pursuant to 38 M.R.S § 342(11-B) and Chapter 2, §§ 25 & 27, the Commissioner may revoke or suspend a license whenever the Commissioner finds that any of the criteria set forth in 38 M.R.S § 342(11-B) and Chapter 2, § 27 has been met.

III. DISCUSSION, ANALYSIS AND CONCLUSIONS OF LAW:

A. Criteria for Suspension

11. Chapter 2, § 27 identifies eight criteria that may trigger the Department's discretionary authority to suspend, revoke, modify or issue a corrective action regarding a license. The authority to suspend or revoke a license is delegated to the Commissioner pursuant to 38 M.R.S. § 342(11-B) and Chapter 2, § 25. The licensee and the petitioners agree that a change in a condition or circumstance exists following the Law Court's decision in the quiet title action. The petitioners allege that the Licenses were obtained by misrepresenting or failing to disclose fully all relevant facts, and the licensee denies that allegation.
12. With regard to the allegations of misrepresentation or failure to disclose fully all relevant facts, the Department finds that the licensee did not obtain the Licenses by misrepresenting or failing to disclose all relevant facts. Both petitioners, as intervenors to the underlying licensing proceeding, raised the majority of the contentions present in the petitions prior to and during the licensing process. The Department was aware of and considered the underlying deeds, use restrictions, and legal arguments presented by both the licensee and opponents to the project. While the licensee may not have supplied all existing surveys, other surveys would not have provided the Department with legal certainty on the issue of TRI, which only the courts can resolve.¹ As such, the

¹ It is notable that the Superior Court in its decision, *Mabee v. Nordic Aquafarms*, No. RE-2019-0018, 2021 Me. Super. LEXIS 103 (Oct. 27, 2021), on an even more fulsome record developed during a multi-day trial, decided the intertidal ownership conveyed with the upland and that Mabee/Grace did not possess title, right, or interest in the intertidal.

Department does not find that the licensee obtained the license by failing to disclose documents or by misrepresenting relevant facts.

13. Mabee/Grace/Friends also allege misrepresentations regarding removal of use restrictions on the northwest portion of the property at issue, regarding the eminent domain process, and regarding the conservation easement in the intertidal area. While characterized as misrepresentations or the failure to disclose relevant facts, the claims, in both cases, appear to be based on alleged deficiencies in the instruments or applicable authority to remove deed restrictions. The Department acknowledges that the claims, if proven, could constitute a change in condition or circumstance; however, they do not at this time support suspension.
14. Lastly, the Department agrees with the petitioners and the licensee that the Law Court's quiet title decision on the intertidal lands proposed for development and the uncertainty resulting from the pending eminent domain appeal, including any effects on the Residential Purposes Restriction and the Conservation Easement, collectively constitute a change in circumstances potentially requiring suspension. Given the degree of potential impacts resulting from the project, and the uncertainties resulting from the Law Court's quiet title decision, the eminent domain appeal, and the Conservation Easement, the Department finds that the 38 M.R.S. § 342(11-B)(E) and Chapter 2, § 27(E) criterion to suspend a license is met.

B. Evaluation of Suspension and Revocation Options

15. As an initial matter, even if a suspension criterion in Section 342(11-B) and Section 27 of Chapter 2 has been met, a determination to suspend or revoke a permit remains an exercise of the Commissioner's discretionary authority. 38 M.R.S. § 342(11-B) ("the commissioner may revoke or suspend a license whenever the commissioner finds . . ."). The Department considers several factors in deciding whether to suspend or revoke a license.
16. First, in making the determination that a change in circumstances may warrant suspension, the Department notes that the TRI findings and conclusions for the underlying license applications have not been invalidated by the Law Court's decision in the quiet title action. Specifically, the Department's acceptance of the applications and the processing of the applications during the processing period pursuant to its rules and under the law in effect at the time remain valid, subject to any eventual adjudication of the TRI issues raised in the pending judicial appeals of the Licenses. Nonetheless, the change in circumstances does impact certain findings and conclusions that warrant consideration now. Where the findings and conclusions in the decision to grant the licenses rely on the reasonableness of the environmental impacts of an activity, legal uncertainty as to whether the project could be completed and operated if construction began may alter the determination of the reasonableness of the impacts. For instance, if

construction of a project ultimately cannot be completed, the associated environmental impacts may be considered unreasonable and actions to prevent those harms warranted. This would also be the case until new uncertainties surrounding the ability of a licensee to complete the project, such as those presented by the changed circumstances here, are resolved.

17. Suspension or revocation would address this concern but with different consequences. Both options would remove Nordic's ability to proceed with the project and prevent its associated environmental impacts. But revocation would effectively require the licensee to begin licensing anew, even if it ultimately prevails in court. The Department finds that revocation would not be in the interest of efficiency for the Department, the licensee, or the parties and the public, and would provide no greater environmental protection than an appropriately structured suspension. If the pending litigation referenced above is decided in favor of Nordic and the City of Belfast, and the Conservation Easement is subsequently legally amended such that the project can be constructed, the Department Licenses that are suspended can be reinstated as outlined below. Accordingly, the Department determined that the change in circumstances here justifies a suspension, not revocation, of certain Licenses to prohibit environmental impacts that may not be warranted, should the licensee be ultimately unable to proceed with the project. For these reasons only suspension proceedings were initiated.
18. Petitioners and other interested persons submitted several comments on the Department's treatment of the licensee's request to toll certain conditions. The Department's decision imposing a suspension may include provisions requiring the licensee to take actions necessary to protect human health or the environment, and thus may define the scope, terms, and conditions necessary to effectuate the suspension in the best interest of environmental protection. The scope, terms, and conditions of the suspension ordered here are addressed in Section IV below.

IV. ACTION AND ORDER:

Based on the above findings of facts, analysis, and conclusions, I, Melanie Loyzim, Commissioner of the Department of Environmental Protection, effective immediately, hereby suspend the Nordic Site Law/NRPA Permit and the Nordic Air License (Board Orders #L-28319-26-A-N / L-28319-TG-B-N / L-28319-4E-C-N / L-28319-L6-D-N / L-28319-TW-E-N, and #A-1146-71-A-N) dated November 19, 2020, subject to certain additional conditions and ongoing licensing requirements as outlined more fully below, unless and until the Department takes action to lift the suspension after all of the following occur:

- A. Final disposition of all challenges related to the City's eminent domain action, including all claims in the eminent domain appeal, in favor of the City and Nordic in a manner that will allow the project to be completed; and

- B. Final disposition of any action to amend or terminate the Conservation Easement, as contemplated by the March 2, 2023, stipulated judgment in the eminent domain appeal, in a manner that will allow the project to be completed.

After final judicial resolution of the actions identified above, the licensee may submit a written request to the Department to take further action with respect to this suspension, with copies sent to the petitioners here. Such submission by the licensee shall identify the final disposition of the actions, address the status of the ownership of the intertidal area, the Residential Purposes Restriction, and the Conservation Easement, and describe how the disposition of the actions will allow the project to be completed. Such submission shall also provide all other information required by the conditions and requirements of this suspension. The Department may, in its discretion, allow for additional comment by petitioners and others after the filing of any such submission. Upon completion of such a submission the Commissioner will issue a decision.

This suspension is subject to the following terms, conditions, and limitations, ordered by the relevant permit or license:

- 1) Site Law/NRPA Permit (#L-28319-26-A-N / L-28319-TG-B-N / L-28319-4E-C-N / L-28319-L6-D-N / L-28319-TW-E-N)

The combined Site Law/NRPA Permit authorizes construction of the development with associated impacts to protected natural resources. So long as the Site Law/NRPA Permit is suspended, no construction may proceed, and no alteration of the site may occur. The Site/NRPA Permit contains numerous conditions requiring Department review and approval prior to start of construction. The deadlines for and processing of any such condition compliance applications are tolled until the licensee demonstrates to the satisfaction of the Department that the condition specified in Section IV(A)-(B) above have been met and the Department has lifted the suspension. The deadline to begin construction associated with the Site/NRPA Permit is tolled until the latest of the following: 18 months after the suspension is lifted; 18 months after final disposition of any appeal of the underlying Licenses; or 18 months after any required approval of a pre-construction condition compliance application.

- 2) Air License (#A-1146-71-A-N)

With regard to the Air License, the licensee may not begin actual construction and no permitted equipment may be installed or operated during the license suspension. The requirement of Standard Condition 3 obligating the licensee to commence construction within 18 months of the issuance of the Air License is tolled until the latest of the following: 18 months after the suspension is lifted; 18 months after final disposition of any appeal of the underlying Licenses; or 18 months after any required approval of a pre-

construction condition compliance application. Prior to commencing construction, the licensee must provide for review and approval a control technology analysis and analysis of the ambient air quality standards demonstrating that there have been no advancements in control technologies or changes to applicable ambient air quality standards since the issuance of the May 18, 2022, letter extending approval to construct. The licensee may not commence construction unless the Department has approved this analysis no more than 18 months prior to the start of construction. This suspension does not toll expiration of the permit, which remains 10 years from the effective date of the Board Order approving issuance of the Air License.

3) MEPDES Permit (#ME0002771/W009200-6F-A-N)

This suspension decision and order excludes and does not apply to the November 19, 2020, MEPDES Permit. All terms and conditions of the MEPDES Permit remain in full effect. Prior to the issuance of the MEPDES permit, available data were compiled and assessed to inform the contents of the permit specifically related to attainment of water quality standards, antidegradation, and nitrogen load limit. At that time, it was determined that additional ambient data were needed to more fully characterize a suite of parameters during May to October within the receiving water at five sites on a range of tide stages and river discharges, following storm events and during dry weather, and with varying biological activity from water column algae. Generally, ambient data collection was required of Nordic to more completely determine variability in the system that would contribute to improved confidence in the characterization of pre-wastewater discharge conditions. The Board agreed with commenters that conducting additional current monitoring in the receiving water prior to the commencement of the discharge may strengthen the verification of the existing modeling results to ensure that water quality objectives will be met.

The purpose of the monitoring requirements in the license is two-fold. Should monitoring results indicate the existing modeling is inaccurate, the Department may exercise Special Condition O, *Reopening the Permit for Modifications*, to modify limitations or require additional data be collected. Secondly, the monitoring results inform Department decision-making upon renewal of the MEPDES Permit, which occurs five years following the issuance of the MEPDES Permit and would not be tolled by a suspension. Suspending the monitoring required by Special Condition G would be inconsistent with the findings and intent of the Board. In addition, suspending monitoring requirements would unnecessarily reduce the comprehensiveness of data that would otherwise be available to inform analysis at a potential future renewal permitting.

Therefore, the Department finds that ambient monitoring should continue as required by Special Condition G for the duration of the MEPDES Permit in accordance with the methods described in the approved Ambient Sampling Plan. Because any environmental impacts associated with a discharge are foreclosed by suspension of the Site Law/NRPA

Permit and the resulting prohibition of the construction of relevant infrastructure, the Department has determined that the MEPDES Permit may remain in effect without risk of environmental impacts. Thus, all terms and conditions of the MEPDES Permit, including all monitoring requirements, remain in full effect and are not subject to this suspension decision and order.

V. APPEAL RIGHTS:

Pursuant to Chapter 2, § 25(F), the following are within the Commissioner's sole discretion and are not subject to judicial review: 1) the decision to dismiss all petitions to revoke the Licenses and act only on petitions to suspend the Licenses; and 2) the decision to take no action with respect to suspension of the MEPDES Permit. Otherwise, judicial review of Department Decisions is addressed by Chapter 2, § 28, 5 M.R.S §§ 11001-11008, and Maine Rule of Civil procedure 80C.



Melanie Loyzim,
Commissioner
Maine Department of Environmental Protection