



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION, AUGUSTA, MAINE 04333-0017

BOARD ORDER

IN THE MATTER OF

NORDIC AQUAFARMS, INC) APPLICATIONS FOR AIR EMISSION,
Belfast and Northport) SITE LOCATION OF DEVELOPMENT,
Waldo County, Maine) NATURAL RESOURCES PROTECTION ACT, and
) MAINE POLLUTANT DISCHARGE ELIMINATION
A-1146-71-A-N) SYSTEM (MEPDDES)/WASTE DISCHARGE LICENSE
L-28319-26-A-N)
L-28319-TG-B-N)
L-28319-4E-C-N) SECOND PROCEDURAL ORDER
L-28319-L6-D-N)
L-28319-TW-E-N)
W-009200-6F-A-N)

On August 15, 2019, Presiding Officer Robert Duchesne held a pre-hearing conference at the Augusta Civic Center in Augusta, Maine. The purpose of the conference was to review procedural rules governing the Board of Environmental Protection's processing of the Nordic Aquafarms, Inc. (Nordic) applications for a land-based aquaculture facility proposed to be located in Belfast and Northport, Maine. This procedural order documents the matters discussed at the conference and the rulings of the Presiding Officer.

Participants:

Robert Duchesne, Board Member and
Presiding Officer
Peggy Bensinger, Assistant Attorney
General (AAG)
Scott Boak, AAG
Laura Jensen, AAG
Cynthia Bertocci, Board Executive Analyst
Ruth Ann Burke, Board Admin. Assistant
Kevin Martin, DEP Office of the
Commissioner
Beth Callahan, DEP Bureau of Land
Resources
Gregg Wood, DEP Bureau of Water Quality
Patric Sherman, DEP Bureau of Air Quality

Joanna Tourangeau, Drummond Woodsum
for Nordic
Erik Heim, Nordic
Ed Cotter, Nordic
Anne Saggese, The Fish Are Okay
Michael Lannan, Northport Village Corp.
Charles Tilburg, University of New England
Donald Perkins, Gulf of Maine Research
Institute
David Losee, for Upstream Watch
Kim Ervin Tucker, for Maine Lobstering
Union, Wayne Canning, and David Black;
and Jeffrey R. Maybee and Judith B. Grace
Eleanor Daniels, for herself and Donna
Broderick

1. Applicable Procedural Rules

The Board will conduct the proceeding in accordance with the provisions of the Maine Administrative Procedure Act (APA) governing adjudicatory proceedings (5 M.R.S. §§ 9051-9064), and the Department's Chapter 2 *Rule Concerning the Processing of Applications and Other Administrative Matters* and Chapter 3 *Rules Concerning the Conduct of Licensing Hearings*. The parties should familiarize themselves with these provisions of statute and rule.

2. Availability of Application Materials

In accordance with Chapter 3, § 3(E) of the Department's rules, the applicant is required to provide the appropriate city or town clerk with a copy of its application and supporting documents, in this case the City of Belfast and the Town of Northport. Any subsequent amendments, modifications, response to comments, or other supplemental filings must be served on all parties and filed by the applicant with the City of Belfast and the Town of Northport. Nordic's application materials will also be available on the Department's webpage under "Major Projects Before DEP."

3. Service List, Filing Requirements, and Attendance

The parties to this proceeding are the applicant and the intervenors. All parties are expected to comply with the deadlines and filing requirements.

Service List. Each party must have one designated person to be the spokesperson and to be on the service list as the contact person. An additional person from each party may also be on the service list. Whenever a party files a document with the Board or the Department, the party must send a copy to each person on the most recent service list. Department staff, Board staff, and counsel to the Board will copy all parties on procedural orders, formal decisions of the Presiding Officer, agency review comments, and other similar documents. If any party wants to change its designated contact person, the party must notify all other persons on the service list. Please note that correspondence addressed to the Presiding Officer should be sent to Ruth Ann Burke, the Board's Administrative Assistant and Clerk.

Correspondence directed to Department staff (Beth Callahan for Site Location of Development and Natural Resources Protection Act applications, Patric Sherman for the Air emission application, and Gregg Wood for the Waste Discharge application) should be sent to the common email box for this project NordicAquaFarms.DEP@maine.gov, rather than staff's individual email addresses. Public comments should also be sent to this common email address. A revised Service List is attached to this procedural order.

Format and Deadlines. Notwithstanding Chapter 3, § 3(D), unless otherwise specified, all filings with the Board related to this proceeding should be made electronically in an unalterable format, preferably Adobe PDF format, and electronically served on all parties at the same time they are filed with the Board. Links to documents are not acceptable. In the

case of pre-filed testimony, the Board will require a paper copy in addition to an electronic copy. The number of paper copies will be determined at a future date.

Submissions not received by the Board by a prescribed deadline will be deemed untimely and may not be accepted, absent a showing of good cause. The risk of material not being received in a timely manner is on the sender.

Attendance. A representative of the applicant and each intervenor must attend the pre-hearing conferences and the public hearing and adhere to all schedules and deadlines. If unforeseen circumstances make a party's attendance at a conference or a session of the hearing impossible, parties are asked to notify the Board in advance of the proceeding. A party that does not participate in a conference waives its right to object to matters discussed or decided at the conference unless the Presiding Officer determines that the party has demonstrated good cause for its absence.

4. Role and Authority of the Presiding Officer

The role and authority of the Presiding Officer is set forth in 5 M.R.S. § 9062 and Chapter 3, § 4 of the Department's rules. The Presiding Officer may vary from any procedure described in Chapter 3 or the APA if the parties and the Presiding Officer agree to such a variation or if the variation will achieve greater fairness or economy and no prejudice to any party will result. Some of the Presiding Officer's rulings, such as those pertaining to the relevant statutes and rules, the admissibility of evidence, and the issues to be heard, may be appealed to the full Board.

5. Roles/Responsibilities of the Parties and Department Staff, and Board Panels

Applicant. As stated in Chapter 2, § 11(F) of the Department's rules, the applicant has the burden of proof to affirmatively demonstrate that each of the licensing criteria in statute and rule is met. While all licensing criteria must be met, the Presiding Officer has authority to limit the issues that will be addressed at the hearing if the parties and the Presiding Officer agree to such limitation or if no prejudice to any party will result. The Board will use its time most effectively if it focuses the hearing on the issues that are in dispute or are of greatest concern to the Board, Department staff, and the parties. For other issues, the Board will not have pre-filed written testimony and will not have oral testimony at the hearing. For those non-hearing issues, the applications will be judged on written submissions, in the form of the applications, any supplemental submissions filed by the applicant, written comments or written evidence submitted by the parties or the general public, and comments filed by sister State agencies.

Intervenors are asked to consider which issues, as set forth in the relevant licensing criteria, they want to address at the hearing. We will discuss a narrowing of the issues for the hearing at a future conference.

Intervenors. As set forth in Chapter 3, § 11(A), an intervenor is a party to the proceeding. As such, each intervenor is required to copy the applicant and all other parties on all documents and correspondence it files with the Board. Intervenors will be required to file the

testimony of their witnesses in writing in advance of the hearing, and their witnesses will be subject to cross-examination by the applicant and other intervenors as well as questioning by Board members and staff. An intervenor may choose not to present testimony or evidence and may simply wish to cross-examine the witnesses of the applicant and other parties.

At the hearing, each intervenor is required to present its case during the time allotted for intervenor testimony. In the case of intervenor groups, the Presiding Officer will prohibit testimony by officers of intervenor groups during the session of the hearing set aside for members of the public. Prior to the hearing, intervenors may submit written comments on Nordic's applications to Department staff; however, any such comments must be copied to all persons on the Service List.

Intervenors may wish to consolidate their appearance at the hearing to conserve resources. Consolidation will be discussed at the next pre-hearing conference.

If any person or group granted intervenor status decides that he/she/it does not want to participate at the intervenor level, that person or group may elect to participate as an interested person and should so notify the Presiding Officer.

Interested Persons. Interested Persons receive the following information regarding the hearing: all procedural orders; notice of all meetings at which the Board will take an official action in the matter (including a copy of the Board agenda, Department memorandum, and draft proposed order); public hearing notices; notice of opportunity to comment on the draft decision document and a copy of that draft document; and a copy of the final decision. Interested Persons may submit written evidence and written comments on the applications at any time until the close of the evidentiary record and may testify at the portion of the hearing reserved for testimony from the general public. Interested Persons will not be required to pre-file their testimony. Interested Persons do not have the right to cross-examine the witnesses of the parties or other persons, however, Interested Persons may, at the Presiding Officer's discretion, be allowed to ask a specific question of a witness through the Presiding Officer.

General Public. The general public may submit written evidence and written comments on the application at any time until the close of the evidentiary record, which generally occurs at the close of the hearing. The entire hearing is open to the public. It is the practice of the Board to receive testimony from the parties during the daytime sessions and to reserve one or more evening sessions to receive testimony from members of the general public. Members of the public are not required to pre-file their testimony. Public testimony is sworn and all persons testifying are subject to questioning by Board members and cross-examination by the parties.

Department Staff. The role of Department staff is to analyze the applications and all evidence submitted and to gather facts on behalf of the Board, which includes asking questions of witnesses at the hearing. After the hearing, Department staff will analyze the evidence in the record, review the record with Board members in one or more deliberative sessions, and draft a recommendation (in the form of a draft Board Order) for the Board's consideration.

Board Panels. As discussed when the Board assumed licensing jurisdiction over Nordic's applications, federal recusal requirements set forth in 38 M.R.S. § 341-C(8) limit participation of three Board members in review of Nordic's applications. Specifically, Board members Mark Draper, Mark Dubois, and Susan Lessard may not participate in review of Nordic's MEPDES/WDL application because their employers hold MEPDES permits. Additionally, Mr. Draper and Mr. Dubois may not participate in review of Nordic's air emissions application because their employers hold Clean Air Act permits.

Given these limitations, there will be three panels of Board members and the hearing will be organized by application type as follows:

- Panel 1: Site Location of Development and Natural Resources Protection Act applications. All Board members may participate - Robert Duchesne, Robert Sanford, Alvin Ahlers, James Parker, Susan Lessard, Mark Draper, and Mark Dubois.
- Panel 2: Air Emissions application. Robert Duchesne, Robert Sanford, Alvin Ahlers, James Parker, Susan Lessard may participate.
- Panel 3 or "Core Group: "MPDES/WDL and all procedural matters: Robert Duchesne, Robert Sanford, Alvin Ahlers, and James Parker may participate.

While the hearing will be organized by application type, the Board intends to hold the hearing on Nordic's applications in a block on one or more consecutive days following completion of staff's technical review and the submission of the parties' pre-filed testimony. The hearing date(s) will be set and publicized well in advance of the hearing.

6. Relevant Licensing Criteria.

Staff distributed a list of the relevant licensing criteria set forth in statute and rules that the applicant's proposed project must meet to obtain the sought-after licenses. The list distributed at the conference inadvertently omitted Chapter 581 of the Department's rules, *Regulations Relating to Water Quality Evaluations*. A corrected list is attached to this Order.

Intervenors should familiarize themselves with the relevant criteria as they pertain to the issues the intervenor wants to address at the hearing. For example, if an intervenor is primarily interested in the requirements for a waste discharge license, the intervenor may wish to focus its attention on the statutes and rules governing waste discharge licenses.

Each intervenor shall provide a preliminary list of the issues that they would like addressed at the hearing either through cross-examination of the applicant's witness or through the presentation of their own witnesses by Monday, September 30, 2019.

7. Pre-Filed Testimony / Availability of Witnesses

Requirement to Pre-File: All parties will be required to pre-file the testimony of their witnesses by the deadline that will be established by the Presiding Officer. Written testimony must be sworn; the witness must affirm that the testimony is true to the best of the witness' knowledge and belief. The requirement of pre-filed testimony allows Board

members, staff, Board counsel, and the parties to review testimony in advance of the hearing and come to the hearing prepared to conduct efficient and focused cross-examination.

Availability of Witnesses at the Hearing: No person will be allowed to testify at the hearing for a party unless the person has submitted pre-filed direct or rebuttal testimony. All witnesses submitting written, pre-filed testimony must be present in person at the hearing for cross-examination. If a witness does not appear at the hearing, the witness' pre-filed testimony will not be allowed or considered as sworn testimony. Upon request it may be allowed in the record as an unsworn comment that was not subject to cross-examination. Accordingly, any scheduling constraints or other limitations concerning a witness's ability to appear at the hearing should be considered when selecting witnesses.

Prior to the hearing, the Board will establish a tentative schedule for the appearance of witnesses. It is the responsibility of each party to keep its witnesses informed regarding the hearing schedule and to ensure that their witnesses maintain maximum flexibility during the hearing. The Presiding Officer may take a witness out of order for good cause shown.

While the hearing will be held in a handicapped accessible facility, a witness may have other limitations requiring accommodation such visual or hearing limitations. Any relevant limitations should be stated in writing sufficiently in advance of the hearing to allow for reasonable accommodation.

8. Site Visit.

The Board has tentatively scheduled a site visit with Department staff for Wednesday, October 23, 2019. The parties may offer suggestions for areas or site features to view; the deadline for suggestions is Monday, September 30, 2019. It is Board practice to allow a representative of each intervenor or intervenor group to attend. Details of the site visit and attendance will be finalized at a future date.

9. Status of Application Review.

The Board is not setting a hearing date at this time. Statute requires that the Board allow time for Department staff to review the applications and for the applicant to respond to any of the staff's information requests prior to holding a hearing on the applications. Specifically, 38 M.R.S. § 341-D(2) requires:

Prior to holding a hearing on an application over which the board has assumed jurisdiction, the board shall ensure that the department and any outside agency review staff assisting the department in its review of the application have submitted to the applicant and the board their review comments on the application and any additional information requests pertaining to the application and that the applicant has had an opportunity to respond to those comments and requests. If additional information needs arise during the hearing, the board shall afford the applicant a reasonable opportunity to respond to those information requests prior to the close of the hearing record.

Staff has requested additional information of the applicant on several aspects of Nordic's proposed project. These information requests, and the applicant's responses to date, appear on the Department's webpage. At the conference, Department staff indicated that, with respect to Nordic's air emissions application, staff does not have any outstanding information requests. The applicant recently responded to staff's request for additional information pertaining to the proposed wastewater discharge. With respect to the Site Law and NRPA applications, Department technical staff and Maine sister agency staff are continuing their review of Nordic's applications and may have additional information requests.

The Board understands that the parties cannot fully prepare their hearing testimony, which will be pre-filed, before the applicant has had an opportunity to provide any requested additional information. However, intervenors should be reviewing Nordic's applications and identifying issues on which they may want to cross-examine the applicant or present their own witnesses. As stated in paragraph 6 of this Order, the Board intends to hold the hearing on Nordic's applications on one or more consecutive days following completion of staff's technical review and the submission of the parties' pre-filed direct and rebuttal testimony.

10. Ex-parte Communications

The parties are reminded that the Board's decision on the applications must be based on evidence that is in the record and available to all. Therefore, as set forth in the Maine Administrative Procedure Act, 5 M.R.S. § 9055, and Chapter 3, § 6 of the Department's rules, the parties may not communicate directly or indirectly with any member of the Board in connection with any issue of fact, law or procedure pertaining to this licensing proceeding while the matter is pending. The parties may communicate with Department staff, counsel to the Board, the Board's Executive Analyst, and the Board's Administrative Assistant.

11. Notice Issues

In a letter dated August 2, 2019, Department staff notified Nordic that it had identified an area of project work on Perkins Road associated with the proposed sanitary sewer connection for the project and that Nordic was required to provide notice to the abutting landowners. By letter dated August 5, 2019, Nordic provided a list of abutters along Perkins Road to whom it provided notice in response to the Department's request, and certified mail return receipts.

Since these persons did not receive notice of Nordic's applications until after the deadline for the filing of petitions to intervene in the Board's proceeding, the Board will allow two weeks from receipt of notice from the Board of the opportunity for these persons to file a petition to intervene.

12. Title, Right, or Interest Petition to Dismiss

On July 12, 2019 Jeffrey Mabee and Judith Grace submitted a petition to dismiss the Nordic applications for lack of title, right, or interest. As stated at the conference, I read that petition to be a request for the Board to return the applications due to a lack of title, right, or interest (also known as TRI), pursuant to Chapter 2, § 11(D), with an alternative request for a preliminary hearing on the issue of TRI. The petition referred to a June 27, 2019 letter from

Board Chair Mark Draper to Nordic's counsel, copies of which were handed out to each of the parties at the conference. As Chair Draper's letter notes, after review of the TRI materials submitted by the applicant and the parties, the DEP Commissioner accepted the Nordic applications as complete for processing on June 13, 2019. Pursuant to my authority under Chapter 3, § 4(C), paragraphs (8), (9), and (12), and as stated at the conference, I decline to return the applications based on a lack of TRI at this time, and I deny the request for a preliminary hearing on the issue of TRI. I also echo Chair Draper's letter. The scope of the Board's eventual hearing on Nordic's applications, and whether the hearing topics may touch on TRI in any way, has not yet been determined.

For the record, at the pre-hearing conference, Kim Ervin Tucker, attorney for Jeffrey Mabee and Judith Grace, stated her objection to my denial of the petition.

This order establishes the following schedule:

1. The Board's site visit is tentatively scheduled for Wednesday, October 23, 2019.
2. The deadline for the parties to offer suggestions for areas or site features for the Board to view is Monday, September 30, 2019.
3. Each intervenor shall provide a preliminary list of the issues that they would like addressed at the hearing either through cross-examination of the applicant's witness or through the presentation of their own witnesses by Monday, September 30, 2019.
4. The parties shall reserve Thursday, October 17, 2019 for a pre-hearing conference with the Presiding Officer. Intervenors should come to the conference prepared to discuss consolidation.
5. Following the conference, the Board mailed notice of opportunity to intervene in the Board's proceeding to persons with land abutting the proposed sanitary sewer force main extension along Perkins Road who did not previously receive notice of the filing of Nordic's applications. The deadline for these persons to file petitions to intervene is September 6, 2019.

DONE AND DATED AT AUGUSTA, MAINE THIS 23rd DAY OF AUGUST, 2019

BOARD OF ENVIRONMENTAL PROTECTION



BY: _____
Robert S. Duchesne, Presiding Officer

Nordic Aquafarms Applications for Land-Based Aquaculture Facility

The Department of Environmental Protection's relevant statutory and regulatory criteria for review of Nordic's applications include:

- Natural Resources Protection Act, 38 M.R.S. §§480-A through 480-JJ;
- Site Location of Development Law, 38 M.R.S. §§481 through 489-E;
- Pollution Control Law, 38 M.R.S. §§411 through 424-B;
- Water Classification Program, 38 M.R.S. §§464 through 470;
- Protection and Improvement of Air, 38 M.R.S. §§ 581 through 610-D; and
- Department regulations adopted pursuant to the above laws, including the following Chapters
 - o Chapter 115: Major and Minor Source Air Emission License Regulations
 - o Chapter 310: Wetlands and Waterbodies Protection
 - o Chapter 315: Assessing and Mitigating Impacts to Existing Scenic and Aesthetic Uses
 - o Chapter 335: Significant Wildlife Habitat
 - o Chapter 371: Definitions of Terms Used in Site Location of Development Law and Regulations
 - o Chapter 372: Policies and Procedures under Site Location Law
 - o Chapter 373: Financial Capacity Standard of Site Location Law
 - o Chapter 375: No Adverse Environmental Effect Standard of Site Location Law
 - o Chapter 376: Soil Types Standard of Site Location Law
 - o Chapter 500: Stormwater Management
 - o Chapter 520: Definitions for the Waste Discharge Permitting Program
 - o Chapter 521: Applications for Waste Discharge Licenses
 - o Chapter 522: Application Processing Procedures for Waste Discharge Licenses
 - o Chapter 523: Waste Discharge License Conditions
 - o Chapter 524: Criteria and Standards for Waste Discharge Licenses
 - o Chapter 525: Effluent Guidelines and Standards
 - o Chapter 579: Classification Attainment Evaluation Using Biological Criteria for Rivers and Streams
 - o Chapter 581: Regulations Relating to Water Quality Evaluations
 - o Chapter 587: Instream Flows and Lake and Pond Water Levels

Links to the Department's rules can be found on the Department's webpage, and the Secretary of State's webpage at <https://maine.gov/sos/cec/rules/06/chaps06.htm>