



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
) SYSTEM/WASTE DISCHARGE LICENSES
L-28319-26-A-N)
L-28319-TG-B-N)
L-28319-4E-C-N) SIXTH PROCEDURAL ORDER
L-28319-L6-D-N)
L-28319-TW-E-N)
W-009200-6F-A-N)

Pre-filed direct testimony was filed by the applicant Nordic Aquafarms, Inc. (Nordic) and the following intervenors: Gulf of Maine Research Institute (GMRI), Lawrence Reichard, The Fish Are Okay (TFAO), University of New England, and Upstream Watch/Northport Village Corporation (Upstream/NVC). By letter dated December 20, 2019, Nordic filed “Objections and Motions to Strike Intervenors’ Pre-filed Testimony” in which it requests that the Board strike portions of Mr. Reichard’s testimony and the testimony of Upstream/NVC in its entirety. Responses to Nordic’s motion were filed by intervenors Reichard, TFAO, Upstream/NVC, and consolidated intervenors Mabee, Grace, and Lobstering Representatives. This procedural order rules on Nordic’s Objections and Motions to Strike.

1. Nordic’s Motion to Strike Testimony of Upstream/NVC in its Entirety

In Section I of its motion, Nordic argues that Upstream/NVC’s testimony should be stricken in its entirety for failure to comply with Chapters 2 and 3 of the Department’s rules and the Second, Third, and Fourth Procedural Orders regarding the filing of testimony. Nordic argues that testimony was not timely filed; was not complete, accessible, and easily understandable; and the exhibits were not numbered. Nordic also objects to Upstream/NVC’s December 18th request that the Board accept additional exhibits that were attached to the paper version of the testimony of its witnesses Bryden and Pettigrew that were delivered to the Department but were not included in Upstream/NVC’s December 13th electronic filing with the Board and the intervenors.

In response to the motion to strike its testimony in its entirety, Upstream/NVC states that its testimony was filed by the December 13th deadline. Upstream/NVC argues that it is a volunteer group whose members did their best to comply with the filing requirements and that its filing was timely and substantially correct and complete.

Ruling. The motion to strike Upstream/NVC's testimony in its entirety as untimely and non-compliant with the procedural orders is denied. Although there may have been confusion caused by the fact that Upstream/NVC's testimony was submitted in multiple emails by different persons and that exhibits were not numbered as required, Upstream/NVC submitted the bulk of its testimony by the December 13, 2019, 5:00 p.m. deadline. On December 16, 2019, the parties were notified that the version of Upstream/NVC's testimony emailed to the Board and parties by 5:00 p.m. on Friday, December 13th would be the official version admitted. Upstream/NVC subsequently numbered its exhibits and resubmitted its testimony electronically on December 18, 2019 in accordance with the December 16th email so there was no significant prejudice to the parties.

Upstream/NVC's December 18th request to admit additional exhibits that were not provided to the applicant and other intervenors by the December 13th deadline is denied. A list of those additional exhibits which were not admitted will be provided to the parties by Board staff subsequent to this Order.

2. Nordic's Motion to Strike Testimony on Non-hearing Issues

A. Noise. Nordic moves to strike Mr. Lannan's testimony on noise (Upstream/NVC pre-filed testimony at Tab 6) arguing that the Board did not list noise as an issue for the hearing.

In response to the motion, Upstream/NVC renewed its argument that the Board voted to grant its November 5, 2019 appeal of the Third Procedural Order and include noise as a hearing issue. Upstream/NVC also renewed its argument that daytime construction noise from commercial and industrial developments is a licensing criterion under the Site Law.

Ruling. The motion to strike Mr. Lannan's testimony at Tab 6 is granted. At its November 7, 2019 meeting, the Board voted to grant Upstream/NVC's request to add Nordic's Chapter 115 Minor Source Air Emissions application as a hearing issue. Noise is not a component of a Chapter 115 Minor Source application. The Board's decision is documented in the Fourth Procedural Order dated November 8, 2019. By letter dated November 15, 2019, Mr. Lannan renewed his arguments regarding sound/noise as a licensing criterion under the Site Law and requested that the Board require the applicant to submit additional information pertaining to potential sources of sound and air emissions from the proposed project. By letter dated November 20, 2019, Board staff reiterated the Board's determination that noise is not a hearing issue and that daytime construction noise is not subject to Department regulation under Site Law.

Upstream/NVC may submit written comment into the record on noise that may be generated from the operation of the proposed facility, but daytime construction noise will not be considered.

B. Carbon Footprint and Climate Change. Nordic moves to strike a portion of Mr. Reichard’s testimony on pages 5 and 6, the last paragraph of the testimony of Dr. Brian Dixon (Upstream/NVC’s pre-filed testimony at Tab 1), and the entirety of Mr. Aquiar and Mr. Merkel’s testimony (Upstream/NVC’s pre-filed testimony at Tab 7). Nordic argues that the Presiding Officer did not include climate change as a hearing topic, and that the carbon footprint of a project is not a licensing criterion.

Ruling. The carbon footprint of the proposed project and climate change are not issues to be addressed by the parties at the hearing. The parties and interested members of the public may file written comment on the climate impact of the proposed project pursuant to Chapter 375, § 2 of the Department’s rules. Rulings on the motions to strike the testimony of specific witnesses are set forth below.

(1) Testimony of Mr. Reichard. In response to the motion to strike, Mr. Reichard argues that his testimony is relevant to air emissions and should be allowed.

Ruling. The motion to strike references to climate change in Mr. Reichard’s testimony is denied. Mr. Reichard’s testimony addresses the availability of water for the proposed project and the potential for changes in water availability over time, partially due to climate change. Water usage was identified as a hearing issue in the Third Procedural Order.

(2) Testimony of Upstream/NVC witness Dr. Dixon (Upstream/NVC at Tab 1). Nordic moves to strike the last paragraph of Dr. Dixon’s testimony, beginning on page 4 with “Climate change will also be a concern.”

Ruling. The motion to strike this paragraph is denied. The paragraph is not a discussion of the impact of the proposed project on climate, rather climate is mentioned in the context of warming ocean waters and the potential impact of the facility’s proposed effluent discharge on the bay and marine life. The wastewater discharge from the proposed project is relevant to the licensing criteria and is a hearing issue. The associated exhibits, B-1 and G-1, are allowed into the record.

(3) Testimony of Upstream/NVC witnesses Mr. Aquiar and Mr. Merkel (Upstream/NVC at Tab 7). Nordic moves to strike the testimony of Mr. Aquiar and Mr. Merkel in its entirety.

In response to the motion to strike, Upstream/NVC acknowledges that carbon was not listed as a hearing topic but notes that Nordic witness Elizabeth Ransom included a carbon section in her testimony. Upstream/NVC argues that all parties should consider how best and most appropriately to consider the carbon consequence of Nordic’s proposed project.

Ruling. The motion to strike the testimony and exhibits is granted.

C. Structural Integrity of the Dams on the Little River. Nordic moves to strike the testimony of Frederick Johnson (Upstream/NVC GEI witness at Tab 2) pertaining to the structural integrity of the Upper and Lower dams on the Little River. Specifically, Nordic moves to strike the testimony on pages 4 and 5 of Mr. Johnson’s testimony, which the Board understands to mean the sections beginning, “The integrity of the existing Little River dams...” and “Little River Upper and Lower dams...”, and the first conclusion on page 6 beginning, “The Nordic Aquafarms site analysis...”. Nordic also moves to strike Section 2, pages 14-28, of the attached report. Nordic argues that “while the integrity of the dams is an important issue, it is not regulated by the Department.” Nordic also comments that dam integrity was not identified as a hearing issue.

In its response to the motion, Upstream/NVC argues that its discussion of dam integrity is relevant to the hearing issues of financial capacity, water usage, impacts to streams and wetlands, stormwater management and soil erosion, and impacts to existing uses from construction and operations including blasting.

Ruling. Impacts to existing uses from construction and operations including blasting was identified as a hearing issue (Third Procedural Order). The motion to strike is denied; however, the parties should bear in mind that the Board will be considering this testimony as it relates to the statutory criteria of potential impacts of blasting on water supply, natural resources and existing uses. The DEP does not determine the structural integrity of dams.

D. Fish Health. Nordic moves to strike the following testimony from Upstream/NVC’s witnesses regarding fish health, viruses, pathogens, best management practices, and disinfection technologies: Dr. Bryden’s testimony (Tab 8) from page 3 beginning with “Nor did the proponent offer...” through page 54; the entirety of Dr. Dixon’s testimony (Tab 1); Section IX of Mr. Krueger and Mr. Gulezian’s testimony (Tab 3). Similarly, Nordic moves to strike Mr. Reichard’s testimony regarding fish health on page 5. Nordic argues that fish health is regulated by the Department of Marine Resources and by the Department of Agriculture, Conservation and Forestry, not the Department of Environmental Protection.

In response to the motion to strike the testimony of its witnesses, Upstream/NVC argues that the testimony is directly relevant to the hearing issues of “composition and characteristics of the effluent” and “impact to the water quality of the bay.”

Ruling. In general, the health of the fish in the proposed facility and the practices needed to ensure fish health are not relevant to the Department’s licensing criteria and are not an issue for the hearing. However, the ability of the proposed wastewater treatment system to effectively treat effluent for pathogens prior to its discharge to the bay is relevant. The composition and characteristics of the effluent and the impact of the discharge on the water quality of the bay including potential impacts to fisheries, marine resources and other uses are issues for the hearing (Third Procedural Order). Rulings on the motions to strike the testimony of specific witnesses are set forth below.

- (1) Testimony of Dr. Bill Bryden (Tab 8). Nordic moves to strike Dr. Bryden’s testimony beginning on page 3 with “Nor did the proponent offer...” through page 54.¹ Dr. Bryden’s testimony addresses both fish health and water treatment systems. As stated above, fish health is not regulated by the Department; however, the composition and characteristics of the effluent are relevant to the licensing criteria and are issues for the hearing. With respect to the motion to strike, the motion is granted with respect to those portions of Dr. Bryden’s testimony that predominantly address fish health. The following portions are stricken:
- Page 4, beginning with “Import of Non-Native Fish” through the first paragraph of page 6 ending with “nor the effluent.”
 - Page 15, second full paragraph, beginning with “Recently, after spending...” through first full paragraph on page 17 ending with “discussed below.”
 - Page 23, second full paragraph beginning with “Brood Stock and Egg Import Issues” through first paragraph on page 24 ending with “discussed below.”
 - Page 25, beginning with “Unknown Viruses and or Hosts” through page 44 ending with “exists in Maine.”
- (2) Testimony of Dr. Brian Dixon (Tab 1). Dr. Dixon’s testimony addresses both fish health and water treatment systems. With respect to the motion to strike, the motion is granted with respect to those portions of Dr. Dixon’s testimony that predominantly address fish health. The following portions are stricken:
- Page 2, the two references to infectious pancreatic necrosis at the bottom of the page that were not included as exhibits;
 - Page 3, beginning 6 lines from the bottom with, “However, if the Nordic plant receives...” through the top of page 4, line 7 ending with, “... after an outbreak is detected in a population.”
 - Exhibit D-1 is stricken. Exhibits A-1, C-1, E-1, and F-1 are allowed.
- (3) Testimony of Mr. Krueger and Mr. Gulezian (Tab 3). The motion to strike is denied. Section IX of Mr. Krueger and Mr. Gulezian’s testimony addresses the potential for viruses and bacteria to be present in the effluent and questions the ability of the proposed water treatment technologies to limit the discharge of pathogens to the bay.
- (4) Mr. Reichard’s testimony. The motion to strike is denied. The limited reference to bacteria and “outbreaks of bacteria and disease” are in the context of potential water use demands that would be associated with tank cleaning. Water usage is a hearing issue.

3. Nordic’s Additional Objections to the Testimony of Upstream/NVC

On pages 6 and 7 of its Motion, Nordic objects to several additional aspects of Upstream/NVC’s testimony. Nordic moves to strike or objects to the following:

¹ Dr. Bryden’s exhibits were not filed with all parties by the deadline. See ruling in Section 1 of this order.

- A. Upstream/NVC's Preliminary Observations, on page 2 of its outline of testimony, on the basis that it is not the sworn testimony of any witness;
- B. Links contained in the testimony of Upstream/NVC's witnesses on the basis that the Presiding Officer has stated that links will not be allowed in testimony;
- C. The inclusion of articles as exhibits that are not referenced in the testimony of any witness on the basis that exhibits are only proper to support testimony, not in lieu of testimony;
- D. The submission of testimony which is signed by multiple witnesses, e.g. Mr. Kreuger and Mr. Gulezian, Mr. Aquiar and Mr. Merkel;
- E. Upstream/NVC's offer to bring witnesses who have not pre-filed testimony on the basis that all witnesses must pre-file their testimony;
- F. Attachment A to Mr. Lannan's testimony on odor as not providing sufficient context to assess its meaning; and
- G. The potential filing by intervenors of significant rebuttal testimony on topics on which the intervenor did not file direct testimony.

Rulings.

- A. Upstream/NVC acknowledges that the preliminary observations on page 2 of its outline of testimony is not sworn testimony. The motion to strike is granted.
- B. As stated in the Second and Fourth Procedural Orders, the Board does not accept links to documents. The referenced documents, or relevant portions thereof, must be submitted as exhibits. Accordingly, the motion to strike documents that are referenced only by link and are not attached as exhibits is granted.
- C. Articles not specifically referenced in testimony may be attached to related testimony as exhibits; however, the witness is subject to cross-examination on those exhibits.
- D. Testimony signed by multiple witnesses. Testimony signed by more than one person is acceptable provided that each author of the testimony is present at the hearing and available for cross-examination. Cross examination in these cases may be done as a panel. The motion to strike on this ground is denied.
- E. Additional witnesses. Only persons who pre-filed testimony may testify at the hearing on behalf of the applicant or any of the intervenors. All witnesses must be present at the hearing to summarize their testimony and allow for cross-examination.
- F. Attachment A to Mr. Lannan's testimony on odor. Nordic's request is granted. Mr. Lannan is required to submit the entire document to the Board and the service list by January 9th.
- G. A party may submit rebuttal testimony on topics for which it did not submit direct testimony, as long as the rebuttal is responsive to another party's direct testimony.

4. Additional Rulings

- A. Pre-Filed Testimony of TFAO. In its pre-filed testimony, intervenor TFAO incorporated, as an attachment to the testimony of Diane Hunt Braybrook (TFAO 1), the testimony of George R. Flimlin. In her testimony, Ms. Braybrook stated that Mr. Flimlin may not be able to attend the hearing, and asked Board approval to incorporate Mr. Flimlin's testimony. Mr. Flimlin's

testimony was also submitted as independent testimony, TFAO 4. In addition, eight unsworn statements by property owners of their views on the proposed project were attached to the testimony of Ms. Braybrook.

Rulings: As discussed above, a witness must be present at the hearing to summarize his or her testimony and for cross-examination by the parties and questioning by Board members and staff. It is not permissible to incorporate the testimony of Mr. Flimlin as an attachment to Ms. Braybrook's testimony. Accordingly, that attachment is stricken from Ms. Braybrook's testimony. With respect to Mr. Flimlin's testimony at TFAO 4, TFAO must notify the Board and the service list by January 9th whether Mr. Flimlin intends to appear at the hearing. If he does not intend to appear at the hearing, his testimony will be stricken. The unsworn statements attached to Ms. Braybrook's testimony are stricken. All testimony must be sworn. Members of the public wishing to testify on their own behalf may testify at the evening session of the hearing.

- B. Requests for Paper Copies of Testimony. In its response to Nordic's Motion to Strike, TFAO stated that it generally did not object to the "submission of any facts or opinions put before the Board for its analysis and ultimate determination of value in the Board's decision-making process." While TFAO did not join in Nordic's objections and motion to strike the testimony of Upstream/NVC, TFAO stated requested a printed copy of the final Upstream/NVC pre-filed testimony as approved for submission by the Board. Nordic also requested a paper copy of Upstream/NVC's testimony.

As stated in the Fourth Procedural Order, if a party requests a paper copy of testimony and exhibits, one paper copy must be provided to that party. Upstream/NVC must provide a paper copy of its testimony and exhibits to Nordic and TFAO by January 9th.

Any appeal from this Order must be filed by Monday, January 6, 2020 at 5:00 p.m. Any appeals would be considered by the Board at its January 9, 2020 meeting at 9:00 a.m. Board members would be provided relevant excerpts from the record, and the appellant would be given an opportunity to briefly argue the appeal to the Board.

DONE AND DATED AT AUGUSTA, MAINE THIS 2nd DAY OF JANUARY, 2020

BOARD OF ENVIRONMENTAL PROTECTION



BY: _____

Robert S. Duchesne, Presiding Officer