



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 (MEPDES)/WASTE DISCHARGE LICENSE
L-28319-26-A-N)
L-28319-TG-B-N)
L-28319-4E-C-N) SIXTEENTH PROCEDURAL ORDER
L-28319-L6-D-N)
L-28319-TW-E-N)
W-009200-6F-A-N)

The Board of Environmental Protection (Board) held an adjudicatory hearing in Belfast from February 11 through February 14, 2020 on Nordic Aquafarms, Inc.'s (Nordic's) applications for permits for an Atlantic salmon land-based aquaculture facility proposed to be located in Belfast and Northport. This procedural order rules on a request that the Board stay its proceedings and require Nordic to file a separate Maine Pollution Discharge Elimination System (MPDES) application for that portion of Nordic's proposed project that involves dredging in the coastal wetland and the management and disposal of dredge spoils.

1. Nordic's Proposed Dredging in the Coastal Wetland

Nordic's proposed project would involve dredging in the coastal wetland for the construction of its proposed intake and discharge pipelines. While some of the excavated material would be used to bury portions of the proposed pipelines, dredged material not suitable or needed for that purpose would be transported to a licensed upland site for disposal.

2. Renewed Request to Stay Proceedings

On April 23, 2020 Intervenor Jeffrey R. Mabee, Judith B. Grace, and Lobstering Representatives (MGL) renewed their request that the Board stay its proceedings. MGL argues that any dewatering of dredge spoils associated with Nordic's proposal to dredge in the coastal wetland would constitute a "point source discharge of pollutants" to the waters of the State requiring a separate MEPDES permit and associated sediment testing for contaminants including mercury. MGL attached a recent U.S. Supreme Court opinion, County of Maui, Hawaii v. Hawaii Wildlife Fund, No. 18-260, 590 U.S. (2020), as support for its position.

In their filings dated April 23, 2020 regarding Department of Marine Resources' (DMR) Assessment of Nordic's proposal to dredge in the coastal wetland, Intervenor Upstream Watch and Northport Village Corporation also argue that any dewatering and transport of dredge spoils would require that the Board's record be reopened for additional evidence.

3. Nordic's Response to Request for a Stay of Proceedings

Nordic responded to the renewed request for a stay of the Board's proceeding, that the Board require additional sampling before application processing continues, and that the Board require that Nordic file a separate MEPDES permit application, in an email from Joanna Tourangeau dated April 23, 2020. Nordic states that MGL's argument that Nordic's proposed dredging and management of dredge spoils requires a separate MPDES permit is without merit. Nordic states that its Natural Resources Protection Act (NRPA) application includes a request for Water Quality Certification under Section 401 of the Federal Water Pollution Control Act (33 U.S.C. sec. 1341) which would include any necessary authorization for any dewatering of marine soils.

4. Legal Analysis and Ruling

Department of Environmental Protection (DEP) staff, serving as staff to the Board in this proceeding, in consultation with the Attorney General's Office, has reviewed the arguments in the request for a stay and for the Board to require the filing of an additional, separate MEPDES permit application, and the relevant provisions of state and federal law. The DEP staff's analysis for the Board is appended to this procedural order in a memorandum to the Presiding Officer from Kevin Martin, Compliance and Procedures Specialist, dated May 6, 2020.

The Department's assessment is that the filing of a separate MEPDES permit application as requested by MGL is not necessary. The analysis describes separate and distinct regulatory regimes overseen by the Army Corps of Engineers and the DEP through its delegated authority. Additionally, the assessment identifies NRPA and Section 401 Water Quality Certification as appropriate mechanisms to address the state's environmental interests.

After review and consideration of MGL's arguments and the legal analysis prepared by Department staff and the Board's Assistant Attorneys General for this proceeding, MGL's motion to stay the Board's proceedings and for the Board to require the filing of a separate MEPDES application is denied. Based upon a review of the governing laws and the record before the Board, a separate MEPDES permit is not required for Nordic's proposed dredging operation and the management of associated dredge spoils. Requests to stay proceedings and reopen the record to provide for additional sediment sampling and analysis were previously denied in the Thirteenth and Fourteenth Procedural Orders and will not be further revisited. The Board will evaluate Nordic's applications based on the evidence in the record.

This ruling is not appealable to the full Board.

DONE AND DATED AT AUGUSTA, MAINE THIS 7th DAY OF MAY, 2020.

BOARD OF ENVIRONMENTAL PROTECTION



BY: _____
Robert S. Duchesne, Presiding Officer

Attachment: May 6, 2020 Memorandum from Kevin Martin, DEP Compliance and Procedures Specialist



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

GERALD D. REID
COMMISSIONER

To: Robert Duchesne, Presiding Officer
From: Kevin Martin, Compliance and Procedures Specialist, Staff to the Board
Re: Scope of MEPDES Licensing in Nordic Aquafarms Proceeding
Date: May 6, 2020

The purpose of this memorandum is to assist the Board of Environmental Protection in responding to licensing questions that have been raised in motions by intervenors in the Nordic Aquafarms Proceeding. Specifically, this memorandum addresses whether, in Department staff’s view, an additional Maine Pollutant Discharge Elimination System (MEPDES) application is required for aspects of Nordic’s proposed project that contemplate the removal and upland disposal of dredge spoils.

Section 402 of the Clean Water Act, 33 U.S.C. § 1342, authorizes the federal Environmental Protection Agency (EPA) to permit the discharge of a pollutant from a point source to navigable waters pursuant to the National Pollutant Discharge Elimination System (NPDES) program. Pursuant to Section 402, the EPA has delegated this regulatory authority to the State of Maine, which administers and issues permits pursuant to the MEPDES program. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, in turn authorizes the Army Corps of Engineers (the Corps) to issue permits for the discharge or disposal of dredged or fill material in navigable waters. The Corps has not delegated this regulatory authority to Maine.

The regulatory regimes established pursuant to Sections 402 and 404 of the Clean Water Act are separate and distinct. This distinction is evident in the language of Section 402, which excludes discharges regulated pursuant to Section 404 from its scope. 33 U.S.C. § 1342(a)(1) (“*Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant . . .*” (emphasis added)); *see Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 273 (2009) (“Section 402 thus forbids the EPA from exercising permitting authority that is ‘provided [to the Corps] in’ § 404.” (alteration in original)).

Moreover, under state law, disposal of all dredged materials is governed by Maine’s natural resource protection laws. 38 M.R.S. §§ 413(2-C), 480-E. These laws consider the effects of such activities on Maine’s state water quality laws. 38 M.R.S. § 480-D(5). In addition, under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, an applicant for a federal permit that may result in a discharge to navigable waters, such as a Section 404 Corps dredge or fill permit, must obtain a state water quality certification that the discharge complies with state water quality standards.

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Here, in addition to the permit applications pending before the Board, including Nordic's MEPDES permit application for the project's proposed discharge from the facility, and its Natural Resource Protection Act permit application, Nordic has applied for a Section 404 permit from the Corps for its proposed pipeline construction. Nordic has not applied for a separate MEPDES permit associated with its proposed pipeline construction.

In emails to the Board dated April 23, 2020, Intervenors Mabee, Grace, and the Lobstering Representatives (MGL) and Upstream Watch assert that incidental effects associated with the removal and upland disposal of dredge spoils during the proposed construction of Nordic's pipelines amount to a discharge that requires an additional MEPDES permit pursuant to the Clean Water Act.¹ This kind of argument has been rejected by federal courts. *See, e.g., Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404-06 (D.C. Cir. 1998) (rejecting the argument that incidental fallback from dredging was regulable by the Corps pursuant to Section 404 because incidental fallback did not constitute an "addition" as required by the Clean Water Act). Moreover, the Department/Board retain oversight over state water quality standards through its review of federal permitting actions, such as Corp Section 404 permits, pursuant to its Section 401 water quality certification authority, and through its administration of the Natural Resources Protection Act.

Accordingly, Department staff do not see a need for an additional MEPDES permit application with respect to Nordic's proposed pipeline construction, which may be addressed by Nordic's pending permit applications before the Board and the Corps.

¹ MGL and Upstream also informed the Board of a recent U.S. Supreme Court decision, *County of Maui v. Hawaii Wildlife Fund*, -- U.S. -- (2020), which addresses when pollutants that arrive at navigable waters after traveling through groundwater constitute discharges requiring a Section 402 permit. *County of Maui* is not relevant to these licensing proceedings, however, as there is no information in the record suggesting that the proposed project will discharge pollutants from a point source via groundwater to navigable waters.