

Upstream Watch's Comments on DMR's Assessment

Bertocci, Cynthia S

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Sent: Thursday, April 23, 2020 12:47 PM
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Subject: Nordic Aquafarms, Inc. Proceeding
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Everyone:

Please see the attached Upstream Comments.
I will be filing an exhibit to these comments shortly.

Thanks, Lisa

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COMMENTS
REGARDING THE APRIL 7, 2020 ADDENDUM
FROM
THE DEPARTMENT OF MARINE RESOURCES
TO
**THE DEPARTMENT OF ENVIRONMENTAL PROTECTION/
BOARD OF ENVIRONMENTAL PROTECTION**
SUBMITTED BY
UPSTREAM WATCH
APRIL 23,2020

Upstream Watch is grateful for the opportunity to respond to the Report in the form of an Addendum dated April 7, 2020 from The Department of Marine Resources (DMR) to the Department of Environmental Protection (DEP)/Board of Environmental Protection (BEP).

By statute, the Department of Marine resources (DMR) is responsible for conducting environmental impact reviews for permit projects in Maine's coastal zone.

The Mandate and responsibility of DMR. At title 12 of the Maine Statutes, Chapter 603, section 6021 the Maine Legislature stated the purpose of DMR. *"The Department of Marine resources is established to conserve and develop Marine and estuarine resources; to conduct and sponsor scientific research; to promote and develop the main coastal fishing industries; to advise and cooperate with local, state, and federal officials concerning activities in coastal waters; and to implement, administer, and enforce the laws and regulations necessary for these purposes".*

To implement that legislative mandate DMR created a mission statement.

"The permit review program is responsible for conducting/coordinating environmental impact reviews for permits and federal consistency determinations for projects in the coastal zone pursuant to the coastal program core laws. The core laws involve regulated activities such as wetland alteration, pollution discharge and dredging/dredge material disposal, both in organized and unorganized territories. The program is also responsible for environmental impact reviews on projects seeking public lands leases on publicly owned submerged and/or intertidal lands, which could have an effect on Maine's fisheries infrastructure, as well as reviewing and commenting on municipal comprehensive plans which may affect Marine, Estuarine and Riverine resources." (emphasis supplied)

The March 2, 2020 Hearing. On March 2, 2020 DMR conducted a public hearing in Belfast Maine. That hearing was advertised as:

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

The Maine Department of Marine Resources (DMR) intends to provide the Maine Department of Environmental Protection (DEP) with an assessment of the potential impacts of a project proposed in connection with a pending Natural Resource Protection Act permit application filed by Nordic Aquafarms Inc. of Belfast, Maine (Nordic). Nordic is proposing to develop a land based recirculating aquaculture system to raise Atlantic salmon in Belfast, Maine.

This facility will require the construction of intake and discharge pipes which will be buried across intertidal and shallow sub-tidal lands to a maximum depth of 10 feet with a minimum of 5 feet of cover. The cover material in the trench will be the excavated marine sediments suitable for backfill directly on the pipes. All excess material will be loaded onto trucks and disposed of at an upland facility. A total of approximately 36,000 cubic yards of material will be excavated over approximately 108,000 square feet (2.4 acres)

There was no mention in the body of the hearing notice about a narrow hearing scope focused on impacts to fishing activity from construction only. And there was no mention of dredging or hauling of material or dewatering in this announcement. Rather, the notice said DMR would provide to DEP "an assessment of the potential impacts of a project proposed in connection with a pending Natural Resource Protection Act permit application filed by Nordic Aquafarms, Inc. of Belfast, Maine (Nordic)."

This is consistent with the direction provided by Attorney Bensinger to all parties on February 14, the last day of the hearing. The transcript of that day's hearing, at pages 8-10 reveals the Presiding Officer's introduction of the day's topics, "wastewater, effluent modelling, and impacts". Then, after the rest of the preliminary procedural remarks and before testimony commenced, Attorney Bensinger told all parties, "The parties may be aware that the Department of Marine Resources, I haven't seen it, but I understand has noticed that it is going to have a hearing on this and following that I believe the Department of Marine Resources will be providing further assessment to the Department on this proposed project." (emphasis supplied). When Attorney Bensinger said "on this" she could only mean the topics for that day, wastewater, effluent modelling, and impacts. She could not have been referring to the dredge, de-water, haul route impact on fisheries topic, because, on February 14, no one except the applicant knew about that plan, *revealed for the first time a month later*. Accordingly, Upstream Watch, the other intervenors, and the public were perfectly justified in believing that the March 2, 2020 DMR hearing covered wastewater, effluent modelling, and impacts.

That understanding is reasonable and consistent because there were matters within the broad purview of DMR that were not "hearing topics" and thus could not be discussed at the BEP hearing from February 11-14. Note Presiding Officer Duchesne's remarks at the close of the hearing on February 14 (transcript page 188) discussing the "non-hearing" topics: "So those issues are not dead. It's still up for the Board to consider, it's just that they were not part of the major part of the hearing testimony that we were hearing in this process. So, I appreciate the input from everybody on those issues and they are still very much alive."

The notice of the March 2, 2020 meeting was broad and would have included all the non-hearing issues within the DMR jurisdiction as Attorney Bensinger and the Presiding Officer suggested. But Deputy Commissioner Mendelsohn announced at the beginning of the hearing that testimony and comments would be limited to those pertaining to the impact on fishing of placing the proposed pipes in their proposed location. This meant that the public and intervenors had no opportunity to address any issue other than the above pipe location/fishing impacts, even though, as the Presiding Officer said, other issues were "very much alive".

A classic example is a thoughtful written submission, which the Presiding Officer seemed to invite, on the February 14 hearing topics referred to by Attorney Bensinger, submitted at the March 2, 2020 hearing by John Krueger. John is the Former Director of Licensing and Enforcement and Director of Field Services at Maine DEP and Director of the DHS Health and Environmental Testing Laboratory, as well as a consultant to EPA Emergency Response Laboratory Network, and the Association of Public Health Laboratories, Biomonitoring. A copy of John's paper is attached. Commissioner Mendelsohn ruled John's work not relevant even though it was clearly within the scope announced in the body of the notice of the hearing. This is to request that BEP/DEP reverse the decision of Commissioner Mendelsohn, admit John Krueger's paper, and carefully consider his remarks.

Furthermore, the comment period for DMR's review was originally set to close at the end of the March 2, 2020 hearing. Before the close of the hearing, the comment period was extended by 10 days to March 12, 2020. There was no subject matter limitation included in the announcement of the extension. Yet when the notice "Comment Period Extended for Nordic Aquafarms" was posted to the DMR website, it stated:

"DMR is accepting comments solely about the potential impacts of the proposed dredging operation on fishing in the area to be dredged and on impacts to the fishing industry of the proposed route to transport dredge spoils to Mack Point in Searsport where material will be offloaded and transported to an approved upland disposal site."

Furthermore, several days after the hearing, the project description was changed from the one above to include hauling:

“This facility will require the construction of intake and discharge pipes which will be buried across intertidal and shallow sub-tidal lands to a maximum depth of 10 feet with a minimum of 5 feet of cover. The cover material in the trench will be the excavated marine sediments suitable for backfill directly on the pipes. All excess material will be loaded onto trucks and disposed of at an upland facility. A total of approximately 30,000 cubic yards of material will be excavated over approximately 108,000 square feet (2.4 acres). Approximately 20,000 cubic yards will be transported by barge to Mack Point, Searsport for disposal at an upland facility. The barge will make an estimated 110-130 trips along a 6.5-mile (5.5 nautical mile) haul route in a direct line from the Little River construction site to the Mack Point facility. All barge trips will be done during the daylight hours and take approximately 1.5 hours. The barge will be anchored during bad weather and overnight. All construction work across the intertidal and subtidal will occur during a Nov 8th to April 8th work window as required by the Army Corps of Engineers Maine General Permit.” This revised project description is different from the project description used in the Notice of the hearing seemed to be unlawfully “bootstrapping” the late- introduced dredge and haul topic into the project description as though it were included in the original notice to the public and then attempted to improperly limit public participation. This suggests that DMR knew that it had acted unlawfully and was attempting to cover up its errors. Perhaps that is why neither Nordic nor DMR notified Searsport, Northport and Islesboro and why they did not participate in the process.

Beyond the fatal Notice errors, it was inappropriate to limit public comment at the hearing and after the hearing to “impacts of the proposed dredging operation....in the area to be dredged....and on impacts...of the proposed route.”, especially when DMR’s own Guidelines/Recommendations for Piers, Ramps, and Floats, DMR focuses on five primary areas of concern, not just the one area limited at the hearing or in the notice :

- **Habitat loss and degradation**
- **Water Quality impacts**
- **Marine Organism impacts**
- **Impacts to Existing Uses including fishing activity and navigation**

- Impacts from the Use of proposed structure(s) including boat traffic to and from the structure(s).

In DMR's own guidelines it says:

"DMR evaluates each of the above areas of concern. If the proposed project does not avoid or at least minimize impacts to the extent possible, DMR will recommend alternatives. If these recommended alternatives are rejected DMR will expect a thorough alternatives analysis. In some cases, an alternatives analysis might still be inadequate which could result in DMR recommending a permit denial. DMR and DEP will communicate closely during this process."

There has been no discussion of alternatives.

In addition, DMR created "Standards" for review of proposed activities in Soft Bottom Habitat, Hard Bottom Habitat, and Salt Marshes. The Nordic project involves both Soft Bottom Habitat and Hard Bottom Habitat. None of the reports from DMR to DEP give any indication that the Soft Bottom or Hard Bottom Habitat checklists were reviewed as is DMR's duty. In fact, other than discussing pathogens, a cursory and inaccurate report on fish in Belfast Bay, and, in an inconsistent and incomplete manner without proper notice, discussing Nordic's proposed dredge operation, there is no evidence in the record that DMR did any sort of environmental impact analysis at all. Consequently, DEP is unable to proceed to process Nordic's application but rather must wait for either Nordic or DMR to perform the investigations incumbent upon one who undertakes an environmental impact and alternatives analysis for a large dredge and haul project, and for DMR to accurately report the result of that environmental impact and alternatives analysis to DEP.

DEP's own "Issue Profile: Applications to Dredge or to Dispose of Dredged Material in Coastal Waters" dated March 1997, requires:

- Detailed biological assessment of the area to be dredged
- All physical impacts
- Past and predicted shoaling rate at the site
- Potential impact of dredging on erosion of adjacent banks and intertidal Areas

- Current patterns, speeds and water circulation
- Substrate types and impacts
- Effect of suspended sediments or particulates
- Potential water column impacts, long term and short term
- A dredging lease from BPL or evidence one is not needed
- Evidence that the proposed disposal of dredged material in an upland area will comply with the Maine Solid Waste Management Regulations, including physical and chemical testing (as yet the location of the disposal site is not disclosed by Nordic so no solid waste management plan is possible).

Nordic failed or refused to perform any of these.

A review of the three reports from DMR to DEP and the Hearing further demonstrates the flaws in the hearing process and the failure of Nordic to provide required submissions.

The January 30, 2020 Memorandum. On January 30, 2020 a DMR review dated January 24, 2020 was posted on the DEP website. It included a discussion of the dredge operations and the potential conflicts with existing marine life in the vicinity of the dredge area. There was no mention of the haul route, the disposal site, the overland traffic route or the impact to existing marine activities near this area. There was no mention of pathogens, and there was no mention of potential impacts to the area from the disturbance of sediment in an area with known mercury contamination. At the end of the Report, the second to last and last sentences implied that data was necessary to address this concern. It states:

“Further, DMR requests suitable sediment testing along the proposed pipes for potential-contaminates. The collection and sampling should meet ACOE standards for testing of marine sediment.”

In other words, this assessment is preliminary and cannot be finalized until this information is provided. That information has not been provided.

The February 5, 2020 Memorandum. On Wednesday, February 5, 2020, DMR delivered to DEP a memorandum entitled “Preliminary review of Nordic aquaculture’s [sic] discharge as it pertains to pathogens.” The first sentence in the Introduction and Disclaimer is “At the request of Gregg Wood of the Maine Department of Environmental Protection (DEP), a preliminary review of Nordic

aquaculture's discharge permit application materials and associated Q and A from hearings and pre-file testimony as it pertains to fish pathogen concerns was conducted." From this we deduce that as of February 5, 2020, DMR had conducted a preliminary review of Nordic's application as it relates to pathogens. The review was preliminary. The subject was limited to pathogens.

The BEP/DEP Hearing. BEP conducted a hearing on the Nordic Aqua Farms application. During that hearing testimony was adduced regarding pathogens and several other topics within the jurisdiction and within the review mandate of DMR.

The hearing commenced on Tuesday, February 11, 2020 and concluded, except for two items, on February 14, 2020. The hearing remained open for the applicant and intervenors to comment on the February 5, 2020 DMR memo on or before February 21, 2020.

At no time has DMR ever finalized its January 24, 2020 memorandum or its February 5, 2020 preliminary review memorandum in the light of the testimony presented at the hearing on February 11 through February 14. Through April 6, 2020 DMR had provided to DEP only a preliminary review limited to pathogens.

On February 21, 2020, Upstream Watch submitted expert testimony regarding DMR's February 5, 2020 memorandum and regarding the position taken by DMR in that memorandum with regard to pathogens. Nordic never responded to that submission.

The March 2, 2020 DMR Hearing

Applicant provided New Evidence on a Hearing Topic After the Hearing. At the March 2, 2020 hearing Nordic was allowed to present to DMR for their record and to be included in the DEP record, new evidence never before viewed by intervenors or by DEP. DMR received this evidence even though the DEP record had closed and even though those participating in the public hearing including intervenors had no notice of this new evidence in advance of March 2, 2020. This "back door" attempt by Nordic to augment the record after it had been closed is unlawful. The new evidence must be stricken as was evidence offered after the close of the record. Without an approved plan for the placement of their pipes, Nordic's plan cannot be built. Without that approved plan, Nordic's application

presents an impossibility and must be denied or, at least, suspended until Nordic devises a proper plan and that plan is approved by the proper authorities.

This new evidence included a plan for dredging a channel in which to place Nordic's three pipes in Penobscot Bay, to partially fill the dredged area, to place the dredge spoils on barges, to use the barges to dewater the dredge spoils discharging that water back into Penobscot Bay, and to create a haul route from the proposed pipeline location 5 ½ miles across the Belfast day portion of Penobscot Bay to Mack Point in Searsport.

At the March 2, 2020 hearing Nordic claimed that there is no ground fishing in the area of the dredging or haul route. That fact was vigorously disputed by fishermen in attendance at the hearing, as the DMR record reveals.

At the March 2, 2020 hearing Nordic never discussed the impact of 100 to 120 barge trips through an area actively used for commercial and recreational boating, mooring fields, and most importantly an area used by oceangoing commercial ships docking at and embarking from Searsport along with the necessary tugboat activity.

DMR Hearing took place without Proper Notification. Searsport has never been given notice of Nordic's application or the March 2 hearing, nor were Northport or Islesboro. Searsport, Northport and Islesboro have been denied any opportunity to participate in the administrative process. Not only are these three towns entitled to notice and participation, it is vital that Searsport be involved. Without Searsport's concurrence the project fails. The entire rest of the application process is nullified.

Nordic never suggested that the Coast Guard or the Searsport Harbor Master had even been contacted. Furthermore, Nordic never suggested that Northport or Belfast Harbor Masters were notified as well.

Nordic's Dredge Plan Makes No Sense. In describing their plan, Nordic said they would remove 20,000 yd.³ of material from its dredge operation. This material would be moved 5 ½ miles across the bay to Searsport in 100 to 120 barge trips. Nordic informed DMR that a barge holds approximately hundred cubic yards of material. Thus, Nordic has accounted for 10,000 to 12,000 yd.³ of material moved on its 100 to 120 barge trips to Searsport. Nordic provided no information with

regard to the other 8000 to 10,000 yd.³ of material that they said they would excavate as part of their dredge operation.

Stranger still, the notice provided to the public by DMR claimed that Nordic would excavate and remove 36,000 yd.³ of material. If DMR's representation to the public that Nordic would remove 36,000 yd.³ of material is accurate 24,000 to 26,000 yd.³ of material is unaccounted for. To allow this discrepancy to stand without further explanation by the applicant at the public hearing with a chance for the public and the interveners to understand and to comment or otherwise participate is beyond unfair. It is grossly irresponsible.

Similarly, in DMR's Public Notice for the March 2, 2020 meeting DMR informed the public that Nordic would excavate an area of approximately 108,000 ft.² or 2.4 acres. At the hearing Nordic indicated that the excavated area was 6703 ft.² leaving a discrepancy of 101,297 ft.² of activity unaccounted for and unexplained

The April 7, 2020 Addendum. After the March 2, 2020 hearing, on April 7, 2020 DMR again reported to DEP, this time in the form of an addendum entitled "Additional Comments on impacts to fishing activity during construction of intake and discharge pipes and haul route for transport of excavated material." Nowhere in that addendum did DMR address the pathogens issue reviewed on a preliminary, prehearing basis and reported to DEP as a preliminary prehearing report and addressed by Upstream Watch in its February 21, 2020 filing along with remarks that the March 2, 2020 DMR hearing.

On the second page of its April 7 addendum DMR states "DMR has already provided comment to DEP on potential impacts to Marine resources and the Marine environment, and those comments remain an accurate representation of the department's assessment of the overall project impacts on resources and habitat within its jurisdiction." If that statement was intended to make the incomplete, complete, it fails. That statement cannot be correct. That statement must mean that DMR affirms its observations that the Nordic application is incomplete and needs further sampling and analysis completed, further plans prepared and other work performed to make the application whole. Significant testimony was provided on a number of the NRPA topics. DMR never finalized the "potential impacts" of the Nordic proposal on "Marine resources and the Maine environment", never completed the testing requested by DMR in DMR's January

24, 2020 memo, never assessed the “overall impacts on resources and habitat within its jurisdiction” and never completed the dredge items listed above, leaving the application incomplete and deficient and incapable of accurate evaluation by DEP, much less approval.

Dewatering is not Exempt. In the last full paragraph on the first page of DMR’s April 7, 2020 addendum, in the last sentence, DMR notes “excavated material will be placed on flat top barges with concrete barriers and silt barriers to contain material as it is dewatered.” With that sentence DMR acknowledges its understanding that Nordic will place the dredge spoils on a flat top barge and dewater that material back into Penobscot Bay.

The dewatering of dredge spoils on a flat top barge necessarily will result in the discharge of that contaminated water into the “waters of the United States” to wit: Penobscot Bay. Nowhere does DMR suggest to DEP, as it should as part of its environmental impact review, that Nordic needs a permit under the federal Clean Water Act to conduct that discharge. Nor does it suggest that this discharge will comply with the Coastal Zone Management Act. Nor does DMR mention that no such permit application has been filed by Nordic.

While it is true that Nordic has applied for a “dredge permit”, when writing the federal Clean Water Act and the Coastal Zone Management Act the Congress of the United States did not say as part of those acts “unless Maine happens to have a dredge permit process”. DMR is charged with responsibility to “administer and enforce the laws and regulations necessary for these purposes” and to conduct its impact reviews for “federal consistency”. By ignoring the federal Clean Water Act and the Coastal Zone Management Act, DMR has failed to meet its responsibilities to the United States government as well as to the people of the State of Maine.

These three comment letters from DMR leave DEP with improperly limited public participation and evidence that Nordic’s application is incomplete.

In conclusion, the DEP should compel Nordic to complete its missing and incomplete application and allow parties comment and rebuttal opportunities when that is done, or DEP should remand the environmental impact review and alternatives analysis back to DMR with a request that DMR do a complete and proper environmental Impact review and alternatives analysis, again with an opportunity for response by parties. Failure to cause Nordic to prepare and

submit a complete and compliant application and DMR to conduct a proper environmental impact and alternatives analysis review on a half billion dollar project that would destroy 35 acres of forest, 18 wetlands, 8 streams, blast the ocean bottom and stir up mercury deposits, and discharge 7.7 million gallons of wastewater containing viruses, vaccines, fish waste and materials still unknown because Nordic refuses to reveal its fish food source, will not pass muster with the people of the State of Maine or a Federal Court reviewing Maine's implementation of the Federal Clean Water Act.

Dated: April 23, 2020

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Perkins', is written over a solid horizontal line.

David J. Perkins, ME Bar Number 3232

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Subject: RE: Nordic Aquafarms, Inc. Proceeding
Categories: Red Category

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Good afternoon:

On behalf of the Intervenor Upstream Watch, I respectfully supplement the comment submitted earlier with a citation to a United States Supreme Court case that was decided today. Upstream Watch cites this U.S. Supreme Court opinion, County of Maui, Hawaii v. Hawaii Wildlife Fund, No. 18-260, 590 U.S. ____ (2020), in support of its statements contained in the second full paragraph on page 11 of its comment.

Best regards,

Kristin

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Subject: Nordic Aquafarms, Inc. Proceeding

Everyone:

Please see the attached Upstream Comments.

I will be filing an exhibit to these comments shortly.

Thanks, Lisa

Lisa Kubiak

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**Upstream Watch: John Krueger's Comments to DMR not admitted
(Fifteenth Procedural Order)**