

IN THE MATTER OF

NORDIC AQUAFARMS INC.
 BELFAST, WALDO COUNTY, MAINE
 LAND BASED AQUACULTURE
 ME0002771
 W009200-6F-A-N

) COMMENTS AND OBJECTIONS OF
) MGL INTERVENORS AND FRIENDS
) OF THE HLHCA TO DRAFT STAFF
) RECOMMENDATIONS RE: NAF'S
) APPLICATION FOR A
) MAINE POLLUTANT DISCHARGE
) ELIMINATION SYSTEM PERMIT AND
) WASTE DISCHARGE LICENSE

Dated: September 14, 2020

Petitioners, MGL Intervenors and Interested and Aggrieved Person Friends of the Harriet L. Hartley Conservation Area (“Friends” or “Friends of the HLHCA”), collectively referred to herein as “Petitioners,” file their joint Comments and Objections to the August 13, 2020 staff recommendation on the MEPDES permit and Waste Discharge License applications submitted by Nordic Aquafarms, Inc. (“NAF”). Petitioners incorporate by reference all of their filings and exhibits submitted to the BEP since February 14, 2020, relevant to NAF MEPDES permit application and discharge license (including the demand that a separate application is required for the dewatering of dredge spoils now orally revealed by the applicant), as though those filings are stated herein and submitted herewith.

INTRODUCTION

The Board of Environmental Protection was created as a check on undue political influence over the environmental permitting process and to provide transparency and greater citizen participation in a process with a long and unfortunate history of elevating alleged economic benefits of a project that damages the environment over preservation of the integrity of the State’s natural resources. The choice between “economic benefits” and the environment is a false one. In Maine, the environment is our economy and maintaining and improving our water quality and pristine natural resources is the best means of ensuring our economic prosperity. Regrettably, in recent years, the lessons of the past practices of allowing foreign corporations to exploit and befoul Maine’s water and other natural resources in the name of creating a few jobs seems to have been forgotten by those now in positions of power and trust.

The Board’s website describes the purpose of the Board as follows:

The purpose of the Board is to provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws related to environmental protection and to provide for credible, fair and responsible public participation in department decisions. While the Board is part of the Department of Environmental Protection, it has independent decision-making authority in the areas of its responsibility. The purpose of the Board is to provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws related to environmental protection and to provide for credible, fair and responsible public participation in department decisions. While the Board is part of the Department of Environmental Protection, it has independent decision-making authority in the areas of its responsibility.

<https://www.maine.gov/dep/bep/index.html>

Similarly, the Purpose of the Maine Department of Environmental Protection is stated in 38 M.R.S. § 341-A(1) as follows:

Purpose. The department shall prevent, abate and control the pollution of the air, water and land and preserve, improve and prevent diminution of the natural environment of the State. The department shall protect and enhance the public's right to use and enjoy the State's natural resources and may educate the public on natural resource use, requirements and issues.

The past Administration restricted and gutted the role of the Board in the DEP permitting process and the current Administration has maintained those improvident changes for its own corporate-centric agenda. Perhaps no project highlights these regrettable choices regarding the diminished and distorted role of the Board more than the NAF salmon factory proposal.

To date, the process employed to evaluate the NAF applications and the Staff Recommendations submitted to the Board have failed to meet any of the goals detailed in the above. The Presiding Officer has repeatedly limited the role of the public and Intervenors, sanctioned post-hearing ex parte changes to the project and submission of new information to DEP staff by the applicant (used by DEP staff to change and draft recommendations and findings to the Board), while denying Intervenors' requests to re-open the Record and allow submission of relevant and essential counter-evidence not available at the close of the hearings and record on February 14, 2020. Opponents were prohibited from appealing any of the Presiding Officer's unilateral decisions to the full Board – a “procedural” directive, also made by the Presiding Officer without an opportunity for appeal.

The process adopted by the Presiding Officer's twenty (20) procedural orders in this case has done nothing to further the goals of the Board acting as an “independent decision-making authority” or of the Board providing “informed, independent and timely decisions on the interpretation, administration and enforcement of the laws related to environmental protection and to provide for credible, fair and responsible public participation in department decisions.” The process in this case erodes public confidence in the integrity, transparency and fairness of the permitting process and suggests a disparate treatment and set of standards favoring large corporations over individual citizens, existing small businesses and the environment itself. One need only read the proposed finding at page 3, ¶ 3(e)¹ of the proposed Findings and Conclusions provided by DEP staff to understand the extent to which the process for evaluating this, and presumably other, permit applications has been perverted.

Please advise where in the Maine environmental statutes or the delegation of authority to Maine to enforce the federally-mandated Clean Water Act provisions that it countenances DEP staff and this Board to authorize a diminution in water quality because – without consideration of the adverse economic impacts to existing businesses and property values – the BEP and DEP deem lowering the existing water quality to be “necessary to achieve important economic or social benefits to the State.”

¹ ¶(3)(e) of the DEP staff's proposed Board Findings and Conclusions states: “Where a discharge will result in lowering the existing water quality of any waterbody, the Department has made the finding, following opportunity for public participation, that this action is necessary to achieve important economic or social benefits to the State.”

Petitioners request that the principles in Maine law and policy regarding the purposes of the Board and DEP, enumerated above, be restored as a guide for the Board's evaluation of and response to the Staff Recommendations for the NAF MEPDES permit and wastewater discharge license, and that the Board: (i) require the applicant to amend its application to reflect the material changes it has made to the project since the close of the hearing on February 14, 2020, particularly those changes revealed on 3-2-2020 relating to dredging, dredge spoils disposal and de-watering; (ii) cease processing NAF's applications until the Superior Court rules on the pending litigation relating to the factual parameters and legal validity of the easement option on which NAF bases its claim of "sufficient" title right or interest, pursuant to the July 7, 2020 holding of the Law Court in *Tomasino v. Town of Casco*, 2020 ME 96; (iii) cease processing the applications until NAF submits all necessary testing to demonstrate the impacts of its proposed project on the water quality and natural and aquatic resources, as well as the environment and the economy of Penobscot Bay and Midcoast Maine, including, but not limited to: sediment testing, a dye study, a sediment suitability determination, and accurate testing to determine the impact of the proposed discharge of millions of gallons daily of warm brackish, nitrogen-rich wastewater into the shallow estuary of Belfast Bay and Western Penobscot Bay.

The findings and determinations contained in the Staff Recommendation are not in compliance with the applicable provisions of the *Pollution Control*, 38 M.R.S. §§ 411 – 424-B, *Water Classification Program*, 38 M.R.S. §§ 464 – 470, and *Federal Water Pollution Control Act*, Title 33 U.S.C. § 1251, and applicable rules of the Department of Environmental Protection ("the Department" or "DEP").

Throughout the consideration of NAF's various applications State officials, including the Presiding Officer acting as the sole decider without an opportunity for appeal to the full Board, have: (i) improperly shifted the burden of proof to Intervenors; (ii) proceeded to consider and process NAF's applications in the absence of NAF having administrative standing and a justiciable issue before the Department or Board; (iii) allowed NAF to continue in the process using applications that are incomplete and fail to reflect the project as currently proposed; (iv) ignored material changes in the project revealed subsequent to the February hearings; (v) altered adverse staff findings after ex parte communications and submission of additional materials by NAF after the alleged close of the Record to opponents; (vi) closed the Administrative Record to consideration of evidence and facts not available at the time of the February public hearings (including facts NAF intentionally withheld prior to completion of those hearings); (vii) denied that this is a project that requires sediment testing pursuant to Section 404 of the CWA; (viii) denied the existence of mercury in the area of Penobscot Bay proposed for dredging trenching, filling, dewatering and blasting; (ix) failed to acknowledge that NAF proposes to discharge pollutants into the waters of the United States in the installation of its proposed pipes in Penobscot Bay requiring a separate MEPDES permit and discharge license; and (x) ignored the material changes that NAF has made in this project without requiring amended or new applications, or providing an opportunity for comment and submission of evidence by opponents.

The Department and Board of Environmental Protection have considered NAF's application for a new combination Maine Pollutant Discharge Elimination System (MEPDES) permit/Maine Waste Discharge License (WDL)(collectively permit) prematurely and in the absence of all relevant data and information needed to make a reasoned and accurate decision, based on sound science, regarding the impacts to the environment and existing economy (as opposed to the false promise of an unknown but limited number of temporary construction jobs and no more than 70-100 jobs at

the NAF facility). The process has ignored or down-played the adverse environmental and economic impacts of the proposed project on existing jobs and the lobster fishery, and has repeatedly failed to provide proper notice to all impacted persons and municipalities (including most recently Searsport where, on March 2, 2020, NAF revealed orally that it “may” dewater up to 20,000 cy of potentially contaminated dredge spoils). Premature consideration of incomplete data and information violates the spirit and letter of Section 404 of the Clean Water Act (CWA) and the State of Maine’s duty to safeguard the quality of the waters of the United States and this State.

The consideration of NAF’s applications for a MEPDES permit and waste discharge license and the Board’s public hearing was conducted prior to any sediment testing of the dredge spoils NAF proposes to discharge into the waters of Penobscot and Belfast Bays. The Administrative Record was closed prematurely and now omits significant information that was not available at the time of the premature hearings conducted by the Board in February of 2020, including the results of sediment testing that the USACE, in coordination with USEPA, ordered NAF to complete pursuant to a sediment and analysis plan (“SAP”) dated June 18, 2020. NAF has submitted the results of these tests to the USACE but not the Board – which has ignored its responsibility, pursuant to 38 M.R.S. § 480-E (3) to consider the results of such sediment tests prior to proceeding in the permitting process, where dredge spoils disposal in the State’s waters is proposed by an applicant. Here, neither the Board nor the DEP Commissioner required NAF to do sediment testing, using an SAP approved by the DEP Commissioner, prior to proceeding with processing these applications and holding hearings and the BEP Presiding Officer has denied the requests of several Intervenors, including the MGL Intervenors, to stay completion of the permitting process until NAF provides the Board with the sediment testing results taken at the direction of the USACE and EPA, and the parties have an opportunity to file additional evidence relating to those results.

Proceeding with processing the NAF applications prior to NAF completing sediment testing to detect pollutants, including mercury, that NAF proposes to disturb and re-suspend through dredging, trenching, side-casting, filling, hauling and de-watering is contrary to the spirit and letter of applicable State and federal laws enacted to protect water quality and is simply irresponsible to the duty owed by the Board to Maine’s citizens to protect the environment and economy of this State. This testing was required to be done before processing of these applications, pursuant to 38 M.R.S. § 480-E(3). However, because the Department and Commissioner improperly claimed that side-casting 37,000 cy of dredged spoils does not constitute disposal of dredge spoils or a discharge of pollutants into the waters of the U.S. – a determination that the USEPA does not share – no sediment testing was timely ordered or done. Such actions were contrary to the Commissioner’s responsibilities under Maine law and has jeopardized the Penobscot Bay environment and lobster fishery.

As a preliminary matter of due process, the Board’s Presiding Officer has acted unilaterally to deny Petitioners’ repeated requests for re-opening the Record to supplement it with relevant material previously withheld by NAF or not in existence in February 2020; and ignored or misapplied the Maine Supreme Judicial Court’s July 7, 2020 holding relating to what constitutes “sufficient” proof of title, right or interest for an applicant to demonstrate administrative standing when the applicant is relying on an easement the factual parameters of which have not been determined by a Court of competent jurisdiction, rather than a claim of title to the property for which permits are sought. See, e.g. *Tomasino v. Town of Casco*, 2020 ME 96, ¶15. In addition, the Presiding Officer ignored the holding of the Waldo County Superior Court’s June 4, 2020 Order in RE-2019-18 detailing some of the factual parameters of the NAF-Eckrottes easement option – the basis for NAF’s claim

of “sufficient TRI” -- that the Superior Court has identified as in dispute and, as yet, un-resolved. Further, the Presiding Officer erred in his application of the precedents cited in the Superior Court’s July 13, 2020 Order in AP-2020-03. Finally, the Presiding Officer erred in denying Petitioners the right to appeal these unilateral determinations to the full Board. Now is the time for the Board to re-open the Record to address the significant defects in the pending applications and require NAF to amend its applications to reflect the actual nature of the project as now proposed.

APPLICATION SUMMARY

Error Number One in the Staff Recommendation is that the description of what the application proposes to do bears no relationship to what the applicant actually proposes to do. On March 2, 2020, at a DMR hearing to solicit public comments in Belfast, NAF announced a radically altered proposal for dredge spoils disposal and de-watering. The amount of dredge spoils increased three to five fold from the amount referenced in the pending applications considered at the February public hearings. NAF has increased the amount of dredge spoils that would be removed for upland disposal from 4,000-8,000 cy of dredge spoils in the application submitted to the DEP-BEP up to now 20,000 cy. Rather than returning 32,000 cy of dredge spoils to the trench and removing and dewatering roughly 5,000 cy of dredge spoils up the pipeline route and transporting those dredge spoils by truck to an undisclosed inland disposal site; the new proposal is to remove and transport 20,000 cy of dredge spoils by barge, using 110 to 130 barges loads, and taking those barges across Penobscot Bay to Mack Point at Searsport. It is unclear if this increase in removed dredge spoils means that 15,000 cy less will be returned to the trenches – and, if so, the impact on the seafloor of that change. Or, if NAF is dredging 15,000 cy more than the original total of 36,000 to 37,000 cy.

The transport by 110 to 130 barges of de-watering dredge spoils – comprised of fine sediments containing unknown contaminants – constitutes as separate discharge of pollutants into the waters of the United States *for which NAF has failed to submit a separate application for a wastewater discharge permit*. Further, this dewatering will adversely impact a vast area of Penobscot Bay the effects of which have never been considered by the Board during the February public hearings and about which the Presiding Officer denied Intervenors the right to file supplemental evidence.

Petitioners’ requests that NAF be required to amend its applications to reflect the actual activities it proposes to do have been denied by the Presiding Officer. The Staff Recommendations are based on conjecture and oral representations made, *ex parte*, by the applicant to DEP staff – not based on any application or written amendment by NAF submitted to the Board, Intervenors, Interested and Aggrieved Persons, and the public. As a consequence, Petitioners and other similarly situated Intervenors and Interested Persons have been denied due process in assessing the impact of the proposed development on their property and the environment and economy of Penobscot Bay, and have been denied any opportunity to present evidence relating to the impacts of the project NAF actually proposes.

In short, the description of the NAF project in the draft Staff Recommendations would more accurately begin with the phrase “Once Upon An Time. . .” and end with “they all lived happily ever after” because it is based on a fiction – and is a figment of the imaginations of DEP staff, untethered to any description in the filed applications submitted by NAF. For that reason the Board’s first action should be to require NAF to amend its pending MEPDES permit application and wastewater discharge license application and to file the missing wastewater discharge application for de-watering 20,000 cy of dredge spoils.

PERMIT SUMMARY

Petitioners' comments and Objections to the Permit Summary in the Draft Staff Recommendations to the Board are submitted below in Bold.

This permit establishes:

1. Technology-based numeric limitations for flow, biochemical oxygen demand (BOD), total suspended solids (TSS) and pH;

NAF has failed to provide the Department and Board with adequate data relating to currents, flow of effluent, the content of the wastewater it proposes to discharge at a rate of 7.7 million gallons a day, TSS and pH. Indeed, the Staff has manipulated and falsified data to reverse its prior determination that the nitrogen levels proposed would have too great an impact on water quality to be approved. The Staff Recommendations are without any basis in fact or sound science, and in the absence of any actual scientific proof submitted by independent experts evaluating NAF's submissions. Is Penobscot Bay not worth doing a proper evaluation based on the best available science before we allow a foreign corporation to treat it like a toilet for the next thirty (30) years? Is this the legacy we really wish to leave our children and grandchildren? Is the production of foreign salmon on U.S. soil worth the health of Penobscot Bay and the risk to the lobstering grounds where more than 25% of all U.S. lobsters are caught?

DEP and DMR staff have simply issued reports declaring the project is safe enough for government work – without doing any independent analysis of the limited data NAF has submitted and without study of or regard to the adverse impact of the proposed wastewater on the lobster fishery, critical and essential habitat of a myriad of species – including endangered and threatened species, or the health of the aquatic, estuarian, or terrestrial species that depend on Penobscot Bay for their lives or, in the case of the human population, their livelihoods.

The arrogance and irresponsibility of DEP Staff was revealed during the May 20, 2020 Deliberations call, during which Nick Livesay – a lawyer who has been put in charge of the “Land” division at DEP – declared “So what,” if NAF finds more mercury during sediment testing. That misguided mind-set permeates the draft staff recommendations.

2. A requirement to seasonally (May – October) monitor the effluent for total phosphorus, total ammonia, total kjeldahl nitrogen, nitrate + nitrite nitrogen;

NAF proposes dumping 7.7 million gallons of wastewater a day, 365 days a year, that is 5° to 33° warmer than the ambient water temperatures, and contains a multitude of contaminants (known and unknown), regardless of weather conditions. To put this in perspective, DEP Staff is recommending authorizing NAF a permit to dump more wastewater every day into Penobscot Bay than the entire community of Bayside is authorized to dump in the Bay in a *year*. To add insult to injury, DEP staff proposes to only “seasonally” monitor the effluent for some contaminants for only half of the year – but not during November through April – and omits monitoring the heat of the

discharged water when heat is a pollutant under the CWA and will decimate the lobster population impacted by increased temperatures of only a degree. This limited “seasonal” monitoring of pollution that will be spewed 365 days a year is grossly inadequate and irresponsible. This proposal represents a reckless disregard for the health and safety of Penobscot Bay and every living being that depends on this Bay for survival.

3. A monthly average water quality-based mass limitation for total nitrogen;

Nitrogen needs to be limited on a daily basis – not a monthly average.

4. A requirement for the permittee to conduct a dye study to more accurately determine the mixing characteristics of the treated effluent discharge from the facility with the receiving water;

To be relevant, this dye study must be done *prior to granting a permit* – not after the facility is being built. The point of the dye test is to determine the impacts of the proposed project before approval of the project.

5. A requirement to conduct seasonal (May – October) ambient water quality monitoring at five (5) stations in Belfast Bay;

This is grossly inadequate and without scientific justification. This shows a reckless disregard for Penobscot Bay’s water quality and the fisheries and fishermen that depend on this Bay – as well as all those businesses that depend on the income generated by the lobster catch. DEP Staff appears to believe all life ceases in Penobscot Bay during six months of the year – perhaps if the Bay’s health is left to the “stewardship” of current DEP staff that may well be the case. But current Maine law suggests that water quality is a public resource and right that require protection for all twelve months and vests this Board with the responsibility to protect the water quality of the State.

6. A requirement for the facility to develop and maintain an Operations & Maintenance (O&M) Plan for the production facility and the wastewater treatment facility;

This Operations and Maintenance Plan should be mandated by the Board, based on sound science and the recommendations of independent experts, not the applicant that is motivated by its profits not the protection of the shared public resources of the Bay. And the O&M developed by those independent experts should be incorporated as a mandatory provision in the permit. This is nothing more than granting the fox the right to make its own plan for guarding the hen house. While a proposal that would make former US EPA Secretary Scott Pruitt proud, this is beneath the requirements of safeguarding Maine’s water quality in Maine law and the duty owed to current and future generations of Maine citizens.

7. A requirement to limit the use of antibiotics, fungicides, bactericides, parasiticides and other chemical compounds;

This appears to be more of a wish than a “requirement,” as proposed by DEP staff. A prohibition on the use of products that could damage or destroy natural fisheries in the Bay, placed as a mandatory provision of the permit is what is needed to protect Penobscot Bay and the lobster fishery, as well as other aquatic species in the Bay (including wild Atlantic salmon).

8. A requirement for the facility to develop and maintain a Containment Management System (CMS) to prevent escape of fish from the facility; and

The Containment Management System should be mandated by the Board, based on sound science and the recommendations of independent experts, not the applicant that is motivated by its profits not the protection of the shared public resources of the Bay.

9. Best practicable treatment (BPT) and General Reporting requirements consistent with National Effluent Guidelines (NEG) found at 40 Code of Federal Regulations (CFR), Part 451 – *Concentrated Aquatic Animal Production Point Source Category*.

All reporting guidelines and other standards should be expressly stated as a condition of operations at this facility and mandated by the Board, based on sound science and the recommendations of independent experts, not the applicant that is motivated by its profits not the protection of the shared public resources of the Bay. The health of Penobscot Bay should not depend on nothing more than an amorphous federal regulation the long-term contents of which the State of Maine has no control over and that could be altered at any time without Maine’s consent. The reputation of Maine seafood depends on preserving the quality of Maine’s water and environment. This proposal abdicates this responsibility to an entity outside of Maine and fails to protect our fisheries or the value of Maine’s resources by imposing mandatory guidelines in this permit that are determined by the State of Maine in consultation with independent experts.

10. A requirement for the permittee to meet with the Department’s permitting and compliance inspection staff 90 days prior to commencement of operations, to review the permit limitations, monitoring requirements and reporting requirements.

This is a meaningless requirement that provides no protection to the environment or economy of this State. This also fails to include other stakeholders in the meeting process and thus denies Intervenor and the public due process and necessary transparency. Prior ex parte meetings by DEP staff and NAF have resulted unfortunate decisions, including: (i) the unexplained reversal of the 1-22-2019 determination by DEP that the NAF-Eckrote easement option terminates at the Eckrote’s high water mark and is thus inadequate to demonstrate that NAF has sufficient TRI in the adjacent intertidal land to have administrative standing to proceed in the permit process; and (ii) the reversal of the determination that the level of nitrogen in NAF’s waste water are too high to grant NAF a permit. It is unlikely any better result would come from this proposed meeting, held in private, 90 days prior to commencement of operations. Any such meetings should occur in public with participation of all stakeholders.

CONCLUSIONS AND FINDINGS

BASED on the findings in the attached **PROPOSED DRAFT** Fact Sheet dated August 13, 2020, and subject to the Conditions listed below, the BOARD makes the following **CONCLUSIONS AND FINDINGS**:

1. The discharge, either by itself or in combination with other discharges, will not lower the quality of any classified body of water below its classification.

The Board lacks the necessary information to state this as a conclusion or finding. This is a declaration without any basis in fact or science. This applicant has not provided sufficient evidence to support this claim and the limited information provided by the applicant contradicts this claim. Further, the DEP staff has failed to have independent analysis done necessary to honestly make this claim.

2. The discharge, either by itself or in combination with other discharges, will not lower the quality of any unclassified body of water below the classification which the Department expects to adopt in accordance with State law.

The Board lacks the necessary information to state this as a conclusion or finding. This is a declaration without any basis in fact or science. This applicant has not provided sufficient evidence to support this claim and the limited information provided by the applicant contradicts this claim. Further, the DEP staff has failed to have independent analysis done necessary to honestly make this claim.

3. The provisions of the State's antidegradation policy, *Classification of Maine waters*, 38 M.R.S. § 464(4)(F), will be met, in that:

- (a) Existing in-stream water uses and the level of water quality necessary to protect and maintain those existing uses will be maintained and protected;

The Board lacks the necessary information to state this as a conclusion or finding. This is a declaration without any basis in fact or science. This applicant has not provided sufficient evidence to support this claim and the limited information provided by the applicant contradicts this claim. Further, the DEP staff has failed to have independent analysis done necessary to honestly make this claim.

- (b) Where high quality waters of the State constitute an outstanding national resource, that water quality will be maintained and protected;

The Board lacks the necessary information to state this as a conclusion or finding. This is a declaration without any basis in fact or science. This applicant has not provided sufficient evidence to support this claim and the limited information provided by the applicant contradicts this claim. Further, the DEP staff has failed to have independent analysis done necessary to honestly make this claim.

- (c) Where the standards of classification of the receiving waterbody are not met, the discharge will not cause or contribute to the failure of the waterbody to meet the standards of classification;

The Board lacks the necessary information to state this as a conclusion or finding. This is a declaration without any basis in fact or science. This applicant has not provided sufficient evidence to support this claim and the limited information provided by the applicant contradicts this claim. Further, the DEP staff has failed to have independent analysis done necessary to honestly make this claim.

- (d) Where the actual quality of any classified receiving waterbody exceeds the minimum standards of the next highest classification that higher water quality will be maintained and protected; and

The Board lacks the necessary information to state this as a conclusion or finding. This is a declaration without any basis in fact or science. This applicant has not provided sufficient evidence to support this claim and the limited information provided by the applicant contradicts this claim. Further, the DEP staff has failed to have independent analysis done necessary to honestly make this claim.

- (e) Where a discharge will result in lowering the existing water quality of any waterbody, the Department has made the finding, following opportunity for public participation, that this action is necessary to achieve important economic or social benefits to the State.

This proposed “finding” is a perversion of the Board and Department’s statutory purposes. This finding is diametrically opposed to the DEP’s and BEP’s responsibilities under Maine law to protect water quality and the environment. In fact, the public was expressly denied the ability to present evidence of the adverse economic impacts of this project – under the stated reason that economic impacts are irrelevant to determinations relating to environmental impacts of the proposal and whether or not the project meets legal requirements in the applicable environmental regulations and laws.

The suggestion that lowering the existing water quality of Penobscot Bay could ever be necessary to achieve important economic or social benefits to the State of Maine is absurd and demonstrates an utter lack of understanding of the very foundation of the Maine economy – our pristine waters and clean environment. Maintaining the integrity of our environment is the only manner in which our economy will thrive or survive. Further, it is a false statement to suggest that the public was provided an opportunity for “public participation” in a process that would balance existing jobs and economic value against the proposed potential jobs that the proposed project would generate.

Intervenors were never permitted to present such a case and to suggest that they were is dishonest and inaccurate. More importantly, to suggest that the paltry 70-

100 jobs NAF has dangled – the remuneration level of which has never been revealed – provides the State of Maine with greater economic or social benefits than the 200 lobster fishing jobs this project will adversely impact already provide and have provided for generations is offensive. This statement denigrates the economic and social contribution of Maine’s lobstermen – who are a \$2 billion a year foundation to all of Maine’s economy – supporting tourism, real estate, and a myriad of other commercial enterprises (e.g. boat and truck sales, gear manufacturing and sales, bait, fuel). Economic progress depends first on preserving what we have and then building on that in ways that support existing jobs and preserve or improve the environment – not choose the new over the existing.

4. The discharge will be subject to effluent limitations that require application of best practicable treatment as defined in 38 M.R.S. § 414-A(1)(D).

The Board lacks the necessary information to state this as a conclusion or finding. This is a declaration without any basis in fact or science. This applicant has not provided sufficient evidence to support this claim and the limited information provided by the applicant contradicts this claim. Further, the DEP staff has failed to have independent analysis done necessary to honestly make this claim.

5. Pursuant to the Board’s interpretation of the Department’s Chapter 2 regarding title, right or interest (TRI), the Board finds that the applicant has made a sufficient showing of TRI to develop the property as proposed. As the Department found in its June 13, 2019 acceptance letter, the deeds and other submissions, including Nordic’s options to purchase, and the analysis of the chain of title remain unchanged and remain a sufficient showing for the Board to take action on the application.

Petitioners restate and readopt the argument submitted relating to TRI with their comments and objections to the proposed Staff Recommendations relating to the Air Emissions permit as though stated herein and readopt the exhibits submitted with that filing. In particular, Petitioners object to the staff’s failure to base its determination of NAF’s claim of “title, right or interest” on: (i) the controlling precedent issued by the Maine Supreme Judicial Court on July 7, 2020, in *Tomasino v. Town of Casco*, 2020 ME 96; (ii) the Waldo County Superior Court’s June 4, 2020 Order in RE-2019-18, relating to the unresolved disputes regarding the factual parameters and legal validity of the August 6, 2018 NAF-Eckrote easement option pending in that Superior Court action; and (iii) the Superior Court’s July 14, 2020 Order in *Mabee and Grace, et al. v. BEP, et al*, AP-2020-03.

Respectfully submitted this 14th day of September 2020.



Kimberly J. Ervin Tucker, Maine Bar No. 6969

Counsel for Petitioners:

Intervenors Jeffrey Mabee and Judith Grace

Intervenors The Maine Lobstering Representatives; and

Interested and Agrieved Persons The Friends of the Harriet L. Hartley Conservation Area

48 Harbour Pointe Drive

Lincolnville, Maine 04849

P: 202-841-5439

k.ervintucker@gmail.com

CC: BEP Service List

Bertocci, Cynthia S

From: Kim Ervin Tucker <k.ervintucker@gmail.com>
Sent: Monday, September 14, 2020 4:35 PM
To: Bertocci, Cynthia S
Cc: Barry A. Costa-Pierce; Bensinger, Peggy; Boak, Scott; Brewer, Angela D; Burke, Ruth A; Carrie Byron; Charles Tilburg; David Losee; David Perkins; DEP, Nordic Aqua Farms; Diane Hunt Braybrook; Donald W. Perkins, Jr.; Donna Broderick; Ed Cotter; Eleanor Daniels; Elizabeth M. Ransom; Erik Heim; Jacki Cassida; Jensen, Laura; Joanna Tourangeau; Kristin M. Racine; Lawrence Reichard; Marianne Naess; Martin, Kevin; Michael Lannan; Northport Village Corporation; Peter Tischbein; Wood, Gregg
Subject: Re: Nordic Aquafarms - Staff Recommendation on MEPDES/WDL application

EXTERNAL: This email originated from outside of the State of Maine Mail System. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Petitioners MGL Intervenors and Interested and Aggrieved Person Friends of the Harriet L. Hartley Conservation Area file the following federal CWA regulations in support of Petitioners' Comments and Objections to ¶ 3(e) of the proposed Findings and Conclusions.

See the federal regulations regarding the State's obligation under the CWA to assure water quality adequate to protect existing uses: <https://www.law.cornell.edu/cfr/text/40/131.12>

"In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully."

It is not clear that DEP staff, in drafting the proposed Findings and Conclusions in support of granting NAF's MEPDES permit and Wastewater discharge license have assured that water quality adequate to protect lobster fishing and recreational swimming will be protected. The wastewater is proposed to be dumped adjacent to the swimming area for an elementary school and will adversely impact the fishing grounds where hundreds of zone D, Districts 10 and 11 commercial lobster and crab license holders fish. In the absence of adequate testing by the applicant, verified by independent experts with appropriate qualifications, DEP staff recommends jeopardizing lobstering grounds that are essential to the area in which 20% or more of all lobsters harvested in the United States are caught or spend some portion of their life cycle. Yet, this project risks disturbing buried HoltraChem mercury — that, if re-suspended could cause a permanent closure of much of the upper Penobscot Bay to lobster and crab fishing.

It is hard to imagine that disturbing buried mercury will help sales of NAF's salmon if 6 million gallons of mercury-contaminated water is circulated daily through their fish tanks. Thus, it is incomprehensible that this project is being recommended by DEP staff before all necessary testing results are provided (including the sediment testing, dye tests, and more thorough heat and nitrogen studies. See, also pp. 8-9 of the NPDES Permit Writer's Manual, Chapter 6 (September 2010): https://www3.epa.gov/npdes/pubs/pwm_chapt_06.pdf

In addition, the area of this pipeline was previously determined to posed a substantial risk to the Essential Fish Habitat of multiple species. Specifically, this area of Belfast Bay and Penobscot Bay has been designated by NOAA Fisheries as "Essential Fish Habitat" ("EFH") for twenty species.^[1] NOAA Fisheries is the federal agency

with jurisdiction to make such designations of EFH. Specifically, NOAA Fisheries has identified the area where NAF proposes to place its pipelines, as EFH for the following species:

- **Atlantic Sea Scallop** – ALL stages -- New England Amendment 14 to the Atlantic Sea Scallop FMP;
- **Atlantic Wolffish** – ALL stages -- New England Amendment 14 to the Northeast Multispecies FMP;
- **Haddock** – Juvenile -- New England Amendment 14 to the Northeast Multispecies FMP;
- **Winter Flounder** -- Eggs, Juvenile, Larvae/Adult -- New England Amendment 14 to the Northeast Multispecies FMP;
- **Little Skate** -- Juvenile, Adult -- New England Amendment 2 to the Northeast Skate Complex FMP;
- **Ocean Pout Adult** -- Eggs, Juvenile -- New England Amendment 14 to the Northeast Multispecies FMP;
- **Atlantic Herring** -- Juvenile, Adult, Larvae -- New England Amendment 3 to the Atlantic Herring FMP;
- **Atlantic Cod** -- Larvae, Adult, Juvenile -- New England Amendment 14 to the Northeast Multispecies FMP;
- **Pollock** -- Juvenile -- New England Amendment 14 to the Northeast Multispecies FMP;
- **Red Hake** -- Adult, Eggs/Larvae/Juvenile -- New England Amendment 14 to the Northeast Multispecies FMP;
- **Silver Hake** -- Adult -- New England Amendment 14 to the Northeast Multispecies FMP
- **Windowpane Flounder** -- Adult, Larvae, Eggs, Juvenile -- New England Amendment 14 to the Northeast Multispecies FMP;
- **Winter Skate** -- Juvenile -- New England Amendment 2 to the Northeast Skate Complex FMP;
- **American Plaice** -- Adult, Juvenile, Larvae, Eggs -- New England Amendment 14 to the Northeast Multispecies FMP;
- **Smooth Skate** -- Juvenile -- New England Amendment 2 to the Northeast Skate Complex FMP;
- **White Hake** -- Adult, Juvenile -- New England Amendment 14 to the Northeast Multispecies FMP;
- **Thorny Skate** -- Juvenile -- New England Amendment 2 to the Northeast Skate Complex FMP;
- **Atlantic Mackerel** -- Juvenile, Adult -- Mid-Atlantic Atlantic Mackerel, Squid,& Butterfish Amendment 11;
- **Bluefish** -- Adult, Juvenile -- Mid-Atlantic Bluefish; and
- **Atlantic Butterfish** -- Adult, Juvenile -- Mid-Atlantic Atlantic Mackerel, Squid,& Butterfish Amendment 11.

In addition, the area may be Habitat Area of Particular Concern (HAPC) for Inshore 20m Juvenile Cod.

In February, 2020, the USACE, a federal agency with which the Bureau has allegedly consulted on the NAF lease, in its Public Notice soliciting comments relating to the NAF project dated February 4, 2020, made a specific finding that:

The Magnuson-Stevens Fishery Conservation and Management Act, as amended by the Sustainable Fisheries Act of 1996 (Public Law 104-267), requires all federal agencies to consult with the National Marine Fisheries Service on all actions, or proposed actions, permitted, funded, or undertaken by the agency, that may adversely affect Essential Fish Habitat (EFH). Essential Fish Habitat describes waters and substrate necessary for fish for spawning, breeding, feeding or growth to maturity.

This project will have an adverse effect on a total of 14.62 acres of EFH. This habitat consists of saltmarsh, cobble beach, mudflat and subtidal substrate. ***Loss of this habitat may adversely affect species that use these waters and substrate.*** The District Engineer has made a preliminary determination that ***site-specific impacts may be substantial.*** Accordingly, the Corps will submit an expanded EFH assessment to the National Marine Fisheries Service, who in turn will provide conservation recommendations to the Corps. The Corps will coordinate with the applicant regarding implementation of these recommendations. The EFH consultation will be concluded prior to the final decision.

(emphasis supplied).

None of these issues have been given adequate (or seemingly any) consideration by DEP staff and the staff recommendation fails to address how existing uses (fishing and recreational swimming by the children in the nearby elementary school) will be fully protected as required by the above-referenced CWA federal regulations.

Please append this supplemental submission to the filing I submitted earlier today on behalf of the Petitioners noted above. Kim Ervin Tucker (Me. Bar No. 6969)

<https://www.habitat.noaa.gov/application/efhmapper/index.html>

<https://www.nefmc.org/library/amendment-14>

<https://www.fisheries.noaa.gov/action/omnibus-essential-fish-habitat-amendment-2>

<https://www.nefmc.org/library/amendment-3-5>

<https://static1.squarespace.com/static/511cdc7fe4b00307a2628ac6/t/518968c5e4b0884a65fe5067/1367959749407/Amendment+11+FEIS+-+FINAL+2011+05+12.pdf>

See USACE Public Notice for File Number: NAE-2019-01481, pp. 2-3, at:

<https://www.nae.usace.army.mil/Portals/74/docs/regulatory/PublicNotices/2020/NAE-2019-01481.pdf>

On Aug 13, 2020, at 2:03 PM, Bertocci, Cynthia S <Cynthia.S.Bertocci@maine.gov> wrote:

Dear Participants:

I have received the Department staff's recommended decision (in the form of a proposed Board order) on Nordic's MEPDES/Waste Discharge application. A copy is attached and is posted on the Department's webpage under Major Projects. MEPDES/WDL proposed decisions must be made available for comment for 30 calendar days. The deadline for comment on the MEPDES/WDL proposed Board order is Monday, September 14, 2020 at 5:00 p.m.

Each party submitting comments on the staff recommendation/proposed Board order is asked to submit one filing which includes the entirety of its comments on the proposed order. Comments on the MEPDES/WDL staff recommendation/proposed Board order should be sent to Gregg Wood at Gregg.wood@maine.gov and NordicAquaFarms.DEP@maine.gov, and copied to all persons on the service list.

Please note that the record is closed. Comment on the staff recommendation/proposed Board order cannot include new evidence.

Thank you for your attention to this matter.

Cynthia S. Bertocci
Executive Analyst, Board of Environmental Protection
17 State House Station, Augusta, Maine 04333-0017
Phone: (207) 287-2452
Cynthia.s.bertocci@maine.gov

<Nordic Draft Board Order MEPDES permit 8-13-2020.pdf>