



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) EIGHTEENTH 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 addresses requests and filings submitted by intervenors following issuance of the Seventeenth Procedural Order.

1. Seventeenth Procedural Order

In response to issues regarding the far-field dilution factor that were raised following the Board's deliberative session on Nordic's applications, the record was re-opened pursuant to the Seventeenth Procedural Order for the limited purpose of receiving the following information:

- a) the pre-deliberation communications from Nordic and/or its representatives with Department staff pertaining to the far-field dilution factor that occurred after distribution of the staff briefing memorandum on May 15, 2020;
- b) the technical data underlying *Figure 2. Time series of areal dilution distribution within region containing diluted effluent with median age between 1.5 days and 2.5 days old*, in the November 3, 2019, memorandum from Nathan Dill to Nordic Aquafarms (Nordic Pre-Filed Direct Testimony, Exhibit 23, Figure 2); and
- c) comments by the intervenors on the appropriate far-field dilution factor and comments on the new underlying data submitted by Nordic.

The deadline for Nordic to provide the requested underlying data for Figure 2 was Friday, May 29, 2020 at 5:00 p.m. The deadline for intervenors to comment on that submission by Nordic and the appropriate dilution factor was set at Friday, June 12, 2020 at 5:00 p.m. The Seventeenth Procedural Order stated that the parties must restrict their submissions to these items.

Department staff provided the requested correspondence between Department staff and Nordic's consultants to Board staff via electronic mail on May 29, 2020 at 2:01 p.m. Board staff forwarded this information to the parties by electronic mail on May 29, 2020 at 3:59 p.m. The correspondence consisted of the following email chain:

- Email from Nathan L. Dill, P.E. to Elizabeth Ransom on May 18, 2020 at 2:59 p.m. which included two graphs: 1) Time series of aerial dilution distribution within region containing diluted effluent with median age between 1.5-days-old and 2.5-days-old with notations not on the copy of the graph that is in the existing record, and 2) area of plume with average 1.5 to 2.5-day old effluent. The email also included a Google Earth Map depicting the area of Belfast Bay.
- Email from Nathan L. Dill to Elizabeth Ransom on May 18, 2020 at 4:49 p.m.
- Email from Elizabeth Ransom to Gregg Wood and Robert Mohlar dated May 19, 2020 at 9:08 a.m. forwarding the above emails from Nathan L. Dill to Elizabeth Ransom.

Nordic provided the requested technical data underlying *Figure 2. Time series of areal dilution distribution within region containing diluted effluent with median age between 1.5 days and 2.5 days old*, in the November 3, 2019, memorandum from Nathan Dill to Nordic Aquafarms (Nordic Pre-Filed Direct Testimony, Exhibit 23, Figure 2) to the Board and the parties via electronic mail from Elizabeth Ransom on May 29, 2020 at 4:08 p.m. The response consisted of a two-page letter, Attachment A May 18, 2020 Email from Nathan Dill, and Attachment B Microsoft Excel Dilution Data File.

2. Requests Regarding Revision of the Far-Field Dilution Factor

Following issuance of the Seventeenth Procedural Order and distribution of the above listed documents, the Board received the following requests from intervenors to the proceeding:

- Michael Lannan, witness for Northport Village Corporation, requested via electronic mail on May 29, 2019 at 4:49 the pre-deliberation communications between the Department and Nordic pertaining to the far-field dilution factor. Intervenor Jeffrey R. Mabee, Judith B. Grace, and Lobstering Representatives (MGL) joined in this request via electronic mail on May 29, 2020 at 4:55 p.m.
- On May 29, 2019 at 4:58 p.m. Mr. Lannan requested the Department's initial and revised calculations of the far-field dilution factor.
- On June 1, 2020 at 8:20 a.m. David Perkins, on behalf of Intervenor Upstream Watch, stated that Upstream had not received the communications between Nordic and/or its representatives and Department staff as required by the Seventeenth Procedural Order.
- On June 1, 2020 at 11:26 a.m., MGL requested that Department staff provide all of its communications with the Board, Board staff, and the Assistant Attorneys General advising the Board that have occurred since the close of the hearing record. MGL stated that it believes any such communication constitutes *ex-parte* communications. MGL also presented information on water temperature in Belfast Bay, commented on the impact of water temperature on lobster, requested information on the evaluation of temperature impacts from the proposed project, and requested that DEP staff provide "all communications with Nordic over the temperature issue and all communications between DEP staff (and legal counsel) with Nordic and its agents (and counsel) on the issue of temperature." The email included four NOAA ocean temperature graphs for Penobscot Bay collected by Mr. Mike Dassatt between 2003 and 2009. MGL also requested an extension of the comment period due to a delay in receipt of the correspondence between Nordic and/or its representatives and Department staff.

- By email on June 1, 2020 at 11:58 a.m., MGL submitted a chart depicting the location of the temperature readings collected by Mr. Dassatt.
- On June 1, 2020 at 12:47 p.m., Board staff re-sent Department staff's communications with Nordic's representatives that had previously been distributed to the parties on May 29, 2020 at 3:59 p.m.
- By email on June 1, 2020 at 1:39 p.m., MGL commented on the email from Nathan Dill to Elizabeth Ransom which included a depiction of Belfast Bay, argued that Searsport is required to be provided with notice of Nordic's applications, and requested proof that Searsport had been provided with notice and opportunity to comment.

3. Rulings on Intervenors' Requests

Scope of Record Re-opening. The Seventeenth Procedural Order re-opened the hearing record for the very limited purpose of receiving the information listed in Section 1 of this Order to ensure that the record is clear and accurate with regard to the far-field dilution factor and to allow all parties to comment on the specific issue of the appropriate far-field dilution factor. MGL's comments, submissions, and requests regarding water temperature are not relevant and will not be accepted into the record and will not be considered by the Board. MGL's arguments regarding notice to the Town of Searsport have been previously argued by MGL and are not relevant to the matter for which the record was re-opened.

Request for Calculations. With respect to Intervenor Northport Village Corporation's request that Department staff provide its initial and revised calculations regarding the far-field dilution factor, Department staff reviewed the information in the application and pre-filed testimony and provided its initial assessment in its May 15, 2020 briefing memorandum to the Board. The staff re-evaluated the dilution factor following receipt of the graphic information and correspondence provided by Nordic's consultants on May 19, 2020 which was distributed to the parties on May 29, 2020. In response to the Board's request in the Seventeenth Procedural Order, Nordic has provided the underlying data for the graph in question (Figure 2). The intervenors may review this information and provide comment on both the email correspondence between Nordic's consultants and Department staff and the underlying data. Following receipt of the intervenors' comments on this information, Department staff will re-examine the far-field dilution factor taking into consideration all comments received and revise its May 15, 2020 memorandum to the Board.

Role of Department Staff and the *Ex-parte* Communication Rule. Department staff's communications with the parties, Board, Board staff, and the Assistant Attorneys General advising the Board do not constitute *ex-parte* communications. As set forth in prior Procedural Orders and in the pertinent parts of Chapter 3 of the Department's *Rules Governing the Conduct of Licensing Hearings*:

Section 5. Department Staff. The role of Department staff in a licensing proceeding is to assist the Presiding Officer, Commissioner, or Board in a non-advocate capacity by gathering facts, identifying issues for consideration, analyzing evidence submitted, and making recommendations regarding compliance with relevant licensing criteria. Department staff may communicate with the applicant regarding additional information sought on specific licensing criteria. Department staff may also communicate with any party regarding evidence or other materials submitted by that party.

Section 6. *Ex-parte* Communications.

- B. **Communications Permitted:** This section does not prohibit the Presiding Officer, Commissioner, or Board members from communicating in any respect with or receiving the aid or advice of Department staff, counsel, or consultants retained by the Department who have not participated and will not participate in the licensing proceeding in an advocate capacity.

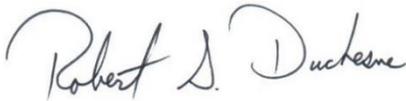
MGL's June 1, 2020 request for Department staff's communications with the Board, Board staff, and the Assistant Attorneys General advising the Board will be referred to the Department's Freedom of Access Act coordinator for a response.

Opportunity to Comment on Far-Field Dilution Factor. As stated in the Seventeenth Procedural Order, the deadline for intervenors to comment on the information Nordic provided to Department staff, the underlying data set, and determination of the far-field dilution factor remains Friday, June 12, 2020 at 5:00 p.m. The parties must restrict their submissions to these items. MGL's June 1st request to extend the comment period was based on the statement that the correspondence between Department staff and Nordic had not been provided; however, the information was provided to the service list on May 29th. The request to extend the comment period is denied.

Multiple Submissions. Each party commenting on this matter is required to provide a single submission which includes the entirety of its response. If a prior submission will constitute a party's comment, the party should specify which submission will constitute the party's comment.

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

BOARD OF ENVIRONMENTAL PROTECTION



BY: _____
Robert S. Duchesne, Presiding Officer