

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

NORDIC AQUAFARMS INC.)	
Belfast and Northport)	
Waldo County, Maine)	
)	REMAND OF AIR EMISSION,
A-1146-71-A-N)	SITE LOCATION OF DEVELOPMENT,
L-28319-26-A-N)	NATURAL RESOURCES PROTECTION ACT,
L-28319-TG-B-N)	and MAINE POLLUTION DISCHARGE
L-28319-4E-C-N)	ELIMINATION SYSTEM (MEPDES)/
L-28319-L6-D-N)	WASTE DISCHARGE LICENSES TO
L-28319-TW-E-N)	CONSIDER IMPACT OF QUIET TITLE
W-009200-6F-A-N)	DECISION
)	

NORDIC AQUAFARMS INC. RESPONSE TO PROCEDURAL OBJECTIONS

Relevant Factual Background

On November 19, 2020, the Board of Environmental Protection (“Board”), as part of and on behalf of the Department of Environmental Protection (“Department”), issued the above captioned licenses approving construction and operation of a land-based recirculating aquaculture system for the production of Atlantic salmon, including associated wastewater discharge and air emissions (“Project Approvals”).

Throughout Department proceedings on the Project Approvals, intervenors filed numerous motions and comments relating to title, right and interest (“TRI”). The record before the Board included not just the TRI documentation from the Eckrotes but also deeds from heirs of the original property owner releasing the intertidal property and any use restrictions based on expert surveyor information provided to Nordic indicating that if the Eckrotes did not own the intertidal it had been retained by the original property owner and passed automatically to her heirs. *See* Nordic Responses to Department Requests for Additional TRI Information dated May 24 and June 26, 2019. Mabee/Grace sought reconsideration of the Department’s TRI determination five times before the Board record closed. The full Board heard oral argument before deciding two of the Mabee/Grace motions. After argument and deliberation, the Board voted unanimously to deny their request to hold an adjudicatory hearing on the issue of TRI and to deny their motions. The balance of the motions were likewise denied by the Presiding Officer. In the Project Approvals, the Board again found Nordic had demonstrated sufficient TRI for the Board to process the applications and approve the licenses, setting forth its reasoning in each of its decisions.

In February of 2023, Maine’s Supreme Judicial Court decided *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15 (“Quiet Title Decision”). In the Quiet Title Decision, the Law Court held that a deed conveying land in Belfast over which Nordic later obtained rights to an easement for intake and discharge pipes did not include the intertidal land. The Quiet Title Decision found that the intertidal land was eventually conveyed to Mabee/Grace. In addition, the Law Court held that Mabee/Grace hold an enforceable “residential purposes only” servitude that runs with the land (Residential Purposes Restriction) on the related upland property. The Law Court’s decision also states that a conservation easement over the intertidal land created by Mabee/Grace in 2019 (Conservation Easement), which was granted to Upstream Watch (“Upstream”), who later assigned it to Friends of Harriet L. Hartley Conservation Area (“Friends”), is enforceable.

Following review of petitions from Upstream, Mabee/Grace and Nordic- all asking that the Department suspend or revoke the Project Approvals, the Commissioner for the Department suspended the Project Approvals pending a final decision resolving the outstanding title issues (“Suspension Order”). Specifically:

12. With regard to the allegations of misrepresentation or failure to disclose fully all relevant facts, the Department finds that the licensee did not obtain the Licenses by misrepresenting or failing to disclose all relevant facts. Both petitioners, as intervenors to the underlying licensing proceeding, raised the majority of the contentions present in the petitions prior to and during the licensing process. The Department was aware of and considered the underlying deeds, use restrictions, and legal arguments presented by both the licensee and opponents to the project. While the licensee may not have supplied all existing surveys, other surveys would not have provided the Department with legal certainty on the issue of TRI, which only the courts can resolve.¹ As such, the Department does not find that the licensee obtained the license by failing to disclose documents or by misrepresenting relevant facts.

¹ It is notable that the Superior Court in its decision, *Mabee v. Nordic Aquafarms*, No. RE-2019-0018, 2021 Me. Super. LEXIS 103 (Oct. 27, 2021), on an even more fulsome record developed during a multi-day trial, decided the intertidal ownership conveyed with the upland and that Mabee/Grace did not possess title, right, or interest in the intertidal.

13. Mabee/Grace/Friends also allege misrepresentations regarding removal of use restrictions on the northwest portion of the property at issue, regarding the eminent domain process, and regarding the conservation easement in the intertidal area. While characterized as misrepresentations or the failure to disclose relevant facts, the claims, in both cases, appear to be based on alleged deficiencies in the instruments or applicable authority to remove deed restrictions. The Department acknowledges that the claims, if proven, could constitute a change in condition or circumstance; however, they do not at this time support suspension.

14. Lastly, the Department agrees with the petitioners and the licensee that the Law Court’s quiet title decision on the intertidal lands proposed for development and the uncertainty resulting from the pending eminent domain appeal, including any effects on the Residential Purposes Restriction and the Conservation Easement, collectively constitute a change in circumstances potentially requiring

suspension. Given the degree of potential impacts resulting from the project, and the uncertainties resulting from the Law Court’s quiet title decision, the eminent domain appeal, and the Conservation Easement, the Department finds that the 38 M.R.S § 342(11-B)(E) and Chapter 2, § 27(E) criterion to suspend a license is met.

Suspension Order at ¶¶ 12-14.

Maine’s Supreme Judicial Court ordered remand of the Project Approvals to the Board ordering consideration of a narrow question: “the impact, if any, of [... the Quiet Title Decision] on the challenged approvals.” Law Court Remand Order at 3-4. The Remand Order also authorized the Board to: “choose to make their determinations on the existing administrative records or expand the records to include materials such as a referenced subsequent conveyance after the exercise of eminent domain power that Nordic suggests should result in no change to the viability of the approvals.” Law Court Remand Order at 4. The Law Court Remand Order was to the Business Court Docket of Superior Court and that court then remanded, with substantially identical language, to the Board. Herein, the two remand orders are jointly referred to as the Remand Order.

Accordingly, the Board’s Presiding Officer issued a letter (“Remand Process Order”) specifying the process the Board would use to answer the question presented in the Remand Order. The Remand Process Order states that “[a]n opportunity for a hearing is not required and no hearing is contemplated for this limited proceeding on remand.” Remand Process Order at 3. The Remand Process Order also clearly lists the documents outside the “existing” administrative record which it will consider as part of its review of the question presented in the Remand Order. Those documents include the Remand Order, Quiet Title Decision, and the Suspension Order.

SYNOPSIS OF PROCEDURAL OBJECTIONS

The Remand Process Order specifies that:

Objections to the substance or materiality of these officially-noticed documents shall be made, if at all, in the briefs.

[...]

Briefs are limited to 10 pages, may not include attachments or appendices, and may not reference any new evidence. Evidence in the underlying licensing record and the documents of which the Board has taken official notice may be referenced if directly relevant to the limited issue before the Board. Briefs that do not comply with these filing requirements may be rejected. In consideration of the narrow scope of the Remand Orders and prior Board proceedings in this matter, no additional reply briefs or other filings are permitted.

Remand Process Order at 2. Notwithstanding this directive, Upstream filed nearly a hundred pages of objections, offers of proof, and proposed supplemental evidence. *See* Upstream emails

to Ms. Burke dated August 9, 2023. Their objection boils down to the contention that the Remand Process Order violates due process and Chapter 3 of the Department's Rules. Upstream Objection at 1-7. Upstream posits that because the Quiet Title Decision and Suspension Order are nearly 40 pages (seeming svelte at half the length of Upstream's complaints), due process and Chapter 3 require the Board to be more specific about which portions it takes notice of. Assuming we could set aside the basic fact that it would be absurd for the Board to refuse to consider the entirety of the Quiet Title Decision after receipt of the Remand Order directing it to determine the impact of the Quiet Title Decision on the Project Approvals. Otherwise, the Upstream Objection is founded entirely on the premise that the Remand Process Order violates due process requirements because it does not follow numerous provisions of Chapter 3, such as those relating to the record, availability of witnesses, and other hearing related requirements. Upstream Objection at 1-7. Upstream also objects to assignment of the same legal counsel to various arms of the Department. Of course, the Department routinely and properly uses the same assistant attorneys general from the Natural Resources and the Environment Section because of the depth and breadth of their experience. Such joint representation is proper in these proceedings. 5 M.R.S. § 191 (2003). Separately, the Upstream Offer of Proof is a nine page list of documents all of which appear to have been either part of the Quiet Title Decision or the Belfast eminent domain proceedings. There is no indication of which of these documents are in the Board's administrative record or of their relevance to the question presented in the Remand Order. Upstream Offer of Proof 1-9.

Likewise on August 9, 2023, Mabee/Grace filed an eleven page objection to the Board Process Order and offer of proof arguing that the process set forth in the Remand Process Order does not comply with Chapter 3 of the Department's Rules and fails to inspire public confidence as required by due process ("Mabee/Grace Objection"). Mabee/Grace argue that the Board must review numerous surveys previously considered by the Department and/or rejected from inclusion in the administrative record as well as a portion of an email from counsel for Governor Mills discussing the Quiet Title Decision. Mabee/Grace Objection at 1-4. Mabee/Grace argue further that the Board must consider new litigation filed by Mabee/Grace against the Maine Department of Transportation ("MDOT") and the City of Belfast ("Belfast") claiming that in order to properly address the Remand Order, the Board must reconsider the Deed of Vacation voiding historic use restrictions MDOT placed on land it granted Belfast which Nordic submitted to the Department as part of its original TRI review. Mabee/Grace Objection at 5-7. Mabee/Grace ask this Board to determine questions regarding the impact of the Belfast exercise of eminent domain currently raised by Mabee/Grace in Superior Court as part of their appeal of that municipal action. Mabee/Grace Objection at 7-9. Finally, Mabee/Grace argue that the Quiet Title Decision automatically voids the Project Approvals as a matter of law. Mabee/Grace Objection at 9-11.

Northport Village Corporation ("NVC") filed an email which appears to posit that if the Board answers the question presented in the Remand Order it must also reopen the entirety of the prior proceedings to consider other unspecified evidence. August 9, 2023 email from M. Lannan of Tech Environmental on behalf of NVC ("NVC Objection").

NORDIC'S RESPONSE TO PROCEDURAL OBJECTIONS

The Upstream, Mabee/Grace and NVC objections and offers of proof themselves violate the Remand Process Order which specified that any objections to the substance or materiality of any portion of the Quiet Title Decision or the Suspension Order be included with merits briefing and prohibited additional filings. For that reason alone, their objections and offers of proof should be rejected.

Setting this initial violation aside, the Upstream, Mabee/Grace and NVC Objections each also reference violations of due process and/or Chapter 3 of the Department Rules. However, the Remand Order specifically left to the Board the scope of any Board process for addressing remand. Remand Order at 4. The Board Process Order provides clear notice of the process and provides ample opportunity to be heard to not just the parties to the Quiet Title Decision but also to intervenors to Board proceedings on the Project Approvals. Such clarity more than clears the hurdle of fundamental due process. *Fichter v. Bd. of Env't Prot.*, 604 A.2d 433, 436–37 (Me. 1992) (Due process requirements for the Board “are flexible and entail no specified form or procedure” and, so long as they “assure the basic fairness of each particular action according to its circumstances” the Board’s “procedure can be adjusted to reflect the competing interests involved and the context” of the proceeding).

In addition to providing due process, the Board Process Order also complies with Department Rules. The Board Process Order specified that Board review of the question presented on remand would not include a hearing. Specifically, the Board Process Order states: “[a]n opportunity for a hearing is not required and no hearing is contemplated for this limited proceeding on remand.” Remand Process Order at 3. Chapter 3 of the Department’s Rules- which includes detailed requirements for notice, intervention, submission of testimony, availability of witnesses for cross-examination and the like as one might expect for an adjudicatory hearing, does not apply. *See generally* 06-096 CMR ch. 3. Indeed, the applicability section of Chapter 3 of the Department’s Rules, the very first section of that Rule, specifies that “[t]he following provisions govern those Department licensing proceedings where a decision has been made to hold a hearing on a license application or on an appeal to the Board of a Commissioner license decision.” 06-096 CMR ch. 2 § 1. The Board’s remand process is neither a hearing¹ (as explicitly stated in the Remand Process Order) nor an appeal to the Board of a Commissioner license decision (because it is a remand, not an appeal). Consequently, Chapter 3 of the Department’s Rules does not apply. The Board is not required to accept independent objections regarding the materials it took notice of nor to accept offers of proof regarding additional evidence which Upstream and Mabee/Grace seek to include in the Board review of the remand question.

Although the Upstream, Mabee/Grace and NVC Objections wrongly argue that Chapter 3 of the Department’s Rules requires the Board to undertake additional and different process and to accept additional evidence, even if Chapter 3 did apply, it requires that Upstream, Mabee/Grace

¹ “Hearing” means a hearing conducted in accordance with the procedural requirements of the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV at which the Department receives oral testimony and evidence for the purpose of gathering facts upon which a decision in a licensing proceeding will be based. 06-096 CMR ch. 3 § 2(H).

and NVC demonstrate via an offer of proof that the evidence they seek to have included in the Board review is relevant to the question presented on remand. Specifically,

Evidence will be admitted if it is relevant and material to the subject matter of the hearing and is of a kind upon which reasonable persons are accustomed to rely in the conduct of serious affairs. Evidence which is irrelevant, immaterial or unduly repetitious will be excluded. The Department's experience, technical expertise, and specialized knowledge may be utilized in the evaluation of all evidence.

06-096 CMR ch. 3 § 20(A).

Put simply, the purpose of the objection and offer of proof processes set forth in Chapter 3 is for parties to provide the Board with a demonstration that relevant evidence was excluded and to explain why review of that evidence is necessary to provide a fulsome review of the issue before the Board. Here, the issue before the Board is the impact, if any, of the Quiet Title Decision on the Project Approvals. If the Board were holding a hearing, which it isn't, then Chapter 3 would require that objections or offers of proof demonstrate the relevance of the proffered evidence to the hearing topics.

While Upstream, Mabee/Grace and NVC provide lengthy discussions of evidence they believe the Board should consider, they don't claim that evidence wasn't already in the administrative record or that it is relevant to the question remanded to the Board.² Consequently, even if Chapter 3 required that the Board consider procedural objections and offers of proof regarding supplemental evidence, which it does not (because, consistent with the Remand Order the Board is not holding a hearing), Upstream, Mabee/Grace, and NVC do not explain the relevance of the materials they provided or claim are necessary for the Board to assess the impact of the Quiet Title Decision on the Project Approvals.

² For example, in footnote 1 to the Mabee/Grace Objection, without context or discussion of relevance, Mabee/Grace quote an email from counsel for the Governor as follows:

In the 2-16-2023 email from former DEP Commissioner Jerry Reid to Governor Mills and other official of the Mills' Administration, obtained through FOAA, Attorney Reid describes the Law Court's Decision in Mabee I in relevant part as: "Bad news for Nordic. The Law Court just held that under the terms of Nordic's deed they don't own the intertidal land they need to run their discharge pipe to the bay. . . . Nordic has justifiably complained about how long it took to get regulatory approvals in the face of a few committed opponents, but this decision is a self-inflicted wound. They put millions of dollars into a project on land that they didn't own, and according to footnote 9, their own surveyor apparently told them that years ago." See, email thread attached to this objection as Exhibit A.


The "footnote 9" referenced by Attorney Reid, refers to a Law Court observation that Nordic's surveyor originally "read the Hartley-to-Poor deed as excluding the intertidal land." See Quiet Title Decision fn 9. The administrative record for the Project Approvals contains the survey referenced in footnote 9, where that surveyor concluded that the intertidal land was retained by the heirs of Harriet Hartley. The administrative record also contains release deeds from those heirs releasing to Nordic any rights they would have had to the intertidal land or to enforce any upland use restriction had that surveyor's original opinion been adopted by the Law Court. Of course, the Law Court ultimately adopted a different conclusion, but Nordic still provided evidence of right, title, and interest consistent with that surveyor's original (and subsequent) opinions. In any case, the offhand comments of counsel to the Governor on this tangential issue are of no relevance to the directive here on remand. This attachment (and all other attachments to the various objections) should be rejected and stricken for lack of relevance to the issue currently before the Board.

Nordic concedes that the Quiet Title Decision means that Nordic's option to obtain an easement from the Eckrotes would not allow it to build the intake and outfall piping as documented in the Project Approvals. Nordic is well aware that the Project Approvals do not and cannot convey any property rights. Similarly, here, the Quiet Title Decision cannot retroactively void Department determinations that Nordic maintained sufficient TRI throughout the entire permit processing period. 06-096 CMR ch. 2 §11. This fact alone is sufficient for the Board to confirm that the Quiet Title Decision does not impact the Project Approvals. Because Chapter 2 of the Department Rules requires only that TRI be maintained throughout the application processing period- which expired when the Board issued the Project Approvals in November of 2020- changes to TRI after issuance of the Project Approvals are irrelevant to the TRI determinations of Chapter 2 and completeness of an application. Instead, any such developments are properly considered by the Department pursuant to 38 M.R.S. §11-B and sections 25 and 27 of Chapter 2 which grant the Commissioner authority to revoke or suspend the Project Approvals if there "has been a change in any condition or circumstance that requires revocation or suspension of a license." *Id.* As the Board is aware, the Commissioner exercised said authority in response to the Quiet Title Decision and other pending litigation discussed by Upstream, Mabee/Grace and NVC, by issuing the Suspension Order. The Suspension Order makes clear that Nordic will not, and cannot, proceed under the Project Approvals until the Department determines that the property ownership and use issues raised by the Quiet Title Decision are fully adjudicated. Given the court's directive on remand it is outside the Board's authority, to review hundreds of pages of depositions of competing expert surveyors or portions of emails purporting to summarize the Quiet Title Decision, let alone unspecified substantive evidence alluded to by NVC.

CONCLUSION

The objections and offers of proof provided by Upstream, Mabee/Grace, and NVC are unsupported by the Remand Order, basic tenets of due process or Chapter 3 of the Department's Rules. The Remand Order provided the Board broad authority to establish a process for considering the narrow question presented in the Remand Order. The Board's proposed process provides adequate notice and opportunity to be heard (as demonstrated by the many pages before it). Further, even if Chapter 3 did apply, which it doesn't, Upstream, Mabee/Grace and NVC fail to demonstrate- or even claim- the relevance of proffered evidence to the question presented in the Remand Order. Consequently, the pending objections and offers of proof must be rejected. Nordic looks forward to addressing the issue presented in the Remand Order before the Board.

Dated: August 14, 2023



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