



BOARD ORDER

ORDER ON APPEAL

IN THE MATTER OF

NORDIC AQUAFARMS, INC
Belfast and Northport
Waldo County, Maine

L-28319-26-A-N
L-28319-TG-B-N
L-28319-4E-C-N
L-28319-L6-D-N
L-28319-TW-E-N
W-009200-6F-A-N

) APPLICATIONS FOR AIR EMISSION,
) SITE LOCATION OF DEVELOPMENT,
) NATURAL RESOURCES PROTECTION ACT, and
) MAINE POLLUTANT DISCHARGE ELIMINATION
) SYSTEM/WASTE DISCHARGE LICENSES
)
)
) SEVENTH PROCEDURAL ORDER
)
)
)

By letter dated December 20, 2019, Nordic Aquafarms, Inc. (Nordic) filed “Objections and Motions to Strike Intervenors’ Pre-filed Testimony” requesting that the Board strike, among other testimony, the testimony of Upstream Watch/Northport Village Corporation (Upstream/NVC) in its entirety. Upstream/NVC filed a response to Nordic’s motion on December 30, 2019. The Sixth Procedural Order, dated January 2, 2020, ruled on Nordic’s Objections and Motions to Strike. On January 6, 2020, Upstream/NVC filed an appeal of the Sixth Procedural Order objecting to the ruling in Section 2(A) of that order pertaining to noise. The Board considered Upstream/NVC’s appeal at its meeting on January 9, 2020. This order constitutes the Board’s decision on Upstream/NVC’s appeal.

1. Upstream/NVC’s Appeal of the Sixth Procedural Order

Upstream/NVC appeals the ruling pertaining to Noise in Section 2(A) of the Presiding Officer’s Sixth Procedural Order. In its appeal, Upstream/NVC argues that the ruling is contrary to the vote taken by the Board at its November 7, 2019 meeting. Upstream/NVC also argues that the Board is incorrect as a matter of law in holding that daytime construction noise is not subject to Department regulation under the Site Location of Development Law.

2. Noise as a Hearing Issue

Upstream/NVC argues that at the Board meeting on November 7, 2019, the Board voted to grant Upstream/NVC’s November 5, 2019 appeal of the Third Procedural Order and that vote operated to include noise as a hearing issue. Upstream/NVC includes a transcription of parts of the Board meeting made from the Board’s audio recording of the meeting as support for its position that the Board voted 4-0 to grant Upstream/NVC’s appeal and include noise as a hearing issue.

Upstream/NVC argues that the Site Law issues of blasting and odor, both allowed as hearing issues pursuant to the Third Procedural Order, are inseparable from the issue of noise.

A review of the transcript shows that the Board understood Upstream/NVC's appeal of the Third Procedural Order to be primarily a request to add Nordic's Chapter 115 Minor Source Air Emissions application to the list of issues to be addressed at the hearing; and the Board's vote was intended to add just Nordic's Chapter 115 application, and not to add noise under the Site Law, to the list of hearing issues.

Female Speaker [Ms. Bensinger]: So the air application is pending along with the [S]ite [L]aw, and the NRPA, and the waste discharge license applications...And the question here is which issues should the Board spend time at the hearing on with live witnesses as opposed to paper submissions. And the Presiding Officer initially ruled that the air emissions license should be decided on the paper; not live witnesses. But the intervenors have raised some new issues and the Department staff is saying that it recommends that we do live witnesses on the air emissions license at the Board's public hearing...Do you think that live witnesses are warranted on – on the air emission license? That's the question before the Board. (Transcript page 26, line 23 to page 27, line 25)

In response to questioning regarding the scope of the air emissions application and whether it included the issues of odor and noise, Department staff stated that the air emissions application is limited to eight generator sites. Mr. Crawford stated that, "I recommend that the Board does in fact take this up during the public hearing that would be restricted simply to those generators." (Transcript, page 28, line 21-24) The Board subsequently voted to grant the appeal.

The Board's vote on Upstream/NVC's motion was documented in the Fourth Procedural Order. That order, signed by the Presiding Officer, specifically added Nordic's Chapter 115 Minor Source Air Emissions application as a hearing issue and clarified that noise is not a criterion for a Chapter 115 application. Accordingly, in the Sixth Procedural Order, the Presiding Officer struck Upstream/NVC's pre-filed testimony on noise because noise was not a hearing issue. The order stated that Upstream/NVC may submit written comment into the record on noise from the operation of the proposed facility and referenced the November 20, 2019 reiteration that daytime construction noise is not subject to Department regulation under Site Law.

Based upon the record of the Board's November 7, 2019 meeting and the Board's decision on Upstream/NVC's appeal of the Third Procedural Order as documented in the Fourth Procedural Order, the Board affirms the Presiding Officer's ruling

striking Upstream/NVC's testimony on noise at Tab 6 of its pre-filed direct testimony.

3. Daytime Construction Noise

Upstream/NVC asserts that, contrary to the Presiding Officer's rulings in the Fourth and Sixth Procedural Orders, construction noise from commercial and industrial developments is subject to review under the Site Law under the language of 38 M.R.S. §484(3)(A). They contend that the language exempting from review the daytime noise from the construction of a development only applies to residential subdivisions. Upstream/NVC bases its argument in part on the two-sentence structure of § 484(3)(A), arguing that the first sentence applies to commercial and industrial developments and all of the second sentence applies only to residential developments. Upstream/NVC also contends that the legislative history of this language in the law supports this proposed interpretation. They request that the Board reconsider or reverse the prior determinations and allow construction noise to be considered by the Department in its determination of whether the Site Law licensing criterion of "No adverse effect on the natural environment" is met.

In order to approve a permit application, the Board must find that the applicant has met the licensing criteria of the Site Law listed in 38 M.R.S. §484. The language at issue in this appeal states as follows:

No adverse effect on the natural environment. The developer has made adequate provision for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities.

A. In making a determination under this subsection, the department may consider the effect of noise from a commercial or industrial development. Noise from a residential development approved under this article may not be regulated under this subsection, and noise generated between the hours of 7 a.m. and 7 p.m. or during daylight hours, whichever is longer, by construction of a development approved under this article may not be regulated under this subsection.

B. In determining whether a developer has made adequate provision for the control of noise generated by a commercial or industrial development, the department shall consider board rules relating to noise and the quantifiable noise standards of the municipality in which the development is located and of any municipality that may be affected by the noise.

The Board finds that 38 M.R.S. § 484(3) exempts daytime construction noise from all developments from review under the Site Law's "No adverse effect on the natural environment" criterion. Upstream/NVC's proposed interpretation of the statute would render the daytime construction noise language meaningless. Since noise from a residential development may not be regulated at all, there is no need for next portion of the sentence to state that daytime construction

noise from a residential subdivision may not be regulated. The Board interprets the two-sentence structure of this subsection of the statute as delineating between activities that can and cannot be regulated. The first sentence articulates that noise from commercial or industrial development can be considered. This is followed by the full exemption of noise from residential developments, and then the exemption of daytime construction noise from developments in general. The clear intention of the final clause of the second sentence is to exempt, from the allowable consideration of commercial/industrial noise, construction noise during daytime hours. The Board notes that this reading of the Site Law statute is consistent with the Department's historical application of the law. Because the Board views this statute as unambiguous, there is no need to review statutory history; however, when the legislative history is considered, it too supports the Department's interpretation of the provision. The legislative history shows that the legislature has made clear when it intends to modify the noise standard in a particular matter versus when it simply intends to move provisions from one section to another. Here the language was simply moved from one section to its current location in the section applicable to standards.

Based on the language of the Site Law, the Board finds that construction noise generated between the hours of 7:00 a.m. and 7:00 p.m. or during daylight hours, whichever is longer, may not be regulated under the No Adverse Effect on the Natural Environment criterion of the Site Law.

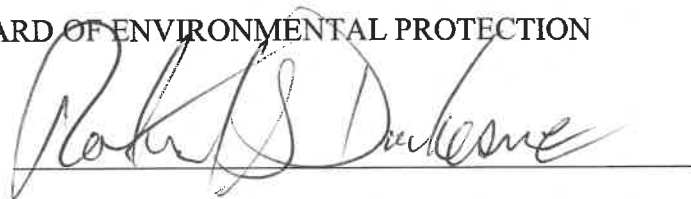
The Board notes that a different criterion of the Site Law, §484(9), does allow the regulation of blasting, and blasting is a hearing issue. Airblast noise from blasting is regulated under the specific terms of that subsection. Both the applicant and Upstream/NVC submitted direct testimony on blasting; therefore, responsive rebuttal testimony and cross-examination on blasting, including airblast noise, will be allowed.

AS SET FORTH ABOVE, THE BOARD DENIES THE APPEAL AND AFFIRMS THE SIXTH PROCEDURAL ORDER.

DONE AND DATED AT AUGUSTA, MAINE THIS 9th DAY OF JANUARY, 2020

BOARD OF ENVIRONMENTAL PROTECTION

BY:



Robert S. Duchesne, Presiding Officer