



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) EIGHTH PROCEDURAL ORDER
L-28319-L6-D-N)
L-28319-TW-E-N)
W-009200-6F-A-N)

On January 9, 2020 Presiding Officer Robert Duchesne held a pre-hearing conference at the Augusta Civic Center in Augusta, Maine. The purpose of the conference was to review matters related to the schedule, rebuttal testimony, and the organization and conduct of the hearing. This procedural order documents the matters discussed at the conference and the rulings of the Presiding Officer.

Participants:

Robert Duchesne, Board Member and
Presiding Officer
Peggy Bensinger, Assistant Attorney
General (AAG)
Laura Jensen, AAG
Cynthia Bertocci, Board Executive Analyst
Ruth Ann Burke, Board Admin. Assistant
Kevin Martin, DEP Office of the
Commissioner
Beth Callahan, DEP Bureau of Land
Resources
Gregg Wood, DEP Bureau of Water Quality
Joanna Tourangeau, Drummond Woodsum
for Nordic
Ed Cotter, Nordic
Anne Saggese, The Fish Are Okay

Michael Lannan, Northport Village Corp.
David Losee, for Upstream Watch
Kim Ervin Tucker, for Jeffrey R. Maybee
and Judith B. Grace, and Lobstering
Representatives

Intervenors Absent:

Barry Costa-Pierce, University of New
England
Donald Perkins, Gulf of Maine Research
Institute
Eleanor Daniels and Donna Broderick
Lawrence Reichard

1. Pre-Hearing Schedule

Ms. Bertocci reviewed the pre-hearing schedule which is as set forth below.

- Friday, January 17, 2020 at 5:00 p.m. Deadline for direct testimony on the Chapter 115 Minor Source Air Emissions application and deadline for rebuttal testimony on all other hearing issues.
- Friday, January 24, 2020 at 5:00 p.m. Deadline for any motions to strike testimony filed on January 17, 2020.
- Wednesday, January 29, 2020 at noon. Deadline for responses to any motions to strike testimony filed on January 17, 2020 and deadline for requested time for cross examination of witnesses.
- Monday, February 3, 2020 at noon. Deadline for any appeal to the Board of the Presiding Officer's rulings on any motions to strike testimony.
- Thursday, February 6, 2020. Board meeting to address any appeals of the Presiding Officer's rulings on motions to strike testimony.
- Tuesday, February 11, 2020 at 9:00. Hearing begins. Each party must have a representative available to meet with the Presiding Officer at 8:30 a.m. prior to the start of the hearing.

2. Rebuttal Testimony

The parties were reminded that rebuttal testimony must be responsive to pre-filed direct testimony. Any rebuttal testimony pertaining to pre-filed direct testimony on the Chapter 115 Minor Source Air Emissions application will not be filed in written form and should be presented orally at the hearing. Oral rebuttal should be woven into the summary of the pre-filed direct testimony.

3. Board Panels

As discussed when the Board assumed licensing jurisdiction over Nordic's applications, federal recusal requirements that are incorporated into Maine law in 38 M.R.S. § 341-C(8) limit the participation of three Board members in this proceeding. Specifically, because their employers hold MEPDES permits, Board members Mark Draper, Mark Dubois, and Susan Lessard may not participate in review of Nordic's Maine Pollution Discharge Elimination System and Waste Discharge License (MEPDES/WDL) application. Additionally, Mr. Draper and Mr. Dubois may not participate in review of Nordic's Chapter 115 Minor Source Air Emissions application because their employers hold Clean Air Act permits.

Given these limitations, there will be three panels of Board members and the hearing will be organized by application type as follows:

- Panel 1: Site Location of Development (Site Law) and Natural Resources Protection Act (NRPA) applications. All Board members may participate - Robert Duchesne, Robert Sanford, Alvin Ahlers¹, James Parker, Susan Lessard, Mark Draper, and Mark Dubois.
- Panel 2: Chapter 115 Minor Source Air Emissions application. Robert Duchesne, Robert Sanford, Alvin Ahlers, James Parker, Susan Lessard may participate.
- Panel 3, or “Core Group:” MPDES/WDL. Robert Duchesne, Robert Sanford, Alvin Ahlers, and James Parker may participate.

4. Organization of the Hearing

- A. General Organization. The general sequence will be as follows. The hearing will begin on Tuesday morning with a short overview of the proposed project presented by the applicant; the overview must be based on evidence in the record. Next will be the testimony, cross-examination, and Department staff and Board questioning of witnesses pertaining to the Site Law and NRPA hearing issues. If this is concluded before the end of the day on Tuesday, the Board will proceed with testimony and questions on the Chapter 115 application. If the Site Law/NRPA hearing issues do not conclude by the end of the day on Tuesday, the Board will proceed to the Chapter 115 issues on Wednesday. The hearing will conclude with the testimony and questions on the Waste Discharge License application.
- B. Public Participation. The entire hearing is open to the public. During the day, the Board will hear testimony from the applicant and intervenors. The Board will hear testimony from members of the public during an evening session on Tuesday, February 11, 2020 beginning at 6:00 p.m. In the event of postponement due to weather, the public session will be held as noticed on Wednesday, February 12, 2020 beginning at 6:00 p.m. Persons testifying during the evening session will be sworn and are subject to cross-examination by the parties and questions from Department staff and the Board. An intervenor group may not present evidence during the public session that should have been pre-filed and presented as part of the party’s case in chief. Members of an intervenor group may testify during the evening session provided the member is not an officer or Board member of the organization or group. However, intervenor groups should be aware that the time allowed for each member of the public to testify during the evening session may be limited.
- C. Request for Additional Evening Session. At the conference Upstream/NVC questioned whether a single evening session would afford all wishing to address the Board an opportunity to do so. Specifically, Upstream/NVC requested a second evening session for public comment that would follow testimony on Nordic’s MPDES/WDL application. Upstream/NVC argued that the proposed waste discharge is a major concern of the public.

¹ Mr. Ahlers’ has served two terms on the Board, and the Governor has nominated Steven Pelletier to fill the seat currently held by Mr. Ahlers. If Mr. Pelletier’s nomination is confirmed prior to the start of the hearing, he will replace Mr. Ahlers; otherwise, Mr. Ahlers will continue to serve until the Board issues its decisions on Nordic’s applications.

Response. As stated at the conference, the Board may limit time per person during the evening session so that all persons wanting to testify will have an opportunity to do so. If numbers warrant, the Board may decide at that time to continue the public session on Wednesday evening. In response to the request to hold an evening session after the close of the parties' testimony on the waste discharge application, the Board declines to do so as it is difficult to predict the end of the hearing and the three Board members who are not able to participate in review of the waste discharge application will already have left the hearing. To address this concern, the Board will leave the record open for written comments from members of the public until Tuesday, **February 18, 2020 at 5:00 p.m.** so that members of the public may submit additional written comments after hearing all of the testimony.

- D. Opening Statements. As discussed at the conference, the parties may make opening statements immediately prior to the testimony of their first witness.
- E. Summary of Pre-filed Testimony. Witnesses are asked to summarize their testimony, weaving together their direct and rebuttal testimony. The majority of the time at the hearing will be allocated for cross-examination and questions from Department staff, Board counsel, and Board members.
- F. Sequence of Testimony and Cross-Examination. In accordance with Chapter 3, for each application, the applicant's witnesses will testify first, followed by the intervenors' witnesses. The Board will draft a schedule for the hearing following receipt of the remaining pre-filed testimony and input from the parties on their requests for time to cross-examine witnesses. The order in which the intervenors will present their testimony, and the order in which cross-examination will occur, will be decided based on both the intervenors' positions on the proposed project and the amount of time necessary for each party.
- G. Allocation of Time. Parties are asked to provide by **January 29, 2020 at noon** a list of the witnesses they intend to cross-examine and an estimate of the amount of time requested for cross per witness. Following input from the parties, the Board will distribute a draft schedule for the hearing. In some instances, it may be appropriate for two or more witnesses who have pre-filed testimony on a given issue to testify in a panel format, followed by cross-examination of the panel. If a party intends to present two or more of its witnesses as a panel, please notify the Board staff by January 29th, the same date for submitting the time requests for cross-examination.
- H. Questions from the Public. If a member of the public in attendance at the daytime portion of the hearing wants a particular question to be asked of a party's witness, the person may submit the question in writing to Board staff. Index cards will be located on a table at the rear of the hearing room for members of the public to write down such questions, and Board staff will periodically gather the index cards. If the Presiding Officer determines that the question is relevant and not repetitive, the Presiding Officer may pose the question to the witness as time permits.

- I. Role of Department Staff. Parties are reminded that the role of Department staff in this proceeding is to analyze the applications and all evidence submitted and to gather facts on behalf of the Board, which includes asking questions of witnesses at the hearing. Department staff may ask questions of a witness at any time. After the hearing, Department staff will analyze the evidence in the record, and then will likely review the record with Board members in one or more deliberative sessions. A deliberative session of the Board on an application would be open to the public; however, the record is closed at that point and neither the parties nor members of the public may address the Board. Following any deliberative session, the Department staff will draft a recommendation (in the form of a draft Board Order) for the Board's consideration. Parties and the public will have an opportunity to submit written comment on the draft order; however, the written comments must be based on the record and may not include new evidence. After the Department staff has considered the written comments received and possibly made changes to the order in response to those comments, the Board will consider the proposed order for a decision at a regularly scheduled Board meeting.

5. Evidence

- A. Relevancy. As set forth in Chapter 3, §20 of the Department's rules, evidence will be admitted if it is relevant and material to the subject matter 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.
- B. Objections. Objections to evidence that occur during the hearing must be made at the time a party believes an objectionable action has occurred. An objecting party should stand to be recognized and state for the record the party objecting. The witness whose testimony is the subject of the objection should wait until after the ruling on the objection before proceeding with testimony.
- C. Exhibits. Exhibits submitted with a party's pre-filed testimony may be enlarged for presentation purposes but must not otherwise be altered. Any enlarged exhibits must be clearly identified with the number of the exhibit. In limited circumstances, the Presiding Officer may admit additional exhibits at that hearing for impeachment purposes. If a party intends to use an exhibit for impeachment purposes, the party should bring to the hearing 25 copies of the exhibit, all of which should be marked with an exhibit number. Before using the exhibit, the party should state that the exhibit is a newly proposed exhibit. PowerPoint presentations which consist of text simply summarizing the major points of a witness' pre-filed testimony may be used as demonstratives, but copies must be provided to Department, Board staff and the parties in advance of the hearing.
- D. Types of Evidence. In response to a question at the pre-hearing conference, the Assistant Attorney General clarified that both sworn testimony and written comments are evidence. The parties' sworn testimony is subject to cross-examination at the hearing. On topics that are the subject of the hearing, the parties should submit their evidence as sworn testimony for the hearing so that it can be subject to cross-examination. On non-hearing topics, the parties may submit written comments into the

record. Written comments submitted into the record by non-parties (members of the public) on topics that are the subject of the hearing are not subject to cross examination and for that reason may be afforded different weight than sworn testimony. All evidence submitted is considered by the Board and Department staff when evaluating compliance with the licensing criteria.

6. Additional Information Requests

- A. Enlarged Site Maps. At the Board's request, Nordic agreed to provide enlarged maps of the site and proposed project for display in the hearing room to assist the Board, parties, and the public with understanding references to the site by persons testifying. Enlarged maps should be selected from the application and/or the pre-filed testimony and appropriately identified. Intervenor Upstream/NVC suggested that the parties consult with Nordic on the selection of maps for this purpose.

Ruling. Parties are encouraged to agree, if possible, on the maps to be enlarged, but Nordic may select the maps to be enlarged.

- B. Request for Map. Ms. Tucker, representing intervenors Mabee, Grace and the Lobstering Representatives, requested an electronic copy of Nordic's map of alternative pipeline routes from the NRPA application (which the Board understands to be Figure 2-6 in Appendix 2.F. of the NRPA application). Ms. Tucker commented that portions of the copy included with the pre-filed testimony are not fully legible and that the electronic version of the map cannot be expanded to make all lines and notations readable. Nordic responded that a clear electronic copy of Map CS 101 (Intake/Discharge Piping Plan and Profile), which is the base map for the requested figure, is available with the application materials on the Department's webpage.

Ruling. Department staff has previously reviewed both Figure 2-6 in Appendix A of the NRPA application and Map CS 101 and determined that together they provide the requested information. Nordic is not required to provide additional copies of the maps in question.

- C. Land Survey Documents. Ms. Tucker requested that the Board request that the applicant submit copies of the signed and sealed surveys associated with the various deeds filed as part of Nordic's application.

Ruling. The Board has previously determined that it is not reconsidering the Commissioner's determination of the applicant's showing of sufficient Title, Right or Interest in the property proposed for development or use, and this issue is not a hearing issue.

- D. Air Modeling Information. Michael Lannan, on behalf of Intervenor Northport Village Corporation, stated that he spoke with Department staff regarding its modeling of air emissions from Nordic's proposed facility and asked if the Department would be conducting additional modeling prior to the hearing.

Response. The Department's modeling of emissions from Nordic's proposed facility is presented in a December 18, 2019 memorandum to the file from Kevin Ostrowski, Department Senior Meteorologist. Department staff will not be conducting additional or revised air emissions modeling prior to the hearing. The deadline for parties to submit any comments on Nordic's Chapter 115 application or the Department's modeling of the potential air emissions is Friday, **January 17th**. Following close of the record, staff will review all testimony and comments received prior to drafting its recommendation on the application for the Board's consideration.

- E. Nordic's Request for Information from Upstream/NVC. At the conference, Nordic stated that it had not received the additional context information from Upstream/NVC regarding the source of Attachment A to Mr. Lannan's testimony on odor as required by the Sixth Procedural Order. In response, Mr. Lannan stated that the information had been excerpted from a book and he was actively seeking permission to reproduce the source document or portions thereof. Following this discussion at the conference, the Presiding Officer understood that Mr. Lannan would work with Nordic to provide the requested context for Mr. Lannan's Attachment A.

By electronic mail on Monday, January 13, 2020 copied to the Board's counsel, Nordic informed Mr. Lannan that it had not received the information at issue on Attachment A and requested that Mr. Lannan withdraw the exhibit; alternatively, Nordic stated that it would ask the Board to strike Attachment A. Mr. Lannan subsequently submitted supporting documents to Nordic and the Board.

Ruling. Mr. Lannan's submissions of January 13, 2020 are responsive. His testimony on odor including Attachment A will remain in the record and his submissions of January 13, 2020 will be admitted.

- F. Reconsideration of Title, Right or Interest. Prior to the pre-hearing conference, on January 8, 2020, Ms. Tucker, on behalf of Intervenors Mabee and Grace, submitted a new request that the Board reconsider the issue of whether Nordic has demonstrated sufficient Title, Right or Interest in the intertidal land that is part of the property proposed for use in the project. In support of her request, she submitted a transcript of a telephonic oral argument on a motion in the federal court case being litigated between Mr. Mabee/Ms. Grace and Mr. and Ms. Eckrote that refers to the renewal of the easement option submitted by Nordic on January 7, 2020.

Deadline. Nordic and any other party may respond to this request by **January 21, 2020 at 5:00 p.m.**

7. Hearing Logistics

- A. Hearing Location. The hearing will be held at the Hutchinson Center in Belfast. The facility is ADA compliant. Parties were reminded to notify the Board if any witness requires special accommodations.

- B. Recording/Transcription. The Board has arranged for the hearing to be recorded and transcribed by a reporter service. To ensure an adequate is made of the hearing, parties should speak clearly and all responses to questions must be audible. If an exhibit is referenced, the record must reflect the exhibit number. A transcript of the hearing will be made available following the hearing.
- C. Audio/Visual Equipment. The Board noted that the parties are responsible for ensuring that they have adequate equipment to present their testimony. The Board understands that the Hutchinson Center's projection equipment is available for use by the parties.
- D. Disruptive Behavior. Disruptive behavior will not be tolerated at the hearing. Booing and cheering will not be allowed during the hearing or in the hearing room.
- E. Meals and Refreshments. Parties will be responsible for their own refreshments and meals. Drinking water will be provided at the rear of the hearing room. To maximize time available for testimony and cross-examination, meal breaks will be limited in length. Parties should plan accordingly.

DONE AND DATED AT AUGUSTA, MAINE THIS 13th DAY OF JANUARY, 2020.

BOARD OF ENVIRONMENTAL PROTECTION



BY: _____
Robert S. Duchesne, Presiding Officer