

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

Susan M. Lessard, Chair

William F. Hinkel
Executive Analyst

Ruth Ann Burke
Board Clerk

August 16, 2023

SENT VIA ELECTRONIC MAIL ONLY

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Re: Presiding Officer ruling on objections of Jeffrey R. Mabee and Judith B. Grace, the Maine Lobstering Union, commercial crab and lobster license holders David Black and Wayne Canning, and Friends of the Harriet L. Hartley Conservation Area; Upstream Watch; and Northport Village Corporation

To The Service List:

On July 26, 2023, I issued a letter outlining the process and defining the scope of the Board of Environmental Protection (Board) proceedings following judicial orders of remand (Remand Orders) from the Maine Law Court and the Maine Superior Court, Business & Consumer Docket.¹ In that letter I notified the persons on the service list that the Board would be taking official notice of three documents. On August 9, 2023, Attorney Tucker, on behalf of Jeffrey R. Mabee and Judith B. Grace, the Maine Lobstering Union, commercial crab and lobster license holders David Black and Wayne Canning, and Friends of the Harriet L. Hartley Conservation Area (collectively Mabee-Grace), Upstream Watch, and Michael Lannan on behalf of Northport Village Corporation filed objections to the process outlined in my letter, objections to the official notice documents, and requests that other documents be officially noticed. At my instruction, the Board's Executive Analyst notified the persons on the service list that Nordic Aquafarms, Inc. could submit a response to the objections and requests, which it did on August 14, 2023, and that the deadline to file briefs on the remand question was extended to August 21, 2023.

¹ Law Court Docket No. BCD-22-48 and Superior Court Docket No. BCD-APP-2021-009.

Mabee-Grace, Upstream Watch, and Northport Village Corporation requested that the Board either take official notice of additional documents or reopen the record to accept new evidence. Mabee-Grace and Upstream Watch also argue that the matter before the Board on remand is an adjudicatory proceeding governed by Chapter 3, the Board's Rules Concerning the Conduct of Licensing Hearings, and that the Board procedure I previously outlined fails to comply with Chapter 3 requirements and violates their due process rights.

Chapter 3 governs the conduct of licensing hearings, and the Board has not scheduled a hearing on the Remand Orders. Nevertheless, the procedure outlined for official notice in Chapter 3, § 20(C) was followed by the Board here. The service list was notified of the Board's intention to take official notice of certain documents, and objections were received. The objections filed regarding official notice, the requests that the Board take official notice of additional documents, and Nordic's responses to the objections and requests were all considered.

The requests to officially notice additional documents and to admit additional evidence on the issue of Nordic's title, right, or interest (TRI) in the property at issue and other aspects of the project as a whole are denied. The Law Court did not instruct the Board to re-examine the decisions of the Commissioner, the Presiding Officer, and the Board that Nordic had provided sufficient evidence of TRI for the applications to be processed and decided pursuant to Chapter 2, § 11(D). The scope of the matter before the Board is the narrow legal question the Law Court posed on remand: the impact, if any, of the quiet title decision, *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, on the permits issued by the Board. Therefore, and as more fully noted in my letter dated July 26, 2023, no additional evidence is being solicited or permitted in this remand proceeding.

Officially-noticed documents

There were no objections to the Board taking official notice of the first two documents listed in the July 26, 2023, letter. Although there were objections to the third document, the Commissioner's Suspension Order dated June 21, 2023, they seem to stem primarily due to uncertainty about the meaning of the statement, "including the fact of matters referenced by the Suspension Order such as the City of Belfast's eminent domain actions and related Superior Court challenges to those actions in BELSC-RE-2021-0007." As a point of clarification, only the Suspension Order document is officially noticed. The filings in the other cases mentioned in the Suspension Order that relate to this proposed project are not officially noticed, but those filing briefs here may refer in their briefs and oral argument to facts referenced in the Suspension Order.

Briefing schedule and scope

Briefs may be filed on the limited legal question of the impact, if any, of the Law Court's quiet title decision on the Board's approvals of the Nordic permits. The deadline for submitting a brief is **5:00 p.m. on August 21, 2023**. 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, no reply briefs or other filings are permitted.

FILING OF DOCUMENTS AND SERVICE LIST

All filings in this matter must be copied to the enclosed service list.² It is the responsibility of each participant's representative to circulate filings to other members of its organization as it sees fit. The filing of any submission or the service of any document or communication is deemed complete when the document or communication is sent to the designated representative by electronic mail, U.S. mail, in-hand delivery, or telefax. Electronic mail to the Board is preferred, provided the signed original document is received by the Board within five working days of the filing date.

Filings with the Board must be directed to:

Robert Duchesne, Presiding Officer
Board of Environmental Protection
c/o Ruth Ann Burke
17 State House Station
Augusta, ME 04333-0017
ruth.a.burke@maine.gov

If you have any questions, you may contact Board Executive Analyst William F. Hinkel at bill.hinkel@maine.gov or (207) 314-1458 or Assistant Attorney General Peggy Bensinger at peggy.bensinger@maine.gov (207) 626-8578.

Sincerely,



Robert Duchesne
Presiding Officer
Board of Environmental Protection

cc: Service List (August 16, 2023)

Enclosure: Service List (August 16, 2023)

² At her request, the Service List was revised on August 15, 2023, to remove Carrie Byron.

Enclosure(s)

Board of Environmental Protection
In the Matter of the Court Ordered Remands to the Board
Law Court Docket No. BCD-2022-48; Superior Court Docket No. BCD-AP-2021-009
Nordic Aquafarms, Inc.
Service List
Revised August 16, 2023

Board of Environmental Protection

Filings with the Board must be directed to Ruth Ann Burke and, unless otherwise specified, are due by 5:00 p.m. on the filing date. Untimely filings may be rejected.

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Department of Environmental Protection

OFFICE OF THE COMMISSIONER

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**Board of Environmental Protection
In the Matter of the Court Ordered Remands to the Board
Law Court Docket No. BCD-2022-48; Superior Court Docket No. BCD-AP-2021-009
Nordic Aquafarms, Inc.
Service List
Revised August 16, 2023**

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The Fish Are Okay

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