

After the close of the record, the DEP Staff reviewed the data submitted by Nordic and others and determined that the project failed to meet antidegradation standards. With its Memorandum RE: Nordic Aquafarms, Inc.-Application for a Maine Pollutant Discharge Elimination System (MEPDES) Permits submitted to the Board of Environmental Protection for the March 20 & 21 Board Meeting-Deliberative Session, the DEP staff made the following findings regarding Total Nitrogen:

*“For the protection of dissolved oxygen as the environmental response indicator, based on Department staff review and analysis to date, the proposed discharge concentration of 23 mg/L would not meet the default antidegradation licensing criteria threshold of 12 mg/L at full flow if permitted. This is because a proposed discharge of 23 mg/L would consume 38% of the remaining assimilative capacity of the receiving water.”

* “For the protection of eelgrass as the indicator, based on Department staff review and analysis to date, the proposed discharge concentration of 23 mg/L would not meet the default antidegradation licensing criteria threshold of 12 mg/L at full flow. This is because a proposed discharge value of 23 mg/L would consume 33% of the remaining assimilative capacity of the receiving water.”

*“Based on the default antidegradation licensing criteria and Department staff review and analysis to date, F consumption of no more than 20% of the remaining assimilative capacity of the receiving water. According to the state’s antidegradation policy, and based upon Department staff’s historical practice and best professional experience and judgment, consuming more than 20% of the remaining assimilative capacity of the receiving water is considered a lowering of the water quality and the applicant would only be able to meet the

standard if it established and the Department made findings required by Maine law, 38 M.R.S. Section 464(4)(F)(5).”

C. At the Deliberative Session, Mr. Wood used Ex Parte, Unsworn Testimony from unidentified representatives of Nordic to Change the DEP’s Staff’s Findings Regarding Total Nitrogen.

At the May 20, 2020 Deliberative Hearing, Mr. Wood testified that based on his post-hearing communications with representatives of Nordic, he had determined that the DEP Staff’s findings on total nitrogen were based on incorrect factors. The factors had previously been provided by Nordic as part of the record.

During his testimony, Mr. Wood did not identify who called him on behalf of Nordic to discuss the DEP’s findings on Total Nitrogen. The Memorandum prepared by the DEP staff for the Deliberative Hearing was never amended to provide the basis for Mr. Wood’s change in position. The information that Mr. Woods relied upon in changing the DEP staff analysis was not made part of the record. The person providing Mr. Woods with the new technical information was never identified or put under oath, and the interested parties were never provided an opportunity to cross-examine the Nordic representative on these matters. Finally, the Board was not provided any of this new information in advance of the Deliberative Session and the Board, like the intervenors, were not provided with the evidentiary basis for Mr. Wood’s change in DEP’s staffs analysis regarding Total Nitrogen.

D. Mr. Wood’s Testimony on Total Nitrogen Should be Stricken from the Record.

The Nordic proceedings are governed by the Maine Administrative Procedures Act, the Maine Department of Environmental Rules, and the Procedural Orders issued by the Board. Under the relevant procedural rules, Nordic is barred from ex-parte submitting new

technical evidence to a DEP official resulting in the DEP official utilizing the unsworn evidence to alter DEP Staff findings, after the evidentiary record is closed and without the parties having an opportunity to hear the new evidence and to cross-examine the source of the new evidence.

The Maine Administrative Procedures Act, 5 MRSA Section 9056, requires: "... every party shall have the right to present evidence and arguments on all issues, and at any hearing to call and examine witnesses and to make oral cross examination of any person present and testifying."

Similarly, the Maine Department of Environmental Protection's Rules Concerning Conduct of License Hearings (Chapter 3) provides: "The opportunity for hearing shall be afforded without undue delay every party has the right to present evidence and argument on all issues in contention, and at any hearing to call and examine witnesses and to make oral cross-examination of any person present and testifying."

With its Second Procedural Order, the Board confirmed that the Nordic hearing would be conducted in accordance with the Maine Procedure act and the DEP's Rules.

The evidentiary record supported the DEP's staff's findings that the Nordic application did not meet antidegradation criteria relating to Total Nitrogen. At the time the DEP staff did its memorandum to the Board for the Deliberative Hearing, the record was closed and new testimony or submission of evidence from Nordic and other parties on total nitrogen was prohibited.

The use of ex parte technical information, at this stage of the administrative proceeding, clearly violates the procedural rules set by state law and the Board. The new technical evidence was submitted by Mr. Woods to the Board without the new technical information

being part of the evidentiary record, and without the parties being afforded an opportunity to cross-examine and present opposing arguments.

Conclusion

For all the above reasons, Mr. Woods' testimony contradicting the Total Nitrogen section of the DEP memorandum for the Deliberative Hearing should be Stricken from the Record.

INTERVENORS
NORTHPORT VILLAGE CORPORATION,
UPSTREAM WATCH

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