Talk by atty Charley Bering June 21, 2022 in Belfast Maine, Bering, like atty Lossee represents Belfast based conservation NGO Upstream Watch in their ongoing litigation

CHARLEY BERING said

“Thank you, David [Lossee] . I'm not at all sure I'm better at explaining anything than yo u are. But I'll give it my best shot.

The late Justice Scalia had a very simple statement: "The words of a statute mean what they say." And Scalia made that statement, actually said it in a case, which I can't remember the name of.

But he also wrote in a text that he wrote about interpreting laws, that he distinguished (and this is what he is most known for) he distinguished between original intent and original meaning.

And he was opposed to the search for the original intent, except to the extent that it could be discerned from the meaning. And he emphasized the meaning of the words.

And in the context of the Clean Water Act, one thing Scalia said is: if a statute contains a statement of intent, that's part of the law, and it has just as much force as the rest of the law.

In the context of the Clean Water Act, we have Section 101, which is a section that says that the purpose of the law is "fishable, swimmable water". And the goal of the law is "fishable, swimmable water" plus the elimination of discharge of pollutants to the waters of the United States.

And I want to make a quick distinction here. That means "to the waters of the United States." If you have wastewater that has some pollutants in it, and don't discharge it, you are not discharging in violation of the Clean Water Act.

And if you discharge clean water after removing the pollutants, that's also not a violation, at least not as a general matter; there may be contexts in which there's a reason why it might be.

But in general, the intent of the Act, to achieve zero discharge, is just as much enforced now as it ever was. And the Words Mean What They Say.

I want to talk about the effluent standards, as they're called; the standards governing discharges from a facility when it applies for a permit.

There are two kinds of discharge limits that the Clean Water Act calls for, and it's a stepwise process, either the permit contains technology based standards, or, if those are insufficient to prevent the degradation of water quality and the receiving water, then the permit has to have water quality based limits.

So you may use the word standards, and it specifically limits, in the context of the permit, the concentrations of pollutants in the discharge. Those limits can be based on standards in the Act, but the permit limit is what governs the discharge itself.

Now, when DEP issued the permit to Nordic, they went through a long list. In their final decision, in November of 2019. they described at length Nordic's proposed discharge system.

And they never actually said this. I don't remember them saying that this represented the best available technology, or the best technology in use.

And they also did not base the limits on what that discharge technology could achieve. Nordic proposed this system and proposed a limit of 23 milligrams per liter for dissolved nitrogen. Dissolved nitrogen is the pollutant of concern to us here and I'll get get to that in a minute.

But I want to say that DEP considered the fate of nitrogen in the receiving waters. They spent a great deal of time modeling it and reviewing the models, and they determined that 23 milligrams per liter was too high.

And they did what the statute called on them to do: they came up with a water quality based limit of 21 milligrams per liter, which is only 3% less than 23.

But it turns out that it is a significant difference and there is nothing in the record, which tells DEP how Nordic can meet that limit.

So DEP ended up finding that this discharge as it would be, as the applicant said it would be from their system would cause deleterious.... (And that's not, that's the word they use). But I'm trying to use a non technical term, it would harm water quality.

And the limit that DEP chose was not, according to the record, something that DEP had any evidence that the company could meet.

Now, I read that to mean that when the permit is issued, the company can build its system as it was designed as it was described in the final decision issuing the permit, and begin discharging as soon as they have production up and running.

And to me, they're not going to meet the water quality based limit under those circumstances.

So there will be the kind of harm to water quality which DEP predicted. And that leaves me wondering how dep could possibly have made the determination, the water quality wouldn't be harmed. Now, I know what they said they said, it's not they won't be hard, because the permit has a limit of 21 milligrams per liter, and that will protect the water.

Now, we also have in Maine, something called the Site Law, the law for protecting sites, when they're chosen, and I forget the exact terms of this, the formal name of it. But the site law requires a determination from DEP that there will be no adverse effects to... air quality and water quality and a lot of other interests.

I don't understand how DEP could in one breath, say they can't meet this discharge. We have no evidence that they can meet this limit. And if they discharge at a higher amount, higher concentration, there will be harm to water quality. And then, make a finding as required by the Site Law, that there won't be harm to water quality.

And it's a curious fact that in the Site Law decision that DEP issues, they don't make that finding. What they do instead is try to incorporate by reference, the water discharge permit, which also doesn't make that finding, and in fact tells us that there will be water quality harm.

And so I am very much at a loss as to how this permit will be upheld, when we finally get a decision from the what we call the Law Court. The Maine SJC.

We have a brief in front of them, and we're waiting for a response from the state. Two responses: one from the state, one from Nordic. We will have an opportunity to respond to those responses. And then the SJC will grant oral argument scheduled at sometime after those things are filed. And sometime after that they'll issue a decision. I

I have no idea how long that process will last. But when I clerked for the SJC, Vincent McKusick was the Chief Justice and he was determined to reduce the backlog and we did it. We got the backlog down to a couple of months. As I recall, it may have been more than that. But it was not a year more than a year and it had been up to three years at times.

So I will be confident when we have oral argument that we will have a wait of only a few months before we get a decision. So sometimes this winter.And and we'll see what they do with it.

Now, I also want to talk about how technology-based standards are arrived at and what what they look like.

There are several different terms in both Maine's, and the federal statute that describe various levels of water quality, or technology based standards.

Because of the amount of time that's gone by the only ones that really matter now, are best available technology and new source performance standards, which are for facilities that aren't have never been built or discharges that have never been operated before.

Now there is different standards. Their best available technology is now the standard for toxic pollutants. And there are a large number of toxic pollutants, I believe it's 130 now, and those pollutants are addressed whenever EPA develops a categorical standard that discharges any of them.

Here, we're concerned with nitrogen,.There are other pollutants in Nordic's proposed discharge, and some of those will be eliminated by Nordic streaming system. But most of them are, in fact, as is nitrogen, actually nutrients and therefore not toxic pollutants.

However, this is a facility that is brand new on a site that does nothing never had anything built on it. It is quintessentially a new source. And it should be subject to a new source performance standard.

And that's the argument one of the arguments we make in our appeal. In this permit, the EP did not do that. It didn't even talk about new source performance standards, ass I recall. Maybe I've missed something.

But the standard that they set is something, as I just mentioned, that the technology that will be put in use under this can't meet.

Now, the way that you identify a technology based standard is you consider that's the word in the statute, existing technology. And even if that word weren't there in their statute, the idea that this technology has to be the best technology necessarily implies that there will be some comparison between the proposed technology and other technology and uses or treatment technology and uses at other facilities.

And we Upstream Watch recommended other facilities that DEP should look at. That was filed right at the beginning of the permitting process in December of 2018.

That was before the permitting hearings began and not after the permit was issued. The recommendation made by Upstream- that what's called "pre-filed testimony". it was to qualify expert witnesses to testify.

Upstream made the same recommendation repeatedly in comments on draft permits, in a brief they filed after the completion of the hearing. And again, in the fall of 2019. And in comments on the draft water permit.

The recommendation was the DEP should consider three companies that are working to achieve but in fact, were achieving zero discharge. those companies were coming

AquaMoti I don't know if I have the pronunciation. an Israeli company that as I understand it was building new companies in Canada and even in in the West in Nevada, I believe, and working very hard to improve its technology all the time. And there's nothing wrong with they're doing that; that's what you would expect them to do.

But the fact is that they were, in their operating facilities, they were achieving a discharge that doesn't discharge pollutants to freshwater. Now, I'm saying that at a memory and I it's possible I have Aqua move wrong.

But I know that the other two companies"Superior Fresh, which is a Midwestern company that discharges treated wastewater as an irrigation source, and the pollutants in that discharge do not go to the waters of the United States.

And the other company is the best of them say Sustainable Blue which is located in Nova Scotia, and Upstream supporters have been there. Our expert witness has talked to their manager.

They have said, and we put this in the record of DEP;s hearing, that they could put their technology to use at the scale of the facility that Nordic has proposed and achieve zero discharge.

And that's in the record and it's the ONLY thing on the record that is on the subject of zero discharge, because DEP never responded to any of the comments submitted by Upstream.

. And that is a violation on their part of a requirement that is in EPA regulations and is identically in DEPS regulations. The exception in that requirement is that they're not required to respond to insignificant error, and they are required to respond to significant comments.

And it is entirely beyond my understanding how they could have claimed, or thought that these comments about discharge technology from Upstream were insignificant. I don't believe they actually really thought that but I don't know what they did.

And I don't know WHY they did. The only thing I know is there is nothing in the record in the nature of any response to those comments.

So we end up with a record that shows the DEP did not consider other technologies in spite of what the statute says they should have done. And they really didn't have a basis of any kind for choosing a technology-based standard.

The outcome was they didn't choose a technology based standard at all.

But they did leave that extensive description of the proposed system in the permit. And the implication is that that's what the permit allows Nordic to build. I don't know what would happen. I don't know what DEP would do, if Nordic build something completely different from what the permit describes.

I think they might say, all we can enforce in this permit is the 21 milligram per liter water quality based permit limit. If you can do that, you're okay. And I have no idea how they would do that, because they never offered us anything. It doesn't mean they couldn't couldn't do it, it just means we haven't seen any plans to do it.

Now, one thing I want to conclude in that discussion is that the there have been a number of circuit court cases concerning zero discharge as a either a requirement in state regulations that are being reviewed by the circuit courts, or in some cases as a requirement that has been imposed on a given industry.

And we cited a number of these cases in our brief, and I just want to quote one of them, which described the zero discharge goal as a guiding star of the Clean Water Act. It should have been a moment of celebration, when the comment identifying a company that had achieved zero discharge was received.

But I don't know what DEP actually thought. All I know is they didn't do anything about that comment. So, I want to add that it's our information that there are three and there were four new NPDES permits for aquaculture facilities under consideration. Anyone can correct me if I'm wrong, I think that the there was one permit proposal that was denied, and I don't think it was by DEP.

So I don't know whether DEP says four or five. But there are a lot of proposals in the works coming down the pike. And I would expect that Nordic's permit would be treated as a model for those new applications.

I would expect to see, if that happens, that they would have the same findings about the alleged Best Available Technology. I don't know how they're going to justify that. Because DEP has already said that that would lead to water quality violations. I really don't know how those new permits are going to work.

And I think it will take some serious revision of thinking Now, when I was thinking about all this, and trying to take you through.

I know Dave and I agreed that we didn't want to talk about how the laws can be changed. I have a couple of ideas about that. And then recommendations which I'd like to offer.

One is that EPA has under the Clean Water Act an obligation to regularly review and if necessary, revise its existing federal categorical standards. It's under Section 304-M of the Act. And they have the schedule and a plan that identifies several industries that they will review, one of which is aquaculture.

And that's because in 2004, EPA issued aquaculture regulations, federal categorical regulations, which contained no discharge limits. The only standards they created were what's called Best Management Practices.

Now, that were may have been the state of the knowledge of the industry in 2004. But that was almost 20 years ago. And what we know now tells us it is high time for them to revisit those regulations.

And I would suggest as a possible end goal of advocacy, that we either get EPA to do that, or we get Congress to tell them to do it. Congress could. in fact, tell them to do review of aquaculture in light of the goals of the Clean Water Act .

Implying that if they find that zero discharge technology is in use, and could be used, that should be the best available technology.

And that would be the federal term. Under the Maine statute, it would be the best practical treatment. But that's the standard that I would envision and hope to see for the future of aquaculture on the coast of Maine.

And I want to emphasize, that's what Upstream and its members are advocating. This is not an attempt to stop aquaculture from being developed. It's not even as an attempt to stop Nordic from being built. And I think that has always been clear, Upstream has always said that.

And I hope that the word gets around that that's what this is about. Because this is not -and I hope nobody would ever use in reference to what we're doing that phrase NIMBY. That's not what we're doing.

So in conclusion, I have those recommendations. And I want to add one other thing that could be done, in terms of an amendment to Maine statute, the Maine legislature could do this:

There should be a rule prohibiting DEP from issuing a water quality-based standard in an MEPDES permit without a record showing how the company would meet that standard. Would meet that limit.

And the there should be a compliance schedule in the permit, which requires them to achieve compliance with that limit within a reasonable amount of time.

And the technology should have been shown to the agency. It should be in a record of the permit when it's issued. And there should never be another permit that has a water quality based limit with no evidence that it can be met.

So I'm going to conclude there and thank you very much for listening

Notes:

1 The above by attorney Charley Bering and the Lossee speech were transcribed from an mp3 meeting recording using otter.ai

2, Text within [parenthese marks] are clarifications by me after the speech was transcribed .