

Talk by atty David Lossee. June 21, 2022 in Belfast Maine, Lossee represents Belfast based conservation NGO Upstream Watch in their ongoing successful appeals, to the Maine Supreme Judicial Court, of DEP's unlawful approvals of permits for the Nordic Aquafarms company's proposed land based salmon farm that would discharge into Penobscot Bay near the mouth of the Little River. In his talk below, Lossee describes also two of the present day Board of Environmental Protection's worst practices: Permit Deferral and Issue Avoidance.

***On June 21, 2022 David Lossee said***

“Good evening, everyone. And thank you for allowing me to join you this afternoon

“A few months ago, a Maine resident asked me what legislation I thought Sierra Club might want to propose to the next session of the legislature. He asked me to in the context of my having represented Upstream Watch in the Nordic Aquafarm Application.

*And I know that David Noyes from Nordic Aquafarms [ his client's opponent] is here. Welcome, David.*

I told my Maine friend I thought that **no new laws were necessary**. Politicians want to take credit for doing something -with all due respect. And so they pass laws whether we need them or not.

In my opinion, environmental laws are just fine. ***They're improperly implemented. And that's what I want to talk about tonight.*** That's where we need help.

Honoring [the 50th anniversary of the Clean Water Act](#), I'll use that Act as an example, and where some factual examples are needed, I may use the Nordic Aqua Farms application.

But this is not about Nordic. This is about the [Clean Water Act](#). That act was proposed and debated and passed as I went from a second year law student to becoming a lawyer being sworn in in 1971. I remember the chief sponsor of that Clean Water Act was Senator Muskie from the great state of Maine.

When EPA first opened its doors in 1970, its authority to enforce pollution laws was very weak. They didn't know the power to write effluent guidelines. Had only general authority to require secondary treatment.

However, in the summer of 1969, sparks from a passing train showered down on the Cuyahoga River in Cleveland, Ohio. The river caught on fire, and it burned. And that was the ninth time that river caught on fire. It was so frequent that locals hardly took the time to notice they simply put out the blaze, and what about their business.

But the publicity from that ninth event finally drew the public eye to the issue. President Nixon mentioned it in his State of the Union address. When he asked for a Clean Water Act, federal lawmakers took action, passing the Clean Water Act. Both parties. I know we don't believe that happens anymore. It did.

Today, the Clean Water Act protects the quality of America's water through direct regulation of water pollutants, and their points of origin. The Clean Water Act was passed at a time when about 60% of America's waterways, were not fishable or swimmable 60%. Today, in part because of the Clean Water Act, less than 40% of our waters are not fishable and swimmable, representing 20-25% improvement. It's good but not good enough.

Well, what did the Clean Water Act do? It established a basic structure for regulating pollutant discharges into the waters the United States. It gave the EPA the authority which it hadn't previously had, to implement pollution control programs such as setting wastewater standards for industry. It funded the construction of sewer treatment plants, under construction grants programs, recognized the important need to address nonpoint source pollution, that is pollution which gets into the waterways, from our fields from our lawns, not from the from the end of a pipe.

But most important, it made it unlawful for any person to discharge any pollutant from a point source into the Navigable Waters of the United States, unless a permit had been obtained under the provisions of the Clean Water Act.

There's a process for doing that called the NPDES, or National Pollutant Discharge Elimination System. Let's look at the name of that permitting authority:

National: all over the US. Nobody's exempt Pollutant Discharge Elimination System: It's a system to eliminate discharges of pollutants. That's the system under which you get a permit. A system gives you a permit, the goal of which is to eliminate pollutant discharges, the very things you're getting a permit for.

It was a bold, bold statement by Congress.

Well, the goal of the Clean Water Act was to restore and maintain the chemical, physical and biological integrity of the nation's waters. They set two interim goals. The first was to achieve the swimmable, fishable standard by 1983. Didn't make it. The second was to eliminate all discharges of pollutants into the navigable waters by 1985. Didn't make that either.

But those goals of the Clean Water Act are STILL the goals of the Clean Water Act. And it's what we strive for today. fishable and swimmable and eliminate all discharges of pollutants into the waters of the United States.

Well it was passed by Congress, but it's implemented by the states, primarily, The states were commanded to create water quality standards, which is like a roadmap for achieving the goals of the Clean Water Act within each state.

Each state had to designate the uses of each water body in the state, establish numeric, biological and narrative criteria to protect those uses, and keep the already good water quality from being denigrated.

**An example of this is that the upper Penobscot Bay where the Nordic discharge would take place is classified as SB,** which is the second highest standard. Pretty good, considering once upon a time there was chicken waste from Belfast coming out into the bay, and it was an awful mess. It's now the second highest quality, we're not sure if they could actually ever achieve anything any higher, but it's something to be proud of, and it's gonna be protected.

Well, the idea of the NPDES permitting process was to delegate that to the states. The EPA wanted the states to take that over. The state had to qualify to take that over. [NPDES = National Pollution Discharge Elimination System]

Qualification required a letter from the governor requesting it, a memorandum of agreement between the state and EPA, a description of the program and how it's actually going to work within that state. A statement of authority by the Attorney General, and an examination of the underlying state laws and regulations. And they've all got to be consistent with federal law and consistent with the Clean Water Act.

**In 1973, that's what I had to do for the Connecticut legislature to take all the Connecticut water laws and try and retool them to work under the federal Clean Water Act.** Connecticut had a goal of becoming the first industrialized state in the union to receive delegation of permitting authority from EPA. And they made it.

Maine got its authority in 2001. 30 years after the Act was passed, and it became available. Why did it take 30 years? I don't know the answer. But I asked the question.

It took Connecticut, four months. I was there. I saw it. Why did Maine take 30 years?

In any event, once EPA approves the program, the state assumes the permitting authority. And instead of everybody in Maine having to go to Boston for a permit, we can go to Augusta. And it has to be consistent with federal and state law.

**But**, when a state says 'Well, we interpret that law differently. We're going to do it our own way.'... now we got a problem.

And this is what I meant when I said *we've got to obey the law as written*. Let me give you an example of two things that I've encountered with the Maine DEP. That, I think, subvert the congressional intent.

**THE FIRST I CALL PERMIT DEFERRAL"** . Let's assume a permit requires a disclosure of nine things, nine things the applicants got to show in order to get a permit. Well, the applicant may be only able to accomplish six and they may say to the state "Gee, I'd like to do this. But I can only do six of the nine."

A favorite applicant may very well be told, 'Do six of the nine. Tell you what we'll do with the other three: We'll ignore them for now. And when we give you a permit, we'll make it a condition of the permit that you do the other three. Well, what does that do? It takes three of the nine requirements out of the hearing process! Gone. Poof.

They don't show up again until after the permit is awarded. And lo and behold, there's a condition saying that the applicant has to do what they were supposed to have done before they filed the application.

That's clever trick number one. It takes the issues off the table, it takes them out of the hearing process. And in my opinion, it denies you and me and our towns due process of law, because we cannot address those issues in the hearing if the issues aren't in the hearing!.

**SECOND IS ISSUE AVOIDANCE.** At the beginning of an appeal process, the chair of the Board of Environmental Protection, which serves as a hearing adjudicator for DEP will say, "Gee, we're gonna have a hearing. What will the topics be in our hearing?"

And people like me would say, "the application itself. All the requirements."

Chair says:” that can't happen. It will be too much. We can't give you two weeks of our lives. We're all volunteers here. So we've got to narrow this down. Everybody come up with a list”. So you come up with a list. And the applicant comes up with a list. And the Department then determines what's going to survive and actually go to hearing

Do you know what they took off the list that I requested? Carbon footprint, carbon impact of this project! The climate change impact of this project. "Oh, no, not fit subject for a hearing."

Other questions were put by the wayside as well. For example, where does the [land-based fishfarm] waste go when it comes out of the pipe?

The Nordic case, just as an example: 7.7 billion gallons per day at full build of treated fish waste. Where's it going to go? They were asked the question.

Upstream Watch put on testimony by a professor from University of Maine with 37 years experience studying the Gulf of Maine; where the currents going, what have you got. He was ignored. Ignored,

**Instead?** A permit condition. Listen to this carefully. "Within two years of achieving full production, the applicant is to begin a study to determine where the waste goes."

Within two years of full production? How about the years that don't make full production? How about the years doing 60% 70, 80 or 90%? Ramping up. All those years: don't know where the waste is going!. And then, while they do the study, don't know where it's going!.

And what happens when the study is complete? The permit condition doesn't say permit avoidance or permit deferral. It's a problem.

Another question that was asked but not answered: what's in the fish food that constitutes a majority of the waste? DEP was told [by Nordic], "Well, we don't know because we're going to make a determination of what fish we're going to use when we get closer to the need"

So we're looking at a waste, which is primarily "fish waste". How is it fish waste? Because the fish poop and the fish urine is fish waste. Is waste from the fish food, the stuff that falls to the bottom of the tank. That's fish food waste, and we don't know what's in it. And yet they granted the permits.

What about the power to run the plant? They are asked. It's never disclosed how much power was necessary to run the plant?

All they knew was that there was 14 megawatts that was going to be produced on site to take care of outages. Well, that's great. That's a nice big number. But 14 megawatts, if they only need 10 to run the plant, is great. What about if they need 28 or 30? Then you only have half power if there's an outage.

And lo and behold, after the hearings, when the applicant did not disclose this, we find out from the Public Utilities Commission that's what it what it is. They're going to have about 50% of what they need. So they're also asked" what is the plan?| And seen the plan yet?

If this were an EPA administered program, not a state administered program, I don't believe this would happen. You know, we'll get our day in court on the specific things and lots of others that have that specific examples.

I'm using these examples not to argue the Noredic case here, but to say: 'look, these issues shouldn't be issues at this point, if DEP were doing its job.'

Let me also talk about what I call "the funnel". This goes back to the NPDES permit process. I call it a funnel, because permit applications must meet certain technological standards and water quality standards.

And they have to be based on the best practical treatment. And they're limited to five years. So at the end of five years, you got to go back and get a renewal permit.

When you get a renewal permit, you got to show that now, five years later, you're still using the best practical treatment.

And so you have to improve along with the industry, you have to improve with the technology, or you don't get your permit renewed, at least that's the federal law.

It draws all permit holders, inexorably closer to the zero discharge goal of Congress back in 1972.

So that's where the that's how the Act is supposed to work. It's one man's view about why it doesn't work in Maine. And I will make a suggestion.

Look at Connecticut general statutes, Section 22A-14 through 17. Here's what that says: It says that any person, corporation, firm, nonprofit entity of any sort, can bring a lawsuit against any other person, corporation, municipality, nonprofit, the state entity of any sort, for declaratory or injunctive relief.

You can get an injunction., where you can show that the proposed activity was reasonably likely to cause unreasonable pollution to a natural resource of the state.

Let me say it again, "reasonably likely" not Oh, it might happen, "reasonably likely" to cause "unreasonable pollution", not just a drop, unreasonable pollution to a natural resource of the state any of the state's national resources.

And once you make a prima facie case, that that is so, the defendant assumes the burden and asked to prove he's not doing it.

And it doesn't matter if the defendant has been issued a permit by DEP.

I had a conversation with Governor Thomas Meskill in 1973. He had been the mayor of a urban industrial city in Connecticut. He had been a US Congressman, and then he was sitting as Governor. And I said, "Governor, I'm sort of skeptical about the need for this, this law that allows people to bring these lawsuits."

Meskill said, "I've been in municipal government. I've been in the federal government and state government. Trust the People because you CAN'T trust the government." He believed firmly that, the people, given the chance, will do the right thing.

I think Maine's laws are fine. They have to administer and enforce them. As They Are Written. And as a check on that, I urge Jan and any others who are interested in legislation, take a look at the People's initiative in Connecticut and see if that wouldn't be a good backstop, because you know what it does? It keeps DEP honest. It keeps everybody in Augusta honest.

I've rambled on long enough! You can hear from a scholar now, Charlie Bering. He's I think better equipped to explain the the true ins and outs and creation to the Clean Water Act . I am kind of a shirtsleeve streetfighter that represented businesses over the last 50 years. “

End

“Thank you, David!”