

STATE OF MAINE

SUPREME JUDICIAL COURT  
Sitting as the Law Court  
Docket Nos. BCD-22-48  
Wal-22-299

Upstream Watch et al.

v.

Board of Environmental Protection

Jeffrey R. Mabee et al.

v.

Department of Agriculture,  
Conservation and Forestry et al.

**ORDER OF REMAND**

In *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79 (“*Mabee I*”), we ruled on various issues regarding title ownership and a conservation easement over property relevant to an aquaculture project located in Belfast, Maine. That project required the issuance of various governmental approvals that have been challenged in pending appeals, including *Mabee v. Department of Agriculture, Conservation and Forestry et al.*, Docket No. Wal-22-299 (*Mabee II*) (Rule 80C appeal relating to submerged lands and dredging leases issued by the Bureau of Parks and Land (BPL)) and *Upstream Watch v. Board of*

*Environmental Protection*, Docket No. BCD-22-48 (“*Upstream Watch*”) (Rule 80C appeal relating to various permits issued by the Board of Environmental Protection (BEP)).

With regard to the impact, if any, that our ruling in *Mabee I* has on those approvals and two aforementioned appeals now pending before us, parties have filed the following motions:

- In *Mabee II* the BPL has filed a motion to dismiss the appeal as moot. Nordic Aquafarms, Inc. (Nordic) does not object. Appellants Jeffrey R. Mabee et al. (*Mabee*) appear not to object, but Mabee has also filed a motion for judgment as a matter of law asking us to vacate the BPL’s approval of Nordic’s application for submerged lands and dredging leases. The BPL and Nordic oppose Mabee’s motion.
- In *Upstream Watch*, Appellant Upstream Watch (Upstream) has filed a “Motion To Reverse the BEP’s Decision on TRI and to Remand,” and Mabee has filed a motion for judgment asking us to vacate the BEP’s orders granting Nordic various permits. Nordic opposes both motions. The BEP has not filed a response to either.

The BPL’s motion in *Mabee II* contends that Mabee’s appeal should be dismissed as moot because our decision deprives Nordic of the right, title, and interest necessary to support the issuance of the leases approved by the BPL.

The BPL motion states that, as a result of our *Mabee I* decision, the BPL will not issue the leases it approved, but the BPL contends that the approval should not be vacated. Mabee responds by contending that for us merely to dismiss Mabee's appeal would leave the BPL lease approvals in place, whereas they should be vacated.

Under the doctrine of primary jurisdiction, "courts should avoid ruling, on appeal, on matters committed by law to the decision-making authority of an administrative agency before the administrative agency has first had an opportunity to review and decide the facts on the merits of the matter at issue." *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2006 ME 44, ¶ 40, 896 A.2d 287, 298. When, as here, it is unclear whether an approval challenged on appeal would have been issued given intervening circumstances, the appropriate response is to remand the matter to the agency that issued the approval to make that determination. *Cf. Hannum v. Board of Environmental Protection*, 2003 ME 123 ¶17 (remanding to the BEP where the Court could not ascertain from the BEP decision whether the BEP would have reached a different conclusion in the absence of a finding that the Court found unsupported by evidence in the record).

We therefore remand these two appeals to the Superior Court in turn to remand the matters to the BPL and the BEP so that the agencies may determine

the impact, if any, of *Mabee I* on the challenged approvals. The agencies may choose to make their determinations on the existing administrative records or expand the records to include materials such as a referenced subsequent conveyance after the exercise of eminent domain power that Nordic suggests should result in no change to the viability of the approvals. We leave to the BPL and the BEP to determine the scope of the proceedings on remand.

We do not retain jurisdiction, nor should the Superior Court or the Business and Consumer Court. Maine Rule of Civil Procedure 80C(m); see *Penkul v. Town of Lebanon*, 2016 ME 16, ¶ 6 n. 4, 136 A.3d 88 (“This case highlights the confusion that may be generated when the trial court purports to ‘retain jurisdiction’ after remanding a matter to a government decision maker. The clearer practice is for the court to enter a final judgment remanding the matter.”) Upon the issuance of the agencies’ determinations on remand regarding the viability of the approvals, any party is free to raise in a new appeal any argument raised previously and any new argument arising from the agency proceedings on remand.

It is therefore ORDERED:

1. The case of *Mabee v. Department of Agriculture, Conservation and Forestry et al.*, Docket No. Wal-22-299 is hereby remanded to the Superior Court, with an instruction to remand the case to the Department of Agriculture,

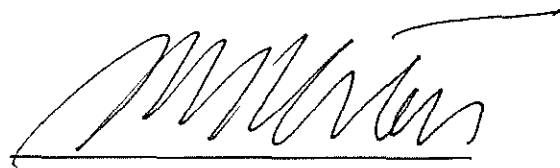
Conservation and Forestry, Bureau of Parks and Lands, for further proceedings consistent with this Order.

2. The case of *Upstream Watch v. Board of Environmental Protection*, Docket No. BCD-22-48 is hereby remanded to the Business and Consumer Court, with an instruction to remand the case to the Board of Environmental Protection for further proceedings consistent with this Order.

3. All pending motions are dismissed without prejudice.

Dated: May 10, 2023

For the Court, all members concurring

A handwritten signature in black ink, appearing to be 'M. W. ...', written over a horizontal line.

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Clerk's Office  
Maine Supreme Judicial Court