STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

JANET T. MILLS
GOVERNOR

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September 12, 2023

SENT VIA ELECTRONIC MAIL ONLY

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Re: Redactions of non-record references in briefs; response to requests to reopen administrative record and to vacate Board Orders; scheduling of oral arguments

To The Service List:

On July 26, 2023, and August 16, 2023, I issued letters 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] Those letters continue to govern the Nordic remand proceeding. This letter serves to 1) notify the Service List that the Board will take official notice of an additional agency action; 2) address a new request for the Board to revoke the four permits issued to Nordic Aquafarms, Inc. (Nordic) on November 19, 2020; 3) circulate redacted versions of previously-filed briefs; and 4) identify the process and tentative schedule for oral argument.

Additional officially-noticed document
On September 7, 2023, the Bureau of Parks and Lands (BPL) within the Department of Agriculture, Conservation and Forestry issued a rescission of its Final Findings and Decision dated September 4, 2020, as well as its prior Final Findings and Decision dated September 11, 2019, to issue to Nordic Aquafarms, Inc. (Nordic) Submerged Lands Lease No. 2141-L-49 and Submerged Lands Dredging Lease No. 05-22DL (BPL Rescission Decision).

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

On September 8, 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, *et al*.), filed with the Board a request to supplement and/or reopen the record to allow the Board to take official notice of the BPL Rescission Decision.

The Board need not reopen the record to take additional official notice of the BPL Rescission Decision. Like the three previously-noticed documents addressed in my prior communications, and consistent with Chapter 3, § 20(C), the Board will take official notice of the five-page BPL Rescission Decision. A copy is enclosed. The BPL Rescission Decision may be referenced during oral argument if relevant to the limited legal question on remand – the impact, if any, of *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15 (*Mabee I*), on the permits issued by the Board. Objections to the substance or materiality of this additional officially-noticed document shall be made, if at all, during oral argument on October 19, 2023, and shall be limited to addressing this document only.[2] No further reply briefs or other filings are permitted.

The September 8, 2023, Mabee-Grace, *et al*. filing also includes materials and references that are outside the record to be considered by the Board in deciding the narrow limited legal question on remand. As more fully noted in my communications dated July 26, 2023, and August 16, 2023, no additional evidence is being solicited or permitted in this remand proceeding. Consequently, the Mabee-Grace, *et al*. filing will not be circulated to the Board.

Request to revoke Nordic permits

In its September 8, 2023 filing, Mabee-Grace, *et al*. also made a new request that the Board revoke the four permits issued to Nordic on November 19, 2020, "based on Nordic's inability to demonstrate sufficient [title, right or interest] because it cannot obtain a Submerged Lands lease as required by 06-096 C.M.R. ch. 2, § 11(D)(2)."

As I previously indicated in my letter dated July 26, 2023, the Board lacks authority to revoke licenses or permits issued by the Department, including the Nordic permits issued by the Board. Pursuant to 38 M.R.S. § 342(11-B) and Chapter 2, § 25, authority to consider revocation of permits rests with the Commissioner of the Department. Additionally, on September 8, 2023, Mabee-Grace, *et al*. separately filed with the Commissioner a "Renewed Petition to Revoke" the Nordic permits. Therefore, the September 8, 2023, request to revoke the Nordic permits is already properly before the Commissioner at this time and no action by the Board is warranted with respect to the new Mabee-Grace, *et al*. request to revoke filed with the Board.

Redaction of previously-filed briefs

The Board invited briefs on the limited legal question of the impact, if any, of *Mabee I* on the Board's approvals of the Nordic permits. Briefs were not to include attachments or appendices, or to reference any new evidence. My prior letters state that "[e]vidence 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," and "[b]riefs that do not comply with these filing requirements may be rejected."

[2] See *Scheduling of oral arguments* below.

Briefs filed by 1) the Maine Lobstering Union and commercial lobster and crab license holders Wayne Canning and David Black, 2) Jeffrey R. Mabee and Judith B. Grace and the Friends of the Harriet L. Hartley Conservation Area, and 3) Upstream Watch contain references to evidence that are outside the record to be considered by the Board in this remand proceeding. Consistent with my prior instructions, those portions of the three briefs that reference non-record materials are stricken and will be redacted from the briefs circulated to the Board. A copy of the redacted versions of the briefs identified above are enclosed.

Scheduling of oral arguments

The Board has tentatively scheduled its consideration of the Court's Remand Orders and the limited legal issue on remand for a meeting to be held in Augusta on the morning of October 19, 2023. Please hold the date. Oral argument by a single representative for each person, entity or groups of entities who briefed the issue will be limited to 20 minutes each and must rely on the admitted portions of their written brief. Oral argument that strays from the record will not be permitted. Board members and the Board's counsel may ask questions of each person's representative and of the Department staff serving the Board. The order of presentation will be as follows:

1. Introduction by Board Executive Analyst
2. Oral argument of clients represented by Attorney Tucker (Jeffrey R. Mabee and Judith B. Grace; Friends of the Harriet L. Hartley Conservation Area; the Maine Lobstering Union, and commercial crab and lobster license holders David Black and Wayne Canning
3. Oral argument of Upstream Watch
4. Oral argument of Northport Village Corporation
5. Oral argument of Nordic Aquafarms, Inc.
6. Department staff presentation of proposed Board Order
7. Board motion, deliberation, and possible vote with respect to the proposed Board Order

Department staff will assemble a packet of materials for the Board, including a staff recommendation in the form of a proposed Board Order. Once available, you will receive a copy of the Board packet and an agenda with the meeting location and start time. Once finalized, the meeting agenda will be posted on the Board's webpage https://www.maine.gov/dep/bep/index.html.

Filing of documents and service list

All filings in this matter must be copied to the enclosed Service List. 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)

Enclosures:
(1) BPL Rescission Decision
(2) Redacted version of the brief of the Maine Lobstering Union and commercial lobster and crab license holders Wayne Canning and David Black
(3) Redacted version of the brief of Jeffrey R. Mabee and Judith B. Grace and the Friends of the Harriet L. Hartley Conservation Area
(4) Redacted version of the brief of Upstream Watch

Enclosure(s)

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
BUREAU OF PARKS & LANDS
22 STATE HOUSE STATION
AUGUSTA, MAINE 04333

JANET T. MILLS
GOVERNOR

AMANDA E. BEAL
COMMISSIONER

NORDIC AQUAFARMS, INC. RESCISSION OF FINAL FINDINGS AND DECISION DATED SEPTEMBER 4, 2020

APPLICANT: Nordic Aquafarms, Inc. (Nordic)

PROJECT LOCATION: City of Belfast and Town of Northport

APPLICATION: Submerged Lands Lease Application No. SL 2352, dated September 26, 2018, as amended on November 20 and December 5, 2018 (one modification sent in two sections), and as further amended by submissions dated March 22, 2019, January 10, 2020, and February 6, 2020, to install three pipes (the Pipes) on submerged lands as part of a proposed commercial, land-based aquaculture operation (the Project).

BACKGROUND: The procedural history related to Nordic's application is set forth more fully in the Bureau's Final Findings and Decision, dated September 4, 2020 (the Final Decision), a copy of which is attached as Exhibit A.

In its Final Decision, the Bureau found that Nordic demonstrated sufficient right, title, and interest (RTI) in the upland property adjacent to the littoral zone for which Nordic sought a submerged lands lease. As explained in the Final Decision, the Bureau based its RTI decision on Richard Eckrote's and Janet Eckrote's deed to the property located at 282 Northport Avenue in Belfast, which deed the Bureau understood to include a call to the water, and a Purchase and Sale Agreement between the Eckrotes and Nordic, as later amended by letter agreement, pursuant to which the Eckrotes agreed to convey Nordic an easement across their property for the Pipes.

While the Bureau was processing Nordic's application, Jeffrey Mabee and Judith Grace (collectively, Mabee) were also claiming title to the intertidal land between 282 Northport Avenue and the submerged lands for which Nordic sought a lease (the Relevant Intertidal Land) and conveyed to Upstream Watch a conservation easement (the Conservation Easement) over the Relevant Intertidal Land. Upstream Watch later assigned the Conservation Easement to the Friends of Harriet L. Hartley Conservation Area (the Friends). The Conservation Easement prohibits "structures of any sort, especially any principal or accessory structures erected, constructed or otherwise located in furtherance of any commercial or industrial purpose." The Bureau noted that the validity of the Conservation Easement as it applied to the Relevant Intertidal Land would turn on the resolution of the title dispute over the Relevant Intertidal Land, which was styled *Mabee v. Nordic Aquafarms, Inc*, RE-2019-0018 (the Title Litigation). The Title Litigation was pending during the Bureau's review of Nordic's application.

ANDREW R. CUTKO, DIRECTOR
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In addition to finding that Nordic demonstrated sufficient RTI, the Bureau found that Nordic otherwise satisfied the Bureau's review criteria for a submerged lands lease and dredging lease as set forth at 12 M.R.S. § 1862 and 01-670 C.M.R. § 53 (2014) (the Chapter 53 Rules). As such, the Bureau determined that it would grant to Nordic Submerged Lands Lease No. 2141-L-49 and Submerged Lands Dredging Lease No. 05-22DL after Nordic submits to the Bureau a copy of a recorded easement conveying Nordic rights to the upland, including the Relevant Intertidal Land, that Nordic proposes to use for its water intake and water discharge Pipes within 30 days of Nordic's receipt of all necessary permits and approvals (the Final Decision Condition). Mabee, along with the Friends, the Maine Lobstering Union, Wayne Canning, and David Black, appealed the Final Decision to Superior Court. The Superior Court appeal of the Final Decision—*Mabee v. Department of Agriculture, Conservation and Forestry*—is docketed AP-2020-04.

During the Rule 80C appeal of the Bureau's Final Decision, and while the Title Litigation was pending, the City of Belfast condemned property interests related to the Relevant Intertidal Land (the Condemnation). Mabee, the Friends, and Upstream Watch appealed the Condemnation, which is styled *Mabee v. City of Belfast*, BELSC-RE-2021 (the Condemnation Appeal). The Superior Court entered a stipulated judgment in the Condemnation Appeal that addresses the impact of the Condemnation on the Conservation Easement. Assuming the validity of the Conservation Easement, the Stipulated Judgement declares that 33 M.R.S. §§ 477-(A)(2)(B) and 478 prohibit the City from unilaterally amending or terminating the Conservation Easement and that the Condemnation did not amend or terminate the Conservation Easement.

Following the Condemnation, Nordic submitted to the Bureau an easement recorded in the Waldo County Registry of Deeds, Book 4679, Page 157 (the Pipes Easement), pursuant to which the City conveyed to Nordic the right to construct, operate, and maintain the Pipes on the property including the Relevant Intertidal Land. Nordic asked that the Bureau not issue Submerged Lands Lease No. 2141-L-49 and Submerged Lands Dredging Lease No. 05-22DL until Nordic receives the final building permits for the Project of which the Pipes are a part.

The Superior Court resolved the Title Litigation in favor of the Eckrotes and Nordic, which judgment was appealed to the Law Court. After resolving the Title Litigation, the Superior Court affirmed the Bureau's Final Decision. Mabee, the Friends, the Maine Lobstering Union, Wayne Canning, and David Black appealed to the Law Court the Superior Court's decision affirming the Bureau's Final Decision. The Law Court appeal of the Bureau's Final Decision is docketed WAL-22-299.

The Law Court issued its opinion in the Title Litigation, *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, 290A.3d 79 (*Mabee I*). Among other things, the Law Court held that Mabee owns the Relevant Intertidal Land and that the Conservation Easement is valid and applies to the Relevant Intertidal Land. As a result of *Mabee I*, the Law Court remanded without vacatur the appeal of the Final Decision to Superior Court with instructions to remand to the Bureau for the Bureau to "determine the impact, if any, of *Mabee I* on the challenged approval." The Superior Court so remanded the Final Decision to the Bureau. The Law Court's Order of Remand states that the Bureau may "choose to make [its] determination[] on the existing record[] or expand the record[]

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."

The Bureau has not issued Submerged Lands Lease No. 2141-L-49 and Submerged Lands Dredging Lease No. 05-22DL to Nordic, and Nordic has not paid any rent to the Bureau.

EXPANSION OF THE ADMINISTRATIVE RECORD AND POST-REMAND PROCEEDINGS: On remand, the issue before the Bureau is limited to determining "the impact, if any, of *Mabee I* on the challenged approval." Nordic and Mabee (together with the Friends, the Maine Lobstering Union, David Black, and Wayne Canning) each addressed the remand issue in written submissions with attachments. To resolve the remand issue, the Bureau is expanding the administrative record to include materials submitted to the Bureau while the Rule 80C appeal was pending and on remand, such as Nordic's letter with attachments dated September 8, 2021; Nordic's letter with attachments dated June 27, 2023 (the June 27 Letter); Mabee's motion to vacate with attachments dated June 28, 2023; and Mabee's email with attachments dated August 10, 2023. The Bureau has reviewed and considered those materials for purposes of this decision.

The Bureau has determined that its Chapter 53 rules do not require it to invite public comment on the remand issue. As such, and because of the limited issue before the Bureau on remand and the multiple prior public comment periods (identified in the Final Decision), the Bureau has not invited public comment on the remand issue.

BRIEF SUMMARY OF ARGUMENTS ON REMAND: On remand, Nordic contends that the Pipes Easement conveys to Nordic the necessary property interests to construct, operate, and maintain the Pipes and asks the Bureau to act in a manner substantially similar to the Department of Environment Protection (DEP), which, through its Commissioner, suspended Nordic's DEP permits. Specifically, Nordic requests that the Bureau amend the Final Decision by tying the Final Decision Condition to the DEP Commissioner issuing an order lifting her suspension of Nordic's DEP permits. Effectively, Nordic requests that the Bureau toll its Final Decision indefinitely. Nordic does not identify any legal authority in support of its request.

Mabee primarily contends that *Mabee I* establishes that the Bureau's RTI finding in its Final Decision was error. Mabee therefore argues that the Bureau must vacate its Final Decision and dismiss Nordic's Application.

FINDINGS: Based on its review of all the information in the administrative record, the Bureau makes the following findings.

Submerged lands are public trust lands that the Bureau administers on behalf of the public. A submerged lands lease conveys a real property interest in public trust lands. The Bureau's review criteria for such leases balance public trust rights in submerged lands and riparian owners' common law rights to submerged lands.

Chapter 53 Rules § 1.7(B)(10) states, "Materially incorrect information submitted in conjunction with an application for a Submerged Lands conveyance shall constitute grounds for

reconsideration of or rescinding of any Findings, Conclusions, or Conveyances issued by the Bureau." To qualify for a submerged lands lease, an applicant must demonstrate sufficient RTI in the upland property adjacent to the littoral zone in which the lease is sought. Chapter 53 Rules § 1.6(B)(1)(a). If the holder of a submerged lands conveyance loses RTI in the adjacent upland, "then the lease or easement shall be invalid, and all leasehold or easement interest in the Submerged Lands shall be extinguished." Chapter 53 Rules § 1.6(B)(1)(b).

During the application processing period, Nordic's claim of sufficient RTI was disputed. As explained in the Final Decision, competing title claims to the adjacent upland do not preclude the Bureau from determining, pursuant to its Chapter 53 Rules, that an applicant has demonstrated RTI sufficient for the Bureau to process a submerged lands lease application. As the Final Decision acknowledges, however, a court judgment may defeat what was previously sufficient RTI by resolving the title dispute against the submerged lands lease applicant.

Contrary to Mabee's argument, *Mabee I* does not compel the Bureau to conclude that its RTI Finding, as set forth in the Final Decision, was error: the Final Decision is based on the record as of September 4, 2020. The record for the Final Decision excludes *Mabee I* because *Mabee I* issued on February 16, 2023. Had *Mabee I* issued before the Final Decision, the Bureau's Final Decision would have reflected *Mabee I's* holding as to ownership of the Relevant Intertidal Land. [1] Nordic's RTI submission was not materially incorrect while the Bureau was processing Nordic's application; however, it has become so.

Pursuant to *Mabee I*, Mabee, not the Eckrotes, owned the Relevant Intertidal Land while the Bureau was processing Nordic's application, and the Conservation Easement is valid. Per its plain language, the Conservation Easement prohibits the Pipes on the Relevant Intertidal Land. And pursuant to the Stipulated Judgment, the Condemnation did not terminate or amend the Conservation Easement.[2] Nordic contends that the Pipes Easement conveys to Nordic the right to construct, operate, and maintain the Pipes. The Bureau disagrees. Although the Pipes Easement purports to convey such rights to Nordic, the Pipes Easement is subordinate to the Conservation Easement, and the Conservation Easement prohibits the Pipes. Taken together, *Mabee I*, the Conservation Easement, and the Stipulated Judgment render materially incorrect Nordic's claim of RTI for Submerged Lands Lease No. 2141-L-49 and Submerged Lands Dredging Lease No. 05-22DL.[3]

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[1] As Mabee notes in his motion, "a determination of whether a party owns the intertidal land adjacent to their upland waterfront property requires a 'meticulous' review of all the deeds in the relevant title chain to determine the boundaries of the property and what the claimant's predecessors-in-interest owned and conveyed." The Bureau is not a court and is not equipped to perform such comprehensive title analyses. Thus, in situations of competing claims to title, the Bureau's Chapter 53 Rules do not require the applicant to submit a quiet title judgment to satisfy the Bureau's RTI standards.

[2] As between Mabee and the City, ownership of the Relevant Intertidal Land is at issue in the Condemnation Appeal.

[3] Had the Bureau already issued Submerged Lands Lease No. 2141-L-49 and Submerged Lands Dredging Lease No. 05-22DL, *Mabee I*, the Conservation Easement, and the Stipulated Judgment would have rendered those leases invalid and extinguished the leaseholds. Chapter 53 Rule § 1.6(B)(1)(b). A different result does not obtain here because the Bureau has not yet issued Submerged Lands Lease No. 2141-L-49 and Submerged Lands Dredging Lease No. 05-22DL.

As to Nordic's request that the Bureau toll the Final Findings for an indefinite period of years, neither the Bureau's submerged lands leasing statute, 12 M.R.S. § 1862, nor the Chapter 53 Rules expressly authorize the Director to suspend his decision to issue submerged lands conveyances and the Bureau declines to do so. Especially where, as here, three years have already passed since the Final Decision issued, and the time frame for completing construction is typically two years. Chapter 53 Rules § 1.6(B)(22). If and when Nordic will obtain a valid property interest that conveys to Nordic the right to install the Pipes on the Relevant Intertidal Land is unknown. As trustee of Maine's publicly owned submerged lands, the Bureau will not maintain indefinitely a pending lease over these lands after an application has been initially reviewed and approved.

DECISION: Pursuant to Chapter 53 Rules § 1.7(B)(10), the Bureau rescinds its Final Decision (as well as its prior Final Findings and Decision dated September 11, 2019) to issue to Nordic Submerged Lands Lease No. 2141-L-49 and Submerged Lands Dredging Lease No. 05-22DL. Nordic may re-apply in the future for a submerged lands lease and dredging lease for the Pipes if there is a material change to its RTI, such as a valid modification of the Conservation Easement to allow the now-prohibited Pipes.

APPEAL RIGHTS: In accordance with 5 M.R.S. § 11002 and Maine Rule of Civil Procedure 80C, this decision may be appealed to Superior Court within 30 days of receipt of notice of the decision by a party to this proceeding, or within 40 days from the date of the decision by any other aggrieved person.

Signed: _____ Date: September 7, 2023

Andrew R. Cutko
Director, Bureau of Parks and Lands

Enclosure(s)

IN THE MATTER OF NORDIC AQUAFARMS INC.

NORDIC AQUAFARMS, INC.	)	APPLICATIONS FOR AIR EMISSION,
Belfast, Northport **and Searsport**	)	SITE LOCATION OF DEVELOPMENT,
Waldo County, Maine	)	NATURAL RESOURCES PROTECTION ACT, and
	)	MAINE POLLUTANT DISCHARGE ELIMINATION
A-1146-71-A-N	)	SYSTEM (MEPDES)/WASTE DISCHARGE
L-28319-26-A-N	)	LICENSES
L-28319-TG-B-N	)	
L-28319-4E-C-N	)	**BRIEF ON REMAND AND OBJECTIONS**
L-28319-L6-D-N	)	**OF THE LOBSTERING APPELLANTS**
L-28319-TW-E-N	)	
W-009200-6F-A-N	)	Dated: August 21, 2023

This matter is before the Board of Environmental Protection ("Board" or "BEP") on remand from the Law Court of the 80C appeal (BCD-22-48) of the Board's 11-19-2020 Orders. This Brief is submitted on behalf of the Maine Lobstering Union and commercial lobster and crab license holders Wayne Canning and David Black (together "the Lobstering Appellants"), who assert that the 2020 Orders should be vacated by the Board based on the judicial determinations made by the Law Court in *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, 290 A.3d 79 (hereinafter "*Mabee I*"), 5 M.R.S. § 10004(1), and 06-096 C.M.R ch. 2, §§ 11(D), 26 and 27(B) & (E).

The Lobstering Appellants join, adopt and incorporate the arguments in the MGF and Upstream Watch ("Upstream") Briefs, and in addition file their separate Brief and Objections. In their separate Brief and Objections, the Lobstering Appellants challenge Nordic's false claims of title, right or interest ("TRI") in the intertidal land adjacent to Belfast Tax Map 29, Lots 36 and 35 based on the sham and fraudulent Release Deeds, that were drafted, solicited by coercion, and recorded in the Waldo County Registry of Deeds by Nordic through its counsel.

The determinations in *Mabee I* establish, as a matter of law, that Nordic cannot, *did not, and never could*, meet its burden to show sufficient TRI to *use the property proposed for development in the manner the permits and licenses would allow*; thus, the applications should be "returned" to Nordic, as mandated by 06-096 C.M.R. ch. 2, §§ 11(D) and the 2020 Orders revoked pursuant to Chapter 2, § 27(E).[1] In addition, the determinations in *Mabee I,* the facts in the existing

[1] 06-096 C.M.R. ch. 2, § 11(D) states in relevant part that:

> "**Title, Right or Interest.** Prior to acceptance of an application as complete for processing, an applicant shall demonstrate to the Department's satisfaction sufficient title, right or interest in all of the property that is proposed for development or use. An applicant must maintain sufficient title, right or interest throughout the

Administrative Record compiled by BEP counsel in 2021, the record in the prior 80C appeals of the 2020 BEP Orders, and the relevant public records, demonstrate that the 2020 BEP Orders were obtained by Nordic through Nordic's and its counsel's misrepresentations and/or failure to fully disclose the facts, in violation of Chapter 2, § 27(B) -- warranting an order by the Board vacating its 2020 Orders.[2]

The Nordic project is under the ***mandatory*** jurisdiction of the Board, as both a project of statewide significance and pursuant to the 2019 request to assume jurisdiction by the Commissioner and application. *See*, 38 M.R.S. § 341-D(2). Accordingly, it is ***the Board*** that has the exclusive jurisdiction to suspend or revoke the permits and licenses issued by the Board in 2020, pursuant to Chapter 2, §§ 26 and 27. Here, the Commissioner erred in issuing a Suspension Order on July 26, 2023 – in the absence of jurisdiction to do so. On remand, *the Board* has the responsibility, authority and jurisdiction to determine whether the 2020 Orders should be suspended, revoked or modified, pursuant to Chapter 2, §§ 11(D), 26 and 27(B) & (E). The Commissioner's Suspension Order should be considered as the Commissioner's recommendation to the Board, pursuant to Chapter 2, § 26 and 38 M.R.S. § 342(11-A).

On August 14, 2023, Nordic's registered agent and counsel Joanna Tourangeau, Esq., made new false claims regarding these Release Deeds to the Board in another effort to retain the permits and licenses obtained in 2020 based on false and incomplete information. The Lobstering Appellants, through undersigned counsel, assert Attorney Tourangeau's 8-14-2023 false and misleading statements regarding the so-called "Release Deeds," like prior statements made to State agencies regarding these sham instruments, were submitted to the Board in violation of the requirements and responsibilities of applicants and their agents and counsel under Department rules, including 06-096 C.M.R. ch. 2, §§ 11(D) and 27(B). [3]

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entire application processing period. ... The Department may return an application, after it has already been accepted as complete for processing, if the Department determines that the applicant did not have, or no longer has, sufficient title, right or interest."

[2] Chapter 2, § 27(B) states: "The Department may revoke, suspend, or modify a license or prescribe necessary corrective action only if the Commissioner, pursuant to section 25, or the Board, pursuant to section 26, finds that . . . [t]he licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts."

38 M.R.S. § 341-A(2) states: "**Composition.** The department shall consist of the Board of Environmental Protection, in the laws administered by the department called "board," and of a Commissioner of Environmental Protection, in the laws administered by the department called 'commissioner.'"

[3] Attorney Tourangeau's misleading and false statements regarding also violate the duty of candor toward the tribunal expected of, and imposed on, all Maine counsel in Rule 3.3 of the Rules of Professional Conduct.

BACKGROUND

Nordic filed its MEPDES application with the Department in October 2018 (A.R. 0021a).[4] To demonstrate sufficient "TRI" in the property on the eastern side of Route 1 (i.e. Belfast Tax Map 29, Lot 36 ("Lot 36") and the adjacent intertidal land), Nordic relied on an "Easement [Option] Purchase and Sale Agreement" obtained from Richard and Janet Eckrote on August 6, 2018 ("8-6-2018 EOA").[5] (A.R. 0150, pp. 3-16). The 8-6-2018 EOA, does not define the boundaries of the easement by metes and bounds, but depicts the boundaries using an image incorporated as Exhibit A (A.R. 150, p. 16). The easement depicted in Exhibit A ***terminates at the high-water mark of Penobscot Bay***, pursuant to the express terms in the 8-6-2018 EOA, and, *if exercised*, would not grant Nordic the right to use the intertidal land on which Lot 36 fronts (A.R. 906d). Rather, the 8-6-2018 EOA, *if exercised*,[6] would grant Nordic a 25-foot wide permanent easement, and a 40-foot wide temporary construction easement, along the southern boundary of Lot 36. *Id.*

On 12-18-2018 and 1-7-2019 (A.R. 0075, 0089 and 0090), Upstream and the Lobstering Petitioners moved to dismiss Nordic's MEPDES Application for lack of administrative standing because the 8-6-2018 EOA failed to grant Nordic TRI to use the intertidal land on which Lot 36 fronts, based on the plain meaning of Exhibit A (A.R. 0906d). On 1-22-2019, Brian Kavanah, DEP's Bureau of Water Quality Director, issued a letter to Nordic requesting additional TRI-related information by 2-6-2019, including an 11-14-2018 survey by James Dorsky, P.L.S. The 1-22-2019 DEP letter correctly concluded that the 8-6-2018 EOA was not sufficient to demonstrate TRI, stating: ". . . the Easement Purchase and Sale Agreement submitted by Nordic Aquafarms defines the easement area by reference to an Exhibit A that depicts the easement area as stopping

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https://mebaroverseers.org/regulation/bar_rules html?id=88222

[4] Documents from the Administrative Record prepared by BEP's counsel for the 80C appeal in BCD-APP-2021-0009 are referenced as "A.R. followed by the document number and, if applicable, a specific page within that document.

[5] DEP Major Projects website, 10-19-2018 MEPDES Application, pp. 46-59: https://www maine.gov/dep/ftp/projects/nordic/applications/MEPDES%20Permit%20Application_Final_Oct%2019,%202018.pdf

5-17-2019 TRI Supplement, pp. 3-16: https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/JBT%20to%20Kavanah%20package.PDF

[6] Nordic never exercised the 2018 Easement Option prior to the Eckrotes' sale of this property on June 27, 2021 to the City of Belfast. The sale had the effect of nullifying the unexercised 8-6-2018 EOA.

at the high-water mark." (A.R. 0095).[7]

On 1-25-2019, then-AAG Jerry Reid – who had been recently nominated by the Governor to be DEP Commissioner – advised the Governor and other email recipients, that:

> I am meeting with Erik Heim *this afternoon at 2:00* to try to reassure him that the DEP process will be fair and can work. ***There is a non-trivial title, right and interest problem with their* application that the opponents have seized on**. It's not clear to me why Nordic hasn't addressed it, because it would seem to be easily resolvable. I'll be talking to him about that too. ***It's not in Nordic's interest to move forward with a flawed application that will allow for a successful appeal of the permits they are seeking***. I'm happy to provide people with more details at any time.

(Law Court Appendix: A. 0206 (emphasis supplied)).[8]

On 1-25-2019, Mr. Reid and then-Acting DEP Commissioner Melanie Loyzim – the incoming and current decision-makers for determinations regarding applicant Nordic's TRI pursuant to 06-096 C.M.R. ch. 2, § 11.D -- had an ex parte[9] meeting with Nordic, including its then-President Erik Heim (Law Court Appendix: A. 0219-0222). No notice of, or opportunity to participate in, this meeting were provided to Upstream or the Lobstering Appellants, who had pending motions to dismiss Nordic's MEPDES application based on TRI deficiencies.

By 1-30-2019, Acting Commissioner Loyzim put the Department's 1-22-2019 request for additional TRI-related information from Nordic in the 1-22-2019 DEP letter – including the 11-14-2018 Dorsky survey -- and consideration of the sufficiency of Nordic's TRI "*on hold*." (A.R. 0103, 0104, 0106-0108). Thereafter, Nordic drafted and solicited the Faux Hartley Heirs' Release Deeds in March through July, 2019, from persons who Nordic and its counsel knew, or should have known, are not heirs or heirs-at-law of Harriet L. Hartley and who never had any title, right or interest in real property in Belfast, Maine once owned by Harriet L. Hartley.

In *Mabee I,* the Law Court stated in footnote 11 that: "Again, although we need not look to extrinsic evidence, we observe that *Hartley's probate file contains a note indicating that she conveyed all her real property during her life*." (emphasis supplied). [redacted]

[7] DACF BPL reached the same conclusion in a 1-18-2019 letter to Nordic (A.R.Doc. 0906b; A: 1151).

[8] Documents in the Superior Court Record from the 80C appeal of the 2020 Orders, that were omitted by BEP counsel from the 2021 Administrative Record but which were part of the Appendix prepared for the Law Court's consideration of that 80C appeal, are designated herein as "Law Court Appendix:" followed by the Bates Stamped page number referenced in that Law Court Appendix.

[9] Black's Law Dictionary online defines "*ex parte*" as: "On one side only; by or for one party; done for, in behalf of, or on the application of, one party only." https://thelawdictionary.org/ex-parte/

[redacted]

Despite having knowledge ***in December 2018*** that Harriet L. Hartley had sold all of her land prior to her death and that no heir or heir-at-law of Harriet L. Hartley had received title to any real property from Harriet L. Hartley's estate, in March through July 2019, Nordic's then-President (Erik Heim), then-COO (Brenda Chandler), and its counsel at Drummond Woodsum (Colleen Tucker, Esq.) drafted, solicited, and obtained six (6) Release Deeds from ten (10) out-of-State persons who Nordic identified as "Hartley Heirs." [redacted]

On 5-17-2019, Nordic filed NRPA and SLODA applications with the Department and supplemental TRI-related information. (A.R. 0148, 0150). Nordic continued to rely on the *unamended*, unexercised 8-6-2018 EOA to support its TRI claim in its 5-17-2019 supplemental-TRI filing (A.R. 0150), which included: (i) a 5-16-2019 surveyor's opinion letter from James Dorsky, P.L.S., to Erik Heim (A.R. 0935q); and (ii) the 8-31-2012 Good Deeds survey (A.R. 0157; 0176; 0243, Ex. 3; 0935j) that expressly stated that *the Eckrotes do not own the intertidal land on which Lot 36 fronts*.

On 5-20-2019, Upstream, Mabee-Grace and the Lobstering Appellants challenged the sufficiency of Nordic's TRI submissions in BPL-DEP -- adding ownership claims by Mabee-Grace in the intertidal land on which the Lot 36 fronts and the abutting intertidal land, and Upstream's claim as holder of a recorded conservation easement dated 4-29-2019 (A.R. 0155).

On 5-29-2019, the Department sent Nordic a letter requesting additional information in support of Nordic's TRI claims. (A.R. 0170). On 6-10-2019 Nordic filed a 144-page pdf containing documents on which it relied in asserting TRI with the Department (A.R. 0177-0178),

[redacted]

which included: (i) an unrecorded 2018 Good Deeds survey (A.R. 0178, p. 4) which depicts Lot 36's waterside (eastern) boundary as the high water mark; (ii) an unrecorded survey plan by James Dorsky, P.L.S., dated 6-4-2019, showing that *the Eckrotes' property interest terminates at their high water mark* and that the intertidal property on which Lot 36 fronts is allegedly owned by "Hartley Heirs" with NAF having a "partial interest" in this 7.2-acres of intertidal land pursuant to "Release Deeds from Hartley Heirs" (A.R. 0178, p. 3); (iii) a 5-16-2019 opinion letter from Surveyor Dorsky to Erik Heim stating that the Eckrotes did not own the intertidal land adjacent to lot 36 but opining that "Hartley Heirs" do own it (A.R. 0178, pp. 87-89); (iv) all relevant chains of title and recorded deeds; and (v) five (5) Release Deeds *with all information identifying the Grantors redacted to prevent identification or location of the Grantors* (A.R. 0178, pp. 135-144).[12]

On 6-12-2019 @ 1:23:59 PM, an email was sent by Tom Abello of the Governor's staff, scheduling a meeting on 6-13-2019, regarding "Belfast fish farm communications next steps" (Law Court Appendix: A. 0222). This email was sent to: Melanie Loyzim, David Madore (DEP staff), Amanda Beal (DACF Commissioner), Andy Cutko (DACF-BPL) and Scott Ogden (Governor's staff). *Id.* Deputy Commissioner Loyzim then forwarded the Abello email to DEP Commissioner Reid. (Law Court Appendix: A. 0222). The purpose of the meeting, scheduled to take place in the Governor's Office at 1 p.m. on 6-13-2019, was described by Mr. Abello as:

> . . . Based on a few conversations with ACF and DEP, I am hoping we can get together tomorrow at 1 pm (here at the Governor's office) *to discuss communications around TRI for Nordic*. *Prior to Friday's deadline, it would be helpful to get everyone on the same page from a messaging standpoint.* Please feel free to invite the right folks from your respective offices.

(emphasis supplied).

At 3:07 p.m. on 6-13-2019, Appellants' counsel and other interested parties received the Commissioner's revised TRI determination, signed by Attorney Kevin Martin, stating:

> With respect to the intertidal portion of the property proposed for use, the department finds that the deeds and other submissions, including NAF's option to purchase and easement over the Eckrote property and the succession of deeds in the Eckrote chain of title, when considered in the context of the common law presumption of conveyance of the intertidal area along with an upland conveyance, constitute a sufficient showing o TRI for the Department to process and take action of the pending applications.

[12] DEP major projects website: https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/19-06-10%20Tourangeau%20-%20Loyzim.pdf

(A.R. 0191). In *Mabee I,* the Law Court stated that the "presumption" of conveyance to low water had no application in this case based on the language in the 1946 Hartley-to-Poor deed. *Mabee I,* at ¶ 27.

Appellants appealed the 6-13-2019 TRI determination to the Board and submitted a motion to dismiss Nordic's applications for lack of TRI on 7-12-2019, supplemented on 7-25-2019. (A.R. 0243, 0268). The Board assumed jurisdiction over the Nordic project on 6-20-2019 and refused to consider Appellants' appeal of the 6-13-2019 TRI determination on 8-23-2019 (A.R. 0317 (2nd Procedural Order ("P.O."), § 12). On 8-15-2019, the Board refused to include TRI challenges in the adjudicatory hearing (A.R. 0303 (1st P.O.)).

[redacted]

Pursuant to Hartley's Probate File and 1945 Will, none of the Grantors of those Release Deeds was an heir or heir-at-law of Harriet L. Hartley or her actual heirs-at-law, her sisters Genevieve Hargrave Bailey and Esther Hargrave Woods (*Mabee I,* 2023 ME 15, n. 11).

The MGF Appellants challenged the Release Deeds as shams in the Title Claims litigation.

Both the 10-28-2021 trial court Decision and Judgment in RE-2019-18 and the Law Court's Decision in *Mabee I* have already determined, *as a matter of law*, that ***the Release Deeds*** that

Nordic drafted and solicited in 2019 from ten out-of-state persons, recorded by Nordic on September 23, 2020, ***conveyed no title, right, or interest in the disputed intertidal land to Nordic, because the Grantors of those Release Deeds had no title, right on interest in any real property formerly owned by Harriet L. Hartley to convey***. *See, e.g., Mabee v. Nordic Aquafarms Inc.,* No. RE-2019-0018, 2021 WL 6932428, at *27, ¶¶ 13-14 (Me.Super. Oct. 27, 2021)[13] and *Mabee I*, 2023 ME 15, ¶¶ 10, 17, 45-53 and 61, n. 11.[14] Rather, in *Mabee I,* the Law Court determined that Plaintiffs Mabee and Grace own the intertidal land on which Lots 38, 37, 36 and 35 front, pursuant to the deeds in Mabee-Grace's chain of title back to the 1950 Hartley-to-Butlers deed (WCRD Book 474, Page 387; A.R. 0178, p. 10). *Mabee I,* 2023 ME 15, ¶¶ 50-52, n. 11.

MEMORANDUM OF LAW AND ARGUMENT

In footnote 2 of Nordic's 8-14-2023 Response to the Objections filed by Upstream Watch, NVC and the MGLF Appellants, Attorney Tourangeau again seeks to use the sham Release Deeds as a basis for asserting that Nordic had demonstrated "sufficient" TRI in the intertidal land adjacent to Lot 36 based on the Release Deeds. Attorney Tourangeau stated in relevant part:

> The "footnote 9" referenced by Attorney Reid, refers to a Law Court observation that Nordic's surveyor originally "read the Hartley-to-Poor deed as excluding the intertidal land." *See* Quiet Title Decision fn 9. The administrative record for the Project Approvals contains the survey referenced in footnote 9, where that surveyor concluded that the intertidal land was retained by the heirs of Harriet Hartley. *The administrative record also contains release deeds from those heirs releasing to Nordic any rights they would have had to the intertidal land or to enforce any upland use restriction had that surveyor's original opinion been adopted by the Law Court. Of course, the Law Court ultimately adopted a different conclusion,* ***but Nordic still provided evidence of right, title, and interest consistent with that surveyor's original (and subsequent) opinions***. In any case, the offhand comments of counsel to the Governor on this tangential issue are of no relevance to the directive here on remand. This attachment (and all other attachments to the various objections) should be rejected and stricken for lack of relevance to the issue currently before the Board.

(emphasis supplied). In point of fact, nothing could be more relevant to the issue before this Board on remand than the fact that Nordic and its counsel obtained the 2020 Orders granting Nordic permits and licenses to use someone else's land through chicanery and by providing

[13] Specifically, the trial court stated in relevant part:

> 13. At the time of her death on October 18, 1951, Harriet L. Hartley owned no real property in Belfast, Maine and her estate conveyed no real property to her intended heirs or heirs at law.
>
> 14. None of the quitclaim deeds executed by the individuals Robert L. Burger, Thomas A, Burger, Robert L. Burger II, David Woods, Marcia L. Woods, David Wesley Bell, Karen L. Stockunas, Constance Daily, Barbara Bell, or Sandra L. Bell conveyed title to the intertidal flats appurtenant to Lots 37, 36, or 35 to Nordic, as these individuals did not have title to convey.

[14] The Law Court stated in footnote 11 of *Mabee I*: "Again, although we need not look to extrinsic evidence, we observe that Hartley's probate file contains a note indicating that she conveyed all her real property during her life."

the Board with false and/or incomplete information relating to TRI in contravention of the applicants' obligations in Chapter 2. *See, e.g.,* A.R. 0243, Ex. 4.

First, *Nordic never provided* ***unredacted*** *Release Deeds to the Commissioner or Board*. Second, *Nordic never claimed TRI based on the Release Deeds in any application submitted to the Department*. Third, *neither the Commissioner nor Board based their respective TRI determinations on the Release Deeds*; rather, all TRI determinations were based on Nordic's knowingly-false claim that it had TRI based on the 8-6-2018 easement option from the Eckrotes. Fourth, *both the trial Court in RE-2019-18 and the Law Court in Mabee I, already established that the Release Deeds were sham instruments that conveyed nothing to Nordic*, because the Grantors had nothing to convey. And, Fifth, the Law Court determined in *Mabee I* that: (i) Mabee-Grace and their predecessors in interest back to 1950 obtained title to the intertidal land adjacent to Lots 36 and 35 pursuant to the 1950 Hartley-to-Butlers deed; and (ii) "Hartley's probate file contains a note indicating that she conveyed all her real property during her life." *Mabee I,* ¶¶ 50-52, n. 11.

Nordic knew the intertidal land where they wanted to place their pipes was ***not*** owned by the Eckrotes no later than April 2018, based on the 2012 and 2018 Good Deeds surveys (A.R. 0243, Exs. 3 & 6; 0935i and 0935j). Nordic knew the intertidal land where they wanted to place their pipes was ***not*** owned by the ten Grantors of the Release deeds Nordic's counsel drafted, solicited and recorded, no later than December 2018 based on the Hartley Probate File. And, Nordic knew the intertidal land where they wanted to place their pipes was owned by Jeffrey R. Mabee and Judith B. Grace and subject to a "residential purposes only" servitude and valid conservation easement held by Upstream Watch and then Friends, no later than May 1, 2019 – and likely much earlier – based on the deeds and surveys in Nordic's counsels' possession and Upstream's and the MGLF submissions to the Department and BPL (A.R. 0178; *see also*, 0187).

Despite this knowledge and the unambiguous ethical responsibilities of its counsel, Nordic, its agents and counsel, have simply misrepresented and/or failed to disclose fully all relevant facts to the Commissioner and Board relating to TRI in violation of Chapter 2, §§ 11(D) and 27(B). The purpose of these material omissions by Nordic and its counsel was to obtain permits and licenses effecting property that Nordic has never had *actual* TRI to use in the manner the permits would allow. Nordic cannot now rely on the *unappealable* suspension decision -- that was erroneously entered, in the absence of jurisdiction, by the Commissioner -- to prove they did not previously get permits and licenses from the Board based on false, misleading and incomplete information, in

contravention of 06-096 C.M.R. ch. 2, § 27(B).

To the extent that the Commissioner's Suspension Order is being referenced for the purpose of "proof" that Nordic has not violated Chapter 2, § 27(B), or for the proposition that the Commissioner, *and not the Board*, has jurisdiction over whether Nordic's permits and licenses can be suspended or revoked, the Lobstering Petitioners object to the Board referencing this document on remand as dispositive of anything.[15] Here, the Board – *not the Commissioner* – has mandatory jurisdiction over the Nordic project pursuant to 38 M.R.S. § 341-D(2) – as a project of statewide significance and pursuant to the request of Nordic and the Commissioner in 2019. Consequently, the Commissioner could *recommend* suspension or revocation *to the Board*, but should have referred that decision to the Board for resolution pursuant to Chapter 2, §§ 26 and 27. At best, the Commissioner's Suspension Order is advisory, pursuant to 38 M.R.S. § 342(11-A) and Chapter 2, § 26. But the Commissioner could not make a dispositive determination regarding suspension or revocation of Nordic's permits and licenses. Only the Board has had the jurisdiction to grant, suspend or revoke Nordic's requested permits and licenses since June 20, 2019, pursuant to 38 M.R.S. §§ 341-A(2), 341-D(2), 342(11-A) and Chapter 2, §§ 11(D), 26 and 27(B) on remand.

CONCLUSION

Because the Release Deeds recorded on 9-23-2020 conveyed nothing to Nordic, Nordic obtained no TRI in the intertidal land adjacent to Belfast Tax Map 29, Lots 36 and 35 from the Grantors of the Release Deeds in 2019. Any assertions to the contrary in these proceedings on remand should be both ignored and admonished as a further violation of Chapter 2, § 27(B) by Nordic and its counsel. Based on the prior Administrative Record, the determinations in *Mabee I,* the evidence contained in the Law Court Appendices in BCD-22-48 and WAL-22-19, and the current state of the facts, the 2020 Orders should be vacated by the Board and Nordic's applications returned to Nordic for lack of sufficient TRI pursuant to Chapter 2, § 11(D) and/or revoked pursuant to Chapter 2, §§ 26 and 27(B) & (E) and 5 M.R.S. § 10004(1) and 38 M.R.S. § 341-D(2).

Dated this 21st day of August, 2023. */s/ Kimberly J. Ervin Tucker*

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[15] The MGLF Appellants challenged the Commissioner's jurisdiction to enter that Order, in the absence of a remand by the Law Court, in their filings relating to Upstream's Petition to suspend or revoke. 4-10-2023 MGLF Reply, f n.1.

Enclosure(s)

IN THE MATTER OF NORDIC AQUAFARMS INC.

NORDIC AQUAFARMS, INC. Belfast, Northport **and Searsport** Waldo County, Maine A-1146-71-A-N L-28319-26-A-N L-28319-TG-B-N L-28319-4E-C-N L-28319-L6-D-N L-28319-TW-E-N W-009200-6F-A-N	)))))))))))	APPLICATIONS FOR AIR EMISSION, SITE LOCATION OF DEVELOPMENT, NATURAL RESOURCES PROTECTION ACT, and MAINE POLLUTANT DISCHARGE ELIMINATION SYSTEM (MEPDES)/WASTE DISCHARGE LICENSES **BRIEF ON REMAND SUBMITTED BY** **MGF APPELLANTS** Dated: August 21, 2023

This matter is before the Board of Environmental Protection ("Board" or "BEP") on remand from the Law Court of the 80C appeal in BCD-22-48 of the Board's 11-19-2020 Orders. The Law Court's purpose in remanding the 2020 Orders to the Board, was to provide the Board with an opportunity to re-evaluate its earlier determinations regarding the sufficiency of Nordic's claims of title, right or interest ("TRI"), and reconsider the TRI issue with the benefit of judicial determinations regarding the disputed title claims and property rights. In effect, the Law Court's remand has turned the clock back to November 18, 2020, and asks the Board if it knew on 11-18-2020, what it knows now, would the Board have determined on 11-19-2020 that: (i) Nordic had demonstrated "sufficient TRI" in the disputed property to obtain permits and licenses from the Board; and (ii) Nordic could use and develop the impacted property in the manner the permits would allow. The answer to both questions must be yes to retain the permits and licenses. Here, the answer to both questions is no – as discussed in more detail below.

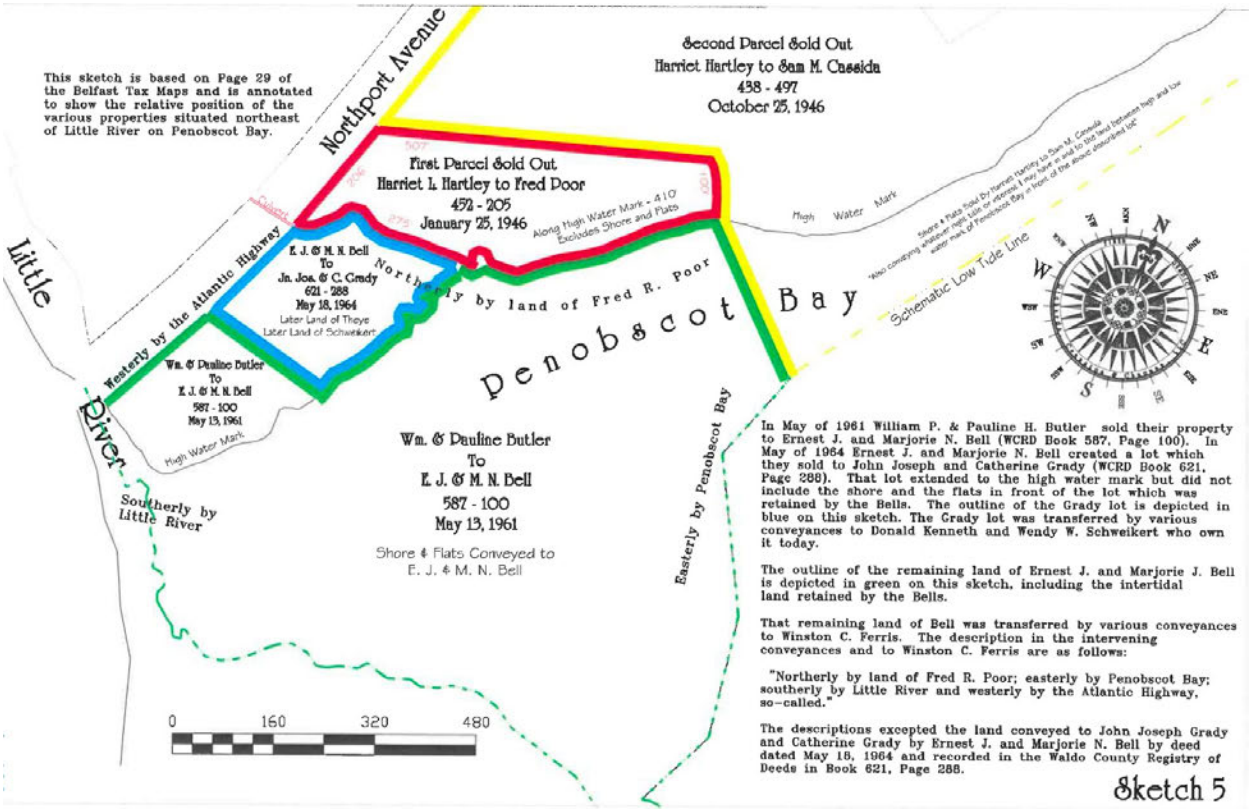
This Brief is submitted on behalf of the MGF Appellants,[1] who assert that the 2020 Orders should be vacated or revoked by the Board based on the judicial determinations made by the Law Court in *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, 290 A.3d 79 (hereinafter "*Mabee I*"). The determinations in *Mabee I* establish, as a matter of law, that Nordic cannot, did not, and *could*

[1] On remand, Jeffrey R. Mabee and Judith B. Grace (Mabee-Grace" or "Mabee and Grace") and Interested and Aggrieved party the Friends of the Harriet L. Hartley Conservation Area ("Friends) (collectively herein "MGF Appellants"), file their brief in support of vacating or revoking the Board's 11-19-2020 Orders granting Nordic Aquafarms Inc. ("Nordic") the above-referenced permits and licenses and returning Nordic's permit applications for lack of title, right or interest ("TRI") in the land proposed for use and development, pursuant to 06-096 C.M.R. ch. 2, § 11.D and 5 M.R.S. § 10004. MGF Appellants also join, adopt and incorporate the Lobstering Appellants' Brief referencing Chapter 2, § 27(B) as a basis for vacating the 2020 Orders on remand; and the Brief filed on 8-18-2023 by Appellant Upstream Watch ("Upstream").

never meet its burden to show "sufficient TRI" to use the property proposed for development in the manner the permits and licenses would allow. Thus, the applications should be "returned" to Nordic, as mandated by 06-096 C.M.R. ch. 2, § 11(D).[2] The Law Court's 2-16-2023 Decision in *Mabee I* determined, as a matter of law and fact, that:

A. "Mabee and Grace own the intertidal land abutting their own upland property [Lot 38] and the intertidal land abutting the upland properties of the Schweikerts, the Eckrotes, and Morgan [Belfast Tax Map 29, Lots 37, 36 and 35 respectively]. Mabee and Grace's property is outlined in the solid and dashed green lines in Figure 5." *Mabee I,* 2023 ME 15, ¶¶ 14, 17, Figure 5 (below).

FIGURE 5



B. Plaintiff Friends holds an "enforceable" Conservation Easement, created in April 2019 by Plaintiffs Mabee and Grace, on the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and 35 front (*Mabee I,* ¶¶ 59-61), depicted on Figure 5 above with a green hashed

[2] 06-096 C.M.R. ch. 2, § 11(D) states in relevant part that: "**Title, Right or Interest.** Prior to acceptance of an application as complete for processing, an applicant shall demonstrate to the Department's satisfaction sufficient title, right or interest in all of the property that is proposed for development or use. An applicant must maintain sufficient title, right or interest throughout the entire application processing period. ... The Department may return an application, after it has already been accepted as complete for processing, if the Department determines that the applicant did not have, or no longer has, sufficient title, right or interest."

or solid line below the high water mark of Penobscot Bay;

C. The "residential purposes only" servitude established in the 1946 deed from Harriet L. Hartley to Fred R. Poor ["1946 Hartley-to-Poor deed;" [redacted]; A.R. 0178, pp. 48-49], "benefiting the holder of the land now owned by Mabee and Grace, ***runs with the land conveyed to [Fred R.] Poor*** [indicated on Figure 5 by a red solid line, which now includes current Lot 36 and portions of Lot 35]***, binding Poor's successors***" (*Mabee I,* ¶ 58 and n. 13 (emphasis supplied));

D. Harriet L. Hartley did not convey any intertidal land to Fred R. Poor in the 1946 Hartley-to-Poor deed, and, therefore, the Eckrotes and Morgan, as successors of Poor never owned the intertidal land abutting their respective upland properties [Lots 36 and 35] (*Mabee I,* ¶¶ 10, 17, 25-45 and Figures 3 and 5);

E. "[O]nce it is understood that the Hartley-to-Poor deed did not convey the disputed intertidal land, under the relevant legal principles, the language in the [1950] Hartley-to-Butlers abutters' deed unambiguously conveyed the disputed [intertidal] land [adjacent to Lots 36 and 35] to Mabee and Grace's predecessors in interest." (*Mabee I,* ¶¶ 46-52).

F. As a matter of law, the "mouth" of a brook, stream and river "is a fixed point defined by the upland boundary, and the call does not shift with the tide," but is where "the banks cease to exist" and "cannot be located below the upland banks." (*Mabee I,* ¶¶ 34-35, n. 8); and

G. "Nordic's surveyor asserted at trial that the 'mouth of a brook' is 'basically where the flowing water body . . . enters the receiving water body,' and, therefore, the mouth of a brook moves with the ebb and flow of the tide. Applying this construction of the term to deed language is impractical in at least two respects. First, it is dependent on the presence of flowing water in the brook, which may not, in fact, be present. *See* 38 M.R.S. § 480-B(9) (listing the characteristics of a 'channel' within the definition of "brook"). Second, regardless of where the bodies of water meet, the iron bolt referenced in the [1946 Hartley-to-Poor] deed would not have moved with each ebb and flow of the tide. Although immaterial to our analysis because we find the deed language clear, Mabee and Grace's surveyor's definition of 'mouth of a brook' was similar to the statutory definition discussed above. He testified that there is a clear distinction between the mouth of the brook and the bay, and he located the mouth of the brook at the high-water mark." (*Mabee I,* 2023 ME 15, n. 8).

MEMORANDUM OF LAW AND ARGUMENT

In order to be eligible to apply for a permit, one must have the type of relationship to a site "that gives ... **a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license [sought]**." *Murray v. Town of Lincolnville,* 462 A.2d 40, 43 (Me.1983) (emphasis supplied). In *Tomasino v. Town of Casco*, 2020 ME 96, ¶¶ 14-15, 237 A.3d 175, 180–81, the Law Court reiterated its prior holdings in *Murray* and in *Rancourt v. Town of Glenburn*, 635 A.2d 964, 965 (Me. 1993), that: "***the applicant must demonstrate not just any right, title, or interest in the property but a right, title, or interest in the property that allows the property to be used in the manner for which the permit is sought*** . . .".

Nordic has ***never*** demonstrated that it had the requisite TRI in Lot 36 (formerly owned by the Eckrotes) and/or the intertidal land adjacent to Lot 36 that would allow it to use that property ***in the manner for which the BEP permits and licenses are sought***. [redacted] Accordingly, the Board should vacate or revoke the Orders entered on 11-19-2020 and return Nordic's applications pursuant to Chapter 2, §§ 11(D), 26 and § 27(B) and 5 M.R.S. § 10004(1).

A. The Eckrotes' Predecessors-in-Interest never received Title to the Intertidal Land on which Lot 36 Fronts and, thus, *could not grant Nordic* an Easement to Use the Intertidal Land on which Lot 36 Fronts

One can only convey, ***or grant an easement in***, land that he has received. *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 19 A. 915, 916 (1890). *See also, Gravison v. Fisher*, 2016 ME 35, ¶ 59, 134 A.3d 857, 875, as corrected (June 30, 2016), and *abrogated* (on other grounds) *by Dupuis v. Ellingwood,* 2017 ME 132, ¶ 59, 166 A.3d 112. Here, the ownership determinations made in *Mabee I* establish, as a matter of law, that the Eckrotes never had the legal capacity to grant Nordic an easement (or easement option) to use Belfast Tax Map 29, Lot 36 ("Lot 36") or the adjacent intertidal land, because: (i) neither the Eckrotes, nor their predecessors-in-interest back to 1946, were conveyed the intertidal land adjacent to Lot 36; and (ii) upland Lot 36 is burdened by a "residential purposes only" servitude that runs with the land and binds Poor's successors. Accordingly, the Board's 2020 TRI determinations were made based on ***errors of law*** and should be reversed by the Board on remand, and Nordic's applications returned pursuant to Chapter 2, § 11(D).

B. No Evidence in the Administrative Record Supports Nordic's claim of having "Sufficient" TRI to Obtain *or Retain* Permits and Licenses from the Board

The Board's 2020 Orders erroneously concluded that Nordic had demonstrated that it had "sufficient" TRI to obtain permits and licenses from the Board, based on ***errors of law*** relating to

the interpretation of the evidence submitted in the Record by Nordic to support its TRI claims. For example, the Board's Final Air License Order states in relevant part:

> The Board continues to concur with the Department's interpretation of Chapter 2's TRI provisions and its analysis with respect to the intertidal portion of the property proposed for use as set forth in the June 13, 2019 acceptance letter. . . . Pursuant to the Board's interpretation of these TRI provisions, *the Board finds that the applicant has made a sufficient showing of TRI to develop the property as proposed for the applications to be processed and decided*. As the Department found in its June 13, 2019 acceptance letter, *the deeds and other submissions, including Nordic's options to purchase, and the analysis of the chain of title remain unchanged and remain a sufficient showing for the Board to act on the applications*.

11-19-2020 Air License Order, pp. 3-4 (emphasis supplied).[3]

From October 2018 forward, the sole basis on which Nordic based it claims of "sufficient" TRI in its applications filed with the Department was (and still is) the 8-6-2018 Easement Option Agreement from the Eckrotes ("8-6-2018 EOA").[4]

However, by its own terms, that easement terminates at the high-water mark of Lot 36 and granted no right to use the adjacent intertidal land. *See*, 1-22-2019 Kavanah letter (A.R. 0095).

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[3] DEP Major Projects website for the Nordic project: https://www.maine.gov/dep/ftp/projects/nordic/final-signed-orders/Air%20signed%20order%2011-19-20.pdf

[4] DEP Major Projects website for the Nordic project: https://www maine.gov/dep/ftp/projects/nordic/applications/

Indeed, ***all*** of the Record evidence, *primarily submitted by Nordic itself,* demonstrated -- *as a matter of law and fact* -- that the Eckrotes had no TRI in the intertidal land on which Lot 36 fronts and, therefore, the Eckrotes had no legal ability to grant Nordic an easement in that intertidal land.[5] The Department (both the Commissioner *and* Board), in concluding to the contrary, erred *as a matter of law* – and improperly granted permits and licenses to Nordic in the absence of a justiciable issue or any competent Record evidence supporting those prior TRI determinations.

Nordic's evidence submitted on 6-10-2019 illustrates this point. On 6-10-2019, Nordic submitted all of the deeds in Mabee-Grace's and the Eckrotes' chains of title (A.R.0164; 0164a; 0178, pp. 5-30, 43-86), as well as two surveyors' plans and a surveyor's opinion (A.R.0178, pp. 3-4, 87-89) to bolster Nordic's TRI claims that the 8-6-2018 EOA (A.R.0906d) demonstrated Nordic had "*sufficient*" TRI to obtain permits and licenses authorizing it to bury three industrial pipes in the Eckrotes' upland lot (Lot 36) and the adjacent intertidal land.

Rather than demonstrating TRI, the deeds, surveys and plans submitted by Nordic to BEP and BPL showed that ***the Eckrotes owned no intertidal land and Lot 36 terminated at the high water mark of Penobscot Bay***. ***ALL of these surveys were all prepared by surveyors retained by the Eckrotes or Nordic*** (Gusta Ronson, P.L.S. (A.R. 0243, Ex. 3; 0935j), Clark Staples, P.L.S. (A.R. 0178, p. 4) and James Dorsky, P.L.S. (A.R. 0178, p. 3)). All of the survey plans submitted to BEP by Nordic, and the 5-16-2019 Surveyor's Opinion Letter from James Dorsky to then-President of Nordic Erik Heim (A.R. 0178, pp. 87-89; 0935q), concluded that the Eckrotes owned no intertidal land adjacent to their parcel.[6] Accordingly, the Board erred, as a matter of law, in simply ignoring the unambiguous conclusions of Nordic's own surveyors that the Eckrotes owned no intertidal land in which to grant an easement. *See, e.g. Mabee I,* n. 9.

Likewise, neither the 3-3-2019 Letter Agreement between Nordic and the Eckrotes (A.R.0906e) nor the 12-23-2019 Amendment of the 8-6-2018 EOA (A.R. 0517 & 0906h) amended the boundaries of the easement option depicted on Exhibit A of the 8-6-2018 EOA (A.R. 0906d & 0935d), nor represented or warranted that the Eckrotes owned the intertidal land. Instead, the second WHEREAS clause in the 12-23-2019 amendment plainly states:

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[5] *See also,* Nordic's concession that *Mabee I* established that the 8-6-2018 EOA never conferred TRI on Nordic to use Lot 36 or the adjacent interest land in the manner allowed by BEP's permits. 8-14-2023 Response, p. 7.

[6] [redacted]

> WHEREAS, as specified in the March 3, 2019 Letter Agreement, any easement rights Seller grants with respect to the intertidal zone and U S Route 1 adjacent to their real property are *limited to whatever ownership rights we may have* in and to said areas, *if any*, and *no representation or warranty is made as to any such ownership rights*;

(emphasis supplied) (A.R. 0517, p. 3). Again, the Board and its counsel simply erred, *as a matter of law*, in ignoring the plain language in the 3-3-2019 Letter Agreement and 12-23-2019 amendment to the 8-6-2018 EOA, submitted to DEP-BEP by Nordic on 1-7-2020.

In sum, ***there was never <u>any</u> Record evidence to support Nordic's TRI claims or the Board's conclusion that Nordic had demonstrated "sufficient TRI" to present the Board with a justiciable issue and obtain permits and licenses from the Board***. In the absence of Nordic having demonstrated administrative standing and, thus, failing to present a justiciable issue for Board resolution, the Board improperly considered and ruled on substantive matters in granting the 2020 Orders. As a result, the 2020 Orders must be vacated or revoked by the Board and Nordic's applications returned, pursuant to 06-096 C.M.R. ch. 2, § 11(D).[7] See, Chapter 2, §§ 26 and 27.

C. <u>Nordic Cannot Demonstrate "Sufficient TRI" now based on the City's 8-12-2021 Condemnation Order or the 9-3-2021 City-to-Nordic Easement</u>

In an effort to preemptively nullify an adverse judicial determination in the title claims case and appeal -- holding that: (i) Mabee and Grace own, and Friends holds an enforceable Conservation Easement on, the intertidal land adjacent to Lot 36; and/or (ii) upland Lot 36 is burdened by the 1946 "residential purposes only" servitude that runs with the land and binds Poor's successors -- [redacted]

On 8-12-2021, the City entered a Condemnation Order purporting to "take": (i) Mabee-Grace's ownership interest in the intertidal land adjacent to Lot 36; (ii) Mabee-Grace's right to enforce the "residential purposes only" servitude on upland Lot 36; and (iii) Friends' Conservation Easement on the intertidal land adjacent to Lot 36. The City's 8-12-2021 Condemnation Order

[7] See, e.g. *Homeward Residential, Inc. v. Gregor,* 2015 ME 108, ¶24, 122 A.3d 947, 954-955 ("The court could not decide the merits of the case when the plaintiff lacked standing . . . Instead, the court could only dismiss the action. Because the court addressed the merits of the complaint for foreclosure in its judgment, we vacate the judgment in its entirety and remand for an entry of a dismissal without prejudice."). *See also*, Witham Family Ltd. P'ship, 2015 ME 12, ¶7, 110 A.3d 642 ("Courts can only decide cases before them that involve justiciable controversies."

[redacted] is the subject of a pending 80B challenge with additional independent claims (BELSC-RE-2021-007). On 9-3-2021, the City also granted Nordic an easement to use Lot 36 and the adjacent intertidal land to bury its industrial pipes in Lot 36 and the adjacent intertidal land, as well as build an industrial pump house on Lot 36. The uses permitted by the 9-3-2021 City-to-Nordic easement are in direct contravention of both the 4-29-2019 Conservation Easement, that the Law Court determined was "enforceable" in *Mabee I*, and the "residential purposes only" servitude on upland Lot 36, that the Law Court determined in *Mabee I* ***runs with the land*** and ***is binding on successors-in-interest of Fred R. Poor*** (which would include the Eckrotes, Belfast and Nordic). *Mabee I,* ¶¶ 2, 58-61, n. 13.

Neither of these subsequent actions by the City and Nordic created a basis for Nordic to demonstrate TRI in Lot 36 or the adjacent intertidal land, because these actions have failed to vest Nordic with a legally cognizable right to use Lot 36 or the adjacent intertidal land in a manner that the BEP permits and licenses would allow.

1. ***8-12-2021 Condemnation Order***

On 3-2-2022 the Waldo Superior Court, [redacted] entered a Stipulated Judgment in *Mabee, et al. v. City of Belfast, et al.,* RE-2021-007 ("the eminent domain case"), [redacted] that expressly states that ***the City's exercise of eminent domain did not amend or terminate the Conservation Easement*** on the intertidal land adjacent to Lot 36 (7-26-2023 Suspension Order, p. 2, ¶ 3). Thus, to the extent the 8-12-2021 Condemnation Order resulted in a transfer of Mabee-Grace's ownership interest in the portion of their intertidal land adjacent to Lot 36 that is within the municipal boundaries of the City of Belfast, the City (and/or Nordic) has taken that land ***subject to the prohibitions and protections in the still-enforceable Conservation Easement held by Friends***.

In addition, in *Mabee I*, the Law Court established a definition of the "mouth of a river" that rejected the definition employed by the City, and the City's and Nordic's Surveyor James Dorsky, P.L.S., in entering its Condemnation Order. Pursuant to the definition of "mouth of a river" established in *Mabee I,* the City erred in "taking" intertidal land outside its municipal boundaries. [redacted].

[redacted] Maine law does not permit such extra-territorial takings.

[redacted] Further, Nordic has sought and obtained a suspension of its permits based, in part, on the inevitable years of litigation that will occur before the Law Court determines whether the City's exercise of eminent domain was constitutionally or legally proper, including whether the City has taken land outside its municipal boundaries. Until a court of competent jurisdiction has made those determinations, Nordic cannot rely on the 8-12-2021 Condemnation Order as a basis for asserting that it currently has sufficient TRI. *See, e.g. Tomasino v. Town of Casco,* 2020 ME 96, ¶ 15, 237 A.3d 175, 181.

2. *9-3-2021 City-to-Nordic Easment*

Judicial determinations in *Mabee I* and the 3-2-2022 Stipulated Judgment have declared that the 2019 Conservation Easement is still enforceable and the 1946 "residential purposes only" servitude on Lot 36 is ***binding on Poor's successors –*** which include the City and Nordic. Thus, the City was without the legal capacity to grant Nordic an easement that authorizes uses of Lot 36 and the adjacent intertidal land that violate either the 2019 Conservation Easement on the intertidal land adjacent to Lot 36 or the "residential purposes only" servitude on upland Lot 36. Consequently, Nordic cannot demonstrate that the 9-3-2021 easement confers sufficient TRI to use the property for which Nordic has sought and obtained permits and licenses from BEP in 2020, in the manner allowed by the 2020 Orders. Accordingly, Nordic does not have, and cannot demonstrate, administrative standing to *retain* those 2020 permits and licenses based on the 9-3-2021 City-to-Nordic easement.[8]

CONCLUSION

Pursuant to *Mabee I,* Nordic has never had sufficient TRI in all land proposed for development and use to *obtain, maintain or retain* permits or licenses from the Board, pursuant to 06-096 C.M.R. ch. 2, § 11.D. Further, Nordic's lack of TRI means that Nordic has always lacked

[8] *Tomasino v. Town of Casco,* 2020 ME 96, ¶ 15, 237 A.3d 175, 181 ("Whatever minimum 'right, title or interest' is required . . . , we conclude that, in the face of a dispute between private property owners, that requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so.").

the administrative standing to present the Board with a justiciable issue on which to act.

Because ***Nordic has always lacked administrative standing***, Nordic never presented a justiciable issue to the Board for substantive action. Thus, the prior Orders entered by the Board on 11-19-2020 should be vacated or revoked because those Orders were entered based on: (i) errors of law (revealed in part by the Law Court's 2-16-2023 Decision in *Mabee I*) and (ii) a lack of evidence in the Administrative Record supporting Nordic's claim of TRI in all land for which it seeks (and was erroneously granted) permits and licenses by the Board. *See, e.g.,* 5 M.R.S. §§ 10004 and 06-096 C.M.R. ch. 2, §§ 11(D), 26 and 27(B) & (E). In addition, Nordic cannot demonstrate TRI currently exists based on either the 8-12-2021 Condemnation Order [redacted] entered by the City of Belfast or the 9-3-2021 City-to-Nordic easement [redacted] Indeed, in pursuing its ultra vires use of eminent domain to benefit Nordic, the City of Belfast has even illegally attempted to take land that is ***outside the municipal boundaries of Belfast***, pursuant to the definition of "mouth of a river" established in *Mabee I,* 2023 ME 15, ¶¶ 34-35, n. 8.

Mabee I and the 3-2-2022 Stipulated Judgment in RE-2021-007 already resolved that the City was without legal capacity to grant an easement authorizing Nordic to use Lot 36 or the adjacent intertidal land in a manner that: (i) violates the 1946 "residential purposes only" servitude on Lot 36; (ii) violates the protections and prohibitions in the enforceable 4-29-2019 Conservation Easement; or (iii) includes intertidal land outside the municipal boundaries of the City of Belfast. Accordingly, Nordic cannot demonstrate that it has "sufficient" TRI based on the 8-12-2021 Condemnation Order or the 9-3-2021 City-to-Nordic easement -- the validity, factual parameters and terms of which are in dispute in pending litigation (RE-2021-007) and have not been determined by a court of competent jurisdiction. *See, e.g., Tomasino v. Town of Casco*, 2020 ME 96, ¶¶ 14-15, 237 A.3d 175, 180–181. Based on the prior Administrative Record, the judicial determinations in *Mabee I,* and the current state of the facts and law, the 2020 Orders should be vacated or revoked by the Board and Nordic's applications returned to Nordic for lack of sufficient TRI pursuant to Chapter 2, §§ 11(D) and 27(B) & (E).

Dated this 21st day of August, 2023. */s/ Kimberly J. Ervin Tucker*

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Enclosure(s)

DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF THE JUDICIAL REMANDS

NORDIC AQUAFARMS INC.	)	
Belfast, Northport and Searsport	)	
Waldo County, Maine	)	
	)	
A-1146-71-A-N	)	**APPELLANT UPSTREAM WATCH'S**
L-28319-26-A-N	)	**BRIEF ON REMAND**
L-28319-TG-B-N	)	
L-28319-4E-C-N	)	
L-28319-L6-D-N	)	
L-28319-TW-E-N	)	
W-009200-6F-A-N	)	

INTRODUCTION

Because the Board of Environmental Protection ("Board") did not have the benefit of the Law Court's decision in *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79 ("*Mabee*" or "Quiet Title Decision"), the Law Court remanded this licensing proceeding to the Board for the Board to redetermine whether the approvals of the above-referenced license applications should issue. If this Board follows the Law Court's instructions, and as Nordic now concedes, it must conclude that what Nordic originally offered to demonstrate sufficient TRI, an option to obtain an easement on which the Board relied in granting the approvals, cannot support a finding that Nordic has sufficient TRI "in all of the property that is proposed for development or use." On reconsideration, the Board must conclude that due to the applicant's lack of TRI, the applications cannot go forward, and must be returned to the applicant.

A. Nordic's Inability to Demonstrate TRI Requires that the Permits be Returned to Nordic

The *Mabee* decision clearly called into question (if not resolved the question) whether, through its option to obtain an easement agreement with the Eckrotes, Nordic demonstrated sufficient title, right or interest ("TRI") in all of the property that is proposed to be developed or

used, including the intertidal land where Nordic proposed to bury its industrial pipes.[1] The Board now must determine that Nordic has never had sufficient right, title, or interest in the intertidal land needed for its project and return the applications to Nordic.

Per the Law Court,

> 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)…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.

Order Of Remand (May 10, 2023) at 3-4.

06-096 C.M.R. ch. 2, § 11(D) provides that "[t]he Department may return an application, after it has already been accepted as complete for processing, if the Department determines *that the applicant did not have, or no longer has,* sufficient title, right or interest." (emphasis supplied). Thus, the Law Court has asked this Board to reexamine, based on what the applicant has offered to demonstrate TRI, and now in light of *Mabee*, whether the applicant has sufficient TRI in order to proceed with the applications.[2] And if not, because this proceeding has been reopened, then to return the applications to Nordic due to lack of TRI.

The Board has no authority to adjudicate an application when not supported by TRI.

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[1]Law Court, Docket No. BCD-2022-48, Order of Remand (May 10, 2023), *reconsideration denied*, Order Denying [Board of Environmental Protection] Motion for Reconsideration (June 29, 2023).

[2] 06-096 C.M.R. ch. 2, § 11(D) **Title, Right or Interest.** Prior to acceptance of an application as complete for processing, an applicant shall demonstrate to the Department's satisfaction sufficient title, right or interest in all of the property that is proposed for development or use. An applicant must maintain sufficient title, right or interest throughout the entire application processing period.

See Murray v. Inhabitants of Town of Lincolnville, 462 A.2d 40, 43 (Me. 1983)("An applicant for a license or permit to use property in certain ways must have the kind of relationship to the site that gives him a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license he seeks."); *see also Madore v. Maine Land Use Regulation Com'n*, 1998 ME 178, ¶¶ 9-14, 715 A.2d 157; *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345, 348 (Me. 1995); *Rancourt v. Town of Glenburn*, 635 A.2d 964, 965-66 (Me. 1993); *Walsh v. City of Brewer,* 315 A.2d 200, 205-207 (Me. 1974).

There is no dispute that in this licensing proceeding part of the property Nordic proposed to use included certain intertidal land to lay its industrial pipes. Nordic sought to demonstrate to the Board that Nordic had sufficient TRI to that land based on an option to enter into easement agreement with the Eckrotes, who claimed to be fee owners of that land. Obviously, the viability of the option depended on whether the Eckrotes had any rights to convey, for if they did not, then the option to obtain the easement was a sham. And if a sham, Nordic had no basis to apply for the permits sought, and the DEP had no basis to process the application, issue any approval, or any permits.

During the adjudicatory process, the Board refused to hear evidence that the option to obtain easement was a sham. Despite compelling evidence offered,[3] the Board accepted its lawyer's legal advice and the Board refused to look beyond the four corners of TRI documentation presented by the applicant, the option to obtain an easement. The Board also refused to follow the Law Court's decision in *Tomasino v. Town of Casco*, 2020 ME 96, 237 A.3d 175, that instructed administrative agencies like this Board that when questions are raised whether the proffered TRI actually allows the applicant to make use of the property in the

[3] As noted in *Mabee*, three surveyors had told Nordic that the Eckrotes did not own the intertidal land. *Mabee,* 2013 ME 15, ¶ 44 n.9, 290 A.3d 79.

manner allowed if they were granted a permit to do so, and rights have not been factually determined by a court with jurisdiction to do so, then the permitting process should not proceed until a court declaration issued. Despite knowing a quiet title action was pending, the Board ignored *Tomasino* and proceeded to act on the applications well aware that the rug could be pulled away from Nordic at any time through an adverse decision in the Quiet Title Action.

In *Mabee*, the Quiet Title Action, the Law Court held as a matter of law, that the Eckrotes did not own the intertidal land, but rather that the land is owned by Jeffrey Mabee and Judith Grace. Implicit in the court's decision is the inescapable conclusion that, as a matter of law, the Eckrotes could not grant Nordic an option to obtain an easement, or any other rights, to use the intertidal land where Nordic proposed as part of this licensing proceeding to bury its industrial pipes. That is because the Eckrotes' predecessor-in-interest Fred R. Poor was never conveyed title to that intertidal land by Hartley. As the court explained, the 1946 Hartley-to-Poor deed [redacted] severed the upland from the flats conveying no intertidal land to Poor (*Mabee*, 2023 ME 15, ¶¶ 44-45, 290 A.3d 79) ("We need go no further than the unambiguous deed language to conclude, as a matter of law, that the Hartley-to-Poor deed did not convey the intertidal land abutting the Eckrotes' property."). *See also, Dorman v. Bates Mfg. Co.*, 82 Me. 438, 448, 19 A. 915, 916 (1890) ("One cannot convey land, nor create an easement in it, unless he owns it.").

Nordic now concedes that what it offered to the Board, its option to obtain an easement from the Eckrotes, to show TRI to seek permits for the use of the intertidal land needed for its project was a sham, as it conveyed no TRI of any sorts. In its August 14, 2023, Response to Procedural Objections, at page 7, Nordic states:

Nordic concedes that the Quiet Title Decision means that Nordic's option to

> obtain an easement from the Eckrotes would not allow it to build the intake and outfall piping as documented in the Project Approvals. Nordic is well aware that the Project Approvals do not and cannot convey any property rights.

With this concession, it is no longer "unclear whether [the approvals] challenged on appeal would have been issued given intervening circumstances." Rather, it is clear that without TRI in all of the lands needed for project, Nordic had no basis to seek approvals, and the approvals should not have issued. So, the Board, now taking into account *Mabee* and Nordic's concession, must issue a decision that due to Nordic's lack of TRI, the Board has no basis to act on the applications which are now back before it on remand, that the prior approvals are no longer viable (void), and the applications should be returned to Nordic.

B. Nordic Is Required to Maintain TRI Throughout the Permitting and Appeal Period

Upstream surmises that Nordic and the Assistant Attorney General who advised the Board on the initial TRI decision (including advising the Board not to hear the compelling evidence challenging the validity of the option, and not to stay) will misdirect the Board (again) and assert that while it is now undisputable that Nordic lacks TRI, the approvals are still viable because the permits have issued, and Nordic's lack of TRI is no longer within the Board's purview. The Law Court, however, has been clear that an applicant such as Nordic must maintain TRI throughout the permitting and appeal period. See *Madore v. Maine Land Use Regulation Com'n*, 1998 ME 178, ¶¶ 9-14, 715 A.2d 157;

By letter to Matthew Pollack, Clerk of the Law Court, dated March 7, 2023, concerning *Upstream Watch, et al. v. Board of Environmental Protection,* Docket Number BCD-22-48, Assistant Attorney General Bensinger told the Law Court not to remand the appeal to the Board because, in her view, the Board would not revisit its TRI decision, regardless of *Mabee*. She informed the Law Court: "A Department of Environmental Protection permit applicant must

demonstrate, to the Department's satisfaction, sufficient TRI for the application to be deemed complete and maintain sufficient TRI 'throughout the entire application processing period.' 06-096 C.M.R. ch. 2, § 11(D). This period ends when the permit is issued."

Now echoing this position, Nordic states in its August 14, 2023, Response to Procedural Objections, at page 7: "Similarly, here, the Quiet Title Decision cannot retroactively void the Department determinations that Nordic maintained sufficient TRI throughout the entire permit processing period. 06-096 C.M.R. ch. 2, §11. This fact alone is sufficient for the Board to confirm that the Quiet Title Decision does not impact the Project Approvals."

According to the BEP and Nordic, any further Board review of the approval process, including TRI, stops once the permit is approved by the BEP (even if there is an appeal and remand). And the Law Court's remand order to determine whether the "approval[s] challenged on appeal would have been issued given intervening circumstances" is a meaningless order, a fool's errand, because even if the approvals would not have issued, once the permits issued, per the Assistant Attorney General and Nordic, the Board will not revisit its approvals. This Catch 22 position is absurd and totally at odds with the remand order.

With a remand to take further action, whether it to be to an inferior court or administrative body, the proceedings that resulted in a final appealable judgment are reopened, and the judgment is not final.[4] That means the adjudicatory process has not ended—that the application processing period has not ended. There is no finality yet.

While "[t]he Law Court did not vacate the Nordic permits" as the July 26, 2023, BEP Process Letter states, the Law Court did not affirm the permits either, because it remanded for the Board to decide whether approval should have issued. The Law Court's order states at page 5:

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[4] In an appeal of final agency action brought pursuant to M.R. Civ. P. 80C, the court may affirm the decision, 5 M.R.S. § 11007(4)(A) (2011) or remand for further proceedings, 5 M.R.S. § 11007(4)(B).

> 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.*

And as stated above at page 1, the Law Court clearly directed the Board in light of *Mabee* to redecide whether the "approvals" should have issued. If not, Nordic no longer has TRI to pursue the applications (as Nordic has now conceded), the application process should stop, and the applications must be returned to Nordic. And without valid approvals of the applications, there can be no permit. If the permits were issued, they are void.

That the Commissioner issued an "unappealable" Suspension Order of the permits is therefore irrelevant. Upstream objects to the Processing Letter's acceptance of the unknown person or entity who without disclosure moved for the Board to take Official Notice of that order. There has been no final adjudication of whether the permits were properly approved. Whether the permits were properly approved was before the Law Court and remains at issue on remand to this Board.

Upstream is not aware that the applicant has submitted any supplemental information to its application as an alternative to showing TRI on some other basis. Due process requires notice of what an applicant claims to be the basis of TRI with an opportunity to respond. The Process Letter already has violated Upstream's due process rights by invoking the procedure outlined for Official Notice in Chapter 3, § 20(C)[5] without allowing Upstream the right secured by that rule "to contest the substance or materiality of the matters noticed." Upstream is not on notice if the

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[5] 06-096 C.M.R. Chapter 3, Section 20(C) states:

C. Official Notice. Official notice may be taken of any facts of which judicial notice could be taken; of any general, technical, or scientific matters within the Department's specialized knowledge; and of statutes, regulations, and non-confidential agency records. Parties will be notified of material so noticed and will be afforded an opportunity to contest the substance or materiality of the matters noticed. Facts officially noticed will be included and indicated as such in the record.

Board intends to allow Nordic *sua sponte* to present an alternative demonstration of TRI. The Process Letter bars any reply, bars any reference to facts not in the record as of the Board's issuance of the permits. Upstream is left in the dark with its hands tied behind its back. Upstream renews its prior objection to this process. *Narowetz v. Board of Dental Practice,* 2021 ME 46, ¶ 29, 259 A.3d 771 (citing and quoting *Amos Treat & Co. v. Sec. Exch. Comm'n,* 306 F.2d 260, 267 (D.C. Cir. 1962) (at an administrative hearing must be attended "not only with every element of fairness but with the very appearance of complete fairness")).

C. Nordic Should Not be Allowed to Maintain Unlawfully Issued Permits

To the extent the Board will permit Nordic to present on this remand an alternative basis to demonstrate TRI to the intertidal land, without waiving its objection, Upstream states that any such basis cannot be relied on to show TRI. The *Mabee* decision indisputably establishes that Nordic presently lacks the TRI required to proceed with its applications. And it would be unlawful for the Board to allow Nordic to maintain its unlawfully issued permits, based on speculation that Nordic may someday obtain TRI.

In the Quiet Title Proceeding, the Law Court held that Friends of Harriet Hartley holds a valid and enforceable conservation easement on the intertidal land. That conservation easement, by its express terms and purpose, prohibits Nordic from installing its discharge and intake pipes within the intertidal land. Nordic and the City of Belfast have entered into a stipulated judgment with the State entered by the Waldo Superior Court[6], and not appealed, which provides:

> a. Pursuant to Maine's conservation easement statute, 33 M.R.S. §§ 477-A(2)(B) and 478, the City is prohibited from unilaterally amending or terminating the Conservation Easement, if valid, which may be accomplished only by a court in an action in which the Attorney General is made a party; and
>
> b. The City's actions, including its Condemnation efforts with respect to the

[6] *Jeffrey Mabee, et al. v. City of Belfast, et al.,* Waldo Superior Court, Docket No. WALSC-RE-2021-007.

> Conservation Easement and the Intertidal Land, did not amend or terminate the Conservation Easement because they were not approved by a court in an action in which the Attorney General was made a party.

33 M.R.S. § 477-A(2)(B) provides that a conservation easement "… may not be terminated or amended in sucsh a manner as to materially detract from the conservation values intended for protection without the prior approval of the court…. In making this determination, the court shall consider, among other relevant factors, the purposes expressed by the parties in the easement and the public interest." Given the conservation easement has the clear purpose of protecting the intertidal land (and Penobscot Bay) from industrial activities and pollution, Nordic cannot plausibly demonstrate TRI by mere speculations that it may someday, somehow avoid the express terms of the conservation easement.

CONCLUSION

For all the above reasons, and in light of Nordic's concession that the option to obtain an easement from the Eckrotes does not allow it to build the intake and outfall piping as documented in the project applications, in other words, does not confer the necessary TRI, Upstream Watch respectfully requests, on reconsideration, that the Board hold that due to Nordic's lack of TRI, the Board lacks any basis to process, act on, and/or approve Nordic's applications, that the approvals are no longer viable, and the applications shall be returned to Nordic.

Dated: August 18, 2023

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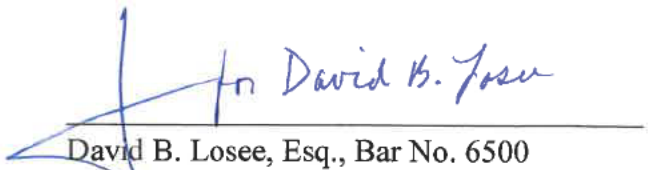

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Filings with the Board must be directed to Ruth Ann Burke and, unless otherwise specified, are due by 5:00 p.m. on the filing date. Untimely filings may be rejected.

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