



Nordic Aquafarms Remand: Staff Briefing

Kevin Martin
Policy Director

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

Protecting Maine's Air, Land and Water

Questions for the Board

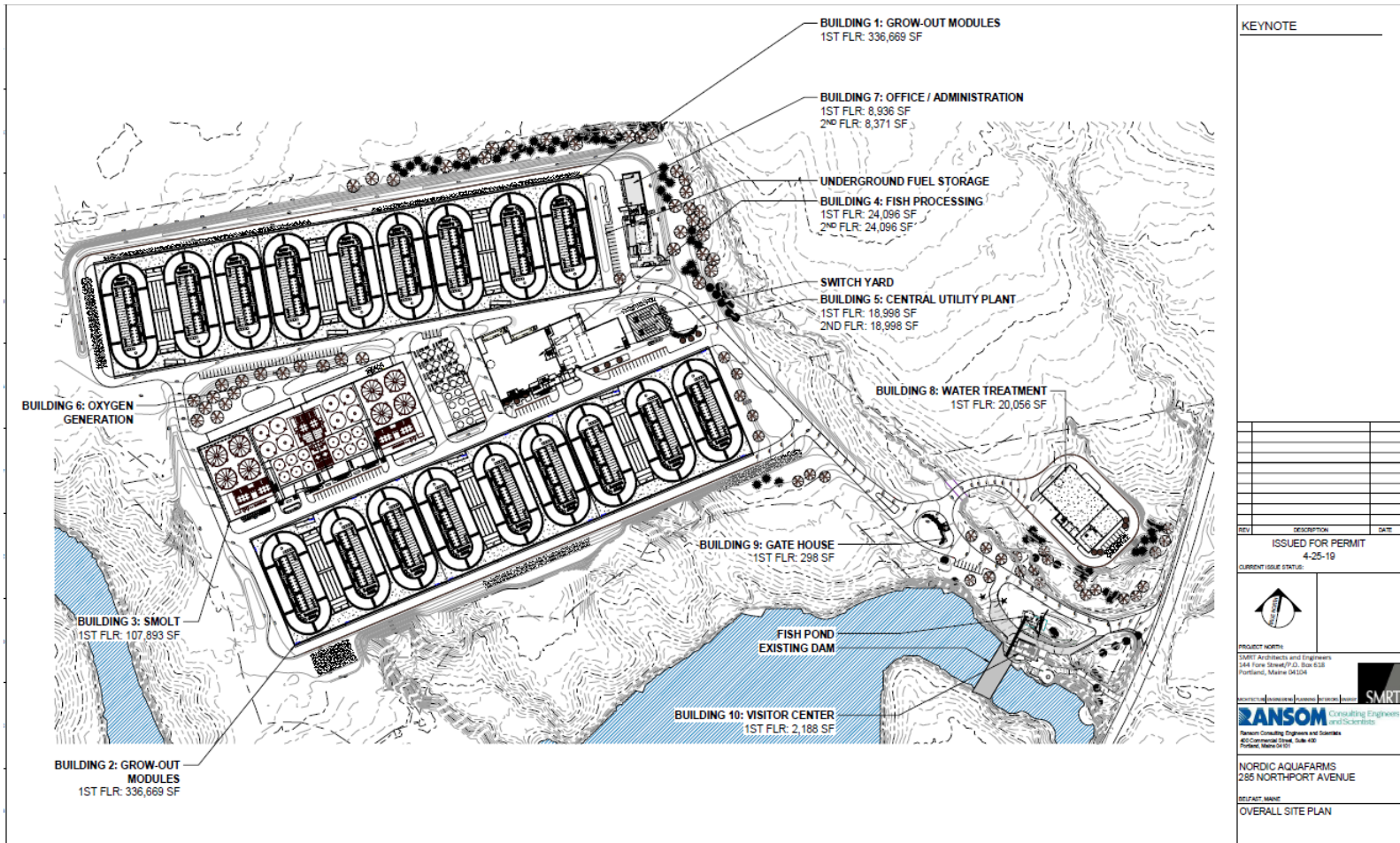


- Law Court: What Impact, if Any, Does the Law Court’s Feb. 16, 2023, Decision in *Mabee I* have on the Board’s Nov. 19, 2020, Decisions Issuing the Nordic Permits?
- When Does the Department’s Application Processing Period End?
- Are Events That Occur After the Issuance of a License Within the Application Processing Period?
- Must a Licensee Continue to Maintain TRI After a License has been Issued?
- May the Board Revisit the Prior Findings on TRI based on Post-Licensing Developments?
- What Authority Does the Board Have with Respect to Post-Licensing Developments?

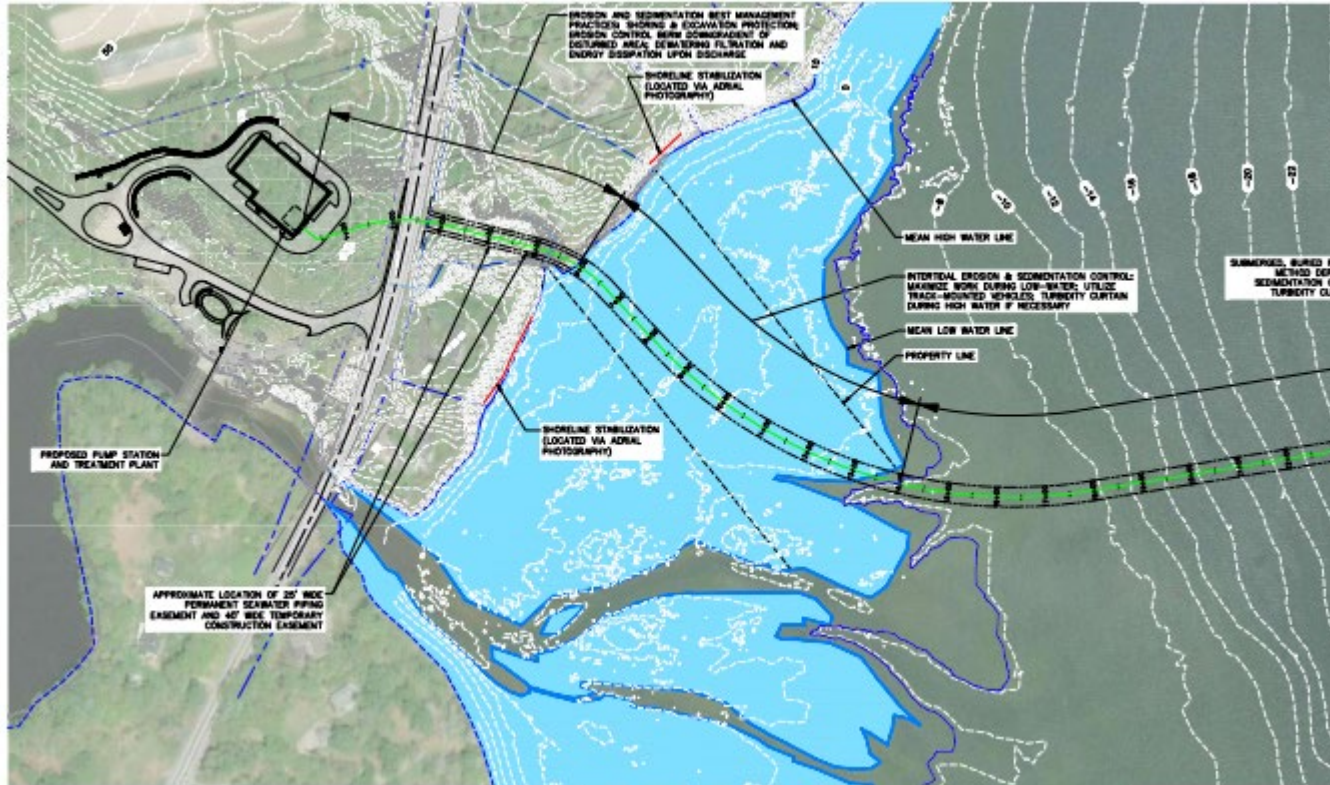
Staff Will Provide Recommended Decision Addressing such Questions at the Board’s Oct. 19, 2023, Meeting



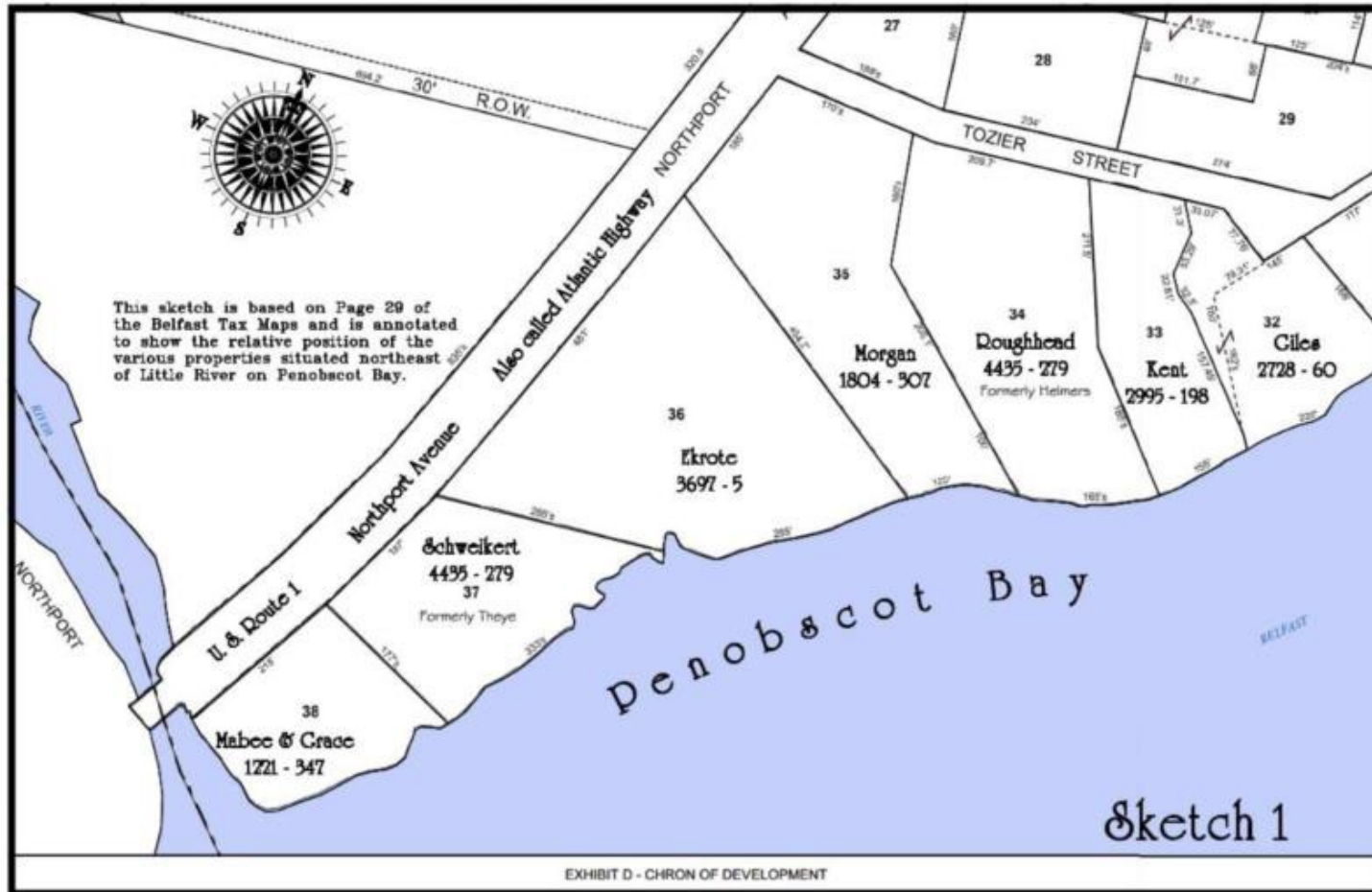
The Project



Intertidal Area



Parcels to Know



Timeline

**Application
2018-2019**

**Hearing
2019-2020**

**Board Order
2020**

**Appeals and
Suspension
2020 - 2023**

**Remand
2023**



Timeline

**Application
2018-2019**



**Hearing
2019-2020**



October 2018

- Nordic Aquafarms submits initial application (MEPDES/Waste Discharge License)
- Contains first set of Title, Right, or Interest Documentation
- Accepted as Complete for Processing on November 9, 2018



Dec. 2018 / Jan. 2019

- Upstream Watch raises issues regarding TRI
- Department Request for Additional Information
 - 1/22/19 - Kavanah Letter
- Proposed Consolidation of MEPDES application with planned applications for NRPA, Site Law, and Air Emissions
- MEPDES application placed on hold pending consolidation



April / May 2019

- Upstream Watch Pre-Application Comments on TRI
 - April 22, 2019
 - May 1, 2019
- NRPA/Site Application Submitted May 17, 2019
- Nordic Submits Additional TRI Package / Responses to Kavanah letter
- May 29, 2019, letter from Dep. Commissioner Loyzim requesting additional information

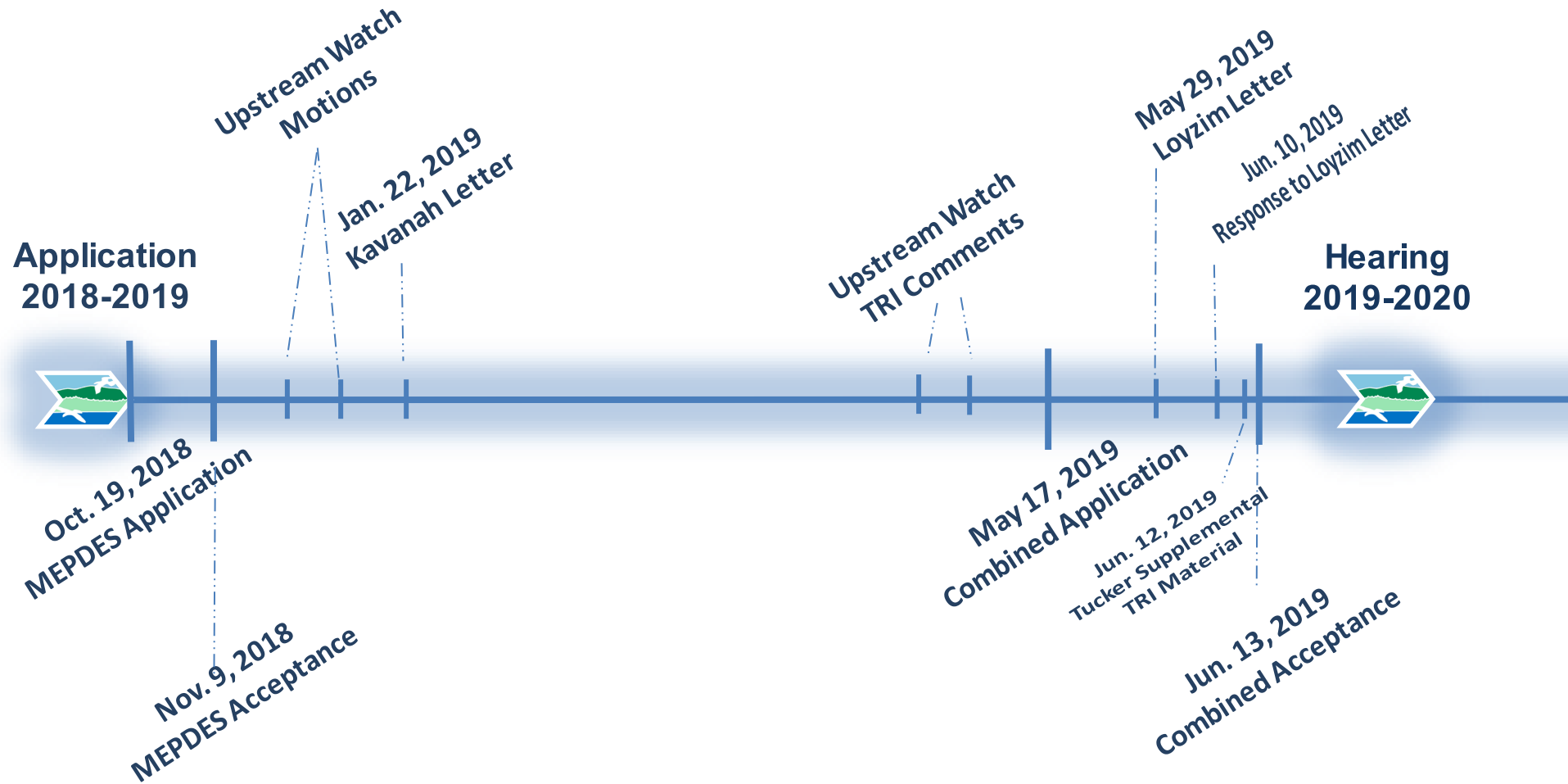


June 2019

- June 10 – Nordic Response to Loyzim Letter
- June 12 – Renewed Challenge to TRI
- June 13, 2019 – Department Accepts Applications as Complete for Processing



Timeline



Title, Right, or Interest

Chapter 2: RULE CONCERNING THE PROCESSING OF APPLICATIONS AND OTHER ADMINISTRATIVE MATTERS

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.

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



Excerpts from Completeness Letter on TRI

A determination that an applicant has demonstrated TRI sufficient for an application to be processed requires a showing of a legally cognizable expectation of having the power to use the site in the ways that would be authorized by the permits being sought. The purpose of this requirement is to allow the Department to avoid wasting its finite resources reviewing applications for projects that can never be built. If the applicant is unable to show a sufficient property interest in the site proposed for the project, pursuant to the TRI threshold requirement in Chapter 2 §11(D), the Department can return the application at the outset without devoting time and resources to its processing. In any TRI analysis under Chapter 2, the Department may look beyond an applicant's initial submissions and may request additional information and consider submissions of interested persons as necessary to judge whether adequate credible evidence has been submitted by the applicant and a sufficient showing of TRI has been made to warrant expending Department resources to process the application. The TRI provision cannot, however, be interpreted as compelling the Department to perform an exacting legal analysis of competing ownership claims to determine the ultimate ownership of a property. That ultimate conclusion can only be made by a court. Moreover, the Department rejects any such interpretation as directly counter to the purpose of the TRI provision and cannot afford to allow its permitting proceedings to be transformed into the equivalent of an administrative agency quiet title action. So long as the applicant is able to make a showing of TRI in the subject property that is sufficient to justify the processing of the application, the Department will generally consider this threshold requirement to be satisfied and move to evaluate the merits of the application.



Excerpts from Completeness Letter on TRI

With that understanding, the Department has reviewed the applications and the MEPDES application addendum (aligning the proposed project's pipe locations in the pending MEPDES application with the pipe locations in the other more recent applications) submitted by NAF and has considered all supplemental TRI material that both NAF and various interested persons have submitted. 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 an 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 of TRI for the Department to process and take action on the pending applications. This determination is not an adjudication of property rights and may be reconsidered by the Department at any time during processing as applicants must have adequate and sufficient TRI throughout the application process. Accordingly, should a court adjudicate any property disputes or rights in a way that affects NAF's interest in the proposed project lands while the applications are being processed, the Department may revisit the issue of TRI and return the applications if appropriate.



Title, Right, or Interest

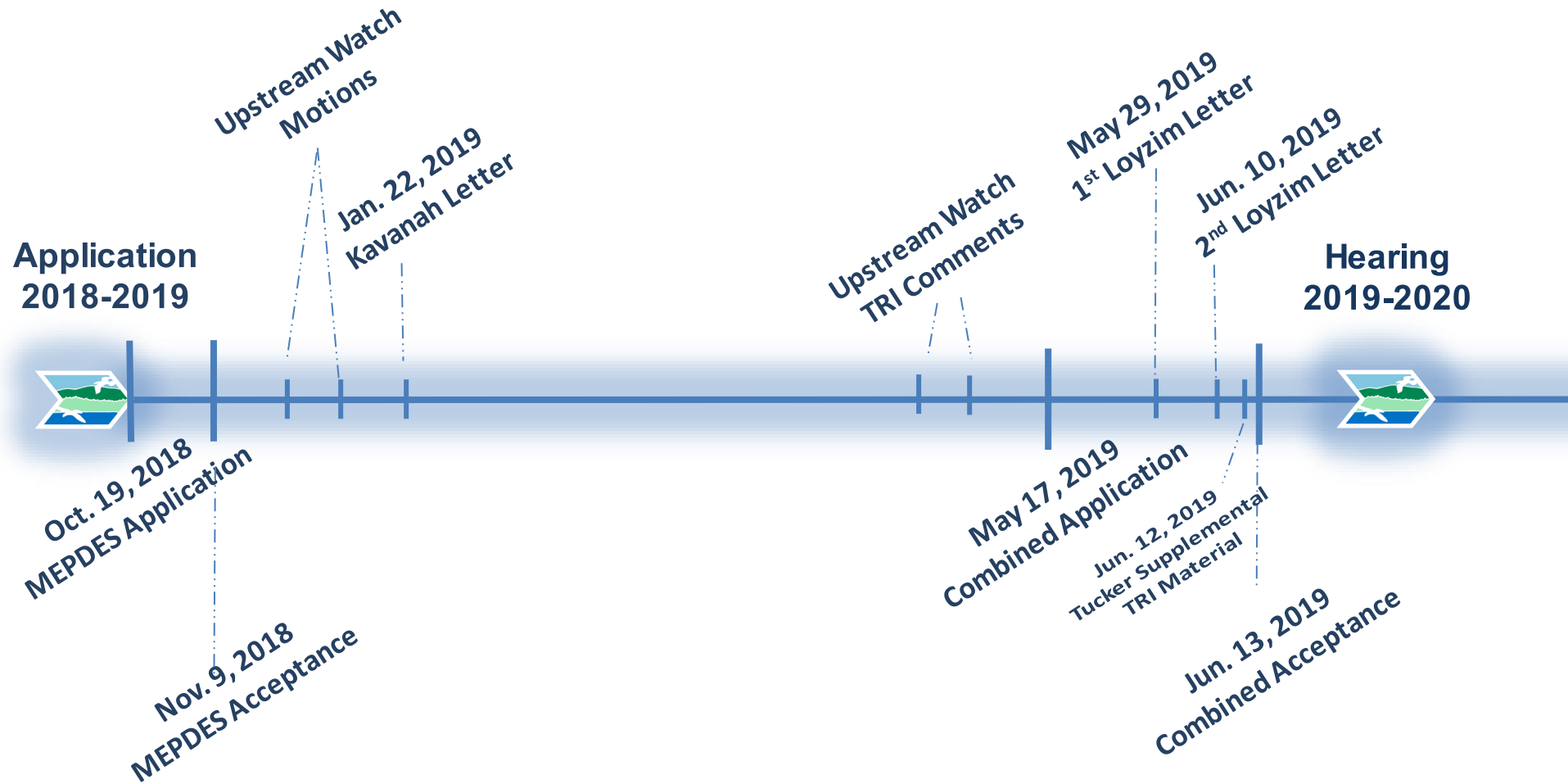
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Timeline



Timeline

Hearing
2019-2020



Board Order
2020



Jun. 13, 2019
Combined Acceptance



TRI Filings During Hearing Process

- Multiple Requests to Return the Applications Pre-Hearing
- Responses from Board
 - Aug 23 Letter from Presiding Officer Duchesne
 - Procedural Orders
 - 3rd – Nov. 1, 2019
 - 4th – Nov. 8, 2019
 - 5th – Nov. 26, 2019
 - 8th – Jan. 24, 2020
 - 9th – Jan. 31, 2020



Timeline

Aug. 29 – Duchesne Letter
I decline to return the applications based on a lack of TRI at this time

Jan. 31 – 9th PO
The request to suspend processing of Nordic's applications is denied. The materials submitted by MGL do not change the Board's decision. The Board has reviewed MGL's position on Title, Right or Interest on more than one occasion and will not revisit the matter at this time.

**Hearing
2019-2020**

**Board Order
2020**



Nov. 1 – 3rd PO
The Board will not hear testimony on this issue at the hearing.

Nov. 26 – 5th PO
... there has been no change to the applicant's Title, Right, or Interest (TRI) that warrants the rescission of the Fourth Procedural Order or the termination or suspension of these Board proceedings



**Jun. 13, 2019
Combined Acceptance**

Nov. 8 – 4th PO
Board voted 4-0 in favor of a motion to deny the appeal ... and uphold the Presiding Officer's ruling that TRI will not be an issue ... at the hearing

**Feb. 11-14, 2020
Hearing**

Jan. 14 – 8th PO
The Board has previously determined that it is not reconsidering the Commissioner's determination of the applicant's showing of sufficient Title, Right or Interest in the property



Timeline

Board Order
2020



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Feb. 11-14, 2020
Hearing

Jan. 14 – 8th PO

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Hearing

- Four Day Hearing
- TRI Not One of the Topics for Testimony at Hearing, But Parties Could and Did Submit Written Comment and Argument
- Two Motions Feb 14 & 18 Renewed Efforts to Return Applications

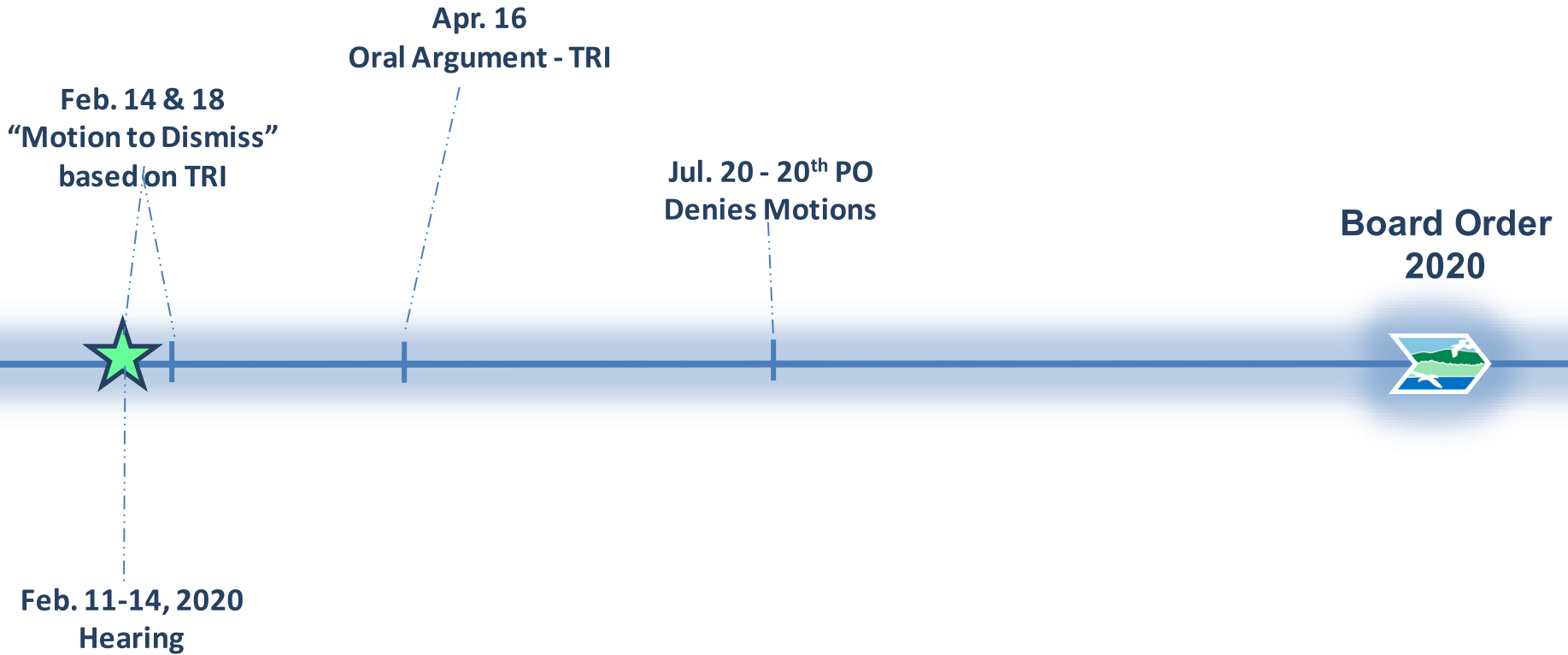


Post-Hearing

- Motions to Dismiss (i.e. Return Application) and Conduct Hearing on TRI
- 12th and 13th POs, Scheduled Oral Argument for April
- Oral Argument Held April 16, 2020 on TRI
- Additional Motion on TRI



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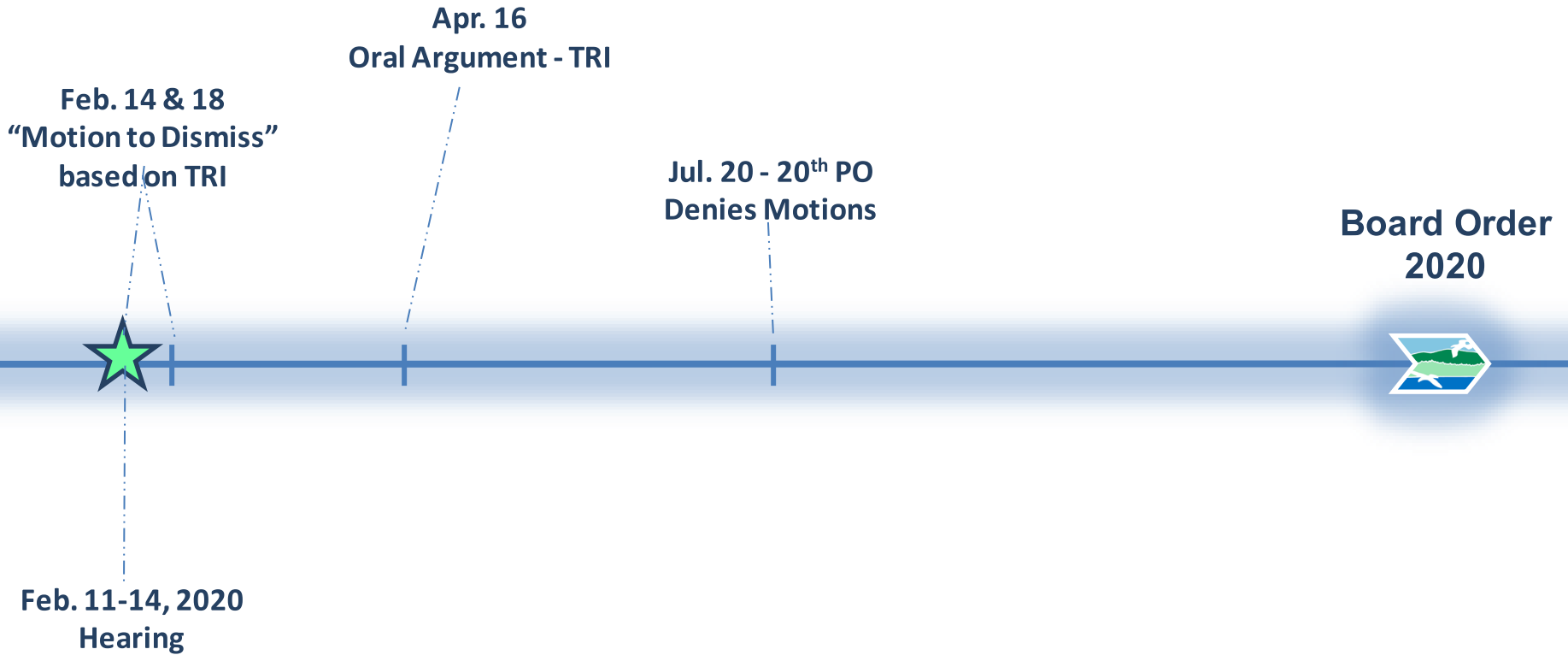


Post-Hearing

- 20th PO - Motion to Stay or Dismiss (Return Application) denied.
 - *the Board has considered and denied petitions by MGL to revisit the Commissioner's decision and stay the proceeding or return Nordic's applications based upon MGL's assertions that Nordic has not demonstrated sufficient TRI in the intertidal lands where Nordic's proposed pipelines would be located if permits were issued. As the Board has previously stated, the courts will ultimately decide the ownership of the intertidal area in question and any issues raised about the parameters of the Eckrote easement.*



Timeline



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Timeline

Board Order
2020

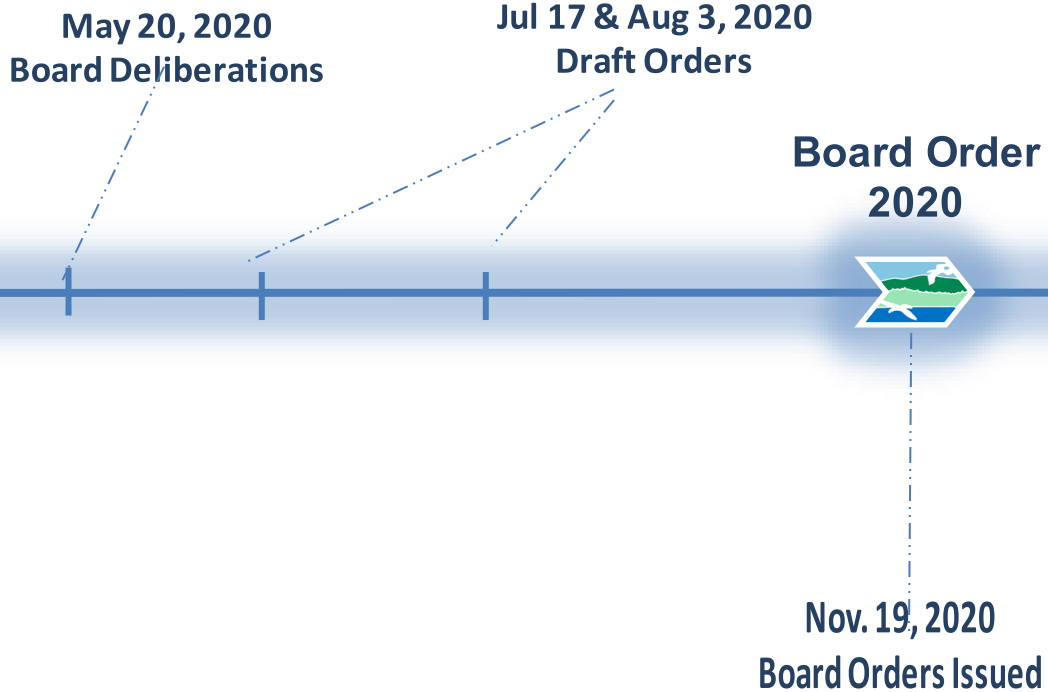


Board Orders

- Deliberative Session Held
- Draft Permit Decisions Issued for Public Comment
 - Air Emissions Jul. 17
 - MEPDES Aug. 3
- Board Orders Issued Approving 3 Permits (Air Emissions, MEPDES/WDL, Site/NRPA)



Timeline

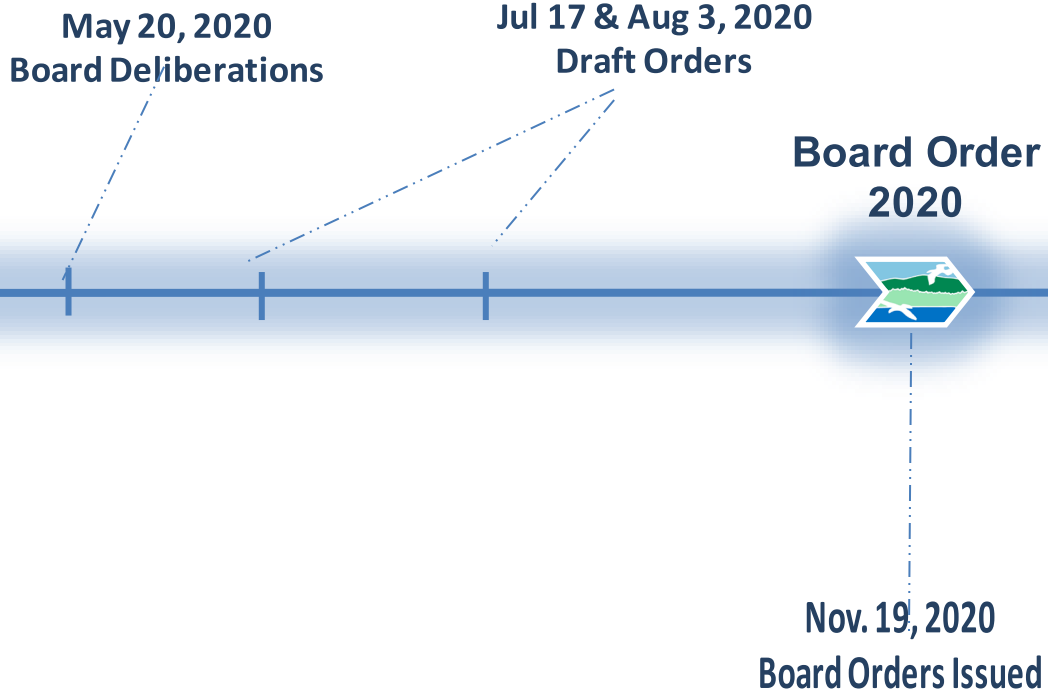


Excerpt from Board Findings on Issue of TRI



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. As explained in the Department's acceptance letter, this conclusion is not an adjudication of property rights and does not grant legal ownership or right to use land. That determination can only be made by a Court. The Board has reviewed the evidence in the record and has again considered the arguments raised regarding TRI pursuant to the Department's Chapter 2 and its TRI provisions. 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 and use 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.

Timeline



Timeline

**Board Order
2020**



**Nov. 19, 2020
Board Orders Issued**

**Appeals and
Suspension
2020 - 2023**



**Remand
2023**



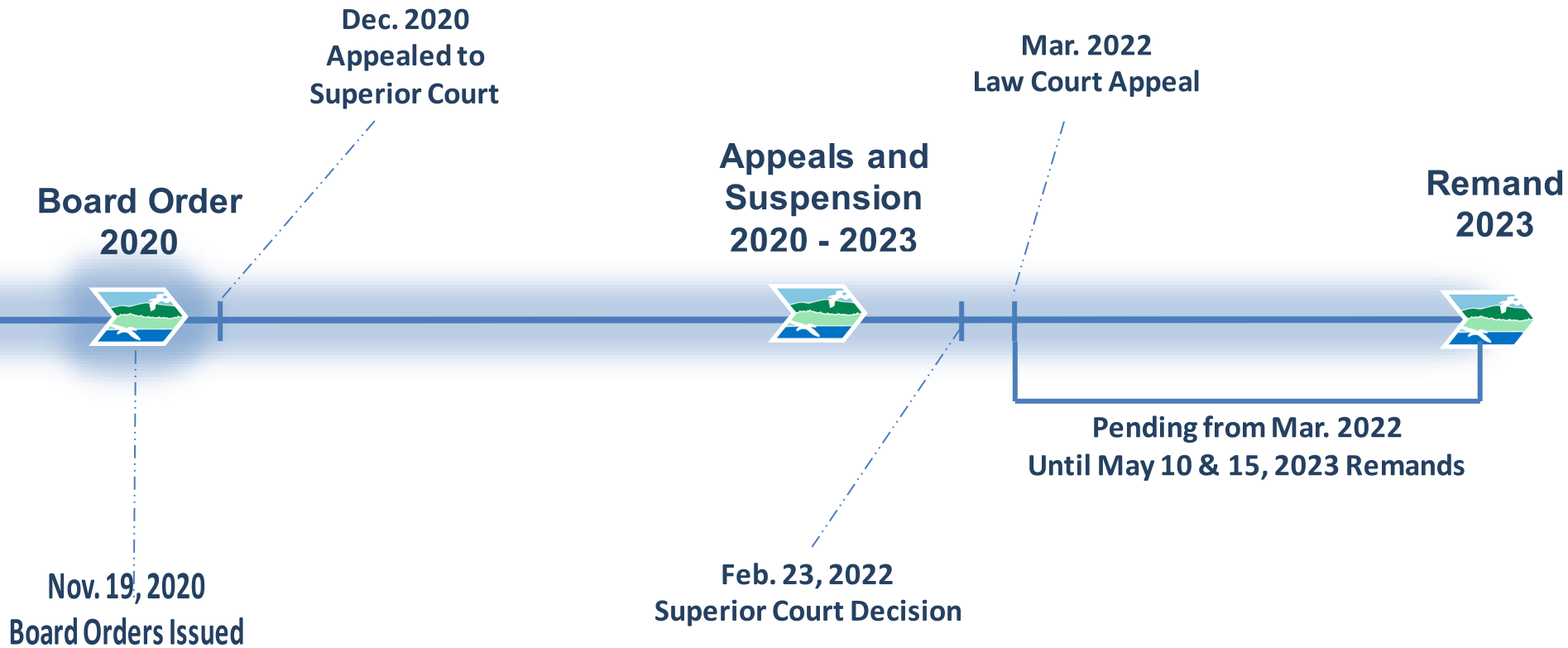
Appeals of Board Decisions Issuing Permits



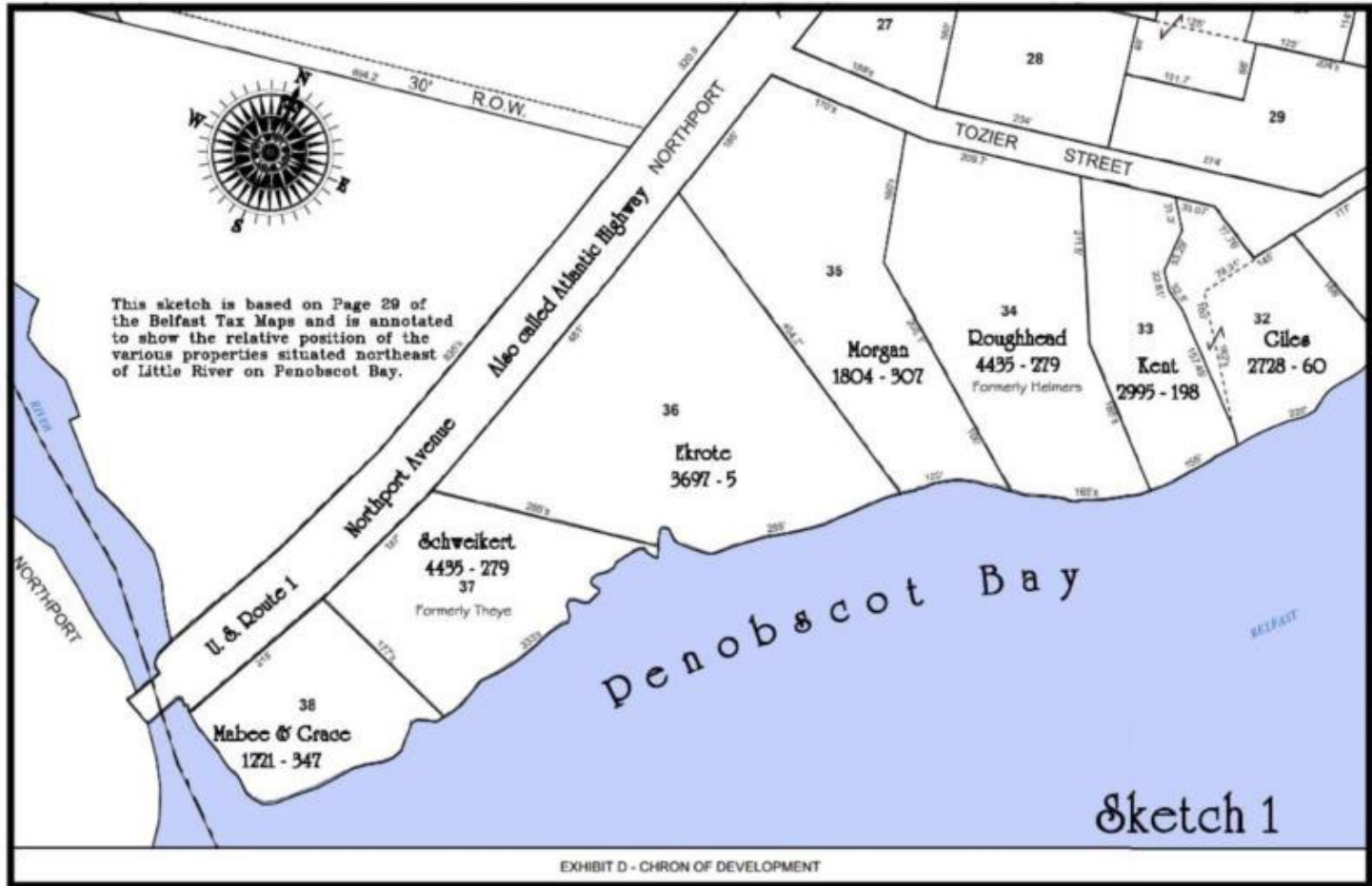
- Appealed to Superior Court
- Licenses Upheld by Superior Court
- Superior Court Decision Appealed to Law Court



Timeline



Quiet Title Action / Mabee /



Quiet Title Action

- In 2019, Mabee and Grace filed a quiet title action asking the Superior Court to determine the ownership of the intertidal area
- Following a multi-day trial, the Superior Court entered judgment primarily in favor of the Eckrotes/Nordic regarding ownership and land use rights in the intertidal area
- Mabee-Grace Appealed to Law Court, which vacated the Superior Court Decision and found in favor of Mabee-Grace



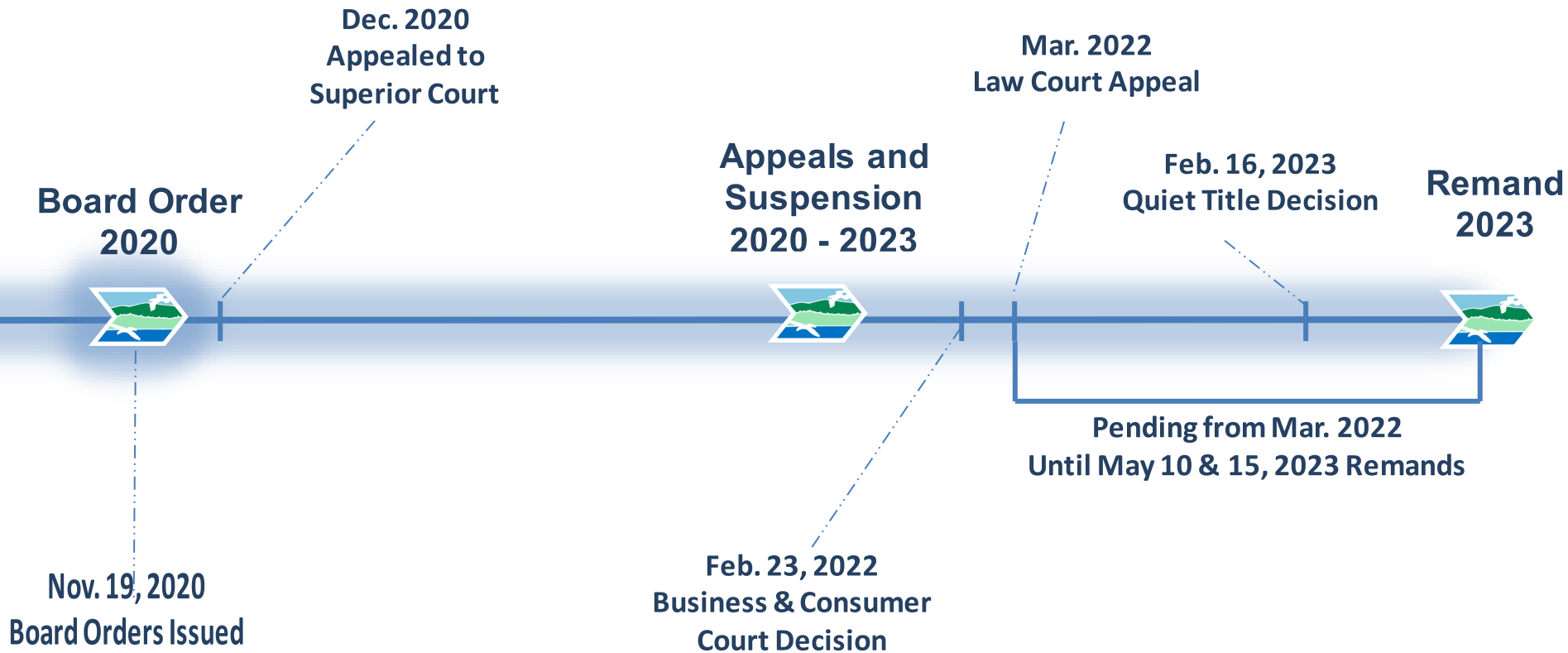
Excerpt from Quiet Title Decision (*Mabee I*)

III. CONCLUSION

[¶61] For the reasons given above, we hold that the deed conveying land to Poor did not include the intertidal land and that this intertidal land was eventually conveyed to Mabee and Grace. Mabee and Grace additionally hold an enforceable servitude over the Eckrotes' upland. Finally, although Friends holds an enforceable conservation easement over the intertidal land, injunctive relief to enforce the easement is not mandated under the circumstances presented.



Timeline



Timeline

Feb. 16, 2023
Quiet Title Decision

Appeals and
Suspension
2020 - 2023



Remand
2023




Pending from Mar. 2022
Until May 10 & 15, 2023 Remands



Suspension Proceedings

§342. Commissioner, duties

11-B. Revoke or suspend licenses and permits. Notwithstanding Title 5, section 10051, after written notice and opportunity for a hearing pursuant to Title 5, chapter 375, subchapter 4, the commissioner may revoke or suspend a license whenever the commissioner finds that:

- 
- A. The licensee has violated any condition of the license;
 - B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
 - C. The licensed discharge or activity poses a threat to human health or the environment;
 - D. The license fails to include any standard or limitation legally required on the date of issuance;
 - E. There has been a change in any condition or circumstance that requires revocation or suspension of a license;
 - F. There has been a change in any condition or circumstance that requires a corrective action or a temporary or permanent modification of the terms of the license;
 - G. The licensee has violated any law administered by the department; or
 - H. The license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990.

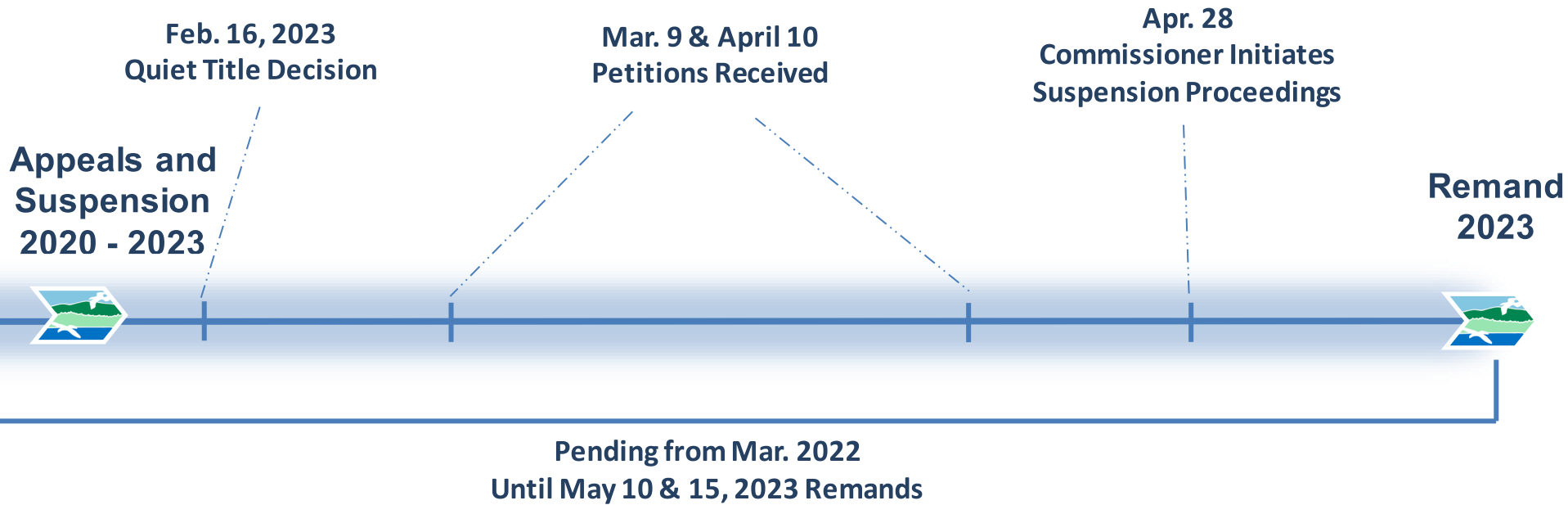
For the purposes of this subsection, "license" includes any license, permit, order, approval or certification issued by the department and "licensee" means the holder of the license.

Suspension Proceedings

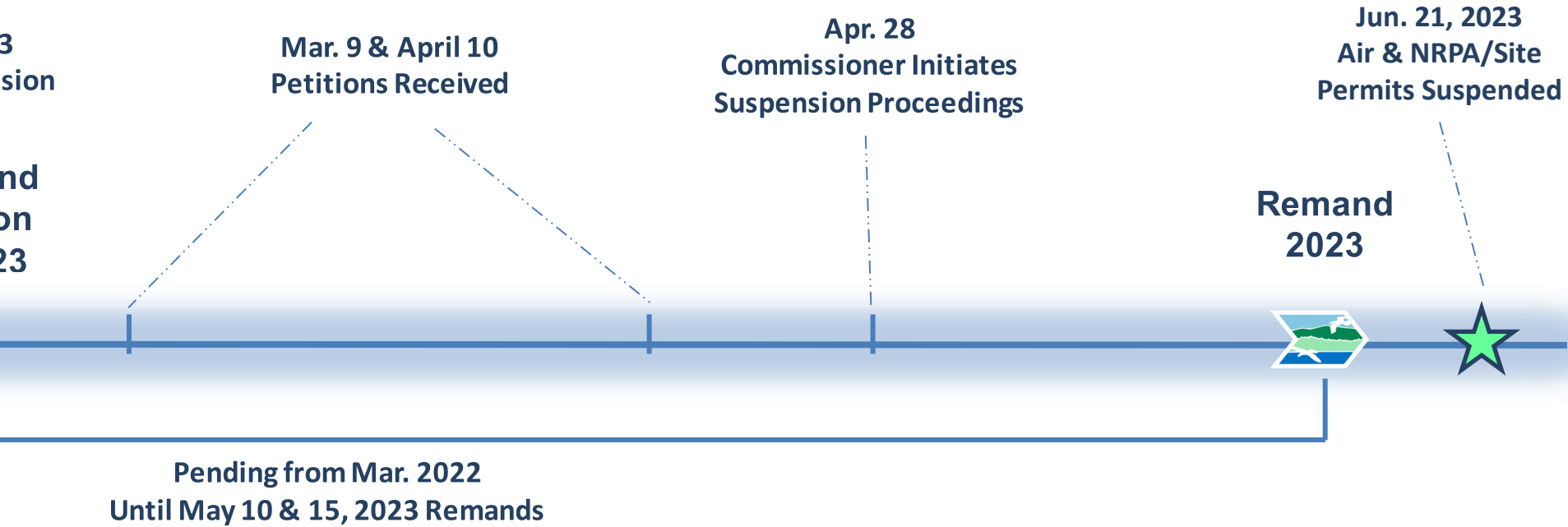
- Mabee and Upstream Filed Petitions to Suspend or Revoke Alleging:
 - Change in Circumstances
 - Misrepresentation
- Per Statute Authority Granted to Commissioner
- Commissioner Initiated Suspension Proceedings on April 28, 2023
- Commissioner Declined to Initiate Revocation Proceedings
- Commissioner Suspended NRPA/Site and Air Emissions Licenses on June 21, 2023



Timeline



Timeline



Excerpt from Commissioner Suspension Decision



14. Lastly, the Department agrees with the petitioners and the licensee that the Law Court's quiet title decision on the intertidal lands proposed for development and the uncertainty resulting from the pending eminent domain appeal, including any effects on the Residential Purposes Restriction and the Conservation Easement, collectively constitute a change in circumstances potentially requiring suspension. Given the degree of potential impacts resulting from the project, and the uncertainties resulting from the Law Court's quiet title decision, the eminent domain appeal, and the Conservation Easement, the Department finds that the 38 M.R.S § 342(11-B)(E) and Chapter 2, § 27(E) criterion to suspend a license is met.



Excerpt from Commissioner Suspension Decision

16. First, in making the determination that a change in circumstances may warrant suspension, the Department notes that the TRI findings and conclusions for the underlying license applications have not been invalidated by the Law Court's decision in the quiet title action. Specifically, the Department's acceptance of the applications and the processing of the applications during the processing period pursuant to its rules and under the law in effect at the time remain valid, subject to any eventual adjudication of the TRI issues raised in the pending judicial appeals of the Licenses. Nonetheless, the change in circumstances does impact certain findings and conclusions that warrant consideration now. Where the findings and conclusions in the decision to grant the licenses rely on the reasonableness of the environmental impacts of an activity, legal uncertainty as to whether the project could be completed and operated if construction began may alter the determination of the reasonableness of the impacts. For instance, if construction of a project ultimately cannot be completed, the associated environmental impacts may be considered unreasonable and actions to prevent those harms warranted. This would also be the case until new uncertainties surrounding the ability of a licensee to complete the project, such as those presented by the changed circumstances here, are resolved.



Excerpt from Commissioner Suspension Decision

IV. ACTION AND ORDER:

Based on the above findings of facts, analysis, and conclusions, I, Melanie Loyzim, Commissioner of the Department of Environmental Protection, effective immediately, hereby suspend the Nordic Site Law/NRPA Permit and the Nordic Air License (Board Orders #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, and #A-1146-71-A-N) dated November 19, 2020, subject to certain additional conditions and ongoing licensing requirements as outlined more fully below, unless and until the Department takes action to lift the suspension after all of the following occur:

- A. Final disposition of all challenges related to the City's eminent domain action, including all claims in the eminent domain appeal, in favor of the City and Nordic in a manner that will allow the project to be completed; and
- B. Final disposition of any action to amend or terminate the Conservation Easement, as contemplated by the March 2, 2023, stipulated judgment in the eminent domain appeal, in a manner that will allow the project to be completed.



Other Litigation

- Eminent Domain Action
 - City of Belfast took by eminent domain certain intertidal property and rights
 - Granted easement to Nordic to access/construct pipes
 - City's action has been appealed
- Conservation Easement
 - Confirmed in effect following Quiet Title Action
 - Requires actions to amend or terminate



Suspension Proceedings

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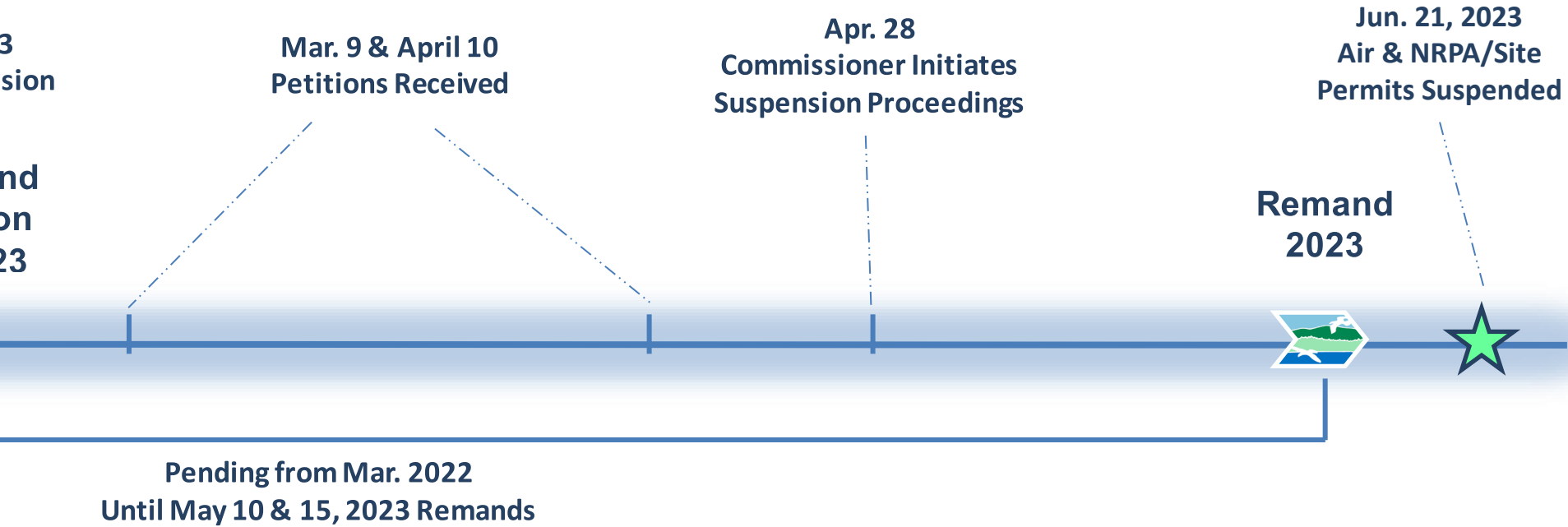


Other Litigation

- Bureau of Public Lands – Submerged Lands Lease
 - Rescinded on September 7, 2023, Following Remand
- Additional Litigation



Timeline



Remand 2023



Excerpt from Law Court Remand Order

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

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



Remand Order from Superior Court

On May 10, 2023, the Law Court issued an Order remanding this matter to the Business and Consumer Court with an instruction to remand to the Board of Environmental Protection (“BEP”) so that the BEP may decide whether the Law Court’s decision in *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79, affects the approval of Nordic Aquafarms, Inc.’s permit applications, the subject of this litigation.

With this matter now before it, this Court hereby remands the matter to the BEP. The Court instructs the BEP to determine the impact, if any, of the Law Court’s decision in *Mabee*, 2023 ME 15, 290 A.3d 79, on the BEP’s approval of Nordic Aquafarms, Inc.’s permit

applications. Consistent with the Law Court’s May 10 Order, the BEP may determine its scope of proceedings on remand including whether it will take additional evidence. This Court does not retain jurisdiction of this matter.



Remand 2023



Questions for the Board



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Staff Will Provide Recommended Decision Addressing such Questions at the Board’s Oct. 19, 2023, Meeting





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