STATE OF MAINE
KNOX COUNTY, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-2019-4
AP-2020-4 After Remand

JEFFREY R. MABEE and
JUDITH B. GRACE, individually
and as joint tenants of certain real property
that is the subject of this action;
FRIENDS OF THE HARRIET L. HARTLEY CONSERVATION AREA, a Maine Non-Profit Corporation;
THE MAINE LOBSTERING UNION, a Cooperative Corporation registered and doing business in the State of Maine,
WAYNE CANNING and
DAVID BLACK,
Commercial lobster an crab license
Holders from Belfast, Maine,

Petitioners,

v.

DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY, BUREAU OF PARKS AND LANDS, SUBMERGED LANDS PROGRAM,

Respondent,

AND
NORDIC AQUAFARMS, INC., a Foreign Corporation registered in the State of Delaware.

Applicant.

PETITION FOR REVIEW OF 9-4-2020 FINAL AGENCY ACTION PURSUANT TO M.R. Civ. P. 80C AFTER REMAND

RE: Submerged Lands Lease Application No. SL2352 Submerged Lands Lease No. 2141-L-49 Dredge Lease No. 05-22DL

The Petitioners: Jeffrey Mabee and Judith Grace ("Mabee and Grace"); The Friends of the Harriet L. Hartley Conservation Area ("Friends"); the Maine Lobstering Union ("IMLU"), and lobstermen Wayne Canning and David Black (collectively the "Lobstering Petitioners"), by and through their counsel Kimberly J. Ervin Tucker, Esq., hereby file their Petition for Review of the 9-4-2020 Final Agency Action by the Department of Agriculture, Conservation and

Forestry, Bureau of Parks and Lands, Submerged Lands Program ("the Bureau"), on the Submerged Lands Lease Application submitted by Nordic Aquafarms, Inc. ("NAF") (No. SL2352), and the resulting lease approvals for Submerged Lands Lease No. 2141-L-49 and Dredge Lease No. 05-22DL. The Petitioners challenge the Bureau's 9-4-2020 final agency action pursuant to M.R. Civ. P. 80C ("Rule 80C") and state as follows:

INTRODUCTION AND BACKGROUND

NAF proposes to build a large land-based salmon aquaculture facility in Belfast, Maine, which would require placing industrial accessory structures, in the form of two 30" industrial saltwater intake pipes and one 36" outfall or discharge pipe, about a mile into Penobscot Bay. These pipes would be located in the municipal boundaries of both Belfast and Northport, Maine, in Waldo County, but would impact the water quality and fishing rights (especially lobstering and crabbing) of commercial lobster and crab license holders, including members of the Maine Lobstering Union ("IMLU"), in virtually every community in and around Penobscot Bay, and would affect communities, property owners and lobstermen in Knox, Waldo and Hancock Counties. The revised method for installation of NAF's intake and discharge pipes, described in the maerials NAF submitted on remand in January and February 2020, would also unreasonably risk the life and property of the Lobstering Petitioners and adversely impact navigation for the Lobstering Petitioners and all mariners (commercial and recreational) using the upper Penobscot Bay.

Details about the nature of NAF's proposed project have been a moving target throughout the Bureau's lease process and permit proceedings in other local, State and federal regulatory agencies. NAF's failure to apprise the Bureau of material changes NAF proposed in filings with the Maine DEP in July 2019, regarding the method for installation of its mile-long pipes into

Penobscot Bay, resulted in the Bureau's 9-11-2019 Final Findings and Decision being remanded by this Court, *at the Bureau's request*, for further consideration.

NAF submitted additional information to the Bureau regarding this amended installation method on January 10 2020 and February 6, 2020.

The Bureau's 9-4-2020 Final Findings and Decision is based on NAF's January 10, 2020 and February 6, 2020 factual submissions amending NAF's September 26, 2018 submerged lands lease application (SL2352). Unfortunately, NAF continued to make material changes to the proposed project *after remand and after NAF submitted materials to the Bureau on January 10 and February 6, 2020*. As a result, Petitioners here assert that the 9-4-2020 Findings and Decision are based on an inaccurate and incomplete application that fails to consider changes NAF announced orally on March 2, 2020.

Significantly, NAF has at all times based its claim of sufficient right, title and interest to have administrative standing to proceed in the Bureaus' lease proceedings on an easement option granted on August 6, 2018, by Richard and Janet Eckrote (Petition Exhibit 2, "2018 Easement Agreement"). Petitioners Mabee and Grace, other interested and aggrieved parties (including "Upstream Watch"), and the Lobstering Petitioners (IMLU, David Black and Wayne Canning) have repeatedly and consistently challenged the sufficiency of NAF's claim of right, title and interest ("RTI") based on the 2018 Easement Agreement.

On January 7, 2019, Petitioners initially challenged NAF's RTI on the grounds that the easement option granted to NAF by Richard and Janet Eckrote, by its own terms, terminates at the Eckrotes' high water mark and fails to grant NAF any right to use the intertidal land on which the Eckrotes' lot fronts. Initially, on January 18, 2019, the Bureau agreed with this interpretation of the plain meaning of the 2018 Easement Agreement and determined that NAF

had failed to demonstrate sufficient RTI to continue in the leasing process. (See, e.g. Petition Exhibit 6).

In response, NAF filed a March 3, 2019 letter from NAF's President to the Eckrotes, allegedly "clarifying" that the 2018 Easement Agreement was intended to grant NAF whatever rights the Eckrotes had in U.S. Route 1 and the intertidal land on which their lot fronts. However, this letter, and the 2-28-2019 acknowledgment submitted with it signed by the Eckrotes ("the March 3, 2019 Letter Agreement"; Petition Exhibit 7), failed to state that the Eckrotes have any rights in U.S. Route 1 *or the intertidal land on which their lot fronts*. Indeed, on December 23, 2019, NAF and the Eckrotes executed an amendment to the 2018 Easement Agreement in which the parties expressly state that the March 3, 2019 Letter Agreement was not a "representation or warranty" by the Eckrotes that they have any ownership interest in U.S. Route 1 or the intertidal land on which their lot fronts. (Petition Exhibit 22, Second WHEREAS Clause).

Beginning on May 1, 2019, Petitioners Mabee and Grace began to challenge NAF's claim of RTI to use the intertidal land on which the Eckrotes' lot front on the grounds that: (i) Petitioners Mabee and Grace – not the Eckrotes – own this intertidal land in fee simple, based on their deeds and a prior quiet title judgment by this Court; (ii) a restrictive covenant in the Eckrotes' deed, limiting the use of this parcel to "residential purposes only," prevents the Eckrotes from granting NAF an easement to use the Eckrotes' upland lot for the placement of industrial or commercial structures that are accessories to a for-profit business; and (iii) Petitioners Mabee and Grace have put all of their intertidal land, including the intertidal land on which the Eckrotes' lot fronts, under the protection of a Conservation Easement protecting this

land in its natural condition, created pursuant to 33 M.R.S. § 477-A, and recorded in the Waldo County Registry of Deed ("WCRD") at Book 4367, Page 273.

On July 10, 13 and 20, 2020 Petitioners Mabee and Grace and the Friends, challenged the Bureau's June 10, 2020 Preliminary Findings and Decision determining that NAF had demonstrated sufficient RTI to proceed in the Bureau's leasing proceedings. Petitioner 2020 RTI challenges were based in part on the Law Court's July 7, 2020 holding in *Tomansino v. Town of Casco,* 2020 ME 96, ¶15 ("***Whatever minimum "right, title or interest" is required*** [to have administrative standing to obtain a permit]. . ., ***we conclude that, in the face of a dispute between private property owners, that requirement is <u>not met by an easement</u> whose parameters have not been factually determined <u>by a court with jurisdiction to do so</u>***.") (emphasis supplied).

In their renewed challenges to NAF RTI, Petitioners asserted that, because the factual parameters and legal validity of the 2018 Easement Agreement had not yet been determined by *this Court* in *Mabee and Grace, et al. v. NAF, et al.,* Docket No. RE-2019-18, NAF's lease application should be dismissed or stayed. In support of Petitioners' RTI *Tomasino*-based RTI challenges, Petitioners Mabee and Grace and Friends submitted this Court's June 4, 2020 Order on Plaintiffs' Summary Judgment Motions to demonstrate that *this Court* has already determined that there are significant questions that exist regarding the factual parameters and legal validity of the 2018 Easement Agreement between NAF and the Eckrotes.

The Bureau's Findings and Decision issued on 9-4-2020, in relevant part, describes the procedural posture of this project and the Bureau's consideration and decision(s) to date as follows:

> **BRIEF PROCEDURAL BACKGROUND:** On April 4, 2019, the Bureau accepted Nordic's application as complete. In its Final Findings and Decision dated September 11, 2019 (September 2019 Findings), the Bureau approved Submerged Lands Lease Application No. SL2352 and the issuance of Submerged Lands Lease No. 2141-L-48 and Dredging Lease No. 05-21DL, subject to the conditions set forth in the September 2019 Findings. The September 2019 Findings were appealed to Superior Court pursuant to 5 M.R.S. § 11002. During the pendency of that appeal, the Bureau learned that in August of 2019 Nordic proposed changes to the design of the pipes' installation as part of its application for various regulatory permits. Those design changes are

> described in an email to the Bureau from Nordic dated October 23, 2019. Nordic did not notify the Bureau of these design changes prior to the Bureau issuing the September 2019 Findings. Because the September 2019 Findings did not account for the new project design, the Bureau moved the Superior Court to remand to the Bureau the September 2019 Findings. Through an order dated December 19, 2019, the Court remanded the September 2019 Findings back to the Bureau. Nordic submitted its design changes to the Bureau on January 10, 2020 and submitted additional information on February 6, 2020.
>
> * * *
>
> In accordance with 12 M.R.S. 1862, the Director of the Bureau has determined that it will grant Submerged Lands Lease No. 2141-L-49 and Dredging Lease No. 05-22DL to Nordic Aquafarms, Inc. after the Bureau received from Nordic a copy of a recorded easement conveying to Nordic rights to the upland, including the intertidal land, the Nordic proposes to use for the proposed pipes. Nordic must provide the recorded easement to the Bureau within 30 days of Nordic's receipt of all necessary permits and approvals. The lease area of Submerged Lands Lease No. 2141-L-49 will be the forty-foot wide corridor on Exhibit A as "40' wide submerged lands lease area.
>
> F.N. 14: "The ending digits of the lease numbers have changed from those assigned in 2019 due to the time that has elapsed. These digits represent the years that the conveyances would expire."

9-4-2020 Findings and Decision, pp. 1, 11-12 (footnotes 1 and 2 omitted).

With regard to RTI, the Bureau relied on its prior determination on April 4, 2019, regarding the sufficiency of NAF's evidence in support of its RTI claims – again referencing the Bureaus' April 2019 interpretation of the March 3, 2019 Letter Agreement. In doing so, the Bureau ignored the plain meaning of the Second WHEREAS Clause in the NAF-Eckrotes' 12-23-2019 Amendment to the Easement Agreement (Petition Exhibit 22) and the Law Court's decision in *Tomasino*.

The Bureau attempted to distinguish and ignore the Law Court's holding in *Tomasino,* by stating that:

> . . . In the [*Tomasino*] case, the court determined that the municipality could deny a person a permit to cut trees within an easement area because the rights granted by the easement were determined to be insufficient to establish right, title and interest for that particular purpose. **Because the Eckrotes and the applicant do not dispute the scope or the location of the easement, *Tomasino* does not compel the conclusion that the applicant lacks RTI for its submerged land lease application."**

9-4-2020 Findings and Decision, p. 6; Petition Exhibit 38.

Petitioner timely file their Rule 80C appeal of the Bureau's September 4, 2020 Findings and Decision based on the errors enumerated herein.

SUMMARY OF ERRORS CHALLENGED IN THIS RULE 80C APPEAL

Petitioners challenge the following errors by the Bureau in this Rule 80C appeal:

- The Bureau's determination that NAF has demonstrated sufficient RTI to have administrative standing and for the Bureau to have a justiciable issue before it;
- The Bureau's determination that there are no factual parameters in dispute relating to the 2018 Easement Agreement, in contravention of the Law Court's decision in *Tomasino v. Town of Casco,* 2020 ME 96;
- The Bureau's determination of the legal validity of the 2018 Easement Agreement;
- The Bureau's shifting of the legal burden of proof for demonstrating RTI from NAF to the Petitioners – requiring the Petitioners to demonstrate that NAF lacks RTI;
- The Bureau's determination that it should exempt NAF from the littoral zone setbacks in 01-670 C.M.R. ch. 53, § 1.6(B)(11);
- The Bureau's determination that NAF's project, as proposed in 2020 after remand, does not unreasonably interfere with: (i) public access ways to the State's submerged lands, (ii) navigation; and (iii) public trust rights including traditional fishing grounds;
- The Bureau's determination that this project, as proposed after remand, does not unreasonably risk life and property of commercial lobster and crab license holders, as well as the navigation rights of recreational and commercial mariners (01-670 C.M.R. ch. 53, §§;
- The Bureau's determination that there is no evidence in the record that any portion of the proposed submerged lands lease area has been designated for special protection by an agency authorized to make such designations (01-670 C.M.R. ch. 53, §1.7(C)(7));
- The Bureau's determination that the proposed pipes are not inconsistent with the Bureau's rules and are not contrary to the public interest. (01-670 C.M.R. ch. 53, §§ 1.7(C)(1), (7), (8) and (9).

BACKGROUND

1. On September 26, 2019, Nordic Aquafarms, Inc. ("NAF") filed an application for a Submerged Lands lease (SL2352) with the Bureau of Parks and Lands, Submerged Lands Programs. (Petition Exhibit 1).[1/2]

2. Pursuant to ¶ 5.A of NAF's Submerged Lands lease application, NAF bases its claim of "sufficient right, title or interest" in the upland and intertidal property required for placing its pipelines in Penobscot Bay, on an unrecorded option agreement to purchase a 40-foot construction easement and a 25-foot permanent easement across the southern boundary of property owned by Janet and Richard Eckrote ("the Eckrotes") (Belfast Tax Map 29, Lot 36; 282 Northport Avenue, Belfast, Maine 04915) (Petition Exhibit 1, ¶ 5.A and Application Exhibits 2 and 3 ("2018 Easement Agreement"); see also, Petition Exhibit 2 ("2018 Easement Agreement")).

3. The boundaries of the easement options granted by the Eckrotes to NAF are not described by a metes and bounds description in the 2018 Easement Agreement, but are instead defined by an image attached as Exhibit A of the 2018 Easement Agreement (Petition Exhibit 2, Section 4 and Exhibit A).

4. Exhibit A of the 2018 Easement Agreement indicates that the eastern (waterside) boundaries of both the 40-foot construction easement and 25-foot permanent easement granted by the option from the Eckrotes in the 2018 Easement Agreement to NAF terminate at the high-

[1] The Bureau has posted NAF's 8-26-2018 Submerged Lands Lease application (SL2352) and many of the documents filed with the Bureau by NAF in support of NAF's Submerged Land Lease application, including the 2020 amendments thereto, on a "Major Projects" website located at: https://www.maine.gov/dacf/parks/about/sublands_major_projects.shtml#nordic

[2] https://www.maine.gov/dacf/parks/docs/SL-2018-09-26-Nordic-Aquafarms-Application.pdf

water mark of the Eckrotes' lot. *Id.* Nothing in the 2018 Easement Agreement grants NAF: (a) an easement in, to or over the intertidal land on which the Eckrotes' lot fronts, or (b) a right to use the intertidal land on which the Eckrotes' lot fronts. *Id.*

5. The image defining the boundaries of the construction and permanent easement indicates that it was prepared by Cory Verrill of CIANBRO and is dated 7-31-2018. *Id.* at Exhibit A.

6. Similarly, Application Exhibit 2 of the September 26, 2018 Submerged Lands Lease application (Petition Exhibit 1) shows that the 40-foot construction easement and 25-foot permanent easement granted by the option from the Eckrotes to NAF both terminate at the high-water mark of the Eckrotes' lot on the eastern (waterside) boundary of the Eckrotes' lot. Application Exhibit 2 indicates that neither the 40-foot construction easement nor the 25-foot permanent easement include any of the intertidal land on which the Eckrotes' lot fronts within the easements granted by the 2018 Easement Agreement. *Id.* This image was also prepared by Cory Verrill of CIANBRO and is dated 9-20-2018. (Petition Exhibit 1 at Application Exhibit 2, titled: "Nordic Aquafarms Submerged Lands Lease Site Map").

7. Despite these obvious defects in the proof NAF submitted relating to its claim of "sufficient title, right of interest" in the intertidal land on which NAF proposes to place its pipes – required to have the requisite administrative standing to proceed in the Bureau's leasing process -- the Bureau found NAF's September 26, 2018 application to be "complete" and issued a Notice dated October 9, 2018 soliciting comments from various stakeholders about the project as proposed. (Petition Exhibit 3).

8. In November and December of 2018, the Bureau allowed NAF, without notice to or a formal opportunity for comment from interested and aggrieved persons, to submit a

significant amendment to the application. (9-4-2020 Findings and Decision, p. 2, f.n. 4). Specifically, the Bureau instructed NAF to radically change the proposed route for its three pipes, and the configuration for placement of these pipes on, over or under the surface of the floor of Penobscot Bay and privately held intertidal land (between the high and low water marks) and/or littoral zone land. (Petition Exhibit 4).

9. NAF was required to alter the original pipeline route it had proposed ". . . in response to comments submitted [to the Bureau] by shorefront property owners and other interested parties regarding the crossing of intertidal land and littoral zones." (9-4-2020 Findings and Decision, p. 2, f.n. 4).

10. On or about November 20, 2018, NAF through its agents submitted a second proposed route for its pipelines that originated from the Eckrotes' upland lot, but took a radically different route from the original proposal that impacted more property owners in Northport than the original route. *Id.*[3]

11. No Notice from the Bureau was provided to any of the Petitioners or these Northport property owners of this change subsequent to its submission to the Bureau by NAF. (Petition Exhibit 4 (Emails relating to need for alternative pipelines route from Carol DiBello to Tim Stiegelman with revised route attached)). "The Bureau did not distribute a notice for public comment for the November-December 2018 amendment because the Bureau was awaiting additional information form Nordic." (9-4-2020 Findings and Decision, p. 2 (f.n. 4 omitted))

12. This Second pipelines route was first revealed to the public during a public hearing required by the Maine Department of Environmental Protection ("DEP") in connection

[3] https://www.maine.gov/dacf/parks/docs/SL-2018-11-20-Steigelman-Email-RE-Supplement-to-Nordic-Aquafarms-Application-Exhibits-A-C-new.pdf

with NAF's MEPDES discharge permit application, conducted by NAF, in Belfast, Maine on December 17, 2018, at the Hutchinson Center. Some impacted Northport residents received notice of this meeting just days before it was held.

13. On or about January 7, 2019, Petitioner IMLU and Upstream Watch[4] (an organization concerned with restoration of the Little River that has opposed the NAF project as proposed and with which Petitioners Mabee and Grace have worked to preserve their property rights) filed a written objection regarding NAF's lack of sufficient title, right or interest, jointly submitted to the Bureau, DEP and the Board of Environmental Protection ("BEP"). This objection was directed to NAF's second proposed pipelines route. (Petition Exhibit 5).

14. The January 7, 2019 objection focused on NAF's lack of "sufficient title, right or interest" (administrative standing), stating that the easement on which NAF relied to establish a claim of "sufficient title, right or interest" in the land proposed for leasing and permitting (i.e. use and development) actually, by its own express terms as illustrated in Exhibit A of the 2018 Easement Agreement, terminated at the high water mark of the easement grantors' (the Eckrotes') upland property and granted no easement to use the intertidal land on which the Eckrotes' lot fronts. See, e.g. Exhibit A of the September 18, 2018 Easement Agreement Between NAF and Janet and Richard Eckrote. (Petition Exhibit 2). (The January 7, 2019 Objection is attached as Petition Exhibit 5 without exhibits).[5]

---

[4] **UPSTREAM WATCH** is a non-profit, 501(c)(3) corporation (T 13-B) duly incorporated in the State of Maine on September 6, 2018, Charter No. 20190094ND, in Good Standing and with an office and principal place of business at 67 Perkins Road in the City of Belfast, Waldo County, Maine. https://icrs.informe.org/nei-sos-icrs/ICRS?CorpSumm=20190094ND

[5] At the time this objection was filed, Upstream Watch and its counsel (then undersigned counsel for Petitioners herein) believed that the Eckrotes owned the intertidal land on which the Eckrotes' lot fronts, but had not done any research into the relevant deeds to determine who in fact owned this intertidal land. The objection focused only on the obvious, express limits of the boundaries of the easement option as defined by Exhibit A of the 2018 Easement Agreement.

15. On January 18, 2019, the Bureau issued a letter to NAF declaring that the 2018 Easement Agreement was ***insufficient*** to demonstrate that NAF had the requisite right, title or interest to proceed in the Bureau's lease process, as required by 01-670 C.M.R. ch. 53, § 1.6.B.1.[6]

16. The Bureau's 1-18-2019 letter also concluded that the easement option granted by the 2018 Easement Agreement terminated, by its own terms, at the Eckrotes' high water mark. Specifically, in the January 18, 2019 letter from the Bureau to NAF's counsel, the Bureau rejected the August 6, 2018 Easement Purchase and Sale Agreement as sufficient proof of TRI, stating in relevant part that:

> This letter serves as the Bureau of Parks and Lands, Submerged Land's Program's formal request that Nordic Aquafarms provide evidence that Nordic Aquafarms had established right, title or interest in the intertidal land where the pipelines are proposed. *As the Submerged Lands Program (the SLP) communicated during our conversation with David Kallin on January 16, 2019,* ***the Easement Purchase and Sale Agreement submitted by***

[6] 01-670 C.M.R. ch. 53, § 1.6(B)(1) states in relevant part as follows:

> **B. General Terms and Conditions**
>
> **1. Right, Title and Interest in Adjacent Uplands.**
>
> a. An applicant for a lease or easement must demonstrate sufficient right, title or interest in the upland property adjacent to the littoral zone in which the lease or easement is sought as follows:
>
> * * *
>
> (3) When the applicant has an option to buy or lease the property, a copy of the option agreement shall be supplied. Option agreements shall contain terms deemed sufficient by the Bureau to establish future title or a leasehold of sufficient duration.
>
> This requirement for sufficient right, title, or interest in adjacent shoreland property may be waived if the project is to be constructed in an area which lies outside of a littoral zone as defined in section 1.6.B.11 of these Rules.
>
> This requirement may also be waived for those portions of projects which extend beyond the bounds of an applicant's littoral zone provided the applicant meets the Bureau's requirements for exemptions to littoral zone setbacks as described in section 1.6.B.11 of these Rules.

Nordic Aquafarms defines the easement area by reference to an <u>Exhibit A</u> that <u>depicts the easement area as stopping at the high-water mark</u>.

Petition Exhibit 6 (emphasis supplied).

17. The Bureau gave NAF until April 18, 2019 to submit additional proof of title, right or interest in all land, including the intertidal land between the high-water mark of the Eckrotes' lot and the State's submerged lands beyond the low water mark. *Id.*

18. Petitioners and other interested parties were not served with this notice; rather, this letter had to be obtained through a Maine Freedom of Access Act (FOAA) request to the Bureau. (Petition Exhibit 6).

19. In March 2019, NAF submitted a *third* proposed route for its pipelines and two letters, drafted by counsel, but signed ultimately by the President of NAF and the Eckrotes allegedly responding to the Bureau's request for additional proof in support of NAF's claim of sufficient right, title or interest, pursuant to 01-670 C.M.R. ch. 53, § 1.6(B)(10), in the January 18, 2020 Letter rejecting the 8-6-2018 Easement Agreement as sufficient proof of RTI. Petition Exhibit 7).

20. The "Letter Agreement" between NAF and the Eckrotes, dated March 3, 2019 with a signed "Acknowledgement" from the Eckrotes dated 2-28-2019, was provided to the Bureau on or about March 26, 2019, as additional support for NAF's assertion that the 2018 Easement Agreement included a right to use the intertidal land on which the Eckrotes' lot fronts. (Petition Exhibit 7). However, nothing in the March 3, 2019 Letter Agreement amends the boundaries of the Easement option as defined in Exhibit A of the 2018 Easement Agreement, which defined the waterside boundary of the easement option granted by the Eckrotes to NAF as terminating at the high-water mark of the Eckrotes' property. *Id.*

21. Indeed, nothing in the March 3, 2019 Letter Agreement expressly states that the Eckrotes have or claim to have any ownership in or to the intertidal land on which their lot fronts. *Id.*

22. The March 3, 2019 Letter from Erik Heim to the Eckrotes states in relevant part as follows:

> . . . You intended a broad easement over your property, including any rights you have to US Route 1 and the intertidal zone such that Nordic Aquafarms can build and site its pipes anywhere in those areas where you have rights.
>
> * * *
>
> . . .[T]his letter clarifies that the easement area delineated in the [8-6-2018 Easement] P&S includes the entirety of your [the Eckrotes'] rights in the intertidal zone and US Route 1 and amends the Closing Date.

Petition Exhibit 7.

23. On or about April 4, 2019, the Bureau accepted the March 3, 2019 "Letter Agreement" as "sufficient" proof of NAF's title, right or interest in the intertidal land on which the Eckrotes' lot fronts, and determined that the NAF application was "complete" – now proposing a third route and new configuration for its pipelines into Penobscot Bay – and the Bureau issued a Notice to interested parties seeking comments relating to amended application. (9-4-2020 Findings and Decision, p. 2; Petition Exhibit 8).

24. The curious wording of the March 3, 2019 Letter Agreement prompted Upstream Watch and its counsel to question whether the Eckrotes actually owned the intertidal land on which their lot fronts for the first time.

25. An examination of the relevant deeds and other documents in the Waldo County Registry of Deeds by experts retained by Upstream Watch confirmed that the Eckrotes did not own the intertidal land on which their lot fronts and revealed that Petitioners Mabee and Grace do own that intertidal land.

26. Once Petitioners Mabee and Grace learned that they owned this intertidal land they placed it under the protection of a Conservation Easement, pursuant to 33 M.R.S. § 477-A, recorded in the Waldo County Registry of Deeds on April 29, 2019, at Book 4367, Page 273. (Petition Exhibit 11). Upstream Watch was named as the "Holder" of that Conservation Easement. *Id.*

27. Upstream Watch and Petitioners IMLU, on or about May 1, 2019, advised the Bureau that the intertidal land upon which all three proposed routes for NAF's pipelines would transit belongs to Petitioners Mabee and Grace in fee simple and that that intertidal land had been placed under a Conservation Easement on April 29, 2019, to preserve this estuary in its natural condition. (Exhibit 9).

28. Specifically, Petitioners Mabee and Grace, through Upstream Watch, provided the Bureau with proof of their ownership of the intertidal land on which NAF was seeking to place its pipes, including: (a) deeds demonstrating that the Eckrotes' deeded title ended at the high water mark of their property since 1946 (Petition Exhibit 10 (Exhibit A to 5-1-2019 filing)), (b) the Conservation Easement, dated April 29, 2019, recorded in the Waldo County Registry of Deeds at Book 4367, Page 273, that protects all of Petitioners Mabee an Grace's intertidal land, from the mouth of the Little River to a point North of the Eckrtoes' northern most upland boundary, in its natural condition, in perpetuity, pursuant to 33 M.R.S.A. § 477-A, et seq. (Petition Exhibit 11 (Exhibit C to 5-1-2019 filing)); (c) an expert surveyor's opinion prepared by Donald R. Richards, P.L.S. regarding who owns this intertidal land (Petition Exhibit 12 (Exhibit F to 5-1-2019 filing)); and (d) deeds proving Petitioners Mabee and Grace's ownership of this intertidal land (Petition Exhibit 13 (Exhibit G to 5-1-2019 filing)).

29. On May 16, 2019, NAF filed materials in opposition to Petitioners' challenge to NAF's claim of "sufficient RTI." (Petition Exhibit 14).

30. The materials NAF submitted on May 16, 2019, included, among other things: (a) the unrecorded August 31, 2012 Good Deeds survey, which confirmed that the Eckrotes' waterside boundary is "ALONG HIGH WATER" (Petition Exhibit 15); and (b) the 5-16-2019 Surveyor's opinion letter from Jim Dorsky, P.L.S. to Erik Heim opining that the intertidal land on which the Eckrotes' lot fronts was owned by the "heirs" of Harriet L. Hartley not the Eckrotes, meaning NAF's own surveyor had concluded that the Eckrotes have no ownership interest in the intertidal land on which their lot fronts and therefore lacked the ability to grant NAF an easement to use this intertidal land. (Petition Exhibit 16).

31. Inexplicably, the Bureau refused to dismiss NAF's application for lack of administrative standing, and, on September 11, 2019, issued its first Preliminary and Final Findings and Decision in favor of granting NAF a submerged lands lease and dredge lease, both based on the 2018 application (SL2351) and the August 6, 2018 NAF-Eckrotes Easement Agreement, as "amended" by the March 3, 2019 Letter Agreement. (Petition Exhibit 17).

32. In making its RTI determination in 2019, the Bureau appropriately stated that only a court can make a determination of ownership of this intertidal land, although the Bureau's own rules require the Bureau to make a jurisdictional determination regarding RTI. See, e.g. 01-670 C.M.R. ch. 53, § 1.6.B.1 and § 1.7.B.10.[7]

33. However, Petitioners' 2019 challenge to NAF's RTI was not based on ownership of the intertidal land, but on the grounds that the Eckrotes-to-NAF easement option terminates,

[7] 01-670 C.M.R. ch 53, § 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."

by its own unamended terms at the Eckrotes' high water mark – *as the Bureau previously determined in its January 18, 2019 letter.* (Petition Exhibits 6 and 18).

34. Petitioners Mabee and Grace, IMLU, Canning and Black, timely filed a Rule 80C Petition challenging the Bureau's final agency action on October 11, 2019, *Mabee and Grace, et al. v. Bureau of Parks and Lands, et al.,* Docket No. AP-2019-4. (Petition Exhibit 18).

35. With regard to the issue of NAF's insufficient demonstration of RTI, Petitioners asserted that the Bureau's April 4, 2019 completeness determination and September 11, 2019 Final Findings and Decision erroneously concluded that the March 3, 2019 NAF-Eckrotes Letter Agreement "clarified" that the boundaries of the easement option granted by the Eckrotes included the intertidal land on which the Eckrotes lot fronts and amended the express boundaries delineated in Exhibit A of the 2018 Easement Agreement. *Id.*

36. On or about October 17, 2019, Petitioners counsel learned that NAF had radically amended its proposed pipeline installation method for placing pipes in the State's submerged lands in July 2019, in filings made to the Maine Department of Environmental Protection, but had failed to advise the Bureau or Interested Parties of this material change prior to the Bureau issuing its September 11, 2019 Findings and Decision based on the original installation method.

37. Subsequently, Petitioners filed a Freedom of Access Act ("FOAA") request for the amended project description that NAF had submitted to the Bureau. (Petition Exhibit 19).

38. The Bureau responded to the Petitioners' FOAA Request by stating that NAF had never filed any amendment relating to the method for installation of its pipes in the submerged lands of the State. (Petition Exhibit 20).

39. As a result, because the Bureau's September 11, 2019 Final Decision and Findings were based on the original method for pipelines installation and the amendment of that

method for pipelines' installation constituted a "material" change in the project proposed by NAF, the Bureau requested that the Court remand its Final Decision and Findings back to the Bureau for reconsideration, pursuant to 01-670 C.M.R. ch. 53, §1.7(B)(10).

40. Petitioners did not oppose this request but did request that the Court sanction NAF for the additional cost burden created by its concealment of this material change.

41. On or about November 4, 2019, Upstream Watch assigned its role as "Holder" of the Conservation Easement to the Friends of the Harriet L. Hartley Conservation Area ("Friends") and recorded that assignment in the Waldo County Registry of Deeds at Book 4435, Page 344.

42. The Court granted the Bureau's uncontested remand request on December 19, 2019, in Docket No. AP-2019-4 but declined to rule on Petitioners' motion for sanctions prior to remand.

43. On January 10, 2020, NAF filed additional materials relating to its amended pipes installation proposal and materials relating to its claims of TRI, including the 12-24-2019 amendment of the 2018 NAF-Eckrotes' Easement Agreement (Petition Exhibit 21 (January 10, 2020 NAF Filing including all attachments)).

44. On February 6, 2020, NAF filed additional materials to supplement its January 10, 2020 filing. (Petition Exhibit 22).

45. On or before February 27, 2020, the Bureau made a determination that the revised NAF application was "complete" and issued a Notice soliciting public comment to interested parties, including Petitioners. The Notice also provided a link to relevant documents on the Bureau's "Major Projects" website:

https://www.maine.gov/dacf/parks/about/sublands_major_projects.shtml#nordic

(Petition Exhibit 26).

46. The Bureau later clarified that its February 27, 2020 Notice "addressed the proposed pipe installation and the removal of submerged lands material from the project area, which activities require a standard submerged lands lease and a separate dredging lease. The purpose of that [February 27, 2020] notice was to invite comments on both activities requiring a conveyance from the Bureau." (Petition Exhibit 36).

47. On March 2, 2020, NAF orally announced material alterations to its construction and dredge spoils disposal plan as described in its amended Bureau filings (and applications at various other local, State and federal agencies). These material changes were announced during a public solicitation of comments on impacts of the NAF proposal on fisheries and the fishing industry, conducted by the Maine Department of Marine Resources, on the night of March 2, 2020.

48. The changes NAF and CIANBRO announced on 3-2-2020 included: (a) radically increasing the amount of dredge spoils to be removed by the project from 4,000-8,000 cy to 20,000 cy without revealing how much of the increase in dredge spoils will be from the State's submerged lands); and (b) changing the dewatering and transportation method from dewatering the spoils from barges along the pipeline route in Belfast and Northport and trucking the spoils from Belfast to an upland disposal site, to transporting the spoils on 110 to 130 barge loads across the bay to Mack Point in Searsport, with de-watering in Searsport, followed by transport of the spoils by truck to an upland disposal site from Searsport.

49. NAF has failed to file written information in any local, State of federal agency explaining whether de-watering of the now 20,000 cy of dredge spoils will occur in the water from barges or on land in Searsport and has failed to reveal the location from which the 15,000

cy of additional dredge spoils originates (the subtidal or intertidal zones). However, because this material change in the amount, method and location of dredge spoils to be removed, de-watering, transported by barge and disposed of upland was not announced by NAF until March 2, 2020, the amended and additional filings submitted on remand on January 10 and February 6, 2020 fail to include any information relating to these material changes in the project.

50. The only written evidence of these material changes that NAF announced at the DMR meeting on March 2, 2020 was a proposed "haul route" for the 110 to 130 barge loads of spoils from the pipeline to Mack Point in Searsport. (Petition Exhibit 24).

51. NAF did not file the "haul route" or any other materials with the Bureau detailing any of these announced material changes to the proposed project.

52. On March 3, 2020, Petitioners filed notice with the Bureau (and other local, State and federal agencies) of the material changes that NAF announced at the 3-2-2020 DMR meeting and filed a copy of the "haul route" with that notice. Petitioners requested that NAF be required to file written amendments to the pending amended application(s), including the pending Submerged Lands Lease application in the Bureau, to conform its written applications to the material changes announced on 3-2-2020. (Petition Exhibit 25).

53. Petitioners also filed a copy of comments filed by Dr. Dianne Kopec, one of the neutral court-appointed experts who has participated in the Penobscot River Mercury Study ("PRMS"), under the direction of the federal court in the "*Mallinckrodt*" litigation.[8] (Petition Exhibit 27).

[8] *Peoples Alliance of Maine and NRDC v. HoltraChem Manufacturing, LLC and Mallinckrodt Inc.,* Civil No. 1:00-cv-00069-JAW (U.S. Dist. Me.)
https://www.nrdc.org/resources/mallinckrodt-case-documents

54. The Haul Route chart does not reveal if NAF is dredging 15,000 cy more dredge spoils or if NAF is placing 15,000 cy less into the trenches it proposes to dig for its pipes. (Petition Exhibit 24). Further, NAF has filed no documentation relating to where the roughly 15,000 cy of additional dredge spoils (not mentioned in its pending applications, including the amended Bureau application) will be taken from along the pipeline route (i.e. from the intertidal zone or subtidal land held in trust by the Bureau).

55. On June 10, 2020, the Bureau issued its Preliminary Findings and Decision for comment. (Petition Exhibit 28).

56. On June 22, 2020 the U.S. Army Corps of Engineers ("USACE") issued a Sediment and Analysis Plan ("SAP") to NAF – requiring NAF to test the sediment along the proposed pipeline route for a variety of contaminants, including mercury. (Petition Exhibit 29).

57. On June 27, 2020, Petitioners obtained a copy of the SAP and forwarded it to the Bureau with a request stating in relevant part that:

> Notably, this sediment testing plan — issued pursuant to Section 404 of the Clean Water Act — expressly references the well-established presence of the buried HoltraChem mercury, determined by the PRMS as a basis for this SAP. This is precisely as Dr. Dianne Kopec advised DMR and DEP-BEP in her comments I previously submitted to the Bureau (and incorporate again herein) and contrary to the cursory and flawed analysis submitted to the Bureau and BEP by DMR on the fisheries impacts of this proposed project — in which DMR claimed it was unaware of mercury in this area.
>
> This SAP is proffered to the Bureau as evidence of the need for further evaluation by the Bureau of the environmental and economic impacts of this proposed project.

Petition Exhibit 30.

58. On July 10, 2020, Petitioners filed their Comments and Objections to the Preliminary Findings and Decision, including a challenge to the Bureau's determination that NAF had demonstrated sufficient right, title or interest based on the Law Court's July 7, 2020

decision in *Tomasino v. Town of Casco,* 2020 ME 96, as well as substantive challenges to the Bureau's non-RTI related determinations. (Petition Exhibit 31).

59. On July 13, 2020, Petitioners filed a separate Motion to Stay or Dismiss NAF's pending lease application based on *Tomasino v. Town of Casco,* 2020 ME 96. (Petition Exhibit 32).

60. On July 20, 2020, Petitioner filed an Amended Motion to Stay or Dismiss NAF's pending lease application based on *Tomasino v. Town of Casco,* 2020 ME 96 and precedents cited in this Court's July 14, 2020 Order dismissing the Petitioners' Rule 80B challenge to the proceedings in the BEP, Docket No. AP-2020-3. (Petition Exhibits 33 and 35).

61. Petitioners also filed this Court June 4 Order on Plaintiffs' Summary Judgment Motions with its Motions to Dismiss or Stay – as that Order states some of the outstanding disputes relating to the factual parameter of the 2018 Easement Agreement that this Court has already identified in RE-2019-18. (Petition Exhibit 34).

62. On August 3, 2020, the Bureau denied Petitioners' Motion to Stay or Dismiss based on the Law Court's *Tomasino* decision. (Petition Exhibit 36). The Bureau's stated its basis for denial in relevant part as follows:

> The Bureau of Parks and Lands has received the Petitioners' (Jeffrey Mabee, et al.) July 20, 2020 motion to stay or dismiss Nordic Aquafarms' (NAF's) application for a submerged lands lease based on the Law Court's recent opinion in *Tomasino v. Town of Casco,* 2020 ME 96, and the Superior Court's recent decision in *Mabee v. Board of Environmental Protection*, AP-20-3 (Me. Sup.Ct., Waldo Cty., July 14, 2020). NAF responded to the Petitioners' motion on July 24, 2020, and the Petitioners replied to NAF's response on July 27, 2020. The Bureau does not consider the Petitioners' motion, NAF's response, or the Petitioners' reply to be comments on the Preliminary Findings, rather, the Bureau considers those submissions to be present legal argument on a procedural motion.
>
> The Petitioners' motion to stay of dismiss NAF's application for a submerge lands lease is denied. Neither *Tomasino* nor the Superior Court order compels the relief Petitioners request. The Bureau will proceed to issuing its Final Findings and Decision (Final Findings), which Final Findings will address timely submitted

> comments on the Bureau's Preliminary Findings and Decision (Preliminary Findings) and set forth the Bureau's findings regarding right, title, and interest.

63. On August 11, 2020, Petitioners filed a Motion for Reconsideration of the Bureau's denial of their Motion to Stay or Dismiss based on the Law Court's *Tomasino* decision, with additional exhibits not previously available. (Petition Exhibit 37). Included in those additional exhibits were materials that NAF had concealed from Petitioners and permitting agencies during the proceedings, including: surveys prepared between November 14, 2018 and July 24, 2020, by NAF's surveyor, James Dorsky, P.L.S., in which Mr. Dorsky shows that the Eckrotes do not own the intertidal land on which their lot fronts.

64. These belatedly produced surveys show that NAF's Surveyor Dorsky variously indicates on the face of these surveys and revisions, previously withheld by NAF from disclosure to any local, State or federal agency, that this intertidal land: (a) was retained by Harriet L. Hartley, (b) is owned by the "heirs" of Harriet L. Hartley, or (c) the ownership is "unclear." *Id.*

65. In none of the surveys, revisions, opinion, or chart prepared by NAF's Surveyor Dorsky does he conclude that the Eckrotes own this intertidal land. *Id.*

66. On August 17, 2020, the Bureau denied Petitioners' for Reconsideration. (Petition Exhibit 38). The Bureau's stated its basis for denial in relevant part as follows:

> For the reasons set forth in the Bureau's denial letter dated August 3, 2020, the Petitioner's [sic] motion for reconsideration is denied.

67. On September 4, 2020 the Bureau issued it Final Findings and Determination, after remand. (Petition Exhibit 39).

68. In deciding that NAF had demonstrated sufficient RTI to have administrative standing, the Bureau mischaracterized the Law Court's holding in *Tomasino v. Town of Casco,* 2020 ME 96; mischaracterized the nature of Petitioners' challenge to NAF's RTI claims as based on Petitioners' ownership of the intertidal land on which the Eckrotes' lot fronts; and improperly

shifted the burden of proof regarding NAF's lack of sufficient RTI from the applicant to aggrieved parties challenging NAF's improper attempt to obtain permits to use land that neither the applicant to the Grantor of its easement own. *Id.*

69. Indeed, although acknowledging that the Courts – not the Bureau – has the jurisdiction to decide matters of ownership, the Bureau gives greater weight to the unrecorded easement option and March 3, 2019 Letter Agreement than the recorded deeds, surveys, quiet title judgment in *Ferris v. Hargrave* (WCRD Book 683, Page 283), and Conservation Easement. *Id.*; *see also*, 9-4-2020 Findings and Decision p. 6, f.n. 10.

70. Finally, the Bureau fails to acknowledge that the 12-23-2019 Amendment of the 8-6-2018 Easement Agreement, submitted in the January 10, 2020 NAF remand materials, has a Second WHEREAS clause that expressly states that the March 3, 2019 Letter Agreement is not a representation or warranty that the Eckrotes own any of the intertidal land on which their lot fronts – nullifying the interpretation that the Bureau has improperly given this document in 2019 and 2020. (Petition Exhibit 21).

71. This Rule 80C appeal of the Bureau's September 4, 2020 Final Findings and Decision on NAF's September 26, 2018 submerged lands lease application (**SL2352**), as amended by NAF on remand on January 10, 2020 and February 6, 2020, has been timely filed.

72. As part of this appeal Petitioners challenge the Bureau's decision to grant Submerged Lands Lease No. **2141-L-49** and Dredge Lease No. **05-22 DL**.

II. PETITIONERS

73. **Jeffrey R. Mabee and Judith B. Grace** are natural persons, residents of the City of Belfast, Maine, and are the owners of a piece or parcel of land known as Little River Center, located at 290 Northport Avenue, Belfast, Waldo County, Maine, 04915, Belfast Tax Map Page

29, Lot 38, more particularly described in the Waldo County Registry of Deeds, at Book 1221, Page 347, appended hereto and made a part hereof in Amended Exhibit 16.[9] Petitioners Mabee and Grace assert that their land includes the upland and structures on Belfast Tax Map 29, Lot 38 and the intertidal land on which Lots, 38, 37, 36 and most of Lot 35 front, as shown on the recorded survey plan recorded in the WCRD at Book 24, Page 34 and described in the Surveyor's Report recorded at Book 4425, Page 165, incorporated herein as Exhibits 26 and 27, respectively.

74. Petitioners Mabee and Grace have filed a suit for Declaratory and Injunctive Relief to Quiet Title to determine and declare their ownership of the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and most of 35 front and to resolve their rights under a restrictive covenant ("residential purposes only") that is in the 1946 deed from their predecessor in interest Harriet L. Hartley to the Eckrotes' predecessor in interest, Fred R. Poor. *Mabee and Grace, et al. v. NAF, et al.,* Docket No. RE-2019-18 (filed on July 15, 2019).

75. Petitioners Mabee and Grace are husband and wife and own the subject property described in their need in fee simple as joint tenants.

76. Petitioners Mabee and Grace respectfully assert that they are the true owners, in fee simple, of the intertidal land on which applicant Nordic Aquafarms, Inc. ("NAF") improperly seeks to place three industrial pipelines, which are essential accessory structures of its proposed land-based salmon factory in Belfast, Maine. Petitioners do not consent to this proposed taking or use of their land. Petitioners Mabee and Grace are abutters of the proposed NAF project and the true owners of the environmentally fragile intertidal land on, through or under which NAF

[9] All exhibits referenced herein are incorporated by reference.

seeks to place its three industrial pipelines to reach the Bureau's submerged lands in Penobscot Bay.

77. To emphasize their intent to protect this intertidal land from the degradation and destruction that NAF has proposed, Petitioners Mabee and Grace put all of their intertidal land under the protection of a conservation easement, in perpetuity, pursuant to the statutory authority in 33 M.R.S.A. § 477-A, et seq., recorded on April 29, 2019, in the Waldo County Registry of Deeds at Book 4367, Page 273 (Petition Exhibit 11).

78. This Conservation Easement is registered with the Maine Department of Agriculture, Conservation and Forestry ("DACF").

79. The Bureau's 9-4-2020 final agency action adversely affects the Petitioners Conservation Easement, establishing a right in Petitioners Mabee and Grace to file this challenge to the Bureau's action, pursuant to 33 M.R.S. § 478(1)(A).

80. **The Friends of the Harriet L. Hartley Conservation Area** ("Friends") is a non-profit corporation (T13-B) duly incorporated in the State of Maine on August 30, 2019, Charter No. 20200085ND, in Good Standing and with an office and principal place of business in the City of Belfast, Waldo County, Maine, with a mailing address of P.O. Box 465, Belfast, Maine 04915. Friends holds a Conservation Easement over a portion of the Plaintiffs' property, including all of the intertidal land on which Tax Map 29, Lots 38, 37, 36 and most of 35 front), pursuant to an Assignment from Upstream Watch, dated November 4, 2019 and recorded in the WCRD at Book 4435, Page 344.

81. The boundaries of the Harriet L. Hartley Conservation Area are described in Schedules A and B to the Conservation Easement (recorded in the WCRD at Book 4367, Page

273) and shown on the survey plan prepared by Donald R. Richards, P.L.S., L.F., recorded in the WCRD at Book 24, Page 54.

82. The Bureau's 9-4-2020 final agency action adversely affects the Conservation Easement in which Petitioner Friends is the designated Holder, establishing a right in Petitioner Friends to file this challenge to the Bureau's action, pursuant to 33 M.R.S. § 478(1)(B).

83. **The Maine Lobstering Union** ("IMLU") is Local 207 of the International Association of Machinists and Aerospace Workers (IAMAW), within District Lodge 4 of the IAMAW. The IMLU was incorporated in the State of Maine as a nonprofit fish marketing association. The corporation was organized as a "cooperative corporation" by filing Articles of Incorporation under the Fish Marketing Act, 13 M.R.S.A. §§ 2001-2287, with the Maine Secretary of State, on September 10, 2013. The IMLU is in good standing as an entity according to the Maine Secretary of State. The IMLU's charter number is 20140002CP. For federal tax purposes the IMLU is a "cooperative" under subchapter T of the Internal Revenue Code.

84. The IMLU is an organization comprised of active, licensed lobstermen and sternmen and exists to represent the interests of *only* licensed lobstermen and sternmen (as opposed to other lobster industry participants). The IMLU is the first representative organization organized as a cooperative in Maine to represent lobstermen and sternmen exclusively. The harvesters in the IMLU also have purchased and operate a wholesale and retail business that markets and sells Maine lobsters and crabs harvested by IMLU members and other holders of Maine lobster and crab fishing licenses. The IMLU's business operates under the business name Lobster207.

85. The IMLU represents lobstermen in all Maine Lobster Zones, from Kittery to Cutler, including in Zones C and D, the Zones covering Penobscot Bay, Maine, that would be

most directly adversely impacted by this proposed project and the Bureau's Final Agency Action. The IMLU has members that fish in the area directly, adversely impacted by the pipelines, dredging, blasting and wastewater and effluent dumping proposed by NAF, and in all areas of Zones C and D that will suffer direct, indirect, cumulative, primary, secondary, acknowledged, foreseeable and unforeseeable impacts from this project in the short- and long-terms.

86. The IMLU has participated in all stages of the Bureau's lease proceedings, and challenged the NAF lease application based on RTI, justiciability, and substantive and procedural defects since at least October of 2018.

87. Wayne Canning is the Zone D Lobster Council representative for District 11 lobstermen and a lobsterman, holding a Maine commercial lobster and crab fishing license. Mr. Canning fishes out of Belfast, Maine, in the area proposed by NAF for placement of its intake and discharge pipelines and the area where wastewater will be discharged. Mr. Canning has participated in local and State proceedings and meetings in connection with this lease and permitting process and has submitted and given testimony in opposition to the NAF project as proposed. Mr. Canning has solicited input regarding the potential impacts of this proposed project from the Zone D District 11 lobstermen who he represents. Zone D District 11 includes the geographic area where NAF proposes to place its intake and discharge pipelines and discharge up to 7.7 million gallons per day of warm wastewater. The construction and placement of these pipes and discharge of wastewater into Penobscot Bay will adversely impact Wayne Canning and all District 11 lobstermen, including increasing the risk to life and property Mr. Canning and similarly situated commercial lobster and crab license holders will suffer as a result of NAF's revised pipes installation proposal, submitted on remand by NAF in January and

February of 2020.

88. Wayne Canning has participated in all stages of the Bureau's lease proceedings, and challenged the NAF lease application based on RTI, justiciability, and substantive and procedural defects since at least October of 2018.

89. **David Black** is a Belfast resident and a lobsterman, holding a Maine commercial lobster and crab fishing license. Mr. Black has fished for more than 55 years in Belfast Bay and Penobscot Bay out of Belfast, Maine, and fishes in the area proposed by NAF for placement of its intake and discharge pipelines and the area where wastewater will be discharged. Mr. Black has participated in local and State proceedings and meetings in connection with this permitting process and has submitted and given testimony in opposition to the NAF project as proposed. Mr. Black confirmed, based on his personal experience, the uncompensated, multi-year adverse impacts suffered by the lobstermen in District 11, including him, due to past dredging projects (including the 2003 Belfast Harbor dredging project) and past placement of pipelines that obstruct the movement of lobsters in and around the Bay.

90. Petitioner Black will suffer an increased risk to life and property as a result of NAF's amended pipes installation plan proposal, submitted by NAF in January and February 2020, after the remand of the September 11, 2019 Findings and Decision.

91. David Black has participated in all stages of the Bureau's lease proceedings, and challenged the NAF lease application based on RTI, justiciability, and substantive and procedural defects since at least October of 2018.

MANNER IN WHICH THE PETITIONERS' HAVE BEEN AND ARE BEING AGGREIVED:

A. Petitioners Mabee and Grace and Friends

92. If the Bureau's submerged lands and dredging leases for this project are allowed to stand, the Petitioners will suffer significant adverse damages to the value and merchantability of their real property, as well as its use and enjoyment. Indeed, merely having to participate in these lease and permitting proceedings, where the applicant has no actual title, right or interest in the property for which it seeks these leases and other permits, has already cost Petitioners Mabee and Grace and Friends tens of thousands of dollars in attorneys' fees, expert witness fees, surveying costs, and other litigation and administrative forum filing costs. All of these costs constitute special damages borne by Petitioners Mabee and Grace and Friends.

93. NAF's claims of "sufficient TRI" in the Mabee-Grace intertidal land are slandering the Petitioners Mabee and Grace's title and adversely impacting the value and marketability of their real estate and is hindering Petitioner Friends' ability to obtain leases and seek funding for grants needed to protect the Conservation Area in its natural condition and to restore the Conservation Area's eel grass beds and access to the Little River by anadromous species, including wild Atlantic salmon.

94. Allowing the Bureau to grant NAF a submerged lands lease and dredging lease, that would authorize NAF and its agents to take, use, damage and destroy Petitioners Mabee and Grace's intertidal land, on which Petitioner Friends holds a Conservation Easement and has a duty to protect in its natural condition, in the absence of NAF having any actual title, right or interest in that intertidal land, violates Petitioners' rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Art. I, § 21 of the Maine Constitution; and diminishes or destroys the value and marketability of Petitioners' real property and Petitioners Mabee, Grace

and Friends' use and enjoyment of this intertidal land in its natural condition.

95. Further, in granting this lease to NAF, the Bureau is violating the conservation easement, which protects this intertidal land in its natural condition, in perpetuity, free of any commercial or industrial use or structures, in violation of the State's obligations to enforce conservation easements in 33 M.R.S.A. § 478.

96. Petitioners Mabee and Grace and Friends have, and will continue to suffer special damages, spending tens of thousands of dollars to defend and protect their land from theft and degradation in local, State and federal lease and permitting proceedings (including the appeal of the Bureau's lease determination), as well as the Declaratory Judgment action pending in this Court.

B. Lobstering Petitioners

97. The impacts that the Lobstering Petitioners will suffer from this project as proposed include direct impacts on the abundance, distribution, health, access to and commercial value of lobsters in and from Belfast Bay and Penobscot Bay, as well as the potential adverse economic impacts from possible contamination of lobsters caused by disturbing long-buried HoltraChem mercury or discharge of contaminants in the NAF wastewater, which could irreparably damage the reputation for wholesomeness of *all lobsters* marketed and sold under the Maine Lobster brand – including but not limited to lobsters that are caught or landed specifically in or from Waldo County in Belfast and Penobscot Bays.

98. Among those impacts is the deposition of process waste into Penobscot Bay, polluting the Bay and impairing the farming of mussels and harvesting of lobsters and crabs, and fouling beaches where members and Petitioners, and their families swim and fish.

99. In addition, these impacts include permanent physical loss of use and access to

traditional fishing grounds by lobstermen, crabbers, urchin fishermen and scallopers in the area of the proposed pipelines and wastewater and effluent dumping, and potential loss of use of a far more expansive area of the Penobscot Bay if the proposed pipeline and wastewater and effluent dumping cause new contamination and/or the re-suspension and spread of long-dormant and buried mercury contamination from Mallinckrodt and HoltraChem, as well as warming the waters of Penobscot Bay (since the proposed effluent is 5° to 33° Fahrenheit warmer than the ambient water temperatures in the Bay).

100. The Bureau has erred in stating it has no obligation to consider such impacts – characterizing these as "environmental" impacts as opposed to impacts upon public trust resources.

101. IMLU members and other licensed lobstermen and crabbers, including Petitioners Canning and Black, have already lost the use of approximately 13 square miles of lobstering and crabbing grounds near this area due to the presence of mercury contamination. This project poses a threat of disturbing similar contamination from the same original sources (Mallinckrodt and HoltraChem), as well as new and as yet not fully revealed additional contamination that will damage the marketability and/or abundance of lobster and crab, as well as other commercially fished species in this area.

102. NAF's third proposed pipelines route and configuration proposes that a large portion of the intake pipelines and most of the outfall/discharge pipeline would be buried in the intertidal zone originating from the Eckrotes' lot and extending into Belfast and Penobscot Bay. NAF proposes that these pipes will be buried by use of destructive mechanical trenching, side-casting of dredge spoils and dredging in this fragile and sensitive intertidal estuary. NAF also proposes to use blasting to destroy ledge in this area so that it can bury these pipelines – again

disturbing and spreading buried HoltraChem mercury that the federal court's experts have determined is buried in this area.

103. NAF then proposes to place the remaining length of the outfall and intake pipelines along the surface of the Bay beginning at a depth of approximately 35-feet, on brackets located every 15 feet. This construction process would form dangerous underwater obstructions that can entangle lobster and crab fishing gear for approximately a half mile.

104. Although the materials NAF filed on remand, on January 10 and February 6, 2020, state that NAF will remove 4,000-8,000 cy of dredge spoils from the subtidal zone covered by the Bureau's lease, the March 2, 2020 oral representations by NAF and its agent CIANBRO, revealed NAF intends to remove up to 20,000 cy of dredge spoils for upland disposal.

105. NAF has filed no written amendment relating to this additional material change and the 9-4-2020 Findings and Decision do not include an assessment of the impacts of this material change – instead expressly limiting the Bureau's decision to the material submitted by NAF on January 10, 2020 and February 6, 2020.

106. NAF's infrastructure, proposed for placement in, on and above the State's subtidal land, will inevitably alter currents in the area, trap wastewater, disrupt and obstruct the movement of lobsters and other sea life, damage or destroy valuable lobstering and crabbing grounds where 100 to 200 lobstermen currently fish from Districts 10 and 11, and pose a hazard to navigation all mariners and increase the risk to life and property to commercial fishermen (including Petitioners) posed by entanglement in the proposed pipes, concrete anchors and guide piles.

107. The Bureau has done no adequate evaluation of the impacts of this proposed project on lobster and crab fishing in this area – relying on the conclusory statements of staff of

the Department of Marine Resources – that were based on no scientific study by DMR.

108. The up to 7.7 million gallons of wastewater that NAF proposes to dump daily into the fertile lobstering grounds of Penobscot Bay will be 5° to 33° Fahrenheit warmer than the natural temperatures of Penobscot Bay – depending on the time of year of the discharge.

109. Dumping wastewater that is significantly warmer than the ambient temperatures of the Bay will adversely impact lobsters and crabs at all stages of development and permanently harm the Penobscot Bay lobster fishery. To understate such adverse impacts, NAF has filed "expert" reports falsely claiming that there is no significant lobster presence in this area – news to the almost 200 lobstermen who make a living fishing this area each year.

110. The Department of Marine Resources, inexplicably simply ignored these risks in issuing its letter to the Bureau, asserting that there would be no significant impacts to the lobster fishery from this project without any objective, empirical or scientific basis for this bald assertion.

111. The Bureau has erroneously asserted that ". . . environmental and habitat impacts are not within the Bureau's purview." 9-4-2020 Findings and Decision, p. 5.

112. But/for the Bureau granting NAF a submerged lands lease none of the above-referenced adverse impacts would be suffered by the Lobstering Petitioners.

113. The Lobstering Petitioners provided the Bureau with county-by-county lobster landings data from the Maine Department of Marine Resources dating from 1964 to 2018. This data flatly contradicts the specious claims made by DMR, NAF and its agents that there are few lobsters in the area where NAF proposes to place its pipelines and that NAF acknowledges will be directly impacted by its wastewater discharges. This data is incorporated by reference into this petition as though stated herein. This data can be found online at:

https://www.maine.gov/dmr/commercial-fishing/landings/documents/lobster.county.pdf

114. This data demonstrates the exponential increase in lobsters and lobster landings in Waldo County as the Bay has begun to recover from past industrial degradation and pollution of this area of the Bay. From 1964 to 1999, the Waldo County lobster catch was not significant enough for DMR to even be separately mentioned in its report. From 2000 to 2003, Waldo County's catch was included with the Knox County data. However, beginning in 2004, the Waldo County catch had rebounded enough to be separately reported by DMR.

115. In 2004, the Waldo County catch was 401,706 pounds, worth $1,762,878 at the dock.

116. However, this data also confirms that the Waldo County catch drastically declined as a result of the effects of the 2003 Belfast Harbor dredge on the upper Bay fishery. In 2005, the catch declined by over 29% to 284,661 pounds. The catch remained under the 400,000-pound range until 2011.

117. In 2011, the catch was 456,016 pounds with a value of $1,449,663. Since 2014, the Waldo County Catch ranged between 746,704 pounds and 864,528 pounds, with a value in excess of $3 million each year.

118. The value of the Waldo County lobster catch has a value in the local and Maine economy of three to five times the value of the catch at the dock – meaning the Waldo County lobster catch has an economic worth to the Maine and Midcoast economies of in excess of $9 million and $15 million *annually*.

119. The value of this catch far exceeds the potential annual economic benefits to the Maine and local economy of the proposed NAF project. This significant economic value would be lost if this project is approved.

120. The Bureau erred in ignoring the data submitted by the Lobstering Petitioners that demonstrated that the NAF project, as proposed, will have direct, immediate, significant adverse impacts on lobsters' health and quantities, access to traditional lobster and crab fishing grounds currently used by 100 to 200 lobstermen, the reputation and sustainability of the lobster fishery in the upper Penobscot Bay, and the reputation for wholesomeness of Penobscot Bay lobster and the Maine lobster brand.

121. Further, the Bureau erred in relying upon the superficial and conclusory statement submitted by Denis-Marc Nault of the Department of Marine Resources, that limited DMR's assessment of impacts from this proposed project on Pen-Bay fisheries to only the winter of construction on the lobster fishery – ignoring the impact on the winter crab fishery during this construction period, and ignoring all permanent impacts post-construction from dredging, blasting, trenching, disturbing buried HoltraChem mercury, warming water temperatures, changes in salinity because the discharge effluent will contain 15% freshwater, increases in nitrogen, changes in currents, obstructions and disruptions in lobster habitat and movement, and physical loss of traditional fishing areas.

122. The Bureau also erred in ignoring the mercury distribution chart prepared by the federal court's experts during Phase II of the PRMS and submitted to the Bureau by the Lobstering Petitioners, in favor of a one-page conclusory statement by the Maine Department of Marine Resources that they were "unaware" of any mercury. The PRMS mercury distribution chart is incorporated herein as though stated in this petition. (Petition Exhibit 40).

123. This chart shows that the level of contamination from buried HoltraChem mercury in the area NAF proposes to dredge, blast and place its pipelines is 200-300 ng/gm.

124. The Bureau erred in its determination that the proposed pipelines, as proposed in

the January 10 and February 6, 2020 filings submitted by NAF on remand, do not create an unreasonable risk to life or property of the Lobstering Petitioners. Indeed, the Bureau falsely concludes that "the pipes present minimal safety risks to life or property because they would be buried under submerged lands for the majority of the lease area and otherwise ***rest of the bottom of submerged land.***" (9-4-2020 Findings and Decision, p. 10 (emphasis supplied)).

125. The Bureau erred in failing to consider the potential for dangerous entanglements of fishing gear and anchors from this above-ground placement of the pipes.

126. The Bureau appears to have simply ignored the change in impacts created by the change in NAF's proposed installation method, described by NAF in its January 10 and February 6, 2020 filings and shown in the schematics provided by NAF on February 6, 2020 at: https://www.maine.gov/dacf/parks/docs/SL-2020-02-06-8.-Appendix-E-CS-501-Anchoring-Detail-web.pdf

127. Indeed, the Bureau improperly *verbatim* restated its finding on "Risk to Life and Property" from the Bureau's 9-11-2019 Findings and Decision (See page 8 of the 9-11-2019 Findings and Decision) – that was based on the original pipelines installation method of placement of the pipes on the seafloor covered with rip-rap gravel and cement mats) -- in the Bureau's 9-4-2020 Findings and Decision. This error demonstrates the Bureau's utter failure to consider the greater risks to the lives and property of commercial lobster and crab fishermen and recreational and commercial boaters posed by NAF's change in the proposed pipelines installation method.

128. While this change in the method for pipeline installation changes the amount of seafloor that the USACE, DEP and the Bureau calculate will be permanently altered by this proposed project and, thus, *reduces the amount that NAF is being charged for leases and permits*

– this change increases the risk to life and property and adverse impacts to navigation of this proposed project.

129. The Bureau's description of the pipes as "on the bottom of submerged lands" is in direct contravention to the information NAF submitted to the Bureau in January and February 2020 on remand, cited earlier in the 9-4-2020 Findings and Decision, which describes the design of the last half-mile of the pipes as dangling "slightly" above the seafloor from complicated brackets placed every 15 feet along the pipes' route, secured by concrete anchors and guide piles.

130. The pipes as now proposed also would have diffusers and other infrastructure protruding vertically above the pipes as much as eight (8) feet near the termination points of the pipes.[10]

131. The Bureau also erred in failing to consider the temporary and permanent impacts on the lobster and crab fishery in Penobscot Bay caused by NAF and CIANBRO disturbing

---

[10] On page 2 of the 9-4-2020 Findings and Decision, the Bureau describes the above-ground placement method for the pipes in relevant part as follows:

> The pipes would be buried with five feet of excavated material (also referred to as "cover") for approximately 850 feet from the mean high-water mark to the mean low-water mark [i.e. in the land Petitioners Mabee and Grace claim ownership and Petitioner Friends holds a Conservation Easement]. From the mean low-water mark to approximately 1,850 feet, the pipes would continue buried with five feet of cover. For the next 400 feet, approximately, the pipes would transition from being buried with five feet of cover to gradually reducing the amount of cover and being exposed where the water depth is approximately 35 feet at low tide. From this stage**, *the pipes would be anchored slightly above the sea floor with concrete anchors secured with helical anchors or guide piles*, as necessary, which helical anchors or guide piles would be *spaced every 15 feet*, to their respective termination points. After transitioning to being exposed, the water discharge pipe would extend another 600 feet, terminating in approximately 38 feet of water at low tide. The last 100 feet of the water discharge pipe would incorporate *three diffuser valves spaced 50 feet apart that project approximately 34 inches vertically above that pipe. The two water intake pipes would continue, exposed, for approximately 2,700 feet easterly and terminate in approximately 48 feet of water at low tide.* The seaward end of each water intake pipe includes a water intake structure that would *extend vertically approximately 8 feet from the bottom of each pipe.***

9-4-2020 Findings and Decision, p. 2 (emphasis supplied).

mercury and other contaminants in the sediment during construction and by the force of the discharge of 7.7 million gallons of wastewater during operation of the NAF facility.

132. In prior 2019 filings, NAF confirmed a level of 239 ng/gm in one of the 3 core samples they took last year. NAF's employee Ed Cotter has told the Belfast Harbor Committee that NAF did not test 7 of the 10 core samples NAF took along the second pipelines route (the route abandoned in March of 2019 by NAF), 2 samples were "inconclusive" for mercury, and one of the 3 tested cores showed 239 ng/gm (just as the Court's experts stated was present. It is significant that NAF found this level of mercury, since NAF confirmed that it did not use the more accurate PRMS core sampling and testing protocol to do its limited testing.

133. The Bureau erred in refusing to consider the results of sediment testing by NAF, mandated in June of 2020 by the USACE and USEPA, for various contaminants including mercury until those tests are accepted by the USACE and USEPA.

134. It is impossible for the Bureau to make conclusions regarding the temporary or permanent impacts of this proposed project on the existing access of fishermen to this area as a productive commercial fishing resource, without considering the amount and nature of sediment that this project, as proposed, will disturb and re-suspend (including the temporary and permanent impact of construction and operation of the pipes in Penobscot Bay on the lobster and crab fisheries of the upper Penobscot Bay).

135. It is error for the Bureau to attempt to defer its responsibility for such decisions to other State or federal agencies. That other agencies have overlapping jurisdiction does not obviate the Bureau's independent responsibility to make these judgments based on sound science and expert analysis.

136. Further, despite Petitioners' submission of proof with its Comments to the

Preliminary Findings and Decision that multiple federal registries and agencies have designated the area proposed for placement of these pipes in the State's submerged lands as "Essential Fish Habitat" ("EFH") for multiple species, the Bureau erred in finding that "there is no evidence in the record that any portion of the proposed submerged land lease area has been designated for special protection by an agency authorized to make such designations." (9-4-2020- Findings and Decision, p. 11).

137. The Bureau erred in making this Finding – ignoring evidence submitted by the Petitioners and information that is readily available through public sources and erred in failing to consider the impact of this proposed project on the EFH that will be adversely impacted by this project, including the adverse impacts on wild salmon returning to Penobscot Bay and the Little River.

138. In sum, the Bureau has failed in its statutory duty under 12 M.R.S. § 1862(6)(a) and (b) to make determinations, based on evidence and sound science, regarding whether this project, as proposed by NAF in 2020, (a) will not unreasonably interfere with navigation; and (b) will not unreasonably interfere with fishing or other existing marine uses of the area.

C. All Petitioners

139. All of the Petitioners have had to incur an unreasonable cost burden to challenge NAF's administrative standing. Where, as here, the lease applicant (NAF) is relying on an easement to demonstrate RTI – an easement the factual parameters and legal validity of which have not been determined by a Court of competent jurisdiction (i.e. *this Court*) – the applicant is devoid of the requisite right, title or interest "in the upland property adjacent to the littoral zone in which the lease or easement is sought," to have administrative standing.

140. The Bureau's decision to proceed in the lease process was and is contrary to the

Law Court's recent holding in *Tomasino v. Town of Case, supra* at ¶ 15, and the requirements in 01-670 C.M.R. ch. 53, § 1.6.B.1. It is unreasonable and error for the Bureau to grant a submerged lands lease and dredging lease to NAF – shifting the burden on the property owners and this Court to enforce property rights that are guaranteed by law in this State and nation.

141. In the absence of RTI, NAF lacks administrative standing to proceed in the lease process and the Bureau lacks a justiciable issue before it to proceed upon.

142. It was a violation of the Bureau's subject matter jurisdiction to make legal determinations regarding the meaning and interpretation of the March 3, 2019 Letter Agreement or the boundaries of the August 6, 2018 Easement Agreement. These are all matters relating to the factual parameters of the 8-6-2018 Easement Agreement that are solely within the subject matter jurisdiction of this Court – not the Bureau – to make.

143. Until those determinations are made by this Court, in the pending separate declaratory judgment action to quiet title (RE-2019-18), the Bureau was required to dismiss or stay consideration of NAF's submerged lands lease application. It was error for the Bureau to grant a submerged lands lease and dredge lease in the absence of NAF's administrative standing or a justiciable issue before the Bureau.

FINAL AGENCY ACTION TO BE REVIEWED

144. The Bureau erred in granting a submerged lands lease to NAF in multiple ways – substantive and jurisdictional.

145. However, Petitioners respectfully submit that the Bureau's error in determining the threshold jurisdictional question, regarding NAF's alleged demonstration of "sufficient right, title or interest," so fundamentally infects every other decision that the agency has made, this question requires resolution by the Court before the Petitioners should have to address the other

substantive errors made by the Bureau.

146. Because the Record evidence, submitted by both the Petitioners ***and NAF***, unequivocally demonstrates that NAF at all times lacked the requisite administrative standing to apply for a submerged lands lease, the Bureau never had a justiciable issue before it on which to grant NAF a submerged lands lease or dredge lease and erred in stating it would grant NAF these leases – with or without the caveat that the leases will only be granted after NAF presents a recorded easement that includes the intertidal land on which the Eckrotes' lot fronts.

147. Seemingly, in recognition that NAF lacks actual right, title or interest in the intertidal land NAF proposes to use to site and bury its three industrial pipelines – intertidal land that Petitioners Mabee and Grace assert that they own in fee simple – the Bureau has conditioned its issuance of a submerged land lease, stating in relevant part that:

> ". . . [T]he Bureau obtained a copy of the Eckrotes' deed, which is recorded in the Waldo County Registry of Deeds, Book 3697, Page 5. The metes and bounds description in the Eckrotes' deed includes the following call: "to the high-water mark of Penobscot Bay thence general southwesterly along said Bay." Nordic and Upstream Watch each submitted a legal opinion and an opinion from a surveyor opining on the extent of the Eckrotes' ownership. Based on the Eckrotes' deed, which includes a call to the water, the Colonial Ordinance presumption of ownership to the low-water mark, the Easement Purchase and Sale Agreement, as amended, including the letter dated March 3, 2019, the Bureau finds that Nordic has demonstrated sufficient RTI in the upland property adjacent to the proposed submerged lands lease area for the Bureau to process the lease application. ***The Bureau will not issue a submerged lands lease to Nordic until Nordic provides the Bureau with a copy of a recorded easement from the Eckrotes to cross the upland property, including the intertidal lands, adjacent to the submerged lands for which the lease is sought***.

September 4, 2020 Final Fndings and Decision, p. 6 (emphasis supplied).

148. The Bureau also cautioned that:

> The Bureau acknowledges that there are competing claims of title to the intertidal land in front of the Eckrotes' property and a dispute over the validity of the 2019

> conservation easement.[11] ***The Bureau, however, lacks the authority to resolve competing title claims; resolution of such claims is a function of the courts.*** Additionally, the existence of competing title claims does 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.
>
> Except when the Bureau owns intertidal land, the Bureau's submerged lands leasing program does not grant rights to intertidal land; rather, the Bureau determines whether a less than fee conveyance should be issued for the publicly-owned submerged lands. ***The decision to issue a submerged lands conveyance does not constitute an adjudication of any title disputes among private parties regarding ownership of intertidal land, which only a court can adjudicate.*** If the outcome of a title action effectively terminates a lessee's RTI for its submerged lands lease, that lease, pursuant to subsection 1.6(B)(1)(b) of the Bureau's Chapter 53 rules, "shall be invalid and all leasehold . . . interest in the Submerged Lands shall be extinguished."

Id. (footnotes omitted; emphasis supplied).

149. While it is true that "the existence of competing title claims 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"; where, as here, the applicant bases its RTI claims on an easement, the factual parameters and legal validity of which are in dispute and have not been determined by a court of competent jurisdiction, the Law Court's holding in *Tomasino v. Town of Casco, supra* at ¶ 15, requires the permitting agency to dismiss the application for lack of administrative standing and renders the application request non-justiciable, as a matter of law.

150. The Bureau states that it based its administrative jurisdictional determination on: (a) the October 15, 2012 Deed (obtained by the Bureau on its own initiative, not submitted by the applicant NAF); the September 18, 2018 Easement Agreement between the Eckrotes and NAF

[11] There actually is no filing in the Bureau or in this Court in RE-2019-18 challenging the validity of the Petitioners' recorded Conservation Easement and no counterclaim by NAF or the Eckrotes, pending in RE-2019-18 on in the Bureau proceedings, asserting or seeking a declaration by this Court that the Petitioners' Conservation Easement is not valid under 33 M.R.S. § 477-A. Thus, this statement by the Bureau in its 9-4-2020 Findings and Decision is demonstrably false and has no basis in fact or law.

(submitted by NAF); and the Marsh 3 Letter from Erik Heim to the Eckrtoes, with a signed "acknowledgement" from the Eckrotes dated February 28, 2019 attached. The Bureau asserts that this material supports the "presumption" under the "Colonial Ordinance" that the Eckrotes own the intertidal land on which their lot fronts.

151. The Bureau ignored the contradictory evidence ***submitted by NAF itself***, including: (a) deeds dating back to 1946 showing that the Eckrotes' lot's waterside boundary is "along high-water mark of Penobscot Bay"; (b) the August 31, 2012 Good Deeds survey, incorporated by reference into the October 15, 2012 Deed from the Estate of Phyllis J. Poor to the Eckrotes, submitted ***by NAF*** in the Bureau's Record on May 16, 2019, which shows that the waterside boundary of the Eckrotes' lot is "ALONG HIGH WATER" in plain English written along this boundary; (c) the expert opinion of NAF's expert surveyor, James Dorsky, in an opinion letter from Mr. Dorsky to Erik Heim, dated May 16, 2019, and submitted to the Bureau *by NAF*, on May 16, 2019, which acknowledges that the Eckrotes' upland lot was severed from the intertidal land by Harriet L. Hartley in 1946, but asserts that Harriet L. Hartley (not the Eckrotes or their predecessors in interest) later retained this land and did not sell it to the Butlers in September of 1950; (d) the survey prepared by NAF's Surveyor Jim Dorsky, on November 14, 2018 and all revisions thereto through July 24, 2020, that indicate that the Eckrotes do not own the intertidal land on which their lot fronts; and (e) the December 23, 2019 Amendment of the 8-6-2018 NAF-Eckrotes' Easement Agreement that, in the Second WHEREAS Clause, states that the March 3, 2019 Letter Agreement is not a "representation" or "warranty" that he Eckrotes have any ownership interest in the intertidal land on which their lot fronts.

152. In addition, Petitioners submitted evidence in the Bureau's Record that NAF had filed with the DEP on June 10, 2019, but had failed to provide to the Bureau. This evidence,

contained in a 144 page pdf, included the April 2, 2018 Good Deeds boundary survey, commissioned by NAF's agents for NAF, again states that the Eckrotes' waterside boundary is the high water mark of their property and contains a warning about the language defect in the Eckrotes' October 15, 2012 deed description and questions the ability of the Eckrotes' predecessor (the Estate of Phyllis J. Poor) to grant NAF an easement beyond the high water mark.

153. Ignoring this information was error by the Bureau and violated the requirements in §1.7(B)(10) of the Submerged Lands Rules (01-670 C.M.R. ch. 53, § 1.7.B.10).[12]

154. Where, as here, Petitioners provided the Bureau with the prior (June 26, 1970) quiet title judgment of this Court in *Ferris v. Hargrave,* Docket No. 11275, granting quiet title to Petitioners Mabee and Grace's predecessor in interest (Winston C. Ferris), based on the same property description in all of the deeds, including Petitioners Mabee and Grace's deed, contained in the uninterrupted chain of title submitted by Petitioners *and NAF* to the Bureau, the Bureau had no legitimate basis for evading its responsibility to find that the Applicant lacks administrative standing and cannot claim, with a straight face, that the Applicant has demonstrated "sufficient RTI" to proceed in the lease process, let alone obtain a submerged lands lease. As the Bureau has noted, only a court can adjudicate ownership.

155. Also, only a Court can determine the factual parameters of an easement.

156. Thus, the *action to be reviewed* by this Rule 80C appeal is the Bureau's decision to issue NAF a submerged lands lease and dredge lease (if and when the easement document is

[12] Section 1.7(B)(10) of the Submerged Lands Rules states that:

> 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.

recorded to include the intertidal land) when the factual parameters and legal validity of the easement on which NAF relies to demonstrate RTI have not yet been determined by a Court of competent jurisdiction (*this Court*).

GROUNDS FOR WHICH RELIEF IS SOUGHT

157. Central to resolution of this Petition is the Bureau's misapplication of the Law Court's decision in *Southridge v. Board of Envtl. Protection,* 655 A.2d 345, 1995 Me. LEXIS 42 and *Tomasino v. Town of Casco,* 2020 ME 96.

158. In its April 4, 2019 "completeness" determination, the Bureau cited *Southridge,* 655 A.2d at 348, 1995 Me. LEXIS 42, *7-9, in determining that NAF has demonstrated sufficient RTI to proceed in the Bureau's lease process.

159. In *Southridge,* the Court held in relevant part as follows on the question of the sufficiency of administrative standing to obtain a State permit:

> The DEP will review an application for a permit only when the applicant has demonstrated "sufficient title, right or interest in all of the property which is proposed for development or use." As we explained in *Murray v. Town of Lincolnville,* 462 A.2d 40, 43 (Me. 1983), HN5 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." *(citing Walsh v. City of Brewer,* 315 A.2d 200, 207 (Me. 1974)).
>
> We disagree with Southridge's contention that the record does not sufficiently demonstrate Cormier Landco's interest in the property. Funtown's septic system has existed on the disputed parcel for a long period of time. This long established business practice, unchallenged by Southridge for many years provides sufficient evidence of interest to support the administrative determination that Cormier and the entities he represents had standing to seek the after-the-fact permit. *See Murray,* 462 A.2d at 43.
>
> In *Murray,* we found that a purchase and sale agreement, conditioned upon the seller's acquisition of any necessary subdivision approval conferred on the purchaser sufficient interest in the property to have the requisite standing to petition the BEP for approval to build on the property. *Murray,* 462 A.2d at 43. We commented that the fact that the [purchasers] could opt out of the purchase in certain circumstances does not deprive them of standing, any more than the owner

> of property in fee simple could be said to lack standing because he has the right to sell his land at any time." *Murray,* 462 A.2d at 43.
>
> We fully acknowledge that it is possible that Cormier may not prevail in his adverse possession claim to the Southridge property. Should this happen, his permit might be revoked. This possibility, however, neither deprives Cormier and those he represents of their current interest in the land nor their administrative standing. We discern no substantive difference between the interest asserted in *Murray* and Cormier's asserted interest in the disputed property.

160. However, the Law Court in *Tomasino,* the Law Court held that *Southridge* does not apply where the applicant for a permit is relying on an easement rather than a claim of title to assert right, title or interest needed to have administrative standing.

161. In the Law Court's July 7, 2020 decision in *Tomasino v. Town of Casco,* 2020 ME 96, ¶10-¶15 (decided July 7, 2020)*,* the Maine Supreme Judicial Court clarified, for the first time, that a permit applicant cannot demonstrate the requisite administrative standing to proceed in an administrative permitting process, by relying solely on an easement, the factual parameters of which have not yet been decided by a court of competent jurisdiction. The Law Court also made clear that administrative permitting authorities lack the subject matter jurisdiction to make factual (or legal) determinations relating to the parameters of such easements. *Id.* at ¶8.

162. Significantly*,* in making its ruling, the Law Court distinguished administrative standing disputes relating to whether an applicant for permits has "sufficient title, right or interest" that arise between private property owners when the applicant asserts that he/she/it has "***title***" to the disputed property (by deed, purchase option or adverse possession),[13] from

[13] *See, e.g. Tomasino v. Town of Casco,* 2020 ME 96, ¶10-¶15 (decided July 7, 2020), citing, *Walsh v. City of Brewer,* 315 A.2d 200, 205 and 207 (Me. 1974) (the requisite right, title or interest in property to confer administrative standing is the "lawful power to use [the [property], or control its use" in the manner sought through the [permitting] action"); *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' . . . license he seeks." (internal citations omitted)); and *Southridge Corp. v. Bd. of Environmental Prot.,* 655 A.2d 345, 347-48 (Me. 1995) ("a pending action

administrative standing disputes between a private property owner and an applicant claiming "sufficient title, right or interest" based on a mere ***easement***, the parameters of which have not been determined by a Court of competent jurisdiction.[14]

163. Specifically, the Law Court held in relevant part that:

> [N]one of these decisions [referenced in footnotes 13 and 14 herein] supports the proposition that administrative standing may be conferred merely by possessing any kind of easement on the property at issue. Unlike title owners, easement owners are subject to a second layer of necessary authority – what the easement itself allows – in addition to what the applicable ordinances and statutes allow. . . ***Whatever minimum "right, title or interest" is required*** [to have administrative standing to obtain a permit]. . ., ***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***.

Tomasino v. Town of Casco, 2020 ME 96, ¶15 (emphasis supplied).

164. In *Tomasino*, the Law Court determined that the parameters of the easement on which the applicants relied in asserting "sufficient TRI" were unclear on two significant factual points: (i) whether the easement allowed the Tomasinos to cut trees from the land owned by the Trust without the express permission of the Trust; and (ii) whether all three of the trees that the Tomasinos sought to cut were within the boundaries of the easement that the Tomasinos had been granted. The Law Court stated that these factual determinations could only be resolved by a Court of competent jurisdiction, and resolution of such factual matters relating to the parameters of the easement *were beyond the Zoning Board's subject matter jurisdiction to resolve*.

[in a parallel Superior Court quiet title case] claiming ownership by adverse possession was sufficient to confer standing to seek state regulatory permits for the property at issue").

[14] *Rancourt v. Town of Glenburn,* 635 A.2d 964, 965-966 (1993) (applicant did not establish that the scope of her right-of-way included the ability to construct a dock on the property; therefore the municipal board correctly determined that she had not satisfied the right, title or interest requirements to allow her permit application to proceed).

165. Here, the issues relating to the parameters and validity, *if any*, of the 2018 NAF-Eckrote easement are already being directly litigated in the Superior Court, in *Mabee and Grace, et al. v. Nordic Aquafarms, Inc., et al.,* Waldo County Superior Court civil action Docket No. RE-201918.

166. The Law Court's July 7, 2020 holding in *Tomasino,* mandates that all permitting proceedings stop, including the lease application proceedings in the Bureau, until the Superior Court resolves the pending factual and legal issues relating to the parameters and validity, *if any*, of the easement option on which NAF bases its claim of title, right or interest and, thus, its administrative standing in *Mabee and Grace, et al. v. NAF, et al.,* RE-2019-18.

167. In the absence of a ***prior*** resolution by the Superior Court in the pending Declaratory Judgment action regarding the parameters (and validity) of that easement, NAF's lack of administrative standing renders its myriad, voluminous permit, license and lease applications – including the Bureau's lease proceedings -- ***non-justiciable***, precluding NAF from *invoking* the jurisdiction of the various administrative agencies, including the Bureau. See, *Bank of Am., N.A. v. Greenleaf,* 2015 ME 127, ¶ 8, 124 A.3d 1122 (citations omitted) ("When discovered, a standing defect does not affect, let alone destroy, the court's authority to decide disputes that fall within its subject matter jurisdiction. ***A Plaintiff's lack of standing renders that plaintiff's complaint nonjusticiable – i.e. incapable of judicial resolution***."); *see also, Wells Fargo Bank, N.A. v. Girouard,* 2015 ME 116, ¶ 8 n.3, 123 A.3d 216 ("[A] party's lack of standing is not a jurisdictional problem, but rather it is an issue of justiciability that precludes a party from *invoking* the court's jurisdiction." "***Standing is a condition of justiciability that a plaintiff must satisfy in order to invoke the court's subject matter jurisdiction in the first place."***).

168. The basis of Petitioners' challenges to NAF's administrative standing and the justiciability of NAF's applications in the Bureau, and other similarly situated administrative bodies, *relate to* the pending dispute in the Superior Court regarding who ***owns*** the intertidal land on which the Eckrote lot fronts and NAF proposes to place its industrial pipes into Penobscot Bay. However, these challenges **do not require the Bureau (or any other similarly situated local or State permitting authority) to resolve competing *ownership* claims by the relevant private property owners relating to this intertidal land**.[15]

169. Rather, these challenges ***have everything to do with the parameters of the easement between NAF and the Eckrotes***.

170. Resolution of the Petitioners' challenges to NAF's "sufficient RTI" claims in the Bureau are based on the Petitioners' assertion that the easement granted to NAF by the Eckrotes, by its own terms, terminates at the high water mark of the Eckrotes' lot – granting no right to NAF to use the intertidal land on which the Eckrotes' lot fronts. This challenge requires a determination regarding the plain meaning and parameters of the easement option that NAF obtained from the Eckrotes.

171. Prior to *Tomasino,* Petitioners asserted that the Bureau need only review the easement documents NAF has submitted – ***or not submitted*** – to see that NAF has failed to demonstrate that it has a legally cognizable expectation to use the intertidal land it proposes to use for placement of its pipes, in the manner that the Bureau's leases would authorize.[16]

---

[15] Notably, the pending dispute over ownership of the intertidal land on which the Eckrotes' lot fronts does not involve NAF – NAF has no *legitimate* claim of ownership to this intertidal land.

[16] Because, by its own terms, the easement's boundaries terminate at the Eckrotes' high water mark it should be apparent that NAF has failed to demonstrate sufficient TRI to proceed in the permit, lease and license proceedings.

172. However, pursuant to the *Tomasino* decision, the Law Court has clarified that it is ***the Superior Court***, not any State agency, board, bureau or executive official, that *must* ***first*** make such a determination of the meaning and scope (i.e. "factual parameters") of this easement ***before*** NAF may rely on its easement option as proof of "sufficient" title, right or interest in the subject property to proceed in any permitting proceedings.

173. The Bureau, and other similarly situated administrative agencies, lack subject matter jurisdiction to make any determinations regarding the factual parameters or legal validity of NAF's easement (including the effect of the March 3, 2019 Letter Agreement and December 23, 2019 Easement Amendment on the parameters of the 2018 easement boundaries in Exhibit A of the 2018 Easement Purchase and Sale Agreement), and must cease further consideration of NAF's lease, permit and license applications due to NAF's lack of administrative standing.

174. Pursuant to *Tomasino,* until and unless *the Court that has jurisdiction to do so* makes a ruling regarding the parameters of the NAF-Eckrote easement in the parallel pending Declaratory Judgment action (RE-2019-18), the easement should have been determined by the Bureau to be ***insufficient*** proof of TRI (as the Bureau did in January of 2019), and NAF has no standing to invoke the Bureau's jurisdiction.

175. Further, pursuant to *Tomasino,* the Bureau should have determined that NAF's lack of administrative standing (due to insufficient TRI) rendered NAF's applications non-justiciable – i.e. incapable of resolution by the Bureau – preventing the Bureau from considering, processing or making determinations on NAF's lease applications.

176. In this case, the parameters of the easement option on which NAF relies to demonstrate sufficient RTI are even more in doubt, ambiguous and in need of factual (and legal) determinations by the Superior Court than the easement at issue in *Tomasino.*

177. Indeed, in this case, the Superior Court has already determined in the pending Declaratory Judgment action that there are significant factual issues regarding the parameters of NAF's easement that must be resolved prior to further consideration or action by the Bureau on NAF's lease application. See, e.g. June 4, 2020 Order on Summary Judgment Motions, in RE-2019-18 (attached as Petition Exhibit 34 and provided to the Bureau by Petitioners).

178. Here, there are even questions relating to the factual parameters of the easement that place in doubt whether NAF's Grantors, the Eckrotes, have the ability to grant NAF an easement to use their upland lot ***or*** the intertidal flats on which their lot fronts – intertidal flats that Petitioner Mabee and Grace assert that they own in fee simple and to which Petitioner Friends is the Holder of a Conservation Easement.[17]

179. Here, in addition to the question of who *owns* the intertidal flats (and therefore who has the ability to grant an easement to use the flats), the factual issues relating to the parameters of NAF's easement already identified by the Superior Court include: (i) whether NAF's Grantors' (the Eckrotes') have the ability to grant NAF an easement over their upland property or if language in the 1946 deed from Hartley-to-Poor creates a restrictive covenant that limits the use of the Eckrotes' upland lot to residential purposes only;[18] and (ii) whether the

---

[17] Even the surveyor who issued the April 2, 2018 survey, commissioned by NAF, cautioned NAF – in ALL CAPS on the face of that survey that the Eckrotes may not have the ability to grant NAF any easement below the Eckrotes' high water mark because of language indicating that the Eckrotes' waterside boundary terminates at the high water mark. See, e.g. April 2, 2018 Good Deeds survey by Clark Staples, P.L.S., attached hereto as Exhibit 8. See also, August 31, 2012 survey, commissioned by the Eckrotes and incorporated by reference in the Eckrotes deed from the Estate of Phyllis J. Poor (Schedule A), which states that the Eckrotes' waterside (eastern) boundary is "along high water". (attached hereto as Exhibit 9).

[18] As the Superior Court noted in its June 4, 2020 Order denying Plaintiffs Mabee and Grace's First amended Motion for Partial Summary Judgment regarding language Plaintiffs assert constitutes a "restrictive covenant," the Court concluded in relevant part that:

> "Because the deed as a whole is ambiguous regarding whether the residential use restriction was intended to burden all subsequent grantees of lot 36, or just Fred Poor, and because the scant extrinsic evidence present in the summary judgment record does not provide any

Eckrotes' waterside (eastern) boundary ends at their high water mark, requiring further factual determinations relating to the location of the sideline termini referenced in the 1946, 1971 and 1991 deeds.[19] (See, Petition Exhibit 34).

180. Thus, it is impossible to determine if NAF's easement option – even if it includes the intertidal land on which the Eckrotes' lot fronts – until and unless it is first determined by the Superior Court in RE-2019-18 if the Eckrotes own the intertidal land on which their lot fronts, since one cannot grant an easement on land that he/she/it does not own. *Dorman v. Bates Mfg. Co.,* 82 Me. 438,448, 19 A. 915 (1890) ("One can not convey land, nor create an easement in it, unless he owns it.)

181. Accordingly, because Petitioners submitted ample evidence and argument to demonstrate that NAF lacks administrative standing, pursuant to the Law Court's controlling

---

> insight into Hartley's intent in 1946, Plaintiffs' amended first motion for summary judgment must be denied. . . . As the foregoing analysis impliedly details, however, nothing in the 1946 deed (nor the 1945 will) compels a judgment in Defendants' favor. The parties could assist the Court in this case at an eventual trial on the issue by locating and presenting any other evidence regarding the parties' intent at the time Hartley conveyed the parcel to Poor." (6-4-2020 Order Denying Summary Judgments, in RE-2019-18, pp. 9-10.

[19] As the Superior Court noted in its June 4, 2020 Order denying Plaintiffs Mabee and Grace's Second amended Motion for Partial Summary Judgment regarding whether the Eckrotes' waterside boundary is the high water mark of their lot, meaning that they have no ownership interest in the intertidal land on which their lot fronts and thus no ability to grant NAF an easement to use the intertidal land on which their lot fronts, the Court noted in relevant part that: "The second ambiguity relates to the location (or existence) of the artificial monuments described in the boundary description and how those monuments relate to the high-water mark. *Id.* at p. 22.

The Superior Court also noted in relevant part that:

> "[I]f the iron bolt and stake are both at or above the high-water mark, combined with the call along the high-water mark of Penobscot Bay, it would seem likely that the Court would have to apply 'the rule that where the two ends of a line by the shore are at high water mark, in the absence of other calls or circumstances showing a contrary intention, the boundary will be construed as excluding the shore.'" [citations omitted]; *Id.* at p. 21.

On September 28, 2020, Petitioners Mabee and Grace filed a Motion for Summary Judgment in RE-2019-18 seeking declaratory and summary judgment from this Court relating to the Eckrotes' waterside boundary and the location of the sideline termini in the 1946 Hartley-to-Poor deed.

holding in *Tomasino,* there is no justiciable issue on which the Bureau may act. It was error for the Bureau to ignore this precedent by the Law Court.

182. The Court's decision in *Tomasino* was not based on whether or not the parties to the easement disputed the meaning of the easement. This distinction is a figment of the Bureau's imagination that is not contained in the Law Court's holding.

183. Until the Superior Court determines that the parameters and validity, if any, of NAF's easement option in RE-2019-18, NAF's applications are not justiciable by the Bureau, or any other similarly situated administrative entity.

184. Rather, in *Tomasino*, the Court affirmed the judgment of the Casco Zoning Board that the Tomasino's easement was ***insufficient*** proof to demonstrate the requisite title, right or interest to establish the Tomasino's administrative standing to obtain a permit, in the absence of a factual determination ***by a Court of competent jurisdiction*** of the parameters of the easement.[20]

185. The Bureau erred in stating that NAF has demonstrated sufficient title, right or interest in this case – or any title, right or interest in this intertidal land.

DEMAND FOR RELIEF

186. This Court should reverse the Bureau's decision that NAF has demonstrated "sufficient title, right or interest" and declare that the Record evidence demonstrates that NAF lacks the requisite administrative standing to obtain a submerged lands lease or dredging lease form the Bureau at this time and dismiss NAF's pending submerged lands lease application (SL2352).

[20] Because the Superior Court acted in its intermediate appellate capacity, the Law Court reviewed the operative decision of the municipality directly. *Tomasino v. Town of Casco,* 2020 ME 96, ¶10-¶15 (decided July 7, 2020), citing, *Lakeside at Pleasant Mountain Condo. Ass'n v. Town of Bidgton*, 2009 ME 64, ¶ 11, 974 A.2d 893.

187. Or, in the alternative, the Court should remand the case to the Bureau with instructions to make a finding that, based on the Record before the Bureau, that NAF lacks the requisite administrative standing to obtain a submerged lands lease at this time.

Respectfully submitted this 5th day of October, 2019.

/s/ Kimberly J. Ervin Tucker

_____

Kimberly J. Ervin Tucker
Counsel for Petitioners Jeffrey Mabee and Judith Grace
and the Lobstering Petitioners
Maine Bar No. 6969
48 Harbour Pointe Drive
Lincolnville, Maine 04849
P: 202-841-5439
k.ervintucker@gmail.com

CERTIFICATE OF SERVICE

Service, by certified mail return receipt requested pursuant to 5 M.R.S.A. §11003, of this Petition has been simultaneously made on the Bureau, Attorney General and Lease Applicant NAF (certified by the Attorney General as the only other "party" to be served by Petitioners).