DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF THE JUDICIAL REMANDS

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

INTRODUCTION

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

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

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

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

Per the Law Court,

> When, as here, it is unclear whether an approval challenged on appeal would have been issued given intervening circumstances, the appropriate response is to remand the matter to the agency that issued the approval to make that determination. *Cf. Hannum v. Board of Environmental Protection*, 2003 ME 123, ¶17 (remanding to the BEP where the Court could not ascertain from the BEP decision whether the BEP would have reached a different conclusion in the absence of a finding that the Court found unsupported by evidence in the record)…Upon the issuance of the agencies' determinations on remand regarding the viability of the approvals, any party is free to raise in a new appeal any argument raised previously and any new argument arising from the agency proceedings on remand.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: August 18, 2023

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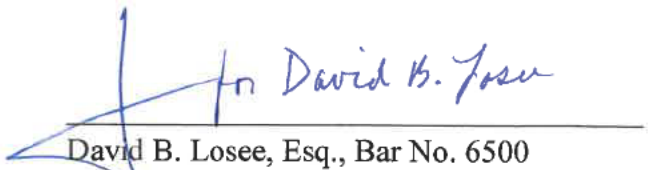

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Filings with the Board must be directed to Ruth Ann Burke and, unless otherwise specified, are due by 5:00 p.m. on the filing date. Untimely filings may be rejected.

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