

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

Mark C. Draper, Chair

Cynthia S. Bertocci
Executive Analyst

Ruth Ann Burke
Board Clerk

MEMORANDUM

To: Board of Environmental Protection
From: Cynthia Bertocci, Executive Analyst
Date: April 9, 2020 Board Meeting
Re: Nordic Aquafarms, Inc. / Motions to Dismiss or Hold an Adjudicatory Hearing on Nordic's Title, Right, or Interest in the Property Proposed for Development.

Site Location of Development Act and Natural Resources Protection Act Applications
DEP #L-28319-26-A-N/L-28319-TG-B-N/L-28319-4E-C-N/L-28319-L6-D-N/L-28319-TW-E-N; Maine Pollutant Discharge Elimination System application #ME0002771 / Waste Discharge License application #W-009200-6F-A-N; and Chapter 115 Minor Source Air Emissions application # A-1146-71-A-N

Question before the Board

Intervenors Jeffrey R. Mabee, Judith B. Grace, and Lobstering Representatives (MGL) filed motions on February 14, 2020 and February 18, 2020 asking the Board to find that Nordic Aquafarms, Inc. (Nordic) lacks sufficient title, right or interest (TRI) to use a portion of the property proposed for development and asking the Board to dismiss Nordic's applications or, in the alternative, to hold an adjudicatory hearing on Nordic's TRI for the proposed project. MGL's motions, and Nordic's response to the motions, are included in the Board's packet.

Relevant Standard

Application requirements pertaining to TRI are found in Chapter 2 *Rule Concerning the Processing of Applications and Other Administrative Matters*, § 11(D) of the Department's rules:

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. Methods of proving title, right or interest include, but are not limited to, the following:
- (1) When the applicant owns the property, a copy of the deed(s) to the property must be supplied;
 - (2) When the applicant has a lease or easement on the property, a copy of the lease or easement must be supplied. The lease or easement must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care,

where required. If the project requires a submerged lands lease from the State, evidence must be supplied that the lease has been issued, or that an application is pending;

- (3) When the applicant has an option to buy or lease the property, a copy of the option agreement must be supplied. The option agreement must be sufficient, as determined by the Department, to give rights to title, or a leasehold or easement of sufficient duration and terms to permit the proposed construction and use of the property including closure and post closure care, where required;
- (4) When the applicant has eminent domain power over the property, evidence must be supplied as to the ability and intent to use the eminent domain power to acquire sufficient title, right or interest to the site of the proposed development or use;
- (5) When the applicant has either a valid preliminary permit or a notification of acceptance for filing of an application for a license from the Federal Energy Regulatory Commission for the site which is proposed for development or use, a copy of that permit or notification must be supplied. This provision applies only to those portions of a project where eminent domain authority exists under federal law; or
- (6) When the applicant has a written agreement with the landowner where said agreement permits the applicant to spread waste material that will be agronomically utilized by the landowner, a copy of that agreement must be supplied.

The Department may return an application, after it has already been accepted as complete for processing, if the Department determines that the applicant did not have, or no longer has, sufficient title, right or interest. No fees will be refunded if an application is returned for lack of continued title, right or interest.

Background/Procedural History

On June 13, 2019 the Department accepted Nordic's applications as complete for processing pursuant to Chapter 2, § 11(B) of the Department's rules. The Department found that the deeds and other submissions, including Nordic's option to purchase an easement over the Eckrote property and the succession of deeds in the Eckrote chain of title, when considered in the context of the common law presumption that the intertidal area is conveyed when the upland is conveyed, constituted a sufficient showing of TRI for the Department to process and take action on the pending applications. The Department acknowledged that subsequent court adjudication of property rights may impact this finding but rejected the assertion that the agency must perform an equivalent analysis through an administrative proceeding.

On June 20, 2019, the Board assumed licensing jurisdiction over Nordic's applications to construct and operate a land-based Atlantic salmon aquaculture facility in Belfast and Northport.

On July 12, 2019, Jeffrey Mabee and Judith Grace submitted a petition to dismiss Nordic's applications for lack of TRI.

On August 15, 2019, Jeffrey R. Mabee and Judith B. Grace, and Maine Lobstering Union, Wayne Canning and David Black (subsequently consolidated as MGL) were granted intervenor status in the Board's proceeding. In granting intervenor status to Mr. Mabee and Ms. Grace, the Board found that they are abutters to the proposed project who assert that they own the intertidal land in front of the

Eckrote upland property, on or under which Nordic proposes to place its proposed intake and discharge pipelines (First Procedural Order).

On August 23, 2019, in response to the July 12, 2019 petition of Mr. Mabee and Ms. Grace, Presiding Officer Robert Duchesne declined to return Nordic's applications and denied MGL's request for a preliminary hearing on the issue of TRI (Second Procedural Order, Section 12).

Intervenor MGL subsequently requested that the issue of whether Nordic had demonstrated sufficient TRI to pursue permits for the proposed project be an issue for the general hearing on the statutory licensing criteria. In the Third Procedural Order, dated November 1, 2019, the Presiding Officer denied MGL's request that TRI be one of the issues for the taking of evidence at the hearing, finding: "The Board is aware of the dispute over ownership of the intertidal lands where portions of Nordic's proposed pipelines would be located, and that ownership of this land is currently being litigated. The Board will not hear testimony on this issue at the hearing. The issue is better suited to written evidence and argument than to live testimony and cross-examination. The parties may submit written evidence and argument on the issue..." Intervenor MGL appealed this decision of the Presiding Officer to the full Board.

At its meeting on November 7, 2019, the Board heard oral argument on the appeal and voted to deny the appeal and uphold the Presiding Officer's ruling that TRI would not be an issue for oral testimony and cross-examination at the hearing. The Board found that the issue could be addressed through written submissions (Fourth Procedural Order).

On November 18, 2019, MGL submitted a request, or motion, to the Board entitled, "Notice of NAF's Lack of Title, Right or Interest, Pursuant to Chapter 2, § 11.D.2 for Failure to have a Complete Submerged Lands Lease Application Pending in the Bureau of Parks and Lands and Motion for Rescission of the Board's Fourth Procedural Order and Suspension or [Termination] of Board Consideration of NAF's DEP Permit Applications Until NAF has a Complete Submerged Lands Lease Application Pending in the Bureau." The motion was filed in response to a change in the construction method for Nordic's proposed pipelines and subsequent need to amend its submerged lands lease. After consideration of the motion, Nordic's response to the motion, and correspondence from the Bureau of Parks and Lands, the Presiding Officer denied the motion for the reasons set forth in the Fifth Procedural Order (November 26, 2019).

On January 8, 2020, MGL submitted a new request that the Board stop processing Nordic's applications for lack of TRI. In support of its request, MGL submitted a transcript of a telephonic oral argument on a motion in the U.S. District Court in the matter of *Jeffrey R. Mabee and Judith B. Grace v. Janet Eckrote and Richard Eckrote*, a lawsuit regarding ownership of the intertidal land. The Presiding Officer denied the request that the Board stop processing the applications, finding that the new material did not change his assessment (Ninth Procedural Order, January 31, 2020).

Pending Motions

On February 14, 2020, MGL filed "Response in Opposition to Proffered Nordic Exhibit 41 and Renewed Motion to Dismiss Pursuant to 06-096 C.M.R. ch.2, §11.D." And on February 18, 2020, MGL filed its "Renewed Motion to Dismiss for Applicant's Lack of Administrative Standing (Title, Right or Interest "TRI") Pursuant to 06-096 C.M.R. ch. 2, §11.D." These two motions ask the Board to find that Nordic has not demonstrated sufficient title, right or interest (TRI) in a portion of the

property proposed for development and to dismiss Nordic's applications or, in the alternative, to hold an adjudicatory hearing on Nordic's TRI for its proposed project.

Packet Material

The packet includes the following documents:

- The Department's June 13, 2019 determination that Nordic's applications were complete for processing.
- Second Procedural Order, August 23, 2019,
- MGL's February 14, 2020 motion plus attachments/exhibits,
- MGL's February 18, 2020 motion plus attachments/exhibits,
- Additional documents referred to in MGL's motions but not attached as exhibits, and
- Nordic's March 12, 2020 response to the motions.

An index to these documents and attachments appears below.

Note: There is some repetition in the filings. Also, I recommend that you refer to documents by their titles. Most documents do not have exhibit numbers, and prior exhibit numbers appear on some of the documents, apparently from when they were submitted as attachments to other filings at various points in this proceeding or the pending litigation.

Estimated Time of Agenda Item: 1 hour

Index to Packet Materials

Packet Page #	Document
014	June 13, 2019 Letter from K. Martin to Joanna Tourangeau accepting Nordic's applications as complete for processing.
017	Second Procedural Order, August 23, 2019

Packet Page #	Document: MGL's February 14, 2020 Motion
	<i>Note: Argument pertaining to the status of Nordic Exhibit 41 discussed on pages 1 and 2 of the motion was resolved in the Eleventh Procedural Order and is not an issue before the Board at this time.</i>
027	Motion: Response in Opposition to Proffered Nordic Exhibit 41 and Renewed Motion to Dismiss Pursuant to 06-096 C.M.R. ch.2, §11.D. (7 pages)
034	Richards et al. Surveyors Report for the Land of Jeffrey R. Mabee and Judith B. Grace, corrected and amended October 4, 2019; (recorded 10/8/2019); 14 pages plus appendices. <u>048</u> Appendix A: Mabee-Grace Chain of Title <u>051</u> Appendix B: May 16, 2019 Letter to Erik Heim (Nordic) from James Dorsky <u>054</u> Appendix C: Schedule "D" Beneficiaries
056	Map of Property of Jeffrey R. Mabee and Judith B. Grace by Richards et al., dated October 1, 2019, corrected and amended October 4, 2019; (recorded 10/8/2019).
057 and 058	August 26, 2019 letter from Gusta Ronson (of Good Deeds) to Donald R. Richards attaching signed copy of boundary survey performed in 2012 as Good Deeds Inc. for Richard and Janet Eckrote (date of survey is August 31, 2012).
059	June 10, 2019 letter from Joanna Tourangeau (Drummond Woodsum) to Melanie Loyzim (DEP Deputy Commissioner). <u>061</u> Exhibit A: Dorsky survey and Good Deeds survey of April 2, 2018 <u>063</u> Exhibit B: Chain of Title to Jeffrey R. Mabee & Judith B. Grace Parcel and deeds <u>089</u> Exhibit C: Chain of Title to Larry D. Theye & Betty Becker-Theye parcel, deeds <u>101</u> Exhibit D: Chain of Title to Richard Eckrote and Janet Eckrote parcel and deeds

	<p><u>145</u> Exhibit E: May 16, 2019 Letter to Erik Heim from James Dorsky, related deeds</p> <p><u>186</u> Exhibit F: June 10, 2019 letter from Tourangeau to Loyzim and DiBello</p> <p style="padding-left: 40px;"><u>192</u> Exhibit A: Article from The Free Press, May 16, 2019</p> <p style="padding-left: 40px;"><u>193</u> Exhibit B: Release Deeds</p>
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Packet Page #	Document: MGL's February 18, 2020 Motion
203	Motion: Renewed Motion to Dismiss dated February 18, 2020, 23 pages
229	Affidavit of Jeffrey R. Mabee; 6 pages plus Index of Incorporated Exhibits 1-12.
236	Exhibit 1: Warranty Deed from Heather O. Smith to Jeffrey Mabee and Judith Grace dated May 31, 1991.
238	Exhibit 2: Donald R. Richards, Seven Sketches (Chronology of Lot Development at Little River, Belfast, Maine 1934-2019, dated February 8, 2020).
246	Exhibit 3: Richards' Survey of Mabee-Grace Map of Property dated October 1, 2019, corrected and amended October 4, 2019; (recorded 10/8/2019). <i>Note: Also submitted with Feb. 14, 2020 motion.</i>
247	Exhibit 4: Richards' Surveyors Report Oct 1, 2019 (corrected and amended Oct 4, 2019) (filed 10//2019) plus Appendices A, B, and C. <i>Note: Also submitted with Feb. 14, 2020 motion.</i>
269	Exhibit 5: Richards' CV (September 2019)
272	Exhibit 6: Richards' Survey of HLHCA, January 2019 (recorded 2/11/2020) <i>Note: See additional documents below pertaining to HLHCA, referred to in motion but not submitted with motion.</i>
273	Exhibit 7: February 7, 2020 email from Mabee-Grace and Friends granting permission for Board Site Visit on 2-10-2020. <p style="padding-left: 40px;"><u>277</u> Chronology of Lot Development at Little River, Belfast, Maine 1934-1991 dated July 29, 2019</p> <p style="padding-left: 40px;"><u>284</u> Penobscot River Mercury Study Map</p> <i>Note: See additional documents listed below that are mentioned in this email, but not attached to this exhibit.</i>
285	Exhibit 8: Chain of Title Jeffrey R. Mabee and Judith B. Grace

290	Exhibit 9: August 31, 2012 Good Deeds Survey for Richard and Janet Eckrote <i>Note: This map was also submitted with the Feb. 14, 2020 motion.</i>
291	Exhibit 10: Eckrote Chain of Title and Deed Restrictions Relevant to the Waterside Boundary
294	Exhibit 11: January 8, 2020 Email Renewed Challenge to Nordic's TRI 296 US District Court Transcript of Proceedings January 2, 2020 in litigation, <i>Jeffrey R. Mabee and Judith B. Grace v. Janet Eckrote and Richard Eckrote.</i> Docket No. 1:19-432/JDL. 325 January 7, 2020 letter from Joanna Tourangeau to Kevin Martin re: Extension of Nordic Aquafarms Inc. Land Agreements with attachments
341	Exhibit 12: February 7, 2020 Email from Ms. Tucker to Ms. Bertocci re: renewed motion to dismiss.
	Additional Documents Referred to in Filing
344	Affidavit and Professional Report of Donald L. Richards, P.L.S. dated July 12, 2019 (<i>apparently Exhibit 18 to 7/12/19 motion</i>)
353	Ferris-Hargrave Quiet Title judgment: 353 Civil action abstract and Final Decree (<i>labeled Exhibit 7</i>) 356 Civil Action and Final Decree documents (Waldo County Superior Court) (<i>labeled Exhibit 8</i>)
381	April 29, 2019 Conservation Easement Deed Mabee and Grace to Upstream Watch
393	Nov 5, 2019 Assignment of Conservation Easement from Upstream Watch to Friends of Harriet L. Hartley Conservation Area
395	August 6, 2018 Eckrote/Nordic Easement Agreement/Purchase and Sales Agreement (<i>collectively labeled Exhibit 5, map labeled Exhibit A, text labeled Exhibit 3</i>)
412	Dec. 24, 2019 Eckrote/Nordic Amendment to Purchase and Sale Agreement
418	March 2019 email chain to DiBello including March 3, 2019 letter from Nordic to Eckrotes re Rights in Easement (<i>labeled Exhibit 15</i>)
425	January 24, 2020: Order on NAF's 12(b) Motion to Dismiss from litigation, <i>Jeffrey R. Mabee and Judith B. Grace v. Nordic Aquafarms, Inc., et al.</i> , (Superior Court DKT. NO. RE-19-18; Jan 24, 2020)

Nordic's Response to MGL's Motions

Packet Page #	Document
437	Nordic Response to Intervenor's Motions on Right, Title and Interest
446	Exhibit 1: Order on NAF's Special Motion to Dismiss from litigation, <i>Jeffrey R. Mabee and Judith B. Grace v. Nordic Aquafarms, Inc., et al.</i> , (Superior Court DKT. NO. RE-19-18; Dec 20, 2019)