IN THE MATTER OF

NORDIC AQUAFARMS, INC.	) APPLICATIONS FOR AIR EMISSION,
Belfast and Northport	) SITE LOCATION OF DEVELOPMENT,
Waldo County, Maine	) NATURAL RESOURCES PROTECTION ACT, and
	) MAINE POLLUTANT DISCHARGE ELIMINATION
A-1146-71-A-N	) SYSTEM (MEPDES)/WASTE DISCHARGE
L-28319-26-A-N	) LICENSES
L-28319-TG-B-N	)
L-28319-4E-C-N	) **RENEWED MOTION TO DISMISS FOR**
L-28319-L6-D-N	) **APPLICANT'S LACK OF ADMINISTRATIVE**
L-28319-TW-E-N	) **STANDING (Title, Right or Interest "TRI")**
W-009200-6F-A-N	) **PURSUANT TO 06-096 C.M.R. ch. 2, §11.D**

Dated: February 18, 2020

This Renewed Motion to Dismiss the above-referenced permit applications is filed on behalf of Intervenors Jeffrey R. Mabee and Judith B. Grace and Interested and Aggrieved Parties Friends of the Harriet L. Hartley Conservation Area.

I. PETITIONERS[1] FILING THIS MOTION:

A. Jeffrey Mabee and Judith Grace

Jeffrey Mabee and Judith Grace are the true owners, in fee simple, of the intertidal land on which applicant Nordic Aquafarms, Inc. (NAF") seeks to place its three industrial pipelines.

Jeffrey Mabee and Judith Grace own the intertidal land on which the lots designated as Belfast Tax Map 29, Lots 38, 37, 36 and most of 35 front. Their ownership claim is based on a Warranty Deed, dated May 31, 1991, from Heather O. Smith to Jeffrey R. Mabee and Judith B. Grace, as joint tenants, and recorded in the Waldo County Registry of Deeds ("WCRD") Book 1221, Page 347, and the underlying chain of title (previously submitted to the Board and incorporated herein as Exhibit 8). See e.g. Exhibit 2, p. 1 and Sketches 1 and 7.

NAF seeks permits to use the intertidal land on which the Eckrotes' lot (Map 29, Lot 36) fronts. However, because the Eckrotes' deeded rights end at the high water mark of their lot, the Eckrotes lack the requisite title, right or interest in the intertidal flats on which their lot fronts to grant NAF an easement to use this intertidal land. (August 31, 2012 Survey by Good Deeds, previously filed with the Board and incorporated herein as Exhibit 9; and Eckrotes' Chain of Title, previously filed with the Board and Department and incorporated herein as Exhibit 10). Indeed, as discussed in more detail below, the Eckrotes have not granted NAF an easement to use this intertidal land. Meaning that NAF has failed to provide any credible evidence that it has "sufficient title, right or interest in all of the property that is proposed for development or use." 06-096 C.M.R. ch. 2, §11.D.

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[1] These parties jointly filing this Motion to Dismiss will be referred to herein by name or as "the

Jeffrey Mabee and Judith Grace are "Aggrieved Persons"[2] within the meaning of 06-096 C.M.R. ch. 2 §1(B), with standing to challenge NAF's claim of TRI and the Department's erroneous June 13, 2019 determination that NAF has demonstrated "sufficient TRI" to proceed in the permitting process and the Board's refusal to hold a hearing on TRI and reverse that prior determination of "sufficient" TRI by the Board and/or its Presiding Officer.

Jeffrey Mabee and Judith Grace were granted the status of "Intervenors" in the Board's proceedings relating to the above-referenced permit applications.

Intervenors Mabee and Grace assert that the intertidal land that they own in fee simple includes the intertidal land over or under which NAF seeks permits from BEP and DEP. Exhibit 2, Sketch 7 and Exhibit 8. Intervenors Mabee and Grace assert that their ownership in this intertidal land is established by recorded deeds, surveys (including one survey commissioned by the Eckrotes in August 2012 and one survey commissioned by NAF in 2018), and the June 26, 1970 quiet title judgment in *Ferris v. Hargrave,* Docket No. 11275, entered by the Waldo County Superior Court, that quieted title to land described using the identical property description that is in the Mabee-Grace Warranty Deed. All of these materials were previously submitted to the Board and are incorporated herein.

Thus, when the Commissioner previously stated in the June 13, 2019 TRI determination that: "only a court can determine ownership of property" he ignored the fact that a court – the Waldo County Superior Court -- already did determine ownership of this property in a 1970 quiet title judgment provided to DEP on June 12, 2019 and recorded in the WCRD at Book 683, Page 283. Neither the Commissioner nor the Board has explained how they have the legal right or authority to ignore that prior court judgment in allowing permitting proceedings to proceed for use of intertidal land in which title was quieted – establishing that Mabee-Grace's predecessor in interest was the owner if fee simple absolute to the land described in that suit using the identical deed description in the Mabee-Grace deed and all deeds conveyed since he entry of that judgment to Mabee-Grace's predecessors-in-inerest.

In addition, neither the Commissioner nor the Board have explained how they can proceed to grant permits on land that is under the protection of a lawful, recorded conservation easement, established pursuant to 33 M.R.S. § 477-A, as all of the intertidal land that NAF seeks permits to use here is.

On April 29, 2019, after learning that their intertidal ownership extended from the mouth of the Little Rvier to a point North along the waterside boundary of Tax Map 29, Lot 35, Intervenors Mabee and Grace recorded a Conservation Easement on all of their intertidal land, including all of the intertidal land between the high and low water marks on which the lots designated as Belfast Tax Map 29, Lots 38, 37, 36 and most of 35 front. This land is located within the

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[2] Pursuant to 06-096 C.M. R. ch. 2 §1(B), "Aggrieved Person" means any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision. The Board will interpret and apply the term "aggrieved person", whenever it appears in statute or rule, consistent with Maine state court decisions that address judicial standing requirements for appeals of final agency action.

municipal boundaries of both Belfast and Northport. A copy of that Conservation Easement was previously provided to the Board and is recorded in the WCRD at Book 4367, Page 273.[3]

In relevant part, that conservation easement was imposed to protect all of this intertidal land in its natural condition, *in perpetuity*, and prohibits alteration and destruction of this fragile estuary land by construction or placement of any commercial or industrial infrastructure and prohibits dredging in any portion of the property within the conservation easement area. All of the members of the Board, relevant Board and DEP staff, and counsel from the Attorney General's office representing the Board and the Department, observed the signs marking the boundaries of the Harriet L. Hartley Conservation Area, protected by and described in this conservation easement during the site visits conducted in the intertidal land proposed for development by NAF. Yet, in contravention of the statutory obligations of the Attorney General of Maine, the DEP and BEP legal counsel from the Attorney General's Office have repeatedly taken actions to ignore and undermine this conservation easement in the Board and DEP proceedings, in violation of spirit if not the letter of the Attorney General's duty to enforce conservation easements in 33 M.R.S. § 478(1)D).

Pursuant to 33 M.R.S. § 478(1)(A) Jeffrey Mabee and Judith Grace seek acknowledgement of and enforcement by the Board of the terms of the conservation easement that they imposed on their intertidal land, as owners in fee simple of the land covered by this conservation easement.

B. The Friends of the Harriet L. Hartley Conservation Area

The "Friends of the Harriet L. Hartley Conservation Area" is a non-profit corporation (T13-B), in good standing, registered in the State of Maine on August 30, 2019, with a Charter No. 20200085ND.[4] The Friends' Bylaws, in relevant part, include the following purposes:

> The purposes of the Corporation are to advocate for the health and preservation of the Midcoast Maine coastline, rivers and coastal watersheds – and in particular the Little River and its adjacent intertidal estuary in Penobscot Bay -- through science, education and providing assistance, including financial assistance for litigation purposes, to those seeking to protect and preserve the Harriet L. Hartley Conservation Area from actions deemed detrimental to this fragile intertidal estuary in its natural condition. It is a further purpose to restore the Little River as a natural fishway.

Bylaws, p. 1. Friends of the Harriet L. Hartley Conservation Area qualifies to hold a conservation easement pursuant to the criteria established by 33 M.R.S. § 476(2)(B).[5]

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[3] The April 29, 2019 Conservation Easement, November 4, 2019 Assignment of the Conservation Easement from Upstream Watch to the Friends of the Harriet L. Hartley Conservation Area, and the Richards' survey plan recorded on February 11, 2020 are all incorporated by reference in this filing.

[4] Available online through the Maine Secretary of State, Division of Corporations, at: https://icrs.informe.org/nei-sos-icrs/ICRS?CorpSumm=20200085ND

[5] An eligible "Holder" of a Conservation Easement is defined by 33 M.R.S.A. 476(2)(B) as:

The April 29, 2019 Conservation Easement originally designated Upstream Watch, a non-profit corporation registered in the State of Maine, as the "Holder" of the Conservation Easement, pursuant to 33 M.R.S. § 476(2)(B). On November 4, 2019, pursuant to ¶D.4 of the April 29, 2019 Conservation Easement, Upstream Watch assigned its interests, responsibilities and duties as Holder of this Conservation Easement to the Friends of the Harriet L. Hartley Conservation Area.

On or about November 4, 2019, the Friends of the Harriet L. Hartley Conservation Area, through its President Dr. Sidney Block, accepted the assignment by Upstream Watch of all rights, responsibilities and duties as Holder of the Conservation Easement and recorded this assignment in the WCRD at Book 4435, Page 344 on November 5, 2019. (This Assignment was provided to the Board on February 10, 2020 with a Motion to Intervene in the Boar permitting proceedings and is incorporated herein by reference.).

As a result of this assignment by Upstream Watch to Friends, Friends has all of the rights, interests and obligations as Holder of the Conservation Easement formerly held by Upstream Watch, including the right and contractual and statutory obligation to enforce the conservation easement and to intervene in actions "affecting" the conservation easement, pursuant to 33 M.R.S. §478(1)(B).

In December 2019, Friends registered the Harriet L. Hartley Conservation on the Maine Registry of Conservation Area maintained by the Department of Agriculture, Conservation and Forestry, pursuant to the mandate in 33 M.R.S. § 479-C, and Friends renewed that registration in January 2020. Friends also had a survey of the intertidal land covered by the conservation easement completed, using the Colonial Method, by Donald R. Richards, P.L.S., L.F., and a survey plan recorded of the boundaries of the conservation easement. That survey plan was recorded on February 11, 2020 in the WCRD at Book 24, Page 54, and is incorporated herein by reference and attached hereto as Exhibit 6.

On February 7, 2020, the Friends, who share legal counsel in common with Intervenors Mabee and Grace, granted leave to the Board and DEP staff to tour the intertidal land covered by the Conservation Easement on February 10, 2020. (Exhibit 7).

On February 10, 2020, the Friends requested leave to intervene in the pending Board proceedings, pursuant to 33 M.R.S. § 478(1)(B).

On the morning of February 11, 2020 – the date the Board proceedings commenced -- the Presiding Officer denied the request to Intervene in the Board proceedings filed by the Friends of the Harriet L. Hartley Conservation Area. Despite this ruling a majority of the Board members of the Friends of the Harriet L. Hartley Conservation Area participated in the Board proceedings advocating for protection of the conservation area. This participation includes testimony and

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2. Holder. "Holder" means:
B. A nonprofit corporation or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic or open space values of real property; assuring the availability of real property for agricultural, forest, recreational or open space use; protecting natural resources; or maintaining or enhancing air or water quality or preserving the historical, architectural, archaeological or cultural aspects of real property.

cross examination of: Intervenor Eleanor Daniels (Friends' Treasurer), Presentation of witnesses and cross examination of Intervenor Jeffrey Mabee (Friends' Board member), testimony by Paul Bernacki (DEP certified erosion control specialist and Friends' Vice President), and testimony during the public comment period of: Dr. Sid Block (Friends' President), Andrew Stevensen (Friends' Secretary), Janie Phillips (Friends' Board member), and Conny Hatch (Friends' Board member).

The Friends of the Harriet L. Hartley Conservation Area is the current Holder of the conservation easement on the intertidal land in Belfast and Northport, Maine, shown on the survey plan recorded in the Waldo County Registry of Deeds at Book 24, Page 54 (Exhibit 6). The Friends of the Harriet L. Hartley Conservation Area is an Aggrieved Person pursuant to 06-096 C.M.R. ch. 2, §1(B) and (P) in the Board proceedings.[6]

II. ARGUMENT AND SUPPORTING LAW

A. Overview

As Board Chair Draper noted in his June 27, 2019 letter to NAF's counsel: ". . . with respect to TRI, Chapter 2 § 11(D) requires that applicants such as Nordic maintain sufficient TRI in all property proposed for development and use 'throughout the entire application processing period,' and further states that ***the Department, which includes the Board***, '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).

This Renewed Motion to Dismiss is brought pursuant to 06-096 C.M.R. ch. 2 §11(D). Chapter 2 is silent as to the precise mechanism by which a challenge to an applicant's TRI is to be presented to the Department, including the Board, when the Board has assumed jurisdiction over a project. Yet, Chapter 2 § 11(D) and the case law interpreting this rule make clear that challenges to TRI, including challenges regarding an erroneous determination by the Department that "sufficient" TRI exists to proceed, raise a matter of jurisdiction that may be raised ***at any time***, even after a permit is issued. *Southridge Corp. v. Board of Envtl. Protection,* 655 A.2d 345, 348 (Me. 1995) ("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.")

In the absence of TRI the applicant lacks the administrative standing to seek permits and the Department, including the Board, lack the jurisdiction to proceed to process permit applications – even where Board jurisdiction is otherwise mandatory for the project pursuant to 06-096 C.M.R. ch. 2 § 17(C) and/or (D), *if TRI were present*. Further, where, as here, an applicant is knowingly and intentionally attempting to misappropriate land that the applicant ***knows*** is owned by property owners whose fee simple ownership rights have been adjudicated by a prior court

[6] The term "Person" is defined in the applicable rule as: "Person" means an individual, partnership, corporation, government entity, association, or public or private organization of any character; other than the Department.

judgment, and who have repeatedly objected to the proposed use of their property, there is no question that such aggrieved persons have the standing to challenge the applicant's TRI.

As discussed in greater detail below, the deficiencies in NAF's TRI, under the requirements in 06-096 C.M.R. ch. 2 § 11(D), are ***numerous***, ***fatal*** and ***incurable.*** In addition, since the first challenge was raised to the sufficiency of NAF's TRI and the Department's and Board's jurisdiction to consider and/or grant the requested permits referenced above, additional evidence has emerged demonstrating the insufficiency of the evidence of TRI submitted by the applicant and relied upon by the Department.

While there is a pending case in the Waldo County Superior Court to declare ownership in the subject intertidal land, NAF

While Petitioners believe that this Board can dismiss the applications based on a review of the written record submitted to the Department, portions of which are resubmitted with this petition, Petitioners submit that a separate adjudicatory hearing on just the issue of NAF's lack of title, right or interest may be appropriate. A determination on the written record should be made, or an adjudicatory hearing on TRI should be conducted, before any other proceedings or actions are undertaken on the pending applications, including a determination on motions to intervene as parties.

In making its June 13, 2019 "completeness" determination, the Department erred in finding "sufficient" title, right or interest ("TRI"). This determination was made in the absence of any credible evidence submitted by the applicant in support of its claim of TRI, and despite the Department receiving, voluminous, uncontroverted evidence – ***including a final judgment in a 1970 quiet title action*** regarding this property and multiple deeds recorded in the Waldo County Registry of Deeds -- that definitively establish that:

(i) Richard and Janet Eckrote do not own the intertidal land on which their lot fronts;[7]

(ii) The true owners of this intertidal land, determined by deeds and a prior quiet title action, are Jeffrey Mabee and Judith Grace, who do not consent to this use of their property; and

(iii) The intertidal land that NAF seeks to use and develop is under the protection of a recorded Conservation Easement, imposed by the true, fee simple owners, Jeffrey Mabee and Judith Grace, with Upstream Watch named as the Holder of this Conservation Easement.

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[7] In addition, the Eckrotes are prohibited by a 1946 covenant that runs with their land from using their upland property for a non-residential use without agreement of the beneficiaries of that covenant – heirs and/or assigns of Grantor Harriet L. Hartley. Jeffrey Mabee and Judith Grace, are assigns of the Grantor who imposed that 1946 covenant, Harriet L. Hartley. Jeffrey Mabee and Judith Grace are assigns of Harriet L. Hartley and have given notice to the Eckrotes that they do not agree to violation of the "residential use only" covenant by NAF's proposed use of the upland property. The Petitioner provided notice to the Department of the exercise of their rights under the 1946 Hartley covenant. However, without explanation or justification, the Department ignored this notice in making its determination June 13, 2019 determination that NAF had demonstrated "sufficient TRI" to proceed with the permitting process.

It is contrary to the purpose of "standing" regulations which are designed "to prevent an applicant from wasting an administrative agency's time by applying for a . . . license that he could have no legally protected right to use." *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)). Here, NAF has no such legally cognizable expectation and it is contrary to public policy to expend the limited resources of State agencies, including this Board, reviewing NAF's voluminous permit applications for property that they have no right to use.

Continuing with permitting proceedings in the absence of TRI, is not done without causing damage to the innocent owners of this property. If these permit proceedings continue in the absence of NAF's TRI, the result is that NAF is permitted, with the assistance of the State, to slander Jeffrey Mabee and Judith Grace's title to land they own in fee simple -- diminishing the value and merchantability of the Petitioners' real property. Further, it is contrary to public policy and the express provisions in the Fifth Amendment to the U.S. Constitution and Article I, section 21 of the Maine Constitution to provide NAF permits to use fragile intertidal estuary land that has been protected by a recorded conservation easement, based on nothing more than an ***unrecorded*** option to acquire an easement, granted by people who do not own any intertidal land on which their lot fronts, and whose predecessors in interest never owned the land to be used.

Accordingly, the Board should dismiss all of NAF's applications and/or remand the applications to the Department with directions to return the applications to the applicant for lack of title, right or interest, as required by 06-096 C.M.R. ch. 2 §11(D). In the alternative, an adjudicatory hearing should be conducted on the issue of NAF's TRI before any further action is taken on NAF's permit applications.

B. The Eckrotes Have No Ownership Interest In the Intertidal Land on which The Eckrotes' Lot Fronts

The August 31, 2012 survey plan commissioned by the Eckrotes by Good Deeds[8] and the April 2, 2018 survey plan commissioned by NAF by Good Deeds,[9] as well as a review of the relevant deeds and deed language in the Eckrotes' chain of title demonstrate that the Eckrotes' property

[8] The 8-31-2012 survey is included in NAF's application materials and supplements on the Department's Major Projects website at:
https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/JBT%20to%20Kavanah%20package.PDF
The specific pages where this 2012 survey can be found in the Department's Record are p. 25 and 59 of this pdf.

[9] The 4-2-2018 survey is included in NAF's application materials and supplements on the Department's Major Projects website at:
https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/19-06-10%20Tourangeau%20-%20Loyzim.pdf
The specific page where this 2018 survey can be found in the Department's Record p. 4 of the 144-page pdf.

does not include any ownership interest in the intertidal flats on which their property fronts and that their waterside boundary is the high water mark of this property.[10]

Consistent with their deeds, including the October 15, 2012 deed that incorporates the August 31, 2012 survey as the basis for its description (which states the waterside boundary of this property is "Along High Water"), the August 6, 2018 Easement Purchase and Sale Agreement (option) between NAF and the Eckrotes similarly defines the boundary of the easement granted by the Eckrotes to NAF as terminating at the high water mark of the Eckrotes' property.[11]

In January of 2019, after Upstream Watch (an organization in which Intervenors Mabee and Grace were members at the time) challenged the sufficiency of NAF's claims of TRI in the Bureau of Parks and Lands and the Department's permitting proceedings, citing the defined boundaries of the 2018 NAF-Eckrote Easement (option) Agreement, NAF filed a Letter Agreement, dated March 3, 2019, that NAF asserted amended the boundaries of the 2018 Easement granted by the Eckrotes to include the intertidal land. The Eckrotes had signed an "Acknowledgement," dated February 28, 2019, that NAF attached to the March 3, 2019 Letter Agreement. However, by its plain language, the March 3, 2019 letter did not amend the boundary of the August 6, 2018 Easement to include the intertidal lands on which the Eckrotes' lot fronts at all.

Although the March 3, 2019 letter contained no claim by the Eckrotes that they had any ownership interest in the intertidal land on which their property fronts, the Bureau and the Department and Board treated this document as though it contained such a representation of ownership by the Eckrotes and that this Letter Agreement had amended the boundaries o the Easement from the image attached to the August 6, 2018 Purchae and Sale Agreement.

Intervenors Mabee and Grace have repeatedly and consistently objected to this interpretation of the March 3, 2019 Letter Agreement in both the Bureau and Board-Department proceedings – to no avail.[12]

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[10] The relevant deed language is included in the Eckrotes' chain of Title attached as Exhibit 10 to this filing and in the Departments' Record of filings on TRI from NAF at:
https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/19-06-10%20Tourangeau%20-%20Loyzim.pdf
The specific pages where the Eckrotes' deeds can be found in the Department's Record are pp. 48-86 of the 144-page pdf.

[11] This easement Agreement is in the NAF application materials and supplements on the Department's Major Projects website at:
https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/JBT%20to%20Kavanah%20package.PDF
The specific page for the boundary picture is page 16, with the complete Easement Agreement located at pp. 3-16 of that pdf.

[12] The March 3, 2019 Letter Agreement in in the NAF application materials and supplements on the Department's Major Projects website at:
https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/JBT%20to%20Kavanah%20package.PDF

On January 7, 2020, NAF filed an amendment of the August 6, 2018 NAF-Eckrotes Easement (option) Purchase and Sale Agreement, extending the deadline for closing on this land agreement to June 30, 2021 or thirty days after all permits from any local, State or federal source becomes unappealable. The NAF-Eckrote "land agreement extension" was one of four similar extension agreements filed by NAF on January 7, 2020 with the Department and Board, copied to all parties on the service list for Board proceedings.

In the December 24, 2019 NAF-Eckrote Extension Agreement and Amendment, NAF and the Eckrotes include a "Whereas" Clause that expressly clarifies that the March 3, 2019 Letter Agreement made "no representation or warranty" that the Eckrote have any such ownership rights in the intertidal land on which their lot fronts and to which NAF claim TRI sufficient to obtain permits from the Board to dredge, trench and blast in an area known to have buried HoltraChem mercury. Specifically, the second "Whereas" Clause of the December 24, 2019 Amendment, between NAF and the Eckrotes, states that:

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

On January 8, 2020, Intervenors Mabee and Grace renewed their motion to dismiss the pending permit applications based on the clarification provided by the NAF-Eckrotes December 24, 2019 Amendment. (Exhibit 11) The second "Whereas" Clause in this document demonstrates that Intervenors Mabee and Grace were correct when they argued that the March 3, 2019 Letter Agreement could not be properly considered an amendment of the easement boundaries in the August 6, 2018 Easement (option) Agreement nor a claim of ownership by the Eckrotes to the intertidal land on which their lot fronts. Thus, NAF still has at all times failed to present any proof of title, right or interest in the intertidal land on which they seek permits for its pipelines through the Eckrotes.

NAF claims that it has "sufficient" TRI based on an option to purchase an Easement across a 25-foot wide strip on the southwest portion of a lot owned by Richard and Janet Eckrote. That lot is located at Belfast Tax Map 29, Lot 36.[13] However, the Eckrotes cannot grant an easement to use the intertidal land on which their lot fronts, if they do not own that intertidal land. Simply, no one can convey an interest, including by granting an easement, or right to use land that they do not own.[14] See also, Affidavit and Professional Report of Donald R. Richards, P.L.S., L.F., dated July 12, 2019 (attached hereto and incorporated herein as Exhibit 18).

The specific page for the 3-3-2019 Letter Agreement is at pp. 22-23, with the complete thread of materials that accompanied the Letter Agreement when submitted to the Bureau of Parks and Lands at pp. 17-23 of that pdf.

[13] The relevant portion of Belfast Tax Map 29 is attached hereto and incorporated herein as Exhibit 2.

[14] *Calthorpe v. Abrahamson,* 441 A.2d 284, 287 (Me. 1982) (A grantor can convey effectively by deed only that real property which he owns. See *May v. Labbe,* 114 Me. 374, 96 A. 502 (1916); 6 U. Thompson, Commentaries on the Modern Law of Real Property § 2935 (1962).); *Dorman v. Bates Mfg. Co.,* 82 Me. 438, 448 (1890) (One cannot convey what he does not own. One cannot convey land, nor

Accordingly, there is only one question that is relevant to determining if this applicant (NAF) has title, right or interest "sufficient" to obtain the requested permits: ***Do the Eckrotes own the intertidal land on which their lot fronts?***

Because the answer to this question is "No," than NAF lacks the administrative standing to seek the requested permits, and all local, State and federal agencies, bureaus and boards lack the jurisdiction to consider NAF's permit applications or grant the requested permits or leases.

Here, ***EVERY*** deed in the Eckrotes' chain of title back to 1946, ***including the October 15, 2012 deed,*** confirms that the Eckrotes do not have any ownership interest in the intertidal land on which their lot fronts. Rather, ***every deed*** explicitly states that the waterside boundary of the Eckrotes' lot is the "***high water mark***" – conveying no interest in the intertidal flats between the high and low water marks.

Specifically, the Eckrotes' chain of title (incorporated herein) is as follows:

- The 1946 Harriet L. Hartley-to-Fred R. Poor deed states that the waterside boundary is "***along high water of Penobscot Bay***" (i.e. words of exclusion under Maine case law that grant no ownership in the intertidal land) (WCRD at Book 452, Page 205);
- The 1971 Frederick R. Poor-to-William O. and Phyllis J. Poor deed states that the waterside boundary is "***along high-water of Penobscot Bay***" (i.e. granting no ownership in the intertidal land) (WCRD at Book 691, Page 44);
- The 1991 William O. Poor-to-Phyllis J. Poor deed states that the waterside boundary is "***along high-water of Penobscot Bay***" (i.e. granting no ownership in the intertidal land) (WCRD at Book 1228, page 346); and
- The October 15, 2012 deed from the Estate of Phyllis J. Poor to Richard and Janet Eckrote expressly states that the description in this deed is based on an August 31, 2012 survey by Good Deeds. (WCRD at Book 3697, Page 5). That unrecorded survey is incorporated by reference into the 10-15-2012 deed and states that the waterside boundary of the Eckrotes' property is "***along high water***" (i.e. granting no ownership in the intertidal land) (this survey is attached at end of this email).

Both NAF and Intervenors Mabee and Grace have repeatedly provided the Board with copies of the August 31, 2012 Good Deeds survey that states that the Eckrotes' waterside boundary is "Along High Water" – not out to low water. NAF withheld this unrecorded 8-31-2012 Good Deeds survey from the public, interested parties, and the State, including the Petitioners, the Department and the DACF Bureau of Parks and Lands, until May 16, 2019. On May 16, 2019, NAF finally submitted this survey to the Bureau and later the Board and Department in response

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create an easement in it unless he owns it. An attempt to do so may render him liable on the covenants in his deed, but neither the land nor the easement will pass.); *Eaton v. Town of Wells,* 2000 ME 176 (a person can convey only what is conveyed into them. See *May v. Labbe,* 114 Me. 374, 380 (1916) (However much hey may have intended to convey, they conveyed no more than the deeds properly construed conveyed.).

to an Upstream-IMLU challenge to NAF's TRI in the Bureau's submerged lands lease application process. This survey expressly determines that the Eckrotes' waterside boundary is "***along high water***" -- consistent with all of the prior deeds in the Eckrote chain of title going back to 1946.

However, NAF has continued to rely on erroneous language inserted in the October 15, 2012 deed, issued by R. Kenneth Lindell[15] and Barbara Gray, as Personal Representatives of the Estate of Phyllis J. Poor to Richard and Janet Eckrote, to assert "sufficient TRI" exists in the intertidal land needed for NAF's pipelines. This deed was written by Attorney Lee Woodward, Esq.,[16] acting as the attorney for R. Kenneth Lindell, in his capacity as Personal Representative of the Estate of Phyllis J. Poor.

Attorney Woodward, inexplicably changed the description from "***along high-watermark of Penobscot Bay***" (contained in all prior deeds) to "***along said Bay***,"[17] in the October 15, 2012 Deed, despite the contrary description in the August 31, 2012 Good Deeds survey, which establishes the waterside boundary of this property as "***along high water,***" and the contrary language is all prior deeds for this property back to 1946.[18] (See, Exhibit 3 and expand to 200% to read Eckrote waterside boundary).

NAF has cited the erroneous deed description language to claim that it has "color of title" to the Mabee-Grace intertidal land. However, inclusion of this erroneous language by the attorney for the Personal Representative of the Estate of Phyllis J. Poor (Janet Eckrote's mother) does not convey title to land that Phyllis J. Poor and her predecessors-in-interest never owned. Notably, the illustration that defines the boundaries of the Eckrote-NAF Easement, attached as Exhibit A to that Easement Agreement drafted by Attorney Woodward, shows that the easement terminated at the high water mark of the Eckrotes' property – as all deeds in the Eckrote chain of title state the Eckrotes' property, and thus any easement from the Eckrotes, must terminate.

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[15] R. Kenneth Lindell was convicted of theft, fraud and tax evasion for misappropriating over $3 million from the estates of two elderly women, including the Estate of Phyllis J. Poor. Now NAF is attempting to use a deed issued by R. Kenneth Lindell to take the intertidal land owned by Jeffrey Mabee and Judith Grace, without payment of compensation or their consent. This Board should reject this effort to steal the Petitioners' intertidal land by NAF.
https://bangordailynews.com/2019/04/23/news/midcoast/ex-lawmaker-gets-10-years-for-stealing-more-than-3-million-from-widows/

[16] Attorney Lee Woodward has also: (i) been listed as the attorney representing Richard and Janet Eckrote in the drafting of the unrecorded Easement Agreement Option with NAF (which shows the boundary of the easement terminating at the high water mark of the Eckrote property); (ii) the attorney for the Cassidas on their lease agreement with the NAF; (iii) drafted, with NAF's counsel, the March 3, 2019 letter from Erik Heim to the Eckrotes "amending" the Eckrote Easement, which letter purports to "clarify" the boundary of the Eckrote-NAF Easement; and (iv) has served as moderator for NAF at their March 26, 2019 public information meeting.

[17] The phrase "along said Bay" are words of inclusion suggesting that the property includes title to the intertidal flats down to the low water mark.

[18] Mr. Woodward also omitted reference to the prior 1946 deed covenant that runs with this property, limiting its use to "residential use only." However, this omission does not nullify the covenant, as discussed more fully below.

More importantly, this erroneous deed description language is superseded by the determination in the 8-31-2012 Good Deeds survey, expressly incorporated by reference into this deed as the basis for the description, that the waterside boundary is "***along high water***." Under controlling Maine case law, the 8-31-2012 survey controls and supersedes any contrary language inserted in the October 15, 2012 deed's description, that inexplicably alters "along high-water mark of Penobscot Bay" (the description in all prior deeds going back to 1946) to "along said Bay".[19] See also, Exhibit 18.

In 2018, long before Intervenors Mabee and Grace were aware that NAF was seeking to place its pipelines on their intertidal land and before NAF filed its applications with the State of Maine, NAF was put on notice that this error in the October 15, 2012 deed description could not be the basis for a claim of TRI or an Easement granting rights beyond the high water mark of the Eckrotes' property by: (i) the express terms of the Eckrote-NAF Easement, which by its own terms terminates at the high watermark (see Exhibit A of the Eckrote Easement showing its boundaries end at the high water mark of this lot, attached as Exhibit 5); and (ii) by the April 2, 2018 Good Deeds boundary survey that NAF commissioned, which includes a notation, in all caps, stating that:

> SHADED AREA DEPICTS LANDS LOCATED BELOW THE HIGH TIDE LINE. THE DEED FROM THE ESTATE OF PHYLLIS J. POOR TO RICHARD AND JANET ECKROTE DATED OCTOBER 15, 2012, AND RECORDED IN BOOK 3697. PAGE 5 CONTAINS THE LANGUAGE. "...THENCE GENERALLY SOUTHWESTERLY ALONG SAID (PENOBSCOT) BAY A DISTANCE OF FOUR HUNDRED TWENTY-FIVE (425) FEET...."
>
> THE PREVIOUS DEED FROM WILLIAM O. AND PHYLLIS J. POOR TO PHYLLIS J. POOR DATED JULY 1, 1991, RECORDED IN BOOK 1228, PAGE 346 CONTAINS THE LANGUAGE, "....THENCE EASTERLY AND NORTHEASTERLY ALONG HIGH-WATER MARK OF PENOBSCOT BAY FOUR HUNDRED TEN (410) FEET...."
>
> I SUGGEST A LEGAL OPINION OF THE ABILITY OF THE ESTATE OF PHYLLIS J. POOR TO GRANT AN EASEMENT BELOW THE HIGH WATER MARK.

The 2018 Good Deeds survey is thus consistent with the August 31, 2012 Good Deeds survey, which shows that the waterside boundary of the Eckrotes' lot is "along high water."

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[19] See, e.g. *Bradstreet v. Winter*, 119 Me. 30, 37-38, 109 A. 482, 485, 1920 Me. LEXIS 41, *12. As the Supreme Judicial Court held in *Bradstreet v. Winter*, *supra*:

> In *Ilsley et al v. Kelley*, 113 Me. 497, 94 A. 939, this court held, that "it is firmly established in this State that the survey must govern when its location can be shown, that when land is conveyed by lot, without further descriptions, that the lot lines determine the boundaries of that lot when they can be located;" and also that "if the owner of a parcel of land, through inadvertance or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate as a disseizin." When a grant or deed of conveyance of land contains an express reference to a certain plan, such plan, in legal construction, becomes a part of the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed. *The Proprietors of the Kennebec Purchase v. Tiffany*, 1 Me. 219; *McElwee v. Mahlman*, 117 Me. 402, 104 A. 705.

"Sufficient" title, right or interest requires the applicant to have the kind of relationship with the site that gives a legally cognizable expectation of having the power to use and develop the land in the manner that the permit would allow. Here, NAF has failed to make the necessary showing of TRI, but the Department has ignored the facts and law and made a determination of "sufficient TRI" to proceed, despite the plain language of all of the deeds and surveys submitted by Petitioners ***and by NAF***. The Department's determination regarding NAF's TRI is unfounded on the record before the Department and will result in a waste of significant individual and taxpayer resources without justification, and damages the Petitioners' rights and property values.

Furthermore, the Department and Board have erred in shifting the burden of demonstrating TRI from the applicant, to creating an obligation on a property owner whose land is being misappropriated by an applicant to go to court to prevent a regulatory taking of their land. Indeed, here, ***even after the aggrieved land owners have provided a prior court judgment demonstrating their title to the subject land***, the Department and Board have still inexplicably found the NAF has demonstrated "sufficient TRI" to proceed with the permitting process in the absence of a single recorded deed or judgment to support their claim and literally four surveyors' opinions (three of whom were commissioned by the Eckrotes or NAF) who have said the Eckrotes' waterside boundary terminates at the high water mark and the Eckrotes' have no ownership interest in the intertidal flats on which their lot fronts.

Such willful disregard by the Department of the private property rights of Jeffrey Mabee and Judith Grace has no justification under the law of this State, which has long held that:

> "[T]he owner of the upland adjoining tide water prima facie owns to low-water mark, and does so in fact ***unless the presumption is rebutted by proof to the contrary***." *Dunton v. Parker*, 97 Me. 461, 54 A. 1115, 1118 (1903).

Here, the Petitioners have rebutted each and every claim that the Eckrotes and/or NAF have title, right or interest in the intertidal land that NAF proposes to use – including providing NAF and the State with the complete file in a prior court judgment of quiet title in favor of the true owners' predecessor-in-interest – a judgment that was long-ago recorded in the Waldo County Registry of Deeds, at Book 683, Page 283.

On January 3, 2019, NAF submitted a letter to the Bureau of Parks and Lands ("BPL"), in which they asserted that:

> The BPL has no authority or jurisdiction to consider whether any other party can rebut this presumption. See *Southridge* [*Corp. v. Bd. of Envtl. Prot*.], 655 A.2d [345,] at 348 [(Me. 1995)]. Thus, even if Upstream and MLU were correct that other parties have future potential claim to rights in the intertidal or littoral zones, NAF has shown sufficient right, title or interest in the adjacent upland for purposes of the BPL submerged land lease.

This letter misrepresents the meaning of the Law Court's holding in *Southridge* to support the notion that a State agency or Board is required to issue a lease or permit, based on nothing more than a fabricated claim of title – even if that claim is: (i) demonstrably untrue pursuant to all recorded deeds; (ii) the presumption of upland-lot ownership of the intertidal land is conclusively rebutted by multiple, uncontroverted recorded instruments (including a prior quiet title judgment); and (iii) the applicant knows, or should know, that the claim of TRI is false pursuant to multiple prior surveys and other recorded instruments.

Rather, in *Southridge*, there was a court action for adverse possession relating to the disputed parcel, pending in the York County Superior Court, and Funtown's septic system had existed on the disputed parcel for a long period of time. The Law Court determined, citing *Murray v. Inhabitants of the Town of Lincolnville,* 462 A.2d 40, 43 (Me. 1983), that: "This long established business practice, unchallenged by Southridge for many years provide[d] 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." While the Law Court's *Southridge* decision has been cited for the proposition that a regulatory permitting agency "is not required to adjudicate property disputes," *Crispin v. Town of Scarborough,* 1998 M. Super. LEXIS 187, •8, the Law Court never endorsed fraud or theft of private property -- ***title to which has been determined in a prior court judgment to belong to someone else in fee simple*** -- nor did the Law Court require or condone local or State permitting agencies to ignore a prior court judgment to quiet title to the disputed property or a recorded Conservation Easement imposed by the record fee simple owners to protect the land in its natural condition.

As the Superior Court for Cumberland County noted in *Collins v. State,* 2004 Me. Super. LEXIS 251, at *6 -*7:

> This [TRI] requirement is akin to the standing requirement for judicial action. The Law Court, in *Murray v. Inhabitants of the Town of Lincolnville,* 462 A.2d 40 (Me. 1983), clarified the concept of administrative standing and its role as "an administrative and valid condition for applicant eligibility." *Id.* at 43 (quoting *Walsh v. City of Brewer,* 315 A.2d 200, 207 (Me. 1974). In that case, the court stated that "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 the site in ways that would be authorized by the permit or license he seeks." *Id.* (internal citations omitted).

The requirement that the applicant provide evidence of TRI is not discretionary; it is jurisdictional and mandated by law.

As the Law Court noted in *Walsh v. City of Brewer,* 315 A.2d at 211: **"**standing is 'conceptually antecedent to the consideration of whether a Court has a jurisdiction of the subject-matter.' . . ." Standing is uniquely interwoven with subject-matter jurisdiction and can be raised for the first time even at the appellate level. *See*, *Nichols v. Rockland,* 324 A.2d 285, 296, 1974 Me. LEXIS 315, *3. Standing and jurisdiction are inextricably intertwined.

> Unless, however, it is alleged, and made to appear, that plaintiff has a relationship to the land qualifying him as a proper "applicant" under the regulatory ordinances -- on the basis of which it becomes at least arguable that plaintiff (upon appropriate findings that he has fulfilled all other regulatory requirements) has legal entitlement to a license and permit which could constitute the "*property*" rights cognizable in a Court of equity, -- there is absent a necessary condition of *equity* subject-matter jurisdiction.

Walsh v. City of Brewer, 315 A.2d at 210, 1974 LEXIS 355, *26.

In order for NAF to have the administrative standing to obtain any of the necessary permits from this Board, NAF must be able to demonstrate that it has ***actual*** (not just apparent or "colorable") TRI in "all of the property that is proposed for development or use" for its pipelines. Having

TRI is an objectively provable or *disprovable* fact – not a matter of mere bureaucratic fiat or discretion. Only actual TRI can create "a legally cognizable expectation of having the power to use the site in ways that would be authorized by the permit or license" sought. *Collins v. State, supra.*

> A justiciable controversy involves a claim of present and fixed rights based upon an existing state of facts. "'Accordingly, rights must be declared upon the existing state of facts and not upon a state of facts that may or may not arise in the future.'" *Campaign for Sensible Transp. v. Maine Turnpike Auth.*, 658 A.2d 213, 215 (Me. 1995) (quoting *Connors v. International Harvester Credit Corp.*, 447 A.2d 822, 824 (Me. 1982)).

Madore v. Maine Land Use Regulation Comm'n, 1998 ME 178, 715 A.2d 157, 160, 1998 Me. LEXIS 175, *6.

Here, an agency determination that NAF has submitted "sufficient" proof that it has TRI to continue to process and consider its applications does not mean that the applicant has actual TRI or sufficient administrative standing to confer jurisdiction on this Board to proceed. State agencies cannot ignore proof, established by public record deeds and a prior court judgment, that an applicant and/or the property owner on which the applicant's TRI is based (through an unrecorded option, lease or easement) lack the requisite TRI in the subject property to create a cognizable expectation of being able to use the property in the ways authorized by the lease or permits sought.

In other words, the State can't ignore proof that someone else owns the property that the applicant wants to use.

C In Finding "Sufficient" Tri, The Department Ignored The Waldo County Superior Court's 1970 Judgment In A Prior Quiet Title Action

In making its erroneous determination that NAF has "demonstrated sufficient TRI to be processed" on June 13, 2019, the Department stated in relevant part that:

> The TRI provision cannot, however, be interpreted as compelling the Department to perform an exacting legal analysis of competing ownership claims to determine the ultimate ownership of a property. ***The ultimate conclusion can only be made by a court.*** Moreover, the Department rejects any such interpretation as directly counter to the purpose of the TRI provision and cannot afford to allow its permitting proceedings to be transformed into the equivalent of an administrative agency quiet title action. . . .

June 13, 2019 Letter from Kevin Martin, p. 1-2 (emphasis supplied).

However, in making this determination, the Department ignored the fact that the Waldo County Superior Court has already entered a judgment in a quiet title action regarding this property on June 26, 1970 – a copy o which was provided to the Department on June 12, 2019. The Final Judgment entered by Justice Silsby determined that Winston C. Ferris was the owner in fee simple of all of the land described in that action, which includes all of the intertidal land on, under or over which NAF proposes to place its industrial pipelines. Based on this judgment, this

intertidal land is now owned in fee simple by Winston C. Ferris' successors-in-interest, Jeffrey R. Mabee and Judith B. Grace. Waldo County Registry of Deeds, at Book 683, Page 283. The Department offers no justification or explanation for its refusal to give effect to this prior 1970 judgment that resolved the question of who owns this land.

Petitioners respectfully submit that just as the Department cannot afford to allow its permitting proceedings to be transformed into the equivalent of an administrative agency quiet title action; the Department and Board have no authority to transform its permitting process into an appellate process to undo a quiet title judgment forty-nine (49) years after that judgment is entered by a court of competent jurisdiction, based on the identical property description that is in the Mabee-Grace deed.

D. Mabee-Grace Chain of Title

If the Eckrotes do not own the intertidal land on which there lot fronts, who does? While this question is irrelevant to a determination of whether the Eckrotes and, through them, NAF has the necessary TRI to seek and obtain permits from local, state or federal regulators, this question is one that the Department has erroneously considered in its June 13, 2019 TRO letter.

The Department's inquiry should have ended once it saw that the Eckrotes do not own the intertidal land on which their lot fronts, pursuant to the plain wording of all deeds in the Eckrotes' chain of title, including the October 15, 2012 deed as clarified by the August 31, 2012 Good Deeds survey.

However, the Department has erred in asking the superfluous question of whether or not sufficient evidence exists to demonstrate that Jeffrey Mabee and Judith Grace own the intertidal land on which the Eckrotes' lot fronts. The answer to this question is that Jeffrey R. Mabee and Judith B. Grace have demonstrated their ownership in this intertidal land by: (i) submitting the relevant deeds from the Waldo County Registry of Deeds from the Mabee-Grace chain of title into the record before the Department; and (ii) more importantly, by submitting a judgment from a 1970 quiet title action that declared that Winston C. Ferris, their predecessor in interest was the owner in fee simple of this land. But this is not a question that need be answered prior to dismissing NAF's applications for lack of TRI.

Both NAF and Upstream-IMLU submitted deeds and summaries relating to the Mabee-Grace chain of title to the Department. The submissions of both NAF and Upstream-IMLU showed that Arthur Hartley acquired title to a large tract of land in Belfast, Maine in 1924, from Eva T. and Edwin D. Burd. Book 343, Page 497. Subsequently, Arthur Hartley, who was then already married to Harriet L. Hartley, wanted to add his wife to the deed as a joint tenant with him. To accomplish this, the law required him to transfer the property out of his possession and then have it re-conveyed to Harriet and him as joint tenants. (Exhibit 8).

On August 27, 1934, Arthur Hartley performed this "straw man" transaction and transferred his land – for less than a day – to Genevieve Hargrave. Waldo County Registry of Deed, at Book 386, Page 452. *Id.* Ms. Hargrave was Harriet Hartley's sister (See, 1900 and 1930 Census documents attached as Exhibit 9 to the original Motion to dismiss for lack of TRI submitted by Mabee and Grace and incorporated herein). On the same day on which Arthur Hartley

transferred title to his land to Ms. Hargrave (August 27, 1934), Genevieve Hargrave conveyed the property *back* to Arthur Hartley and Harriet L. Hartley, his wife, as joint tenants through a quitclaim deed. Waldo County Registry of Deed, at Book 386, Page 453. (Exhibit 8). The purpose of this same-day transaction was to add Arthur's wife (Harriet) to the deed as a joint tenant. The deed from Genevieve Hargrave back to Arthur Hartley and Harriet L. Hartley, his wife, states in relevant part that this conveyance is as joint tenants: "and the survivor of them as joint tenants and not as tenants in common, their heirs and assigns forever." *Id.*

After Arthur's death less than a year later, Harriet L. Hartley owned all of the land covered by the Hargrave-Hartley deed in fee simple.

Harriet L. Hartley subsequently conveyed portions of this land out in 1946 – expressly retaining title to the intertidal land nearest to her Little River homestead property through use of words of *exclusion* (e.g. "along high water mark of Penobscot Bay") in the Fred R. Poor deed, dated January 25, 1946, and notarized on June 19, 1946 (Exhibit 2, Sketch 2); while including the flats adjacent to a tract of land further down the shore, in the conveyance to Sam Cassida on October 25, 1946. Compare, Waldo County Registry of Deeds, at Book 452, Page 205 to Book 438, Page 497. (See, Exhibit 2, Sketch 3; and Exhibit 8).

Thus, Harriet L. Hartley demonstrated by these contrasting, contemporaneous choices, relating to whether to convey or not convey the flats, that she knew what words to include in a deed to express such an intent. She expressed her intent to convey the flats by using words of inclusion and express statements of intent relating to conveyance of the "flats" in the Sam Cassida deed, dated October 25, 1946, stating: "Also conveying whatever right, title or interest I may have in and to the land between high and low water marks of Penobscot Bay in front of the above described lot." *See*, Waldo County Registry of Deeds, at Book 438, Page 497.

On September 22, 1950, Harriet L. Hartley conveyed the Little River homestead property, including all of the retained intertidal land, to William P. and Pauline H. Butler. (Exhibit 2, Sketch 4). This parcel included the current Mabee-Grace parcel and homestead, as well as the land now owned by the Schweikerts. Book 444, Page 184. An examination of the deeds of the Hartley conveyances from 1946 forward demonstrates that the retained intertidal land included all of the flats from the mouth of the Little River to what is now the Morgan-Roughhead boundary line. (Exhibit 2, Sketches 1 and 7; Relevant language from these deeds is included in Exhibits 8 and 10).

On May 13, 1961, the Hartley homestead parcel was conveyed from the Butlers to Ernest J. Bell and Marjorie M. Bell as joint tenants. (Waldo County Registry of Deeds, at Book 587, Page 100). The Bells then sold the portion of this property that is currently owned by the Schweikerts, on May 18, 1964, to John Joseph Grady and Catherine Grady. The Bells retained title to all of the intertidal land when making this conveyance to the Gradys – conveying only to the high water mark in the Grady deed. (Waldo County Registry of Deeds, at Book 621, Page 288). (Exhibit 2, Sketch 5).

After Ernest Bell's death, Marjorie Bell conveyed the remaining Hartley Little River homestead property, including all intertidal flats, to Willis C. Trainor and Virginia K. Trainor, as joint

tenants, on October 17, 1966. (Waldo County Registry of Deeds, at Book 652, Page 116), (Exhibit 8).

On September 1, 1967, the Trainors conveyed the Hartley Little River homestead property, including all intertidal flats, to Snelling S. Robinson. (Waldo County Registry of Deeds, at Book 663, Page 98), *Id*.

An Executor's and Trustee's Deed was issued by the Estate of Snelling S. Robinson to Winston C. Ferris on March 19, 1970. (Waldo County Registry of Deeds, at Book 680, Page 688), *Id*.

E. Ferris v. Hargrave Quiet Title Action

Shortly thereafter, on or about April 10, 1970, Winston C. Ferris filed a quiet title action against Genevieve Hargrave in the Waldo County Superior Court. A clerk's certificate for this complaint is recorded in the Waldo County Registry of Deeds at Book 680, Page 1112. Final Judgment in this action was entered on June 26, 1970 and is recorded in the Waldo County Registry of Deeds, at Book 683, Page 283. See, Exhibit 8.

The 1970 quiet title action was filed by Winston G. Ferris in April of 1970 (during the period that Fred R. Poor still owned the Eckrote property conveyed by Harriet L. Hartley, M.D. to Fred R. Poor in 1946). Waldo County Registry of Deeds at Book 452, Page 205.

The 1970 quiet title action was styled:

> "***Winston G. Ferris v. Genevieve E. Hargrave,*** whereabouts unknown but whose last address was in Philadelphia, County of Philadelphia, State of Pennsylvania, her heirs, legal representatives, devisees, assigns, trustees in bankruptcy, disseizors, creditors, lienors, and grantees, and ***any and all other persons unascertained, not in being or unknown or out of State,*** and ***all other persons whomsoever who claim or may claim any right, title, or interest or estate, legal or equitable, in the within described land and real estate through or under said defendants***."

(emphasis supplied).

Winston Ferris' stated reason for filing this quiet title action against Genevieve Hargrave and the other enumerated defendants was as follows:

> 4. Your Plaintiff is concerned that some person or persons may claim that the said Defendant, Genevieve E. Hargrave, was not a single person at the time of the conveyance by her to Arthur Hartley and Harriet L. Hartley, as joint tenants, on August 27, 1934, which the Plaintiff denies but which the Plaintiff cannot prove without the production of certain evidence. Your Plaintiff is apprehensive that in the event the said Genevieve E. Hargrave was not a single person at the time of the aforesaid conveyance but was a married woman, that some person may claim some right, title interest or estate in the land which is the subject of this action.
>
> WHEREFORE, the Plaintiff demands judgment against the Defendants that:

> 1. They ***and every person claiming through or under them be barred from all claims to any right, title, interest or estate in the above described real property of the Plaintiff***.
>
> 2. The Plaintiff is vested with title to the above described real property in fee simple, free and clear of all claims by the Defendant or any person claiming by through or under her, which judgment shall operate directly on the land and shall have the force of a release made by or on behalf, of the Defendant and all persons claiming by, through or under her of all claims inconsistent with the title established or declare hereby.

Ferris v. Hargrave Complaint (Waldo County Superior Court Docket Number 11,275, pp. 4-5 (emphasis supplied).

On June 19, 1970, pursuant to 14 M.R.S.A. § 6656,[20] the Superior Court appointed a *Guardian Ad Litem*, Roger F. Blake, Esquire, of Belfast, Maine, to represent all of the defendants in this quiet title action "for any Defendants who have not been actually served with process and who have not appeared in this action." (Order appointed Robert F. Blake, Esq. as *Guardian Ad Litem* and Acceptance of Appointment, p. 2); *Id*. Mr. Blake filed an answer denying all allegations in the Complaint on behalf of all defendants and moved to dismiss the Complaint. Subsequently, the Superior Court (The Honorable William S. Silsby, Justice presiding) entered Final Judgment in favor of the Plaintiff, Winston Ferris, on June 26, 1970.

This final judgment, ORDERED, ADJUDGED AND DECREED that:

> 1. The defendants and every person claiming by, through or under them, be barred from all claims to any right, title, interest or estate in the following described land and real estate:
>
> A certain lot or parcel of land, together with the buildings thereon, commonly known and designated as The Little River Inn, situated in Belfast, in the County of Waldo and State of Maine, on the easterly side of the Atlantic Highway, and being bounded and described as follows, to wit:

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[20] 14 M.R.S.A. §6656 provides a follows:

> **§6656. Service on missing defendant; agent; expenses**
>
> Service in such action shall be as provided in section 6653. Notice given under this section shall be constructive service on all the defendants. If, after notice has been given or served as ordered by the court and the time limited in such notice for the appearance of the defendants has expired, the court finds that there are or may be defendants who have not been actually served with process and who have not appeared in the action, it may of its own motion, or on the representation of any party, appoint an agent, guardian ad litem or next friend for any such defendant, and if any such defendants have or may have conflicting interests, it may appoint different agents, guardians ad litem or next friends to represent them. The cost of appearance of any such agent, guardian ad litem or next friend, including the compensation of his counsel, shall be determined by the court and paid by the plaintiff, against whom execution may issue therefor in the name of the agent, guardian ad litem or next friend.

> Northerly by land of Fred R. Poor; Easterly by Penobscot Bay;[21] Southerly by Little River and Westerly by the Atlantic Highway, so called.

The property that was the subject of the quiet title action is the current Mabee-Grace parcel, including all intertidal flats retained by the predecessors in interest of Mabee-Grace, which include the intertidal land on which Tax Map 29, lots 35, 36, 37 and 38 front. (Exhibit 2, Sketch 7).

The description only excepted a single parcel of land. Specifically, the description excluded the lot that had been previously conveyed on May 18, 1964 to John Joseph Grady and Catherine E. Grady from Ernest J. Bell and Marjorie E. Bell, recorded in the Waldo County Registry of Deeds at Book 621, Page 288. The current owners of this excepted parcel are the Schweikerts. (Exhibit 2, Sketches 1 and 7). As noted above, the waterside boundary of this property, as conveyed by Bell to Grady, and thereafter conveyed through to the current Schweikert deed, terminates at the high water mark of Penobscot Bay.

Accordingly, the excepted Schweikert lot includes no intertidal rights, other than the common law rights retained by the public to fish, fowl and navigate in this intertidal area, as protected under the Colonial Ordinance of 1641-1647. (Exhibit 2, Sketch 7).

The June 26, 1970 Final Decree declared that the Plaintiff, Winston Ferris, "is vested with title to the above described land and real estate in fee simple."

Thus, this 1970 quiet title judgment removed any asserted ambiguity in the deeds and definitively establishes that Jeffrey Mabee and Judith Grace, as successors in interest to Winston Ferris, own, in fee simple, all of the intertidal land from the mouth of the Little River to the Northern waterside boundary of the Morgan-Helmers lots (which was the Northern waterside boundary of the intertidal land retained by Dr. Harriet L. Hartley in the Harriet L. Hartley-Fred R. Poor 1946 conveyance, as shown on Exhibit 2, Sketches 5, 6 and 7.

This prior quiet title action by Winston C. Ferris controls and determines ownership of the current Mabee-Grace parcel and flats and confirms the conclusion in Donald R. Richards' survey opinions that Petitioners are the true owners, in fee simple, of the intertidal flats from the mouth of the Little River to the Morgan-Helmers line – including all flats on which the Eckrote lot (Tax Map 29, lot 36) fronts and NAF seeks permits to place its three pipelines. The Complaint Abstract and Final Judgment were obtained from the publicly recorded instruments in the Waldo County Registry of Deeds. These materials provide additional, publicly available, support for dismissing NAF's applications for lack of TRI.

These recorded documents, as well as the complete case file from the Maine State Archives for the 1970 *Ferris v. Hargrave* quiet title action, were submitted to the Department on June 12, 2019, as evidence in support of the Petitioners' challenge to NAF's TRI. However, on June 13, 2019, the Department issued its letter finding that NAF had demonstrated "sufficient TRI." In

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[21] These are words of inclusion that include ownership of all of the intertidal land (flats), between the high and low water mark. (Exhibits 10 and 18).

making this determination, the Department never referenced the *Ferris v. Hargrave* judgment in its letter. The Department erred in not dismissing NAF's applications for lack of TR based on this prior judgment in *Ferris v. Hargrave.*

F. NAF's Claims Relating to Releases From "Hartley Heirs"

To support its claims of TRI, NAF submitted unrecorded and heavily redacted "release deeds" to the Department with its June 10, 2019 filing, which is included in NAF's 144 page pdf in support of TRI.[22] NAF asserts that these unrecorded, *unrecordable* instruments in some way release to NAF, whatever retained rights in the intertidal land that the unidentified persons executing them, identified by NAF as heirs of "Harriet ***A.*** Hartley" (not Harriet ***L.*** Hartley) have in the intertidal land on which the Eckrotes' lot fronts.

There is no "Harriet A. Hartley" appearing in the chain of title to any of the properties of interest in this matter. Heirs of "Harriet A. Hartley" can therefore have nothing to convey that has any bearing on the NAF application. The "Release Deeds" recently filed by NAF are immaterial to curing NAF's lack of TRI.

Further, assuming that the submitted "release deeds" are a mis-drafted attempt to portray something conveyed by "Harriet L. Hartley," NAF still cannot cure its lack of TRI by obtaining these release deeds, because the only retained rights that Harriet L. Hartley's heirs have under the controlling deeds is a right to enforce the 1946 "residential use only" covenant on the Eckrotes' upland property, that is contained in the Harriet L Hartley-Fred R. Poor Deed. That covenant limits the use of this lot to "residential use only" and requires the agreement of Harriet L. Hartley, her heirs or assigns to conduct any "for profit business" on this lot. See, Waldo County Registry of Deeds, at Book 452 at Page 206.

As assigns of Harriet L. Hartley, through her transfer of title and all rights in this land to their predecessors in interest, Jeffrey Mabee and Judith Grace have already placed the Eckrotes on written notice that they do not agree with the proposed use of the Eckrote lot for NAF's for-profit business. Thus, the Eckrotes' Easement violates the 1946 Hartley Covenant by authorizing a non-residential use of their upland lot by NAF.

Grantors Lindell and Gray omitted any specific reference to the Harriet L. Hartley-Fred R. Poor deed (Waldo County Registry of Deeds, at Book 452, Page 205) and/or the 1946 "residential use only" covenant in the October 15, 2012 deed from the Estate of Phyllis J. Poor to Janet and Richard Eckrote. However, the covenant runs with the land and still is enforceable by Harriet L. Hartley's heir and/or assigns,[23] including Jeffrey Mabee and Judith Grace.

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

See pages 138-144 of the 144-page pdf.

[23] Black's Law Dictionary defines "assigns" as: "Assignees; those to whom property shall have been transferred. Now seldom used except in the phrase, in deeds, "heirs, administrators, and assigns." *Grant v. Carpenter*, 8 R. I. 36; *Baily v. De Crespigny*, 10 Best. & S. 12." https://thelawdictionary.org/assigns/

Curiously, in obtaining the "releases," NAF has failed to secure any agreement from the alleged "Hartley heirs" that would agree to the Eckrotes' violation of the "residential use only" covenant by placing accessories structures for a for-profit business on the Eckrotes' lot. Nothing in the redacted releases attached at pages 135-144 of NAF's June 10, 2019 filing conveys any such agreement.[24]

Rather, the releases claim to give whatever title, right and interest that these unidentified "Hartley heirs" have in the intertidal land. Each of the four "release deeds" states in relevant part that: "Meaning and intending to convey, and hereby conveying any and all right, title and interest which I have in and to said lands by virtue of being [blacked out]"). ***However, like the Eckrotes, no Hartley heirs – real or imagined – have any retained rights in the intertidal land on which the Eckrotes' lot front to convey to NAF.***

Even actual heirs of Harriet L. Hartley have no title, right or interest in these intertidal lands to convey to NAF for two reasons.

First, Harriet L. Hartley conveyed all of her interest in her Little River homestead, including all rights in the intertidal flats, to William P. and Pauline H. Butler on September 22, 1950. The only mention of Hartley heirs in the deed conveying this property to the Butlers states in relevant part that:

> . . . And I do covenant with the said grantees, heirs and assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances; that I have good right to sell and convey the same to the said Grantees to hold as aforesaid; and that ***I and my heirs shall and will warrant and defend the same to the said Grantees, the heirs and assigns of the survivor of them, forever, against the lawful claims and demands of all persons.***

(Waldo County Registry of Deeds, at Book 474, Page 387) (emphasis supplied).

Thus, the alleged releases from "Hartley heirs", if provided by actual heirs of Harriet L. Hartley, would be a repudiation and violation of the obligations of these heirs under the Harley-Butler deed – obligations and covenants that were intended to run with the land from Harriet L. Hartley and her true heirs.

Second, the Release deeds that NAF obtained from the supposed heirs of Harriet ***A.*** Hartley are based on the Hargrave deed that was the subject of the 1970 *Ferris v. Hargrave* quiet title action. Specifically, the release deeds all contain the same language from each "Hartley heir" stating in relevant part that, as Grantors, the release deeds are based on: "all of the Grantor's right, title and interest in and to certain lands in Belfast, Waldo County, Maine, being described in a deed from Genevieve E. Hargrave to Arthur Hartley and Harriet L. Hartley dated August 27, 1934 and recorded in the Waldo County Registry of Deeds in Book 386, Page 453."

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[24] Further, neither the Eckrotes nor NAF have sought or obtained agreement from Harriet L. Hartley's assigns to allow a non-residential use of the Eckrotes upland lot for the placement of industrial pipelines that are essential accessory structures of a for-profit business on this lot in contravention of the express covenant in the deed from Harriet L. Hartley to Fred R. Poor, dated January 25, 1946. Book 452, Page 206. Those assigns include Jeffrey Mabee, Judith Grace, among others.

Thus, the Hartley heirs acknowledge that they are basing any claims they have to intertidal land on the Hargrave deed to Arthur Hartley and Harriet L. Hartley. Yet, that deed was the subject of the 1970 *Ferris v. Hargrave* judgment. Any and all "Hartley heirs" are also "Hargrave heirs" – since Genevieve Hargrave was Harriet L. Hartley's sister, and these heirs are precisely the claimants -- i.e. relatives or heirs of Genevieve Hargrave who are asserting claims "through and under" the Hargrave deed -- that the *Ferris* quiet title action was filed to extinguish and precisely the claimants whose claims of TRI were and are barred by the 1970 *Ferris* final judgment.

As such, these "Hargrave heirs" are bound by the *Ferris* quiet title action and Final Decree. Consequently, by operation of the express terms in the Final Decree entered on June 26, 1970, any and all "Hartley heirs" are barred from any and all claims of title, right, interest or estate in any lands covered by the Hargrave deed, pursuant to the Final Decree entered on June 26, 1970. See, Waldo County Registry of Deeds, at Book 683, Page 283.

Even in the absence of the 1970 Final Decree these remote heirs would not have the legal authority to grant title, right or interest to NAF in the intertidal lands owned by Jeffrey Mabee and Judith Grace. These heirs cannot convey title, rights and interests that they do not themselves have.

The doctrines of *res judicata* and *collateral estoppel* bar any collateral claim to title, right or interest in the intertidal land covered by the June 26, 1970 Final Judgment, as this land was included in the land described in this quiet title action, and the Eckrotes, NAF, and the purported "Hartley heirs" were all defendants within the scope and meaning of the 1970 quiet title action. The interests of all parties who fall within the enumerated scope of the defendants in the 1970 action were represented and asserted by the *Guardian Ad Litem* appointed by the Superior Court at that time, Roger F. Blake, Esquire. Consequently, the purported Hartley heirs, the Eckrotes and NAF are all barred from asserting any claim of title, right, interest or estate in this land, pursuant to the plain meaning of the Final Judgment entered in that action.[25]

Whether NAF and its agents were unaware of this Final Judgment in the *Ferris* quiet title action or have withheld it in their submissions is of no relevance to resolution of the issue of TRI. Under no circumstances could heirs of Harriet L. Hartley defeat the fee simple title, right and interest of the true owners of this intertidal land – Jeffrey Mabee and Judith Grace – by granting

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[25] See the discussion of the doctrines of *res judicata*, issue preclusion and *collateral estoppel* in the Law Court's decision in *Pushard v. Bank of Am., N.A.,* 2017 ME 230, P19, 173 A.3d 103, 111, 2017 Me. LEXIS 262, *12, 2017 WL 6334177:

> "The doctrine of res judicata . . . is a court-made collection of rules designed to ensure that the same matter will not be litigated more than once." *Beegan v. Schmidt*, 451 A.2d 642, 643-44 (Me. 1982). The term "res judicata" encompasses two different legal theories: claim preclusion, or "bar"; and issue preclusion, or "collateral estoppel." *Id.* at 644; *see Wilmington Tr. Co. v. Sullivan-Thorne*, 2013 ME 94, ¶ 7, 81 A.3d 371. Claim preclusion "prohibits relitigation of an entire 'cause of action' between the same parties or their privies, once a valid final judgment has been rendered in an earlier suit on the same cause of action"; and issue preclusion "prevents the reopening in a second action of an issue of fact actually litigated and decided in an earlier case." *Beegan*, 451 A.2d at 644; *see Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131 (HN15 "The collateral estoppel prong of res judicata is focused on factual issues, not claims . . . .").

release deed to NAF (recorded or unrecorded). It is telling that neither NAF not the Department submit or cite any case authority to suggest to the contrary – as no such authority exists. It has never been the law in this State or this nation, that rights in real property, conveyed by, and recorded in, deeds and other legal instruments, can be defeated by an unrecorded release of unknown, unsworn and unverified claims of title, right and interest, provided by grantors whose identities, standing and relationship to the land and the parties who had prior title, right or interest in said land are concealed. This is particularly true where, as here, the release is made in a heavily redacted, unrecorded instrument, asserting an interest through or under a person who is not on any prior deed (Harriet A. Hartley, not Harriet L. Hartley) and all relevant information about the persons issuing the releases is concealed from public scrutiny, without any explanation or justification for concealing the identities of those allegedly granting the releases.

In sum, the Department erred in finding the NAF had demonstrated sufficient TRI, and in failing to give the 1970 quiet title judgment the weight required by law.

G. Harriet L. Hartley Owned No Real Property At the Time of Her Death

Even if the so-called "heirs" or "heir-at-law" who allegedly executed the unrecorded "release deeds" to NAF were some sort of blood relatives to Harriet L. Hartley, the probate authorities in the Philadelphia Register of Wills determined in December of 1951 that Harriet L. Hartley owned no real property at the time of her death. Thus, none of her relatives inherited title, right or interest in any land in Belfast, Maine from Harriet L. Hartley as a consequence of her death.

Since no one can convey land that they do not own, *Almerder v. City of Kennebunkport,* 2019 ME 151, ¶¶ 28-38*,* none of Harriet L. Hartley's relatives ever owned land to convey to NAF. These deeds are simply fraudulent instruments drafted by NAF's lawyers to slander the Mabee-Grace title and keep these permit proceedings going in the absence of any legitimate claim by the applicant to sufficient title, right or interest in the intertidal property the seek permits to use and develop. This fraud on the Board should not be entertained any longer and the permits should be dismissed for lack of TRI, pursuant to 06-096 C.M.R. ch. 2, §11.D.

H. The Intertidal Land NAF Seeks Permits To Use Is Protected In Its Natural Condition By A Conservation Easement

The true owners of the intertidal land on which the Eckrotes' upland lot fronts, Jeffrey R. Mabee and Judith B. Grace and Aggreived Party Friends of the Harriet L. Hartley Conservation Area, do not consent to the placement of NAF's industrial pipelines on any portion of their intertidal land. To ensure the protection and preservation of their intertidal land in its natural condition, Petitioners Mabee and Grace placed their intertidal land from the Little River to the North side of Lot 35 under a Conservation Easement to protect and preserve this land in its current natural condition, free of any commercial or industrial, accessory or principal structures, in perpetuity. The Holder of that Conservation Easement is the Friends of the Harriet L. Hartley Conservation Area.

The Department erred in ignoring this Conservation Easement, imposed by the lawful owners of this intertidal land; the Board erred in failing to acknowledge this Conservation Easement in its permit proceedings. This recorded Conservation Easement cannot be nullified by an unrecorded option to acquire an easement, from land owners whose lot terminates at the high water mark of their property and whose Easement terminates at the high water mark. The State has an obligation to honor a lawfully created conservation easement, created in accordance with 33

M.R.S. §477-A, et seq.

CONCLUSION

It is contrary to the public interest for the limited resources of this Board to be expended reviewing the voluminous permit applications submitted by this applicant, when this applicant lacks "the kind of relationship to the site that gives him a legally cognizable expectation of having the power to use the site in ways that would be authorized by the permit or license he seeks." *Walsh v. City of Brewer,* 315 A.2d 200, 207 (Me. 1974); *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40 (Me. 1983). Proceeding to consider and/or grant permits on, over, or under this intertidal land is slandering the title to land owned by the Petitioners and injuring the value and marketability of the Mabee-Grace property. Granting permits that would allow NAF to misappropriate the intertidal land owned in fee simple by Jeffrey Mabee and Judith Grace, and held by Friends of the Harriet L. Hartley Conservation Area, would constitute a regulatory taking of privately owned land for the benefit of another private corporate entity. Such a taking is contrary to public policy in this State and, without prior payment of just compensation, would violate the Fifth Amendment to the U.S. Constitution and Article I, Section 21 of the Maine Constitution. See, *Knick v. Township of Scott*, 588 U.S. ___ (June 21, 2019).

For the forgoing reasons, Jeffrey Mabee and Judith Grace and the Friends of the Harriet L. Hartley Conservation Area respectfully assert that the Board lacks jurisdiction to continue conduct a substantive review of the above-referenced permit applications or to grant such applications, because the applicant NAF does not have title, right or interest in the intertidal lands on which they propose to put their three pipelines. NAF's defects in TRI for its current (third) proposed pipelines route are numerous, fatal and incurable. A court already has made a determination and entered a judgment declaring that Winston C. Ferris, a predecessor in interest of Jeffrey Mabee and Judith Grace, owned all of the land described by that suit, which includes all of the intertidal land at issue here, in fee simple. As successors-in-interest of Winston C. Ferris, Petitioners own this land in fee simple as a consequence of that judgment. That judgment must be given effect and honored, pursuant to the doctrine of *res judicata*.

Petitioners request that the Board dismiss NAF's applications for lack of TRI, pursuant to 06-096 C.M.R. ch. 2 §11(D), based on the record submitted to the Department and this Board. In the alternative, Petitioners request that, prior to any substantive review of these applications proceeding, that the Board conduct an adjudicatory hearing on the specific issue of NAF's TRI, prior to expending any further public or private resources on the substantive review of NAF's permit applications.

Respectfully submitted,

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Holders of a Recorded Conservation

Easement as Shown on A Survey Plan Recorded
in the WCRD at Book 24, Page 54

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