

**York, Marylisa**

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**From:** Tom Saviello <drtom16@hotmail.com>  
**Sent:** Tuesday, October 19, 2021 6:06 PM  
**To:** DEP, NECEC  
**Subject:** saviello testimony  
**Attachments:** My name is Thomas Saviello.docx; 2021-09-30 AG Complaint.PDFunderground structure 2..PDF; 2021-09-30 AG Mtn to Intervene with Ex..PDFunderground structure1.PDF; johnson mt report final.docupdate 10-16-21.docx

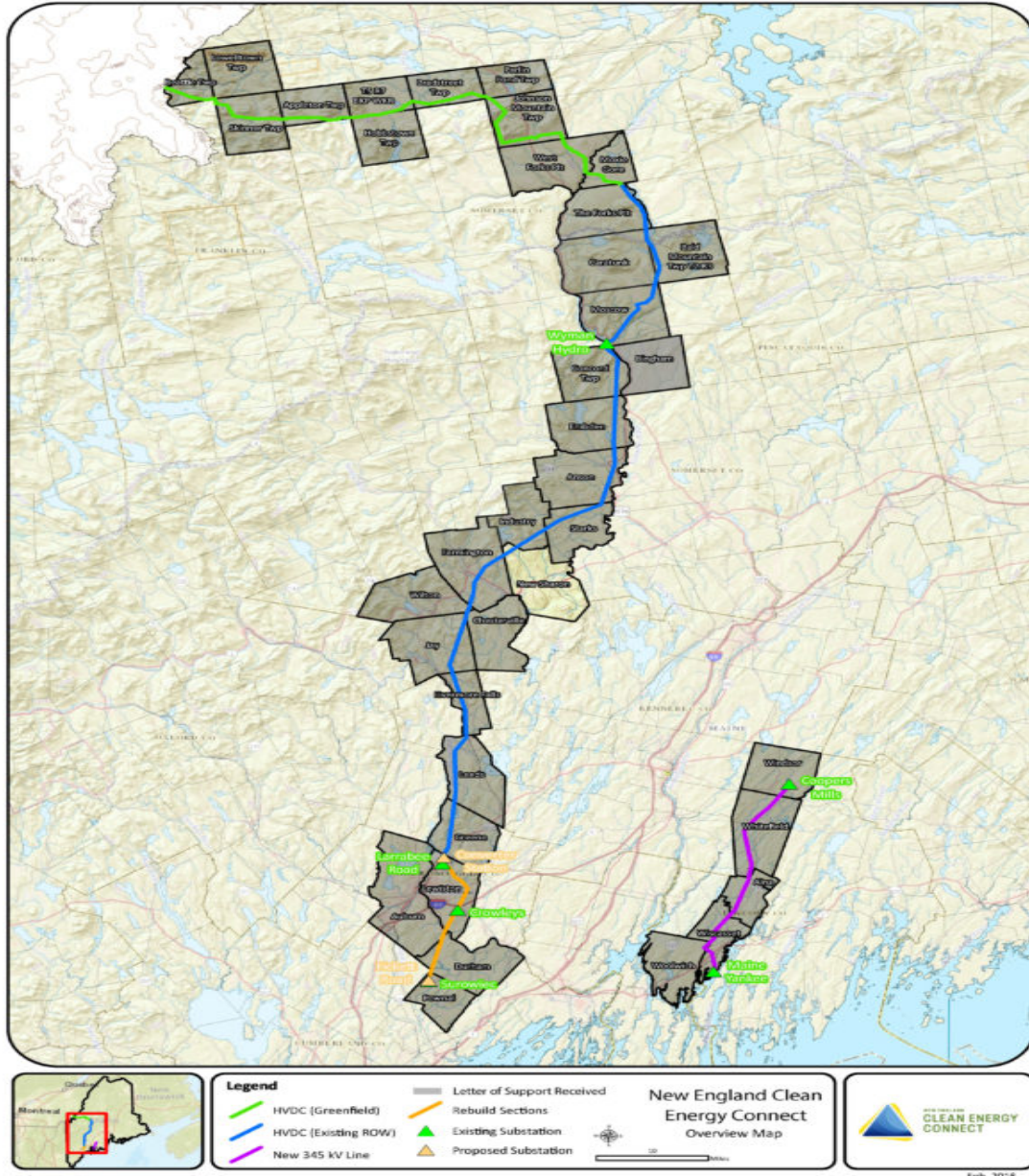
**EXTERNAL: This email originated from outside of the State of Maine Mail System. Do not click links or open attachments unless you recognize the sender and know the content is safe.**

Attached is my testimony and supporting documentation. Thomas Saviello

# Johnson Mt Township Corridor Report

Update 10-16-21

Figure 1. NECEC CMP Corridor proposed map. Segment 1 located at the top of the map outlined in green. Johnston Mt. Township is 9<sup>th</sup> township from the left.



## Site 1. Judd Road hardwood stand



This is a picture of the corridor on the Judd Rd in segment 1 (Identified as Site 1 attached Figure 2) of the NECEC corridor. The person walking in the “taper” zone. Vegetation less than 15 feet is supposed to be left standing to protect wildlife, trout fisheries and minimize visual impact. The green vegetation around the person in the picture is the so called “tapered buffer”.



This is an aerial view of that Corridor cut. The two people in the picture are standing in the so called "taper" zone.



This is an aerial view of the Judd Road Corridor cut. The truck on the road to create a picture scale. It is 20 feet long. The truck image is superimposed this "scale " on the corridor cut.



This is the Judd road corridor on 10-9-21.



Aerial picture of Site 1 where the Judd Road crosses the Corridor. Site 1 in the middle right hand side of the picture just to the left of the wing strut.

## Site 2 Softwood stand



On 1-18-21 this was photographed in front of this conifer stand (Site 2 on attached figure 2). It was flagged to be cut as part of the corridor.



On June 2, 2021 the person is standing in almost the same place. The stand is gone.



This is the actual cut in that softwood stand. ( Fresh moose droppings observed near the Corridor cut.)  
The person is am standing in the so called “taper” zone. There is nothing left standing as the conifer trees cut where all greater than 15 feet tall.



This site is 100 feet wide.

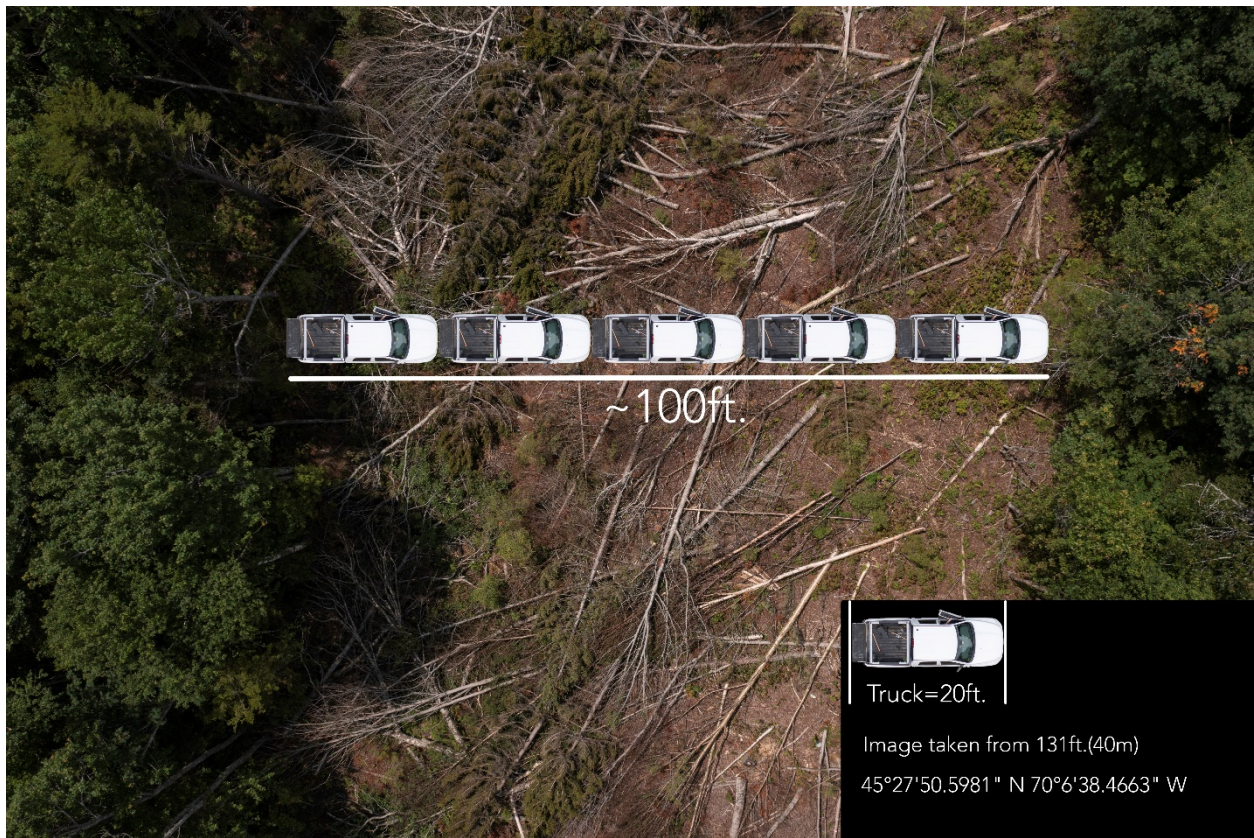


Update picture 10-9. No tapering.



This is an aerial picture of Site 2. The location of the previous three pictures were taken at the end of short spur coming off the main road.

OTHER SCALED Pictures



Another segment 1 corridor location



Another Segment 1 Corridor location



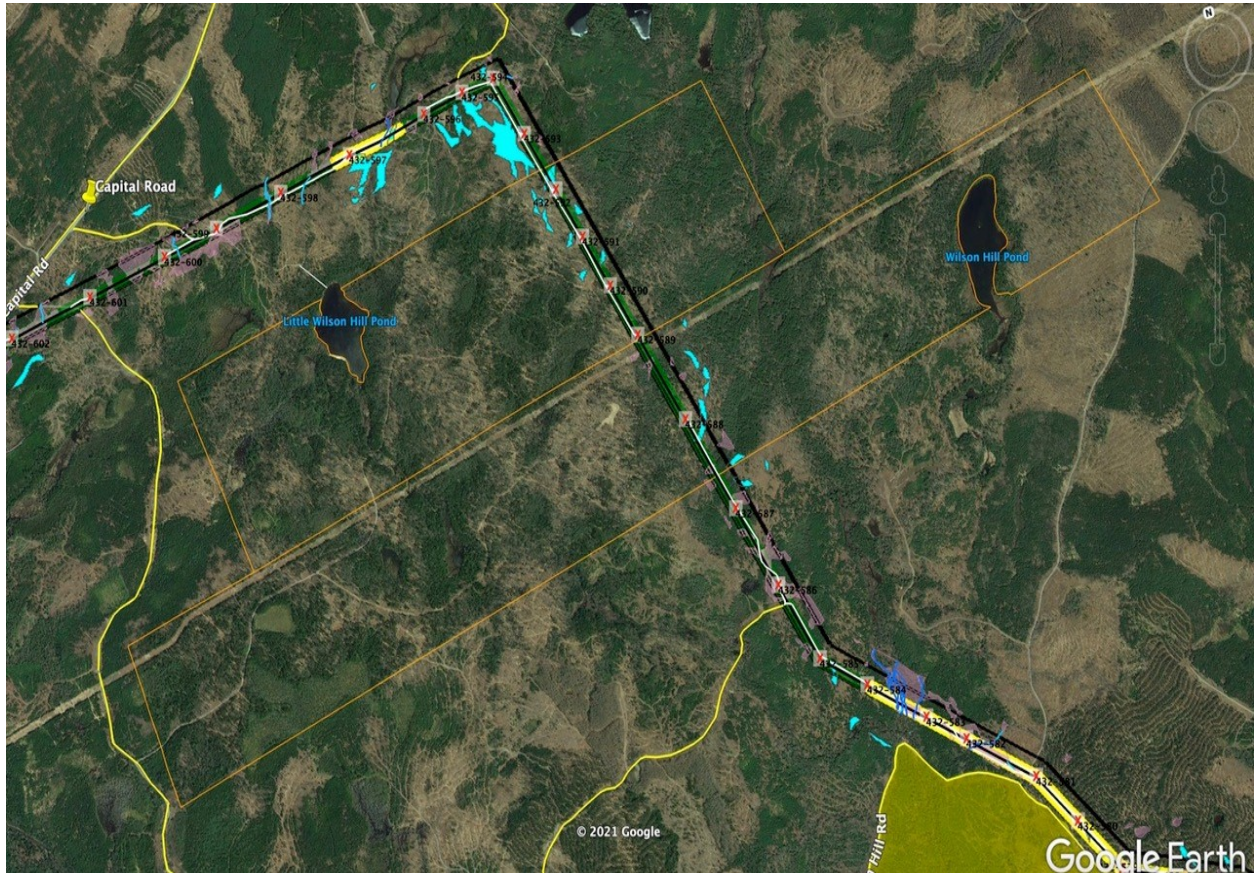
We have the coordinates for each of these sites. It is very safe to say the present cut corridor exceeds 54 feet and there is little if any tapering.

State Heritage Fish Water sign at Little Wilson Hill Pond located in Johnston Mt Township





Figure 3. Proposed corridor crossing location on the public lands. Note: Little Wilson Hill Pond on the left and Wilson Hill Pond on the right.





PUBLIC HEARING TESTIMONY: **New England Clean Energy  
Connect Project License Suspension Proceeding**

State of Maine Department of Environmental Protection Submitted by Email to  
Ruth.A.Burke@maine.gov on 10/16/21

Date: October 19, 2021

To: Members of the Hearing Committee for the Maine Dept. of Environmental  
Protection

From: Thomas Saviello, Wilton , Maine

Re: CMP corridor project with Hydro-Quebec - License Suspension

Position: Support the immediate full suspension of the permit(s) issued to  
CMP/NECEC

My name is Thomas Saviello. I live in Wilton, Maine. I am retired after 33 years with the forest products industry. Before retiring I serve in State legislature as both a Representative and as a Senator. I Co-chaired with my friend now Senator Hickman , the special committee on public land in 2016.

I have three parts to my testimony:

1. I will testify to the lack of planning in identifying alternative routes for the NECEC by Central Maine Power.
2. I will testify as to the actual completion of the NECEC clearing on Segment 1.
3. I will be testifying as to what is an underground structure is that might cross the public lands.

**Lack of Planning:** During my last 20 plus years in the forest products industry I was the environmental manager at the Jay Paper mill. I was responsible for permitting and compliance activities. I cannot imagine a case where I might have a piece of pollution control device malfunction resulting in a call to DEP saying this pollution control it is broken and we need months to fix it. Why? Well one it is really expensive to buy a replacement and two, we have a big order that will increase the mills bottom line. That this order would be jeopardized if we shut

down until the pollution control device is replaced. I could also argue all the jobs and economic benefits to the state would be lost.

I know the DEP at the time would have laughed me out of the room.

So now come here comes CMP... They have a compliance issue at hand. They cannot cross the public lands. They are telling you , If DEP revokes/suspends the NECEC permit they won't be able to meet the required operational deadlines. Temporary jobs will be lost. Property taxes will not be paid. They are saying "lets continue to cut the corridor... let us put up the 100-foot poles. Let us continue to impact the 1200 streams and brooks. In other words, let us continue to destroy the environment while we sort all of this out" ... I hope DEP will also laugh them out of the room.

You have asked CMP the right questions. I will focus more on the "alternative" routes as I believe CMP should have been looking for these routes long before the commissioner asked the question. I do not plan to go into the details of each important action. I have provided the links to support my statements.

1. [CMP has known this is an issue since 2-18-20 when LD 1893 An Act to Require a Lease of Public Lands to Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes.](#) The legislative Joint Standing Committee for Agriculture, Forestry and Conservation voted unanimously that the lease issued by the Bureau of Parks and Lands (BPL) to allow public lands to be crossed by the Corridor was illegal. This was memorialized in a letter to the BPL Director. Unfortunately, a vote was not taken as the legislature adjourned due to Covid.
2. **The lease was appealed to the Court on 6-23-20.**
3. **CMP and the BPL renegotiate the lease and signed a new lease on 6-23-20.** *BPL made it very clear this new lease was to circumvent the 2/3's constitutional requirements. "With input from Andy Cutko, we've characterized this as an "Amended and Restated Lease," and added a provision in Sec. 23 that specifies this Amended and Restated Lease expressly supersedes the 2014 Lease. (As opposed to just signing a new Lease and signing a separate agreement to terminate the 2014 Lease.) Idea is to help show that this 2020 Lease does nothing to "substantially alter" the*

*leased premises now, while still providing a new lease agreement that is being executed after the 2019 CPCN.”*

**4. In September 2020 a citizen-initiated referendum was started that included the public land lease legislative constitutional vote.**

Successful signature gathering and certification was been done . This referendum will be before the Maine Voters on November 2, 2021.

**5. In the 130<sup>th</sup> Legislature LD 471, An Act to Require Legislative Approval for Certain Leases of Public Lands** was introduced. This bill directly addresses the significant alteration of public lands in question. The ACF Committee passed it on a vote of 12-1. (This bill may have been considered to be a competing measure for the upcoming November referendum, thus was held over.)

[Summary \(maine.gov\)](#)

**6. In the 130<sup>th</sup> Legislature LD 1075, An Act to Protect Public Lands** was introduced. This bill directs the Department to do major substantive rulemaking to determine when a parcel of public lands would be substantially altered. Again, this bill indirectly addresses the significant alteration of the public lands in question. The ACF Committee passed it on a vote of 12-1. (This bill may have been considered to be a competing measure for the upcoming November referendum, thus was held over.) [Summary \(maine.gov\)](#)

**7. During the legislative session the Joint Standing legislative Committee for ACF sent multiple letters to the Department making clear that the Committee determined the public lands in question were substantially altered thus requiring a 2/3's affirmative vote by the sitting Legislature.**

**8. The 130<sup>th</sup> Maine State Legislature passed SP 594, Joint Resolution, Expressing the Sense of the Legislature Regarding the Use of Public Land Leased by the State.** It resolved: “That We, the Members of the One Hundred and Thirtieth Legislature now assembled in the First Special Session, on behalf of the people we represent, express our sense in accordance with the Constitution of Maine, that the lease provided to CMP to cross the public reserved lands in West Forks Plantation and in Johnson Mountain Township constitutes a substantial alteration of those lands, requiring a 2/3 vote of all the members elected to each House of the Legislature.” The Joint Resolution also memorialized all the information previously presented in this letter. This Resolution passed in the Senate 28-6 and in the House 66-52.

**9. Justice Murphy vacated the lease in August 2021.**

**10. CMP appealed this decision to the Maine Supreme Court on 8/10/2021.**

Please note: CMP did NOT ask for an expedited hearing before the Court. It seems to me if they are worried about time tables, they would have asked court to act expeditiously.

I provide this chronology as it clearly shows CMP was put on notice the public land lease at Johnson Mt and the West forks was in jeopardy. Waiting until now to explore and permit alternative routes is frankly poor planning and arrogance on the CMP's part.

**NECEC clearing on Segment 1.** I personally have visited Segment 1 of the NECEC six times and flown over it twice in 2021. I have attached a report I generated that includes my observations on the corridor cutting. My observations clearly contradict CMP's comments much the corridor cutting is complete.

The permit allows the NECEC to develop 150 foot right of way for the poles and wires. To date about 90-100 feet have been clear cut within the permitted area. This includes the 54 feet in the corridor center and the first forest taper zone of 16 feet on either side of the center cut. The remaining 64 feet which includes the next two taper zones or the next 32 feet on either side has yet to be cleared. This gives a total of 64 feet. Therefore, 42% has yet to be cleared. I have attached a report called the "Johnson Mt . report that clearly demonstrates these observations.

Vacating or suspending the permit in Segment 1 will ensure this area does not need to regenerate. Thus, protecting this part of the forest in the event CMP cannot secure an alternative route or succeed in the Maine Law Court.

**Underground Structure:** Today, the Pierce Atwood attorneys took the position that a conservation easement prohibition on structures doesn't apply below ground. As the Press Herald reported (link to article: [Maine regulator hears arguments over whether to suspend lease for power line - Portland Press Herald](#)):

The NECEC attorney, indicated that the restrictions applied to structures above ground, and that drilling below conservation land would be "a logical alternative."

But the Attorney General, who is statutorily charged with certain enforcement and interpretation authorities for all conservation easements in the State of Maine, recently took a contrary position. The Attorney General has moved to intervene in a case against the City of Belfast where the Attorney General opines that water pipes that will be buried underground are "structures" within the meaning of a conservation easement that prohibits structures in the intertidal zone. The Attorney General's motion to intervene (which is attached) itself attaches a letter from Assistant Attorney General Lauren Parker to the City of Belfast, which letter on page 3 takes the position that the term "structure" when used in a conservation easement should be read consistently with the Land Use Planning Commission's definition of structure to include "anything

constructed or erected with a fixed location on or in the ground". (Emphasis added). The Attorney General's motion has not yet been acted upon by the Court, but if granted, the Attorney General has filed, together with its motion to intervene, the attached Complaint that they propose to file if their intervention is granted. In that Complaint in paragraphs 16-18, the Attorney General of the State of Maine takes the position that underground pipes are "structures" within the meaning of a conservation easement's prohibition on structures.

The Maine Department of Environmental Protection should credit the interpretation expressed by the Attorney General of the State of Maine of the meaning of the word "structure" when used in a conservation easement, and should not credit the contrary interpretation advanced by the attorneys for CMP, which has no basis in law or in fact. Constructing a high impact transmission line under conservation lands is plainly something "constructed or erected with a fixed location on or in the grounds" that, in the view of the Maine Attorney General, is prohibited by a conservation easement's prohibition on "structures" within the protected property.

In conclusion:

1. All construction must stop until an alternative route is identified and successfully permitted.
2. The permit voided or suspended needs to be done now to protect the remaining part of the Corridor in segment 1 that has yet to be cleared.
3. It should be noted a buried line is in fact a "structure" per the Attorney General.

It is so clear to me that the DEP needs to void or suspend this permit now.

Tom (please consider this my electronic signature)

Thomas Saviello  
Wilton Maine  
[Drtom16@hotmail.com](mailto:Drtom16@hotmail.com)

207-645-3420

STATE OF MAINE  
WALDO, ss.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. WALSC-RE-2021-07

JEFFREY R. MABEE, *et al.*, )  
 )  
 Petitioners/Plaintiffs, )  
 )  
 v. )  
 )  
 CITY OF BELFAST, MAINE, *et al.*, )  
 )  
 Respondent/Defendant. )

**ATTORNEY GENERAL'S  
MOTION TO INTERVENE  
WITH INCORPORATED  
MEMORANDUM OF LAW**

Pursuant to 33 M.R.S. § 478(1)(D) (2021), 5 M.R.S. § 194 (2021), and M.R. Civ. P. 24(a)(1), Aaron M. Frey (the Attorney General), in his official capacity as the Attorney General of the State of Maine, moves to intervene in the above-captioned matter for the reasons set forth below.

Title 33 M.R.S. § 478(1)(D) “confers upon the Attorney General an unconditional right to intervene” in an action affecting a conservation easement when that action is brought by an entity other than the Attorney General. *Windham Land Trust v. Jeffords*, 2009 ME 29, ¶¶ 13-15, 967 A.2d 690. Because this matter is an action affecting a conservation easement brought by an entity other than the Attorney General, the Attorney General has a right to intervene in same.

Plaintiffs Jeffrey Mabee, Judith Grace, the Friends of the Harriet L. Hartley Conservation Area (the Friends), and Upstream Watch filed a complaint against the City of Belfast contesting the City’s taking of plaintiffs’ respective property interests in certain intertidal land. Title to that intertidal land is disputed and being adjudicated by this Court in *Mabee v. Nordic Aquafarms Inc.*, RE-2019-18 (Super. Ct., Waldo Cty.). The Friends’ property interest in the disputed intertidal land is a conservation easement. (Pls.’ Compl. ¶¶ 68-72, 184-91, 200-01.) Count VII of plaintiffs’



complaint alleges Interference with Conservation Easement. (*Id.* ¶¶ 184-91.) In Count VII, plaintiffs aver that the City, through its condemnation, is attempting to terminate a conservation easement without complying with the statutorily mandated process for terminating a conservation easement set forth in 33 M.R.S. § 477-A(2)(A) and (B) and 33 M.R.S. § 478. (*Id.* ¶¶ 186, 191.)

Maine’s conservation easement statute, 33 M.R.S. §§ 476 to 479-C (2021), states that “Amendments and terminations of a conservation easement may occur *only* pursuant to this subsection.” 33 M.R.S. § 477-A(2) (emphasis added). Subsection 477-A(2)(B) provides:

A conservation easement may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the Attorney General is made a party.

Title 33 M.R.S. § 478(3) further provides that “[t]he court may permit termination of a conservation easement or approve amendment to a conservation easement that materially detracts from the values it serves, as provided in section 477-A, subsection 2, paragraph B.” Maine’s conservation easement statute does not identify any exceptions to its requirement that terminating a conservation easement requires court approval in an action in which the Attorney General is made a party.

In a letter dated July 13, 2021, the City asked the Office of the Attorney General (the OAG) to confirm that it would not take the position that certain real estate transactions (e.g., condemning the conservation easement and conveying to Nordic Aquafarms Inc. an easement that authorizes uses of the disputed intertidal land that are prohibited by the conservation easement) require court approval. In an email dated August 9, 2021, the OAG explained that, at least preliminarily, the OAG could not provide the requested confirmation. In the attached letter to the City dated September 27, 2021, the OAG confirms its position that, assuming the validity of the conservation easement and the City’s condemnation of same, the City’s condemnation of the conservation

easement cannot and does not terminate the conservation easement or amend it in a manner so as to materially detract from the conservation values intended for protection.

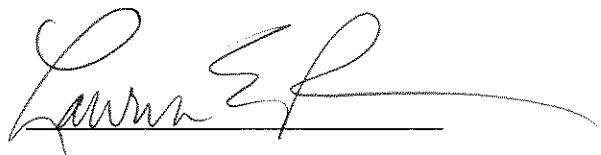
Whether a municipality can terminate a conservation easement by condemnation alone (i.e., without obtaining court approval in action in which the Attorney General is made a party) is, to the best of the OAG's knowledge, a question of first impression in Maine. Since the OAG's initial email to the City, the City has condemned the conservation easement and conveyed to Nordic Aquafarms Inc. an easement that authorizes uses that are prohibited by the conservation easement. In their defense against plaintiffs' motion for a preliminary injunction, the City contends that it may terminate a privately held conservation easement through condemnation and without court approval in an action in which the Attorney General is a party. (City's Opp. to Mtn. for Prelim. Inj. 17-19.) The Attorney General disagrees. Pursuant to the plain language of 33 M.R.S. § 477-A(2)(B), the court alone is vested with the power to terminate a conservation easement. And the Attorney General must be made a party to any such action.

Because this matter is an action affecting a conservation easement and because the Attorney General has an unconditional right to intervene in same, the Attorney General requests that this Court grant his motion to intervene. If it is valid, the conservation easement remains in force until such time as a court terminates it in an action in which the Attorney General is made a party. Pursuant to M.R. Civ. P. 24(a), the Attorney General's complaint seeking a declaration to this effect and to enforce the conservation easement is attached.

Dated: September 30, 2021

Respectfully submitted,

AARON M. FREY  
Attorney General

A handwritten signature in black ink, appearing to read "Aaron M. Frey", written over a horizontal line.

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**NOTICE**

**Pursuant to Rule 7(b)(1), notice is hereby given that any matter in opposition must be filed no later than 21 days after the filing of the enclosed motion unless another time is provided by the Maine Rules of Civil Procedure or set by the Court. Your failure to file a timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.**

AARON M. FREY  
ATTORNEY GENERAL



STATE OF MAINE  
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September 27, 2021

Kristin M. Collins, Esq.  
Preti Flaherty Beliveau & Pachios, LLP  
45 Memorial Circle  
Augusta, ME 04330

Re: Conservation Easement Recorded in the Waldo County Registry of Deeds, Book 4367,  
Page 273

Dear Ms. Collins,

Per William Kelly's letter dated July 13, 2021, the City of Belfast has requested the Office of the Attorney General (the OAG) confirm that it will not initiate any action pursuant to 33 M.R.S. § 478(1)(D)(4) or take the position that court approval of real estate transactions as to certain disputed intertidal land is necessary pursuant to 33 M.R.S. § 477-A(2)(B). Since my preliminary email response to Mr. Kelly, dated August 9, 2021, I have reviewed the information provided by the City in support of its request. Based on that review, the OAG declines to provide the requested confirmation. Instead, this letter confirms the OAG's position that, assuming the validity of the subject conservation easement and the City's condemnation of same, the City's condemnation of the conservation easement does not terminate that real property interest because, pursuant to 33 M.R.S. § 477-A(2)(B), only a court may terminate a conservation easement.

### Background

Based on the information provided by the City, the OAG understands as follows.

#### 1. *Disputed Ownership of Intertidal Land*

Nordic Aquafarms Inc. (Nordic) has obtained various federal, state, and local approvals to construct, operate, and maintain a land-based recirculating aquaculture system. The aquaculture system would consist of a primary upland facility site in Belfast and a seawater access system. The seawater access system would include one water discharge pipe and two water intake pipes that would run from the upland facility, cross intertidal land, and extend onto state-owned submerged lands in Penobscot Bay. Both Jeffrey Mabee and Judith Grace and Richard Eckrote and Janet Eckrote have claimed ownership of the disputed intertidal land where Nordic proposes

to bury its pipes. The Superior Court is adjudicating that title dispute in *Mabee v. Nordic Aquafarms, Inc.*, RE-2019-18 (Super. Ct., Waldo County).

## 2. *The Conservation Easement*

In April 2019, Jeffrey Mabee and Judith Grace conveyed to Upstream Watch a perpetual conservation easement over the disputed intertidal land, as further described in the Waldo County Registry of Deeds, Book 4367, Page 273. See 33 M.R.S. § 476(1) (defining "conservation easement").<sup>1</sup> As a threshold matter, the disputed intertidal land is not subject to the conservation easement unless Mabee and Grace owned that land at the time they granted the conservation easement to Upstream Watch. See *Almeder v. Town of Kennebunkport*, 2019 ME 151, ¶ 28, 217 A.3d 1111 ("[A] grantor may not convey more than what he or she owns."). As stated above, the Superior Court is adjudicating whether Mabee and Grace owned the disputed intertidal land at the time they conveyed the conservation easement to Upstream Watch. See *Mabee v. Nordic Aquafarms, Inc.*, RE-2019-18 (Super. Ct., Waldo County).

If valid, the conservation easement prohibits Nordic's seawater access system on the property subject to the conservation easement. The purposes of the conservation easement are to:

1. Preserve the Protected Property in perpetuity as open space and free from structures of any sort, especially any principal or accessory structures erected, constructed or otherwise located in furtherance of any commercial or industrial purpose.
2. Preserve the property in its natural condition. The term 'natural condition' as referenced in this . . . Conservation Easement shall mean the condition of the Protected Property as it exists at the time of this Conservation Easement, or other changes that may occur to the Protected Property related to restoration of the adjacent Little River as a natural Fishway.
3. Provide a significant public benefit by protecting and preserving, in perpetuity, the Protected Property in its present and historic, primarily undeveloped, natural condition.

To achieve its purposes, the conservation easement expressly prohibits, among other things: filling, excavating, and removing natural materials; any alterations of topography; vegetation removal, except by the grantor in limited instances; industrial activities; commercial activities; and structures.

Based on available information, Nordic's aquaculture system could be characterized as either a commercial or industrial use, or perhaps both. See, e.g., *Merrill v. Saco Valley Land Trust*,

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<sup>1</sup> "'Conservation easement' means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic or open space values of real property; assuring its availability for agricultural, forest, recreational or open space use; protecting natural resources; or maintaining or enhancing air or water quality of real property." 33 M.R.S. § 476(1).

RE-2016-44, 2017 WL 2674057, \*5-\*6 (Super. Ct., York Cty., Apr. 29, 2017) (discussing the meaning of "commercial" as used in a conservation easement that did not define the term). Nordic's pipes are structures. *See* Black's Law Dictionary (defining "structure" as "[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together"); *see also* 12 M.R.S. § 682(4) (defining "structure" for purposes of the Land Use Planning Commission to mean "anything constructed or erected with a fixed location on or in the ground, including, but not limited to, buildings, mobile homes, retaining walls, billboards, signs, piers and floats"). Further, Nordic would need to excavate or remove natural materials, including vegetation present, to bury the pipes in the intertidal zone, which activities the conservation easement also prohibits. If Mabee and Grace owned the disputed intertidal land at the time they conveyed the conservation easement, multiple provisions of the conservation easement prohibit Nordic's seawater access system on that land.

In November 2019, Upstream Watch assigned the conservation easement to the Friends of the Harriet L. Hartley Conservation Area (the Friends). That assignment is recorded in the Waldo County Registry of Deeds, Book 4435, Page 344.

### *3. City Agreements with Nordic*

In April 2021, the Belfast Water District, the City, and Nordic executed the Fourth Amendment to Evaluation Agreement and Options and Purchase Agreement (the Fourth Amendment).<sup>2</sup> The Fourth Amendment obligates the City to clear any title defects to the disputed intertidal land to facilitate Nordic's acquisition of necessary project rights. The Fourth Amendment defines "necessary project rights" to mean:

fee or easement rights sufficient for a perpetual subsurface easement for the purpose of maintaining, owning, and operating water pipes and related equipment, including in connection therewith, installation of culverts, pipes, gaskets, pumps, valves, and other equipment, together with an easement for the purpose of constructing, grading, excavating, and performing earth work as may be necessary to construct, install and maintain such pipes, gaskets, pumps, valves and other equipment as required by any approvals issued by any municipal, state or federal authorities for the installation and maintenance thereof.

In July 2021, the City and Nordic executed a Purchase and Sale Agreement pursuant to which the City agreed to convey to Nordic an easement over the disputed intertidal land for the installation, operation, and maintenance of Nordic's seawater access system along with a temporary construction easement (the proposed Nordic easement). The proposed Nordic easement would also convey to Nordic the right to remove vegetation and change the grade of the property. The Purchase and Sale Agreement requires that the City convey the proposed Nordic easement to Nordic free from specified title defects, including any right, title, and interest of the Friends.

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<sup>2</sup> The OAG has not been provided with nor reviewed the Evaluation Agreement and Options and Purchase Agreement or the first, second, and third amendments to that agreement. Because the scope of this letter is limited, the letter does not recount all aspects of those agreements.

#### 4. *City's Condemnation of Disputed Intertidal Land*

In August 2021, the City condemned the Friends' property interest in the disputed intertidal land. The City's Condemnation Notice states that the City is acting pursuant to 30-A M.R.S. § 3101, 23 M.R.S. §§ 3021 *et. seq.*, and 1 M.R.S. § 816. Neither the City's Condemnation Notice nor its Condemnation Certificate refer to the Friends' real property interest as the conservation easement, but the OAG assumes that the City condemned the conservation easement. Among other findings set forth in its Condemnation Certificate, the City incorporated the Fourth Amendment, finds that the City has been unable to purchase rights to the alleged title defects from certain parties, and further finds that the exercise of eminent domain is "necessary to clear ongoing alleged title defects to its land described in Schedules A and B" and obtain specified, recited benefits. The City's Condemnation Certificate does not specify what effect the City believes the condemnation has on the conservation easement.

Mabee and Grace are contesting the City's exercise of its eminent domain authority over the disputed intertidal land on numerous bases, including, without limitation, as violating 33 M.R.S. §§ 477-A(2)(B) and 478 (Count VII).<sup>3</sup> *Mabee v. City of Belfast*, BELSC-RE-2021-007 (Super. Ct., Waldo Cty.).

#### 5. *City's Conveyance of the Nordic Easement*

In September 2021, the City conveyed to Nordic a permanent easement appurtenant over the disputed intertidal land, which easement is recorded in the Waldo County Registry of Deeds, Book 4704, Page 158 (the Nordic easement). The Nordic easement, if valid, grants to Nordic the right to install, operate, and maintain its aquaculture piping along with a temporary construction easement. The Nordic easement also affords Nordic the right to remove vegetation and change the grade of the property.

### **Discussion**

As laid out above, the City (1) agreed to clear title on a disputed parcel of intertidal land that may be subject to a conservation easement and convey to Nordic the Nordic easement, which allows Nordic to use the property for its seawater access system; (2) condemned the conservation easement pursuant to 30-A M.R.S. § 3101, 23 M.R.S. §§ 3021 *et. seq.*, and 1 M.R.S. § 816; and (3) conveyed to Nordic the Nordic easement. Assuming the conservation easement is valid, it prohibits Nordic's use of the property pursuant to the Nordic easement (i.e., for the seawater access system). The City has asked the OAG to confirm that the City may condemn the conservation easement and convey the Nordic easement without obtaining court approval pursuant to 33 M.R.S. § 477-A(2)(B).

Title 30-A M.R.S. § 3101 authorizes the City to "acquire real estate or easements for any public use by using the condemnation procedure for town ways, as provided in Title 23, chapter 304." Assuming that "easements" as used in 30-A M.R.S. § 3101 includes conservation easements, the City arguably may condemn for public use a conservation easement held by a private entity

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<sup>3</sup> The complaint in *Mabee v. City of Belfast* also contends the City's condemnation violates 1 M.R.S. § 816 (Count I), Maine Constitution Art. I, § 21 (Count II), and 30-A M.R.S. § 3101(2) (Count VI).

provided such condemnation does not violate 1 M.R.S. § 816.<sup>4</sup> Before 2007, the process used by a municipality to condemn a conservation easement may have been fully prescribed by 23 M.R.S. §§ 3021-3035.<sup>5</sup> The condemned conservation easement would "pass to the municipality upon service of the order of condemnation and check or upon recordation in accordance with section 3024, whichever occurs first." 23 M.R.S. § 3023. Before 2007, a municipality's purported condemnation of a privately held conservation easement potentially could have modified or terminated the conservation easement "to the extent that the taking permits a use inconsistent with the continuance of the servitude." Restatement (Third) of Property (Servitudes) § 7.8 (2000).

In 2007, however, the Legislature amended Maine's conservation easement statute, 33 M.R.S. §§ 476 to 479-C, to specifically address amendments and terminations of conservation easements. P.L. 2007, ch. 412. As amended, Maine's conservation easement statute now vests in the courts the power to terminate a conservation easement or amend it in a manner that materially detracts from the conservation values intended for protection. Importantly, it provides: "Amendments and terminations of a conservation easement may occur *only* pursuant to this subsection." 33 M.R.S. § 477-A(2) (emphasis added). Subsection 477-A(2)(B) further provides:

A conservation easement may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the Attorney General is made a party.

Title 33 M.R.S. § 478(3) further states that "[t]he court may permit termination of a conservation easement or approve amendment to a conservation easement that materially detracts from the values its serves, as provided in section 477-A, subsection 2(B)." Maine's conservation easement statute does not identify any exceptions to its requirement of court approval. Nor did P.L. 2007, ch. 412 amend 30-A M.R.S. § 3101 or 23 M.R.S. §§ 3021-3035 to provide that a municipality is exempt from 33 M.R.S. § 477-A(2)(B) when condemning a conservation easement.

Alone, a municipality's condemnation of a conservation easement does not necessarily require court approval provided the conservation easement remains intact: Municipalities may hold conservation easements and conservation easements may be amended without court approval provided the amendment does not materially detract from the conservation values intended for protection. 33 M.R.S. § 476(2)(A) (defining "holder" to include "a governmental body empowered to hold an interest in real property under the laws of this State or the United States"); *see* 33 M.R.S. § 477-A(2), (2)(B) (requiring, as to conservation easement amendments, court approval of amendments that materially detract from the conservation values intended for protection). For example, if the Nordic easement did not authorize uses prohibited by the conservation easement, and assuming the City's exercise of its eminent domain authority was valid, the City presumably could condemn the conservation easement and become the holder, without any need to terminate, partially terminate, or amend the conservation easement in a manner so as to materially detract from the values intended for protection. But where, as here, the conservation easement prohibits

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<sup>4</sup> Title 1 M.R.S. § 816 limits the use of eminent domain in response to *Kelo v. City of New London*, 545 U.S. 469 (2005). L.D. 1870 (122d Legis. 2006).

<sup>5</sup> This letter does not consider the application of charitable trust principles to the condemnation of a privately held conservation easement.

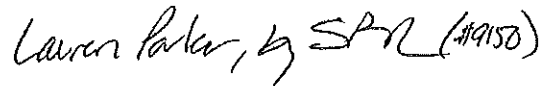


the uses authorized by the Nordic easement, the conservation easement must be terminated or amended before Nordic can exercise the rights conveyed by the Nordic easement. And as discussed above, since 2007 the only entity with the authority to terminate, partially terminate, or amend the conservation easement to allow Nordic's use of the property pursuant to the Nordic easement is a court. 33 M.R.S. § 477-A(2), (2)(B); *see* 33 M.R.S. § 478.

Assuming its validity, the conservation easement remains in effect and prohibits Nordic's use of the disputed intertidal land pursuant to the Nordic easement until such time as a court terminates or amends the conservation easement to allow Nordic's use of the property in an action in which the Attorney General is made a party, or holds that 33 M.R.S. § 477-A(2) and (2)(B) do not apply when a municipality condemns a conservation easement pursuant to 30-A M.R.S. § 3101.

The Office of the Attorney General takes seriously its role in the proper administration of conservation easements. Thank you for your interest in this matter and please feel free to be in touch with additional questions.

Sincerely,



Lauren E. Parker  
Assistant Attorney General

cc: Stephen E. Langsdorf, Esq.  
Sigmund D. Schutz, Esq.  
William S. Kelly, Esq.  
Scott W. Boak, Chief, Natural Resources Division  
Linda Conti, Chief, Consumer Protection Bureau



## **PARTIES**

2. Intervenor-Plaintiff Aaron M. Frey is the Attorney General of the State of Maine and files this complaint in his official capacity as the Attorney General pursuant to 33 M.R.S. § 478(1)(D) (2021), 5 M.R.S. § 194 (2021), and the powers vested in him at common law.

3. Plaintiffs Jeffrey Mabee and Judith Grace are individuals who reside in Belfast, Maine, and who claim title to certain intertidal land in Belfast and Northport (the disputed intertidal land).

4. Plaintiff Upstream Watch is a Maine nonprofit corporation to which Plaintiffs Jeffrey Mabee and Judith Grace conveyed a conservation easement, including over the disputed intertidal land.

5. Plaintiff Friends of the Harriet L. Hartley Conservation Area (the Friends) is a Maine nonprofit corporation to which Upstream Watch assigned the conservation easement.

6. Defendant City of Belfast is a municipal corporation in the State of Maine.

7. Defendant-Intervenor Nordic Aquafarms Inc. (Nordic Aquafarms) is a business corporation incorporated in Delaware and registered to do business in Maine.

## **JURISDICTION AND VENUE**

8. The Court has jurisdiction over this matter pursuant to 4 M.R.S. § 105 (2021), 14 M.R.S. §§ 5951-5963 (2021), 14 M.R.S. § 6051(13) (2021), 33 M.R.S. §§ 477-A(2) and 478.

9. Venue is proper in Waldo County pursuant to 14 M.R.S. § 501 (2021) because Plaintiffs Mabee and Grace reside in Waldo County.

## FACTS

10. Mabee and Grace claim ownership of the disputed intertidal land, title to which is being adjudicated by this Court in *Mabee v. Nordic Aquafarms, Inc.*, RE-2019-18 (Super. Ct., Waldo Cty.).

11. On April 29, 2019, Mabee and Grace conveyed a conservation easement to Upstream Watch, which conservation easement is recorded in the Waldo County Registry of Deeds, Book 4367, Page 273.

12. The purposes of the conservation easement include:

Preserve the Protected Property in perpetuity as open space and free from structures of any sort, especially any principal or accessory structures erected, constructed or otherwise located in furtherance of any commercial or industrial purpose.

Preserve the property in its natural condition. The term 'natural condition' as referenced in this . . . Conservation Easement shall mean the condition of the Protected Property as it exists at the time of this Conservation Easement, or other changes that may occur to the Protected Property related to restoration of the adjacent Little River as a natural Fishway.

Provide a significant public benefit by protecting and preserving, in perpetuity, the Protected Property in its present and historic, primarily undeveloped, natural condition.

13. The conservation easement expressly prohibits, among other things: filling, excavating, and removing natural materials; any alterations of topography; vegetation removal, except by the grantor in limited instances; industrial activities; commercial activities; and structures.

14. If Mabee and Grace owned the disputed intertidal land at the time they conveyed the conservation easement to Upstream Watch, then the property subject to the conservation easement includes the disputed intertidal land.

15. In November 2019, Upstream Watch assigned the conservation easement to the Friends, which assignment is record in the Waldo County Registry of Deeds, Book 4435, Page 344.

16. Nordic Aquafarms proposes to install water intake and water discharge pipes on the disputed intertidal land as part of its proposed land-based recirculating aquaculture system.

17. Nordic Aquafarms' proposed water intake and water discharge pipes are structures.

18. To install the water intake and water discharge pipes on the disputed intertidal land, Nordic Aquafarms plans to remove natural material from the disputed intertidal land and then cover the pipes with fill.

19. Nordic Aquafarms' proposed use of the disputed intertidal land is a commercial use.

20. Nordic Aquafarms' proposed use of the disputed intertidal land is an industrial use.

21. The conservation easement, if valid, prohibits Nordic Aquafarms' proposed use of the disputed intertidal land.

22. The City of Belfast condemned Mabee's and Grace's interest in the disputed intertidal land.

23. The City of Belfast condemned the Friends' interest in the disputed intertidal land (i.e., the conservation easement).

24. The City of Belfast conveyed to Nordic Aquafarms an easement over the disputed intertidal land (the Nordic easement).

25. The Nordic easement, if valid, allows Nordic Aquafarms the right to install, operate, and maintain its water intake and water discharge pipes on the disputed intertidal land and includes a temporary construction easement.

26. The Nordic easement, if valid, affords Nordic Aquafarms the right to remove vegetation and change the grade of the property.

27. The Nordic easement, if valid, would allow the disputed intertidal land to be used in a manner that violates the conservation easement.

28. The conservation easement, if valid, would need to be terminated or amended to allow Nordic Aquafarms' proposed use of the of the disputed intertidal land.

29. Title 33 M.R.S. § 477-A(2) provides: "Amendments and terminations of a conservation easement may occur only pursuant to this subsection."

30. Title 33 M.R.S. § 477-A(2)(B) provides in pertinent part: "A conservation easement may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the Attorney General is made a party."

31. Title 33 M.R.S. § 478(3) provides in pertinent part: "The court may permit termination of a conservation easement or approve amendment to a conservation easement that materially detracts from the values its serves, as provided in section 477-A, subsection 2(B)."

32. No person has filed a court action, in which the Attorney General is named as a party, to terminate the conservation easement described in this Complaint to allow Nordic Aquafarms' proposed use of the disputed intertidal land.

33. No person has filed a court action, in which the Attorney General is named as a party, to amend the conservation easement described in this Complaint to allow Nordic Aquafarms' proposed use of the disputed intertidal land.

34. The City of Belfast claims that it may terminate by condemnation a privately held conservation easement such as the conservation easement described in this Complaint without seeking court approval in an action in which the Attorney General is made a party.

**COUNT I**  
**(Declaratory judgment)**  
**(Violation of 33 M.R.S. § 477-A(2) and (2)(B))**

35. The Attorney General repeats and realleges the allegations set forth in the preceding paragraphs of this Complaint.

36. Title 33 M.R.S. § 477-A(2) and (2)(B) vests in the courts alone the power to terminate a conservation easement.

37. Pursuant to 33 M.R.S. § 477-A(2)(B), the City may terminate a privately held conservation easement such as the conservation easement described in this Complaint only by receiving court approval in an action in which the Attorney General is a party.

38. Title 33 M.R.S. § 477-A(2)(B) does not admit of any exceptions to its rule that only a court may terminate a conservation easement.

39. The City of Belfast contends that through condemnation it may terminate a privately held conservation easement such as the conservation easement described in this Complaint without obtaining court approval in an action in which the Attorney General is a party.

40. The City of Belfast conveyed the Nordic easement, which allows uses of the disputed intertidal land prohibited by the conservation easement, without terminating the conservation easement described in this Complaint pursuant to 33 M.R.S. § 477-A(2)(B).

41. A present dispute exists between the Attorney General and the City of Belfast as to whether the City's condemnation of a privately held conservation easement—namely, the conservation easement described in this Complaint—is exempt from 33 M.R.S. § 477-A(2)(B).

42. A present dispute exists between the Attorney General and the City of Belfast as to whether the City's condemnation of the conservation easement described in this Complaint terminated that conservation easement.

**COUNT II**  
**(Declaratory judgment)**  
**(Violation of Conservation Easement)**

43. The Attorney General repeats and realleges the allegations set forth in the preceding paragraphs of this Complaint.

44. If both the conservation easement described in this Complaint and the Nordic easement are valid, then Nordic Aquafarms' use of the property pursuant to the Nordic easement is prohibited by the conservation easement.

45. If both the conservation easement described in this Complaint and the Nordic easement are valid, then Nordic Aquafarms' use of the property pursuant to the Nordic easement will violate the conservation easement.

**RELIEF REQUESTED**

Wherefore, the Attorney General respectfully requests that this Court enter judgment in his favor and against the City of Belfast as follows:

- A. Declare that 33 M.R.S. § 477-A(2)(B) prohibits the City of Belfast from unilaterally terminating a privately held conservation easement;
- B. Declare that the City of Belfast's condemnation of the conservation easement described in this Complaint did not terminate that conservation easement because it was not approved by a court in an action in which the Attorney General was made a party;
- C. Declare that the City of Belfast's condemnation of the conservation easement described in this Complaint did not amend that conservation easement so as to allow Nordic Aquafarms' use of the property subject to the conservation easement because it was not approved by a court in an action in which the Attorney General was made a party;
- D. Declare that the conservation easement described in this Complaint remains valid and in effect as to the disputed intertidal land;
- E. Declare that Nordic Aquafarms' use of the disputed intertidal land pursuant to the Nordic easement will violate the conservation easement described in this Complaint;

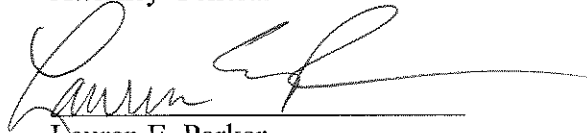


- F. Enjoin Nordic Aquafarms from using the disputed intertidal land until such time that this Court either determines that the conservation easement described in this Complaint is not valid or approves an amendment or termination of that conservation easement so as to allow Nordic Aquafarms' use of the disputed intertidal land in an action in which the Attorney General is a party;
- G. Award the Attorney General his costs of suit, as permitted by 14 M.R.S. § 5962 (2021); and
- H. Award the Attorney General such other and further relief as this Court deems just and proper.

Dated: September 30, 2021

Respectfully submitted,

AARON M. FREY  
Attorney General



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