STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

NORDIC AQUAFARMS, INC.	)	
Belfast ***and Northport***	)	REPLY TO NORDIC'S RESPONSE
Waldo County, Maine	)	TO UPSTREAM WATCH'S
	)	PETITION TO REVOKE OR
A-1146-71-A-N	)	SUSPEND AND SUSPENSION
L-28319-26-A-N	)	REQUEST AND
L-28319-TG-B-N	)	SEPARATE PETITION TO
L-28319-4-E-C-N	)	REVOKE SUBMITTED BY
L-28319-L6-D-N	)	THE FRIENDS OF THE HARRIET
L-28319-TW-E-N	)	L. HARTLEY CONSERVATION
W-009200-6F-A-N	)	AREA AND INTERVERNORS
	)	MABEE AND GRACE
	)	

The Friends of the Harriet L. Hartley Conservation Area and Intervenors Jeffrey R. Mabee and Judith B. Grace (hereinafter "Petitioners" or "Petitioners Mabee-Grace and Friends") file their Reply to "Nordic's Response to Upstream Watch's Petition to Revoke or Suspend and Suspension Request," and file their separate Petition to Revoke the above-referenced permits and licenses, granted by the Board of Environmental Protection ("BEP" or "Board") in November 2020. Petitioners Mabee-Grace and Friends submit a Reply to Nordic's 4-7-2023 filing to correct errors of fact and law contained in that submission. Petitioners Mabee-Grace and Friends also submit their separate Petition to Revoke, with supporting exhibits, pursuant to 38 M.R.S. § 342(11-B)(B) and 06-096 C.M.R. ch. 2, §§ 25 and 27(B).

Suspension: Commissioner Loyzim should *immediately* suspend the above-referenced permits and licenses pursuant to 38 M.R.S. § 342(11-B)(E) and 06-096 C.M.R. ch. 2, § 27(E).[1]

Here, Petitioners Mabee-Grace and Friends have advocated consistently and repeatedly since 2019 for suspension of all actions by the Department (meaning *both* the Commissioner and Board)[2] on Nordic's applications for permits and licenses until resolution of the litigation concerning ownership and other property rights. Such a suspension is consistent with the requirements in *Tomasino v. Town of Casco,* 2020 ME 96, 237 A.3d 175, and would avoid the needless and premature expenditure of limited public and private resources. Petitioners Mabee-Grace and Friends support immediate suspension of the permits and licenses granted by the Board in 2020 for the same reasons stated in Petitioners' earlier requests to suspend review of, or dismiss, Nordic's permit and license applications.

Upstream Watch ("Upstream") has presented significant, substantial, competent evidence to support suspension in its Petition. Now, Applicant Nordic has itself requested suspension pursuant to "changed conditions and circumstances."

[1] Petitioners support immediate suspension of the permits and licenses granted by the Board in 2020 and file their separate Petition to Revoke, although Petitioners remain concerned that the pending Law Court 80C appeal has terminated the Commissioner's jurisdiction to suspend or revoke the permits and licenses, in the absence of a request to, and an order from, the Law Court remanding the permits and licenses to the Department for further action. Petitioners submit that, prior to the April 21, 2023 deadline for filing responses in the Law Court relating to justiciability and the impact of the 2-16-2023 Law Court decision in *Mabee v. Nordic Aquafarms, Inc.,* 2023 ME 15, the Board of Environmental Protection and/or Department of Environmental Protection should request a remand of all permits and licenses for the purpose of suspension and revocation by the Commissioner. See, e.g. *York Hosp. v. Dep't of Health & Hum. Servs.,* 2008 ME 165, ¶¶ 33-37, 959 A.2d 67, 74 (We have clearly limited an agency's authority to exercise power over final agency actions that have been appealed); *Gagne v. City of Lewiston,* 281 A.2d 579, 583 (Me.1971) (The appeal terminates the authority of the tribunal to modify its decision unless the court remands the matter to the tribunal for its further action, thereby reviving its authority; *Eastern Maine Medical Center v. Health Care Finance Comm'n,* 601 A.2d 99, 101 (Me.1992) ("[A]n appeal from final agency action automatically removes jurisdiction from the administrative agency to the court system"); and *Portland Sand & Gravel, Inc. v. Town of Gray,* 663 A.2d 41, 43 (Me.1995) ("[A]n agency loses jurisdiction over a pending matter .... when a party aggrieved by a decision of the agency seeks direct judicial review of that decision in the Superior Court.").

[2] 38 M.R.S. § 341-A(2)

Because both Upstream *and Nordic*, as well as Petitioners Mabee-Grace and Friends, agree that "changed conditions and circumstances" justify suspension of the permits and licenses granted by the Board to Nordic in 2020 pursuant to 06-096 C.M.R. ch. 2, § 27(E), **there is no basis for the Commissioner *not* to suspend Nordic's permits and licenses immediately pursuant to the acknowledged "changed conditions and circumstances."**

Revocation: While immediate suspension of the above-referenced permits and licenses is necessary and appropriate pursuant to "changed conditions and circumstances," suspending Nordic's licenses and permits should not be ordered *in lieu of* revocation, but should be entered *until revocation* is ordered.

Upstream Watch has presented significant, substantial, competent evidence justifying revocation of the above-referenced permits and licenses in its Petition. Likewise, Petitioners Mabee-Grace, Friends and Upstream have presented ample evidence in the Board, Superior Court and Law Court proceedings demonstrating why these permits should never have been issued in the first place. Petitioners' previously-filed evidence in support of denying Nordic's applications for permits and licenses for lack of title, right or interest in the land proposed for development and use, also supports revoking those same permits and licenses now.

There can be no finding of "sufficient" title, right or interest, where the applicant has been judicially determined to have no actual title, right or interest in the land proposed for development and use.

This is particularly the case where, as here, the Law Court has definitively determined that: (i) the Eckrotes never owned the intertidal land on which Lot 36 fronts and therefore never had the legal capacity to grant Nordic an easement or option to use that intertidal land; and (ii) Lot 36 has been burdened since 1946 by a "residential purposes only" servitude, that runs with the land and

binds Fred R. Poor's successors in interest (including the Eckrotes, the City of Belfast and Nordic) from conducting any for-profit business on Lot 36 in the absence of agreement of the current holders of Harriet L. Hartley's retained dominant estate (including Mabee-Grace and Friends) – *and Mabee-Grace and Friends no not agree*.

Nordic's attempt to evade revocation should be rejected, because leaving these permits and licenses in place, in the absence of Nordic having any legal ability to use those permits and licenses, places a cloud on Petitioners Mabee and Grace's and Friends' property and property rights in the intertidal land and ignores their "residential purposes only" servitude on Lot 36. Such uncertainty creates the need for Petitioners to file additional litigation to enjoin any development or use of this land by Nordic under the authorizations granted by the permits and licenses.[3]

Revocation is thus in the interest of preserving limited public and private resources and judicial and agency economy.

ARGUMENT IN SUPPORT OF REVOCATION

I. Background

On February 16, 2023, the Law Court determined that: "Mabee and Grace own the intertidal land abutting their own upland property and the intertidal land abutting the upland properties of the Schweikerts, the Eckrotes, and Morgan [Lots 37, 36 and 35 respectively]. Mabee and Grace's property is outlined in the solid and dashed green lines in Figure 5." *Mabee and Grace, et al. v. Nordic Aquafarms, Inc., et al.,* 2023 ME 15, ¶¶ 14 and 17 (image of Figure 5 below). The Law Court also determined that Mabee and Grace created an enforceable conservation easement on their intertidal land that is held by Friends. *Id.* at ¶¶ 59, 61.

[3] *See, e.g. Mabee, Grace, Block and Friends v. City of Belfast, Nordic and DOT,* BELSC-CV-2023-6.

That Decision establishes, *as a matter of law*, that Nordic does not have, and never could have, actual title, right or interest to use Belfast Tax Map 29, Lot 36 and the adjacent intertidal land in the manner authorized by the permits and licenses granted by the Board of Environmental Protection ("Board" or "BEP") in November 2020.

The legal impediments to the use of Lot 36 and the adjacent intertidal land have not been, and *cannot* be, removed -- *even by the ultra vires use of eminent domain by the City of Belfast to benefit Nordic*. Accordingly, revocation of the permits and licenses granted to Nordic is the appropriate remedy for the Commissioner to direct, pursuant to 38 M.R.S. § 342(11-B)(B) and (E).

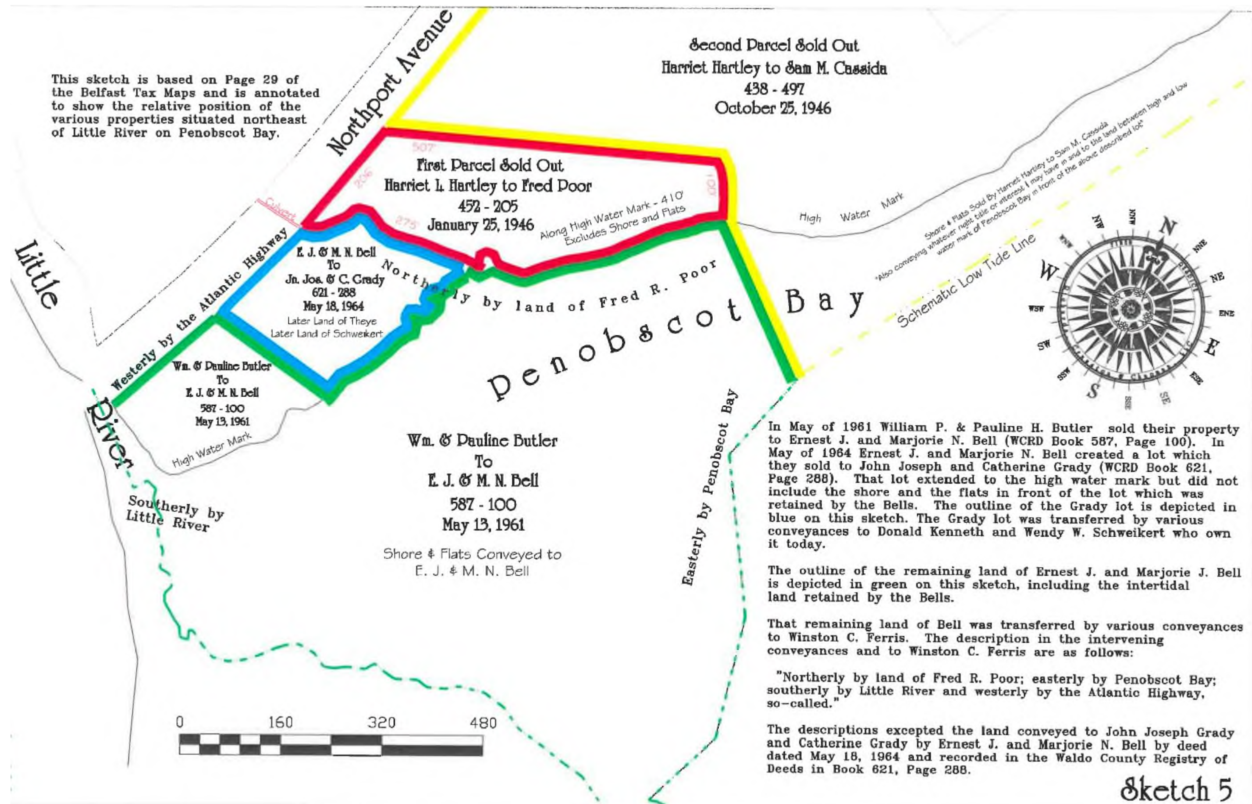

FIGURE 5

II. Revocation is necessary pursuant to 38 M.R.S. § 11-B(B) And Chapter 2, Section 27(B)

In addition to the grounds for revocation asserted by Upstream Watch, Petitioners Mabee-Grace and Friends assert that revocation of the above-referenced permits and licenses is necessary and appropriate pursuant to 38 M.R.S. § 342(11-B)(B) and 06-096 C.M.R. ch. 2, § 27(B), because Nordic has obtained its permits and licenses from the Board by misrepresenting and/or failing to disclose fully all relevant facts relating to the Eckrotes' and Nordic's title, right or interest ("TRI") -- *or lack thereof* -- in all land proposed for development and use.

In support of revocation pursuant to 38 M.R.S. § 11-B(B) and Chapter 2, Section 27(B), Petitioners Mabee-Grace and Friends submit that Nordic falsely claimed and failed to fully disclose all relevant facts to the Department and Board, *known to Nordic*, when Nordic and its counsel claimed that Nordic had "sufficient" title, right or interest to obtain and *retain* permits and licenses from the Department and Board of Environmental Protection.

Since 2018, Nordic and its counsel have known full-well that: (i) Richard and Janet Eckrote never owned the intertidal land on which Lot 36 fronts and therefore lacked the legal capacity to grant Nordic an easement to develop and use the intertidal land adjacent to Lot 36; and (ii) 12.5-acres of the land proposed for development and use on the inland side of Route One has at all times since 1973 been burdened by conditions and restrictions, *imposed by the State of Maine for the protection of a municipal water shed*. Those State-imposed conditions and restrictions include prohibiting construction of *any building* on this 12.5-acre parcel and a requirement to maintain this parcel in its "*natural condition*."

Here, Nordic obtained permits and licenses from the Department by misrepresenting or failing to disclose fully all relevant facts to the Commissioner and Board regarding Nordic's title, right or interest – *or lack thereof* – in either Lot 36 or this 12.5-acre parcel.

Pursuant to 06-096 C.M.R. ch. 2, § 11(D) an applicant must demonstrate *and maintain* sufficient title, right or interest in the land proposed for development and use throughout the permitting process. The Law Court defines the permitting process as including all stages of the litigation challenging final agency action granting permits, licenses and leases.[4] Chapter 2, Section 11(D) defines the requisite title, right or interest that an Applicant must have *and maintain*, in relevant part as follows:

> D. **Title, Right or Interest.** Prior to acceptance of an application as complete for processing, *an applicant shall demonstrate to the Department's satisfaction sufficient title, right or interest in all of the property that is proposed for development or use. An applicant must maintain sufficient title, right or interest throughout the entire application processing period.* Methods of proving title, right or interest include, but are not limited to, the following:
>
> (1) When the applicant owns the property, a copy of the deed(s) to the property must be supplied;
>
> (2) When the applicant has a lease or easement on the property, a copy of the lease or easement must be supplied. The lease or easement must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care, where required. *If the project requires a submerged lands lease from the State, evidence must be supplied that the lease has been issued, or that an application is pending*;
>
> (3) When the applicant has an option to buy or lease the property, a copy of the option agreement must be supplied. *The option agreement must be sufficient, as determined by the Department, to give rights to title, or a leasehold or easement of sufficient duration and terms to permit the proposed construction and use of the property including closure and post closure care, where required;*

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[4] *Madore v. Maine Land Use Regul. Comm'n*, 1998 ME 178, ¶ 17, 715 A.2d 157, 162 (A litigant must possess a present right, title, or interest in the regulated land which confers lawful power to use that land or control its use when invoking the jurisdiction of the court and throughout any period of appellate review.).

The Law Court has consistently held that a party may not seek judicial (or administrative) action concerning land use without having an interest in the property at issue. *See Halfway House, Inc.*, 670 A.2d 1377, 1379 (Me. 1996); *Walsh v. City of Brewer*, 315 A.2d 200, 207 (Me. 1974). Absent that interest, the applicant does not present an actual controversy to be resolved by judicial (or administrative) action. *Madore v. Maine Land Use Regulation Comm'n*, 1998 ME 178, ¶9, 715 A.2d. 157, 160-161. *See also, Homeward Residential, Inc. v. Gregor,* 2015 ME 108, ¶24, 122 A.3d 947, 954-955 ("The court could not decide the merits of the case when the plaintiff lacked standing. . . . Instead, the court could only dismiss the action. Because the court addressed the merits of the complaint for foreclosure in its judgment, we vacate the judgment in its entirety and remand for an entry of a dismissal without prejudice."); *Witham Family Ltd. P'ship*, 2015 ME 12, ¶7, 110 A.3d 642 ("Courts can only decide cases before them that involve justiciable controversies."); *Bank of Am., N.A. v. Greenleaf,* 2015 ME 127, ¶7-¶9, 124 A.3d 1122, 1124-1125; *Conservation Law Found. v. LePage,* 2018 Me. Super. LEXIS 156, *9-10.

> (4) When the applicant has eminent domain power over the property, *evidence must be supplied as to the ability and intent to use the eminent domain power to acquire sufficient title, right or interest to the site of the proposed development or use*;
>
> *The Department may return an application, after it has already been accepted as complete for processing, if the Department determines that the applicant did not have, or no longer has, sufficient title, right or interest*. No fees will be refunded if an application is returned for lack of continued title, right or interest.

(emphasis supplied).

As a consequence of the Law Court's 2-16-2023 Decision and other judicial actions, Nordic cannot demonstrate that it currently has actual or sufficient title, right or interest in the land required for development of its project as proposed for the following reasons:

- **Section 11(D)(1)**: It does not appear that Nordic supplied all relevant deeds to the Water District property as part of its applications. A review of the Major Projects website shows no deeds for this property were submitted by Nordic as a TRI supplement or with the applications initially. As a consequence, Nordic did not fully disclose that 12.5-acres of the BWD property was burdened with restrictions, imposed by the State of Maine in a 1973 deed from the Governor and Council, for the purpose of "protection of a municipal water shed." On March 10, 2022, Nordic was conveyed ownership in the intertidal land on the inland side of Route One, previously owned by the Belfast Water District ("BWD"). However, a 12.5-acre parcel within that conveyance is still subject to conditions and restrictions, imposed by the State of Maine fifty (50) years ago in a deed of conveyance. The BWD-to-Nordic deed states that the conveyance to Nordic is "SUBJECT TO" the restrictions in the 1973 State-to-City deed, restated in the 1987 City-to-BWD deed. Pursuant to those restrictions, which expressly *run with the land*, no buildings can be built on this parcel and this parcel is required to be kept in its natural condition. In granting deeds permitting this parcel to be clear-cut, its wetlands and a brook filled, and enormous buildings built on this parcel, the Board never considered the restrictions or the value and need for this parcel in the protection of a municipal water shed – including its value to Northport property owners whose sole source of potable waters are wells reliant on the Little River aquifer and water shed. Although the City of Belfast has recorded documents purporting to release these requirements, litigation is pending challenging the City's and/or DOT's legal capacity to release the restrictions. *Mabee, Grace, Block and Friends v. City of Belfast, Nordic Aquafarms, Inc. and MDOT,* BELSC-CV-2023-6.

- **Section 11(D)(2):** Nordic requires a submerged lands lease to construct its project, as proposed; however, the Bureau of Parks and Lands has submitted a filing in the pending Law Court 80C appeal of the BPL's 9-4-2020 Order granting Nordic a submerged lands lease and dredging lease (Docket No. WAL-22-299), advising the Law Court that, based on the Court's 2-16-2023 Decision, *BPL cannot issue Nordic a submerged lands lease*.

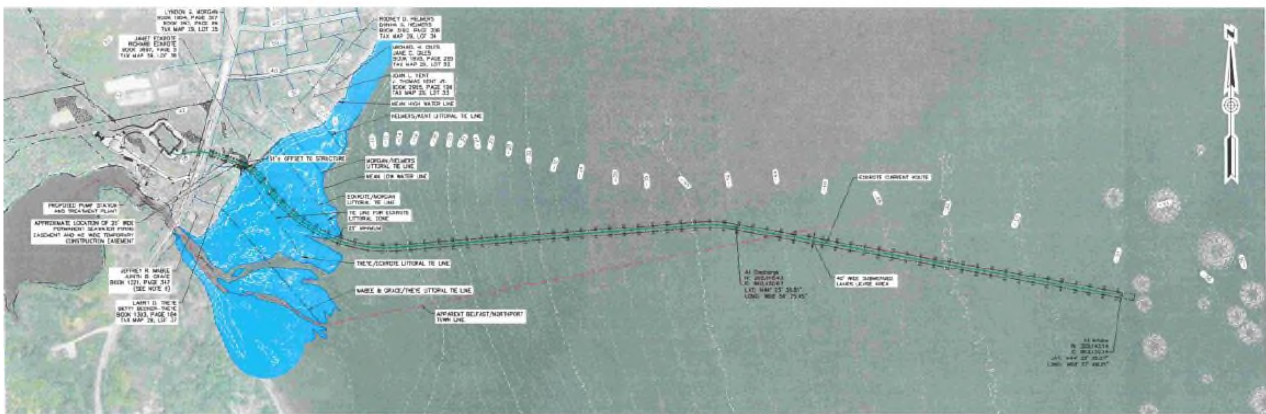
- **Section 11(D)(3):** The Law Court's 2-16-2023 Decision in the title claims case determined that the Eckrotes and their predecessors in interest back to 1946 never owned the intertidal land on which Lot 36 fronts and that Lot 36 is burdened by a "residential purposes only" servitude that prohibits any for-profit business being conducted on Lot 36, without agreement of holders of land benefited by this servitude including Mabee-Grace and Friends. Consequently, the 8-6-2018 easement option – on which Nordic based its claim of TRI and the Department based its determination that Nordic had demonstrated "sufficient" TRI – was at all times invalid (null and void *ab initio*) because the Eckrotes had no legal capacity to grant Nordic an easement in land the Eckrotes never owned and could not grant Nordic an easement to use Lot 36 in a manner that violates the "residential purposes only" servitude. Likewise, as a successor-in-interest to Fred R. Poor, the City of Belfast lacks the legal capacity to grant Nordic an easement to use Lot 36 in a manner that would violate the "residential purposes only" servitude.
- **Section 11(D)(4):** Although the City has attempted to use eminent domain to "take" Mabee and Grace's ownership interest in the intertidal land adjacent to Lot 36 and "take" Mabee and Grace's right to enforce the "residential purposes only" servitude, the 3-2-2022 Stipulated Judgment in BELSC-RE-2021-007 expressly held that the City of Belfast could not amend or terminate Friends' conservation easement on the intertidal land adjacent to Lot 36. Further, the City failed to use eminent domain to "take" Friends' right to enforce the "residential purposes only" servitude 9WCRD Book 4693, Pages 313-314). Thus, the City's attempt to use eminent domain to benefit Nordic and circumvent the judicial determination in the title claims litigation did not, and cannot, provide Nordic the requisite TRI to develop and use Lot 36 or the adjacent intertidal land in the manner authorized by the permits and licenses.

Accordingly, the Commissioner should revoke the permits and licenses.

III. Nordic knew the Eckrotes never had an ownership interest in the intertidal land on which Lot 36 fronts but misrepresented and/or failed to disclose all relevant facts regarding the limits of the Eckrotes' intertidal ownership and Nordic's TRI from the Commissioner and Board

Nordic Aquafarms, Inc. ("Nordic") began publicly proposing to build an industrial land-based salmon factory in Belfast, Maine, in 2018. The infrastructure for this facility is proposed to be located within the municipal boundaries of *both* Belfast and Northport, Waldo County, Maine. To obtain the six (6) million gallons-a-day of seawater required for its project, and a place to discharge 7.7 million gallons-per-day of brackish wastewater, Nordic requires access to Penobscot Bay to place two seawater intake pipes and one wastewater discharge pipe.

Nordic chose a location on a shallow estuary near the Little River for placement of its pipes. The only means of access to Penobscot Bay from this location requires placing Nordic's seawater intake and wastewater discharge pipes across a residential lot on the eastern side of Route 1. Nordic chose to do so over a lot then-owned by Richard and Janet Eckrote, designated as Belfast Tax Map 29, Lot 36 ("Lot 36"). (Original A.R.Doc. 150, p. 24; R-0001-0049).



To demonstrate sufficient title, right or interest ("TRI") to obtain permits and licenses from the Department, Nordic relied on a contractual agreement, dated August 6, 2018, for an option to obtain an easement ("8-6-2018 EOA"), from Janet and Richard Eckrote who then owned the upland parcel designated as Belfast Tax Map 29, Lot 36 ("Lot 36").[5] The 8-6-2018 EOA, does not define the boundaries of the easement by metes and bounds, but depicts the boundaries using an image incorporated as Exhibit A.

[5] DEP Major Projects website, 10-19-2018 MEPDES Application, pp. 46-59: https://www.maine.gov/dep/ftp/projects/nordic/applications/MEPDES%20Permit%20Application_Final_Oct%2019,%202018.pdf

DEP Major Projects website, 5-17-2019 TRI Supplement, pp. 3-16: https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/JBT%20to%20Kavanah%20package.PDF

The boundaries of the easement that would be granted to Nordic by the 8-6-2018 EOA, ***if*** Nordic exercised its option, ***terminates at the high-water mark of Penobscot Bay***, pursuant to the express terms in the 8-6-2018 EOA and Exhibit A.

Exhibit A from the 8-6-2018 Easement Option Agreement

Thus, even *if exercised*, the proposed easement, *by its own terms*, did not and would not grant Nordic the title, right or interest to use the intertidal land on which Lot 36 fronts. Rather, the 8-6-2018 EOA, *if exercised*,[6] would grant Nordic a 25-foot wide permanent easement, and a 40-foot wide temporary construction easement, along the southern boundary of Lot 36 that terminates at the high-water mark of Lot 36.

[6] Nordic never exercised the 2018 Easement Option prior to the Eckrotes' sale of this property on June 27, 2021 to the City of Belfast. The sale had the effect of nullifying the unexercised 8-6-2018 EOA.

In 2018 and 2019, Upstream Watch and the Lobstering Representatives objected that the 8-6-2018 Nordic-Eckrotes Easement Option Agreement failed to demonstrate sufficient TRI in the intertidal land, because – *by its own terms* – that agreement defined the boundaries of the easement to be granted to Nordic as ***terminating at the high-water mark of Penobscot Bay***. Initially, the Department agreed with this assessment in a letter from Brian Kavanaugh dated January 22, 2019 (A.R. 0935c).

In that letter, the Department requested additional evidence of TRI from Nordic, including the 11-14-2018 survey plan prepared for Nordic by James Dorsky, P.L.S. Nordic resisted this request and ultimately never provided that survey plan to the Commissioner or Board prior to the Board's entry of orders granting Nordic permits and licenses in November 2020.

Instead, Nordic submitted misleading information that concealed Nordic's knowledge that the Eckrotes did not own the intertidal land adjacent to Lot 36. For example, Nordic submitted a Letter Agreement, dated March 3, 2019, acknowledged by the Eckrotes, that stated Nordic had the same right to bury its pipes in U.S. Route 1 and the intertidal land adjacent to Lot 36 as the Eckrotes had – without truly representing or warranting that the Eckrotes had any right to U.S. Route 1 or the intertidal land (A.R. 0935e; see also 0935h). This dishonest obfuscation was intended to misrepresent and conceal the facts known to Nordic at that time regarding the Eckrotes, and thus Nordic's, lack of TRI in the intertidal land adjacent to Lot 36.

Specifically, in 2018 through 2020 – prior to the Board granting Nordic's permit and license applications -- Nordic had in its possession: (i) emails and sketches from Nordic-retained surveyor James Dorsky, P.L.S., depicting the Eckrotes' waterside boundary was the high-water mark and stating that the Eckrotes do not own the intertidal land adjacent to Lot 36 (A.R. 0935r; AR22601-AR22605); and (ii) multiple unrecorded survey plans prepared for Nordic by Surveyor

Dorsky all depicting the Eckrotes' waterside boundary as the high-water mark of Penobscot Bay (See, e.g. Dorsky survey plans dated: 11-14-2018, 11-15-2018, 1-25-2019, 2-22-2019, 5-14-2019, and 7-24-2020) (A.R. 0935o, 0935p and 0935s; AR22589-AR22596, AR22606-AR22608). *Mabee v. Nordic Aquafarms, Inc.,* 2023 ME 15, f.n. 9.

It was not until July 27, 2020 that Petitioners obtained all of the Dorsky sketches and survey plans, prepared for Nordic, from Nordic in discovery in the title claims case (RE-2019-18).[7] When obtained, Petitioners submitted all of the Dorsky emails, sketches and survey plans to the Board.

Petitioners Mabee-Grace and Friends and the Lobstering Representatives submitted all of the Dorsky sketches, emails and survey plans to the Board on August 16, 2020 -- the first opportunity to do so after those surveys were belatedly-provided to Mabee-Grace and Friends in the title claims litigation on July 27, 2020 (the eve of Surveyor Dorsky's depositions on 7-29-2020). The unrecorded Dorsky survey plans and other Dorsky documents and sketches -- previously withheld by Nordic from the Board -- were submitted to the Board by Petitioners Mabee-Grace and the Lobstering Representatives with Petitioners' response to the Air License draft and a renewed motion to dismiss Nordic's applications for lack of TRI (A.R. 0935o, 0935p, 0935r and 0935s).

In response to the Air License Draft and Petitioners' renewed motion, *Nordic opposed consideration of those survey plans and sketches by the Board* – Nordic referred to these materials as "new evidence" (A.R. Doc. 0936).[8] Subsequently, Presiding Officer Duchesne excluded those

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[7] All Dorsky survey plans had been requested from Nordic in the title claims case in a Request to Produce, served on Nordic with the original complaint in that case on or about July 15, 2019.

[8] In the 8-17-2020 email transmitting Nordic's response regarding the Air License draft Order and the comments submitted by Mabee-Grace and the Lobstering Representatives to that draft, Attorney Tourangeau on Nordic's behalf stated in relevant part:

> . . . Nordic notes that submission of new evidence is prohibited and must be excluded. Nordic also notes another multi-email attempt to throttle Board proceedings based on false allegations regarding TRI. At this point, these requests abuse the Board process and the Board (and record before it) would certainly be

survey plans and sketches from the Record for consideration by the Board, stating that the Record was closed (A.R. 0940-0941). As a result, the permits and licenses were issued to Nordic by the Board *without the Board ever seeing the survey plans, sketches and emails from Nordic's lead Surveyor (James Dorsky, P.L.S.)* – even though all of these survey plans and documents advised Nordic that the Eckrotes' waterside boundary terminated at the high-water mark of Lot 36 and that the Eckrotes had no ownership interest in the adjacent intertidal land.

Indeed, not only did Nordic conceal the unrecorded Dorsky survey plans from the Board, Nordic went so far as to file false and misleading affidavits from James Dorsky and Will Gartley *with the Board* during the February 2020, hearings -- alleging that Gartley and Dorsky had never told Petitioner's consultant and witness Paul Bernacki that Gartley & Dorsky had "vehemently told Nordic" that the Eckrotes do not own the intertidal land on which Lot 36 fronts.[9] These affidavits again misrepresented the information that Gartley & Dorsky had provided Nordic regarding the Eckrotes' lack of intertidal ownership. And these affidavits falsely implied that Mr. Bernacki was untruthful in telling the Board that Gartley & Dorsky had "vehemently" advised Nordic that the Eckrotes did not own the intertidal land adjacent to Lot 36.

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justified in summarily dismissing the latest iteration. Nordic repeats by reference its existing record responses.

Thus, Nordic delayed production of relevant information from Petitioners in the parallel litigation, and concealed that same relevant information from the Board in the permitting proceedings, and – when Petitioners attempted to provide the Board with that information after its belated-production in the title claims case – Nordic demanded that evidence be excluded from the Board's Record and consideration.

[9] "Vehemently" is defined as: "in a forceful, passionate, or intense manner; with great feeling." Perhaps Mr. Gartley and Surveyor Dorsky do not consider providing a client with eight (8) survey plans and a Surveyor's Opinion letter to Nordic's President (5-19-2019) over a twenty (20) month period, all stating and depicting that the Eckrotes' waterside boundary was and is the high-water mark was not "*vehemently*" telling Nordic that the Eckrotes didn't own the intertidal land on which their lot fronts. But the surveys certainly put Nordic on notice that the Eckrotes did not own the intertidal land and, thus, could not grant Nordic an easement to use that intertidal land. Concealing those survey plans from the Board misrepresented and failed to fully disclose relevant facts regarding the Eckrotes' lack of intertidal ownership and Nordic's resulting lack of TRI based on the 8-6-2018 Easement Option Agreement from the Eckrotes.

In sum, Nordic and its counsel were dishonest with the Board regarding what they had been advised by their surveyors, and concealed the Dorsky survey plans from the Board to perpetuate Nordic's misrepresentations to the Board about the Eckrotes' ownership of the intertidal land and capacity to grant Nordic an easement option to use that intertidal land and upland Lot 36 to bury its industrial pipes.

The Law Court's 2-16-2023 Decision resolves any questions regarding the Eckrotes' lack of ownership in the intertidal land adjacent to Lot 36, as a matter of law. That Decision, in determining that the "residential purposes only" servitude "runs with the land" and "binds Poor's successors" also means that neither the Eckrotes nor the City of Belfast can grant Nordic an easement to use upland Lot 36 to conduct any portion of its for-profit business.

Petitioners Mabee-Grace and Friends resubmit the Dorsky sketches, emails and survey plans – previously excluded from the Board Record -- to support their motion to revoke Nordic's permits, pursuant to 38 M.R.S. § 341(11-B)(B) and Chapter 2, Section 27(B). These survey plans reveal that Nordic was ***repeatedly and consistently*** told ***by its own surveyor James Dorsky,*** as well as Surveyor Gusta Ronson of Good Deeds (retained by the Eckrotes in 2012) (A.R. 0935j) and Surveyor Clark Staples, P.L.S of Good Deeds (retained by Nordic in 2018) (A.R. 0935i), that the Eckrotes never owned the intertidal land adjacent to Lot 36 and therefore never had the legal capacity to grant Nordic an easement option to develop and use that intertidal land for its industrial pipes. (*See also*, 5-16-2019 Dorsky opinion and 6-4-2019 Dorsky survey plan).[10] Yet, in contravention of 38 M.R.S. § 342(11-B)(B) and chapter 2, Section 27(B), Nordic obtained its

[10] DEP Major Projects website, 6-10-2019 TRI Supplement, pp. 3, 4, 87-89: https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/19-06-10%20Tourangeau%20-%20Loyzim.pdf

permits and licenses by misrepresenting or failing to fully disclose relevant facts to the Department and Board relating to its TRI – *or lack thereof*.

IV. Nordic misrepresented its legal right to develop and use the 12.5-acre parcel on the inland side of Route 1 in response to inquiries by DEP staff counsel Kevin Martin in November 2018

Nordic has known since 2018 that is could not develop a 12.5-acre portion of the BWD land on the inland side of Route 1, as proposed.

In the Fall of 2018, DEP staff legal counsel Kevin Martin contacted Nordic's counsel Joanna Tourangeau by phone regarding the conditions and restrictions on this 12.5-acre parcel. Pursuant to the express and unambiguous language in the 1973 deed from the State of Maine, through the Governor and Council, to the City of Belfast, this parcel was conveyed for the purpose of "protection of a municipal water shed." The restrictions in the 1973 deed, *run with the land*, and state in relevant part that: (i) no buildings were permitted to be built on this parcel; and (ii) the parcel was required to be maintained in its "natural condition." In 1987, the City conveyed the parcel to the Belfast Water District, re-stating that it was burdened by the restrictions in the 1973 State-to-City deed.

Attorney Tourangeau deflected DEP Attorney Kevin Martin's questions regarding whether Nordic could clear-cut and build on this parcel by claiming that the restrictions had been vacated, released and extinguished by an unrecorded Deed of Vacation from the Department of Transportation, signed by the Commissioner of DOT, to the City of Belfast, dated April 9, 2018. This sham instrument is now the subject of another Declaratory Judgment action, challenging the legal capacity of DOT's Commissioner to release the State's restrictions on this parcel, imposed by a Governor's deed, by issuing a Commissioner's Deed of Vacation granted to the City of Belfast

31-years after the City of Belfast had conveyed its interests to this parcel to the Belfast Water District. No release was ever granted to the actual parcel owner BWD.

More importantly, when Nordic was finally conveyed this 12.5-acre parcel on March 10, 2022 by the Belfast Water District, its deed expressly states that Nordic takes this parcel "SUBJECT TO" the "terms, conditions and restrictions" in the 1973 State-to-City deed (WCRD Book 710, Page 1153) and the 1987 City-to-BWD deed (WCRD Book 1092, Page 145). ("BWD-to-Nordic deed"; WCRD Book 4776, Page 210).

On March 17, 2022 – five (5) days *after* the BWD-to-Nordic deed was executed and delivered and one day after it was recorded in the Waldo County Registry of Deeds -- the City of Belfast recorded the 4-9-2018 DOT-to-City Deed of Vacation (WCRD Book 4778, Page 34) and executed and delivered a Deed of Vacation to Nordic purporting to "vacate, release and extinguish" the 1973 conditions and restrictions from the 12.5-acre parcel (WCRD Book 4778, Page 35). This second sham instrument is also the subject of the Declaratory Judgment action CV-2023-6, filed by Mabee and Grace, Martha M. Block and Friends, challenging the legal capacity of the City of Belfast to release the State's restrictions on this parcel, imposed by a Governor's deed, and the unambiguous deed from the Belfast Water District to Nordic, by issuing a Deed of Vacation to Nordic 35-years after the City of Belfast had conveyed its interests to this parcel to the Belfast Water District.

Petitioners submit their First Amended Complaint (Exhibit E to Nordic's 4-7-2023 Filing) and sixteen (16) incorporated exhibits, filed by Petitioners Mabee-Grace and Friends, and Martha M. Block, in BELSC-CV-2023-6, in support of their Petition for revocation. These submissions demonstrate that the conditions and restrictions, *as a matter of law*, are still in effect on this 12.5-acre parcel requiring revocation of the permits and licenses granted to Nordic that would authorize

Nordic to clear-cut this parcel, fill the brook and wetlands on this parcel, and place enormous buildings on this parcel.

Revocation is appropriate and necessary because Nordic and its counsel misrepresented and/or failed to fully disclose relevant facts relating to the restrictions and conditions on this parcel to the Commissioner's staff counsel in 2018 and, thereafter, withheld this information from the Board at all times prior to the Board entering the orders granting Nordic permits and licenses.

V. Nordic Falsely Claims that the City of Belfast Is the holder of the Conservation Easement on the intertidal land on which Lot 36 fronts

Nordic falsely asserted in its 4-7-2023 filing that the City of Belfast is the "holder" of the conservation easement on the intertidal land on which Lot 36 fronts, by virtue of its failed attempt to "take" the conservation easement by eminent domain. However, changing the holder of the conservation easement would constitute and *amendment* of the conservation easement that can only occur through assignment or pursuant to a judicial proceeding in which the Attorney General is a party, filed by the owner or holder of the conservation easement. 33 M.R.S. §§ 477-A(2)(B) and 478(1)(a) and (b).

The actual recorded holder of this conservation easement is Friends of the Harriet L. Hartley Conservation Area ("Friends") and Friends most definitely has not assigned its interest to the City of Belfast. Further, Nordic and the City have not and could not amend who the holder of the conservation easement is by use of eminent domain.

As stated in the March 2, 2022 *Stipulated Judgment*, entered in the pending eminent domain litigation (RE-2021-007) and signed by Nordic's counsel:

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

B. The City's actions, including its Condemnation efforts with respect to the Conservation Easement and the Intertidal Land, did not amend or terminate the Conservation Easement because they were not approved by a court in an action in which the Attorney General was made a party.

Stipulated Judgment, p. 3, filed herewith and incorporated herein as support for revocation.[11]

Thus, the Friends of the Harriet L. Hartley Conservation Area is still the holder of the conservation easement created by Mabee and Grace on April 29, 2019. The Law Court has determined that that conservation easement includes the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and 35 front. Even if the City of Belfast has "taken" Mabee-Grace's ownership interest in the intertidal land on which Lot 36 fronts by recording a Condemnation Order on 8-16-2021 (WCRD Book 4693, Page 304; unrecorded version attached to Nordic's 4-7-2023 filing as Exhibit B), the City has "taken" that intertidal land ***subject to the conservation easement held by Friends*** – a conservation easement that prohibits dredging and the construction of any commercial or industrial infrastructure.

Nordic's counsel *signed* the 3-2-2022 Stipulated Judgment in RE-2022-007. Accordingly, Attorney Tourangeau's false representation to the Commissioner on 4-7-2023 that the City of Belfast is the holder of the Harriet L. Hartley Conservation Area conservation easement can best be characterized as "misrepresenting and/or failing to disclose fully all relevant facts" in an effort

[11] A copy of the 3-2-2022 Stipulated Judgment is submitted with this Petition and incorporated herein.

to retain permits and licenses, in contravention of 38 M.R.S. § 342(11-B)(B) and 06-096 C.M.R. ch. 2, § 27(B).

Similarly, Petitioner Friends has a right to enforce the "residential purposes only" servitude on upland Lot 36, which prohibits any for-profit business being conducted on Lot 36 without the agreement of Harriet L. Hartley, her heirs and assigns. As the Law Court stated in its 2-16-2023 Decision:

> [¶58] In sum, the restriction to "residential purposes only," benefiting the holder of the land now owned by Mabee and Grace, runs with the land conveyed to Poor, binding Poor's successors.

2023 ME 15, ¶ 58.

Friends is a holder of the intertidal land now owned by Mabee and Grace, and Friends' is benefited by the servitude and has the right to enforce the "residential purposes only" servitude on Lot 36. The City of Belfast and Nordic are successors of Poor *bound by that servitude*. While the City has attempted to "take" Mabee and Grace's right to enforce the "residential purposes only" servitude by eminent domain, the City failed to use eminent domain to "take" Friends' right to enforce this servitude on Lot 36. (WCRD Book 4693, Page 304, at 313-314).

Because the valid and enforceable conservation easement and servitude on Lot 36 prohibit the activities that the permits and licenses would authorize, the permits and licenses should be revoked. These permits and licenses were obtained by Nordic as a result of Nordic and its counsel misrepresenting and failing to fully disclose relevant facts regarding Nordic's lack of title, right or interest to use Lot 36 and the adjacent intertidal land in the manner the permits and licenses would authorize.

VI. Petitioners Mabee-Grace and Friends' Standing and Right to file this Petition

Because Nordic's permits and licenses propose to use intertidal land protected by the conservation easement held by Friends, and created by Mabee-Grace, Petitioners Mabee-Grace and Friends have a statutory right to intervene in Upstream Watch's Petition to Suspend and/or Revoke and to bring a separate Petition for revocation pursuant to 33 M.R.S. § 478(1)(a) and (b).[12]

CONCLUSION

BASED ON THE EVIDENCE SUBMITTED WITH THIS PETITION, as well as the evidence previously submitted by Upstream Watch, Nordic's permits and licenses granted by the Board in November 2020 should be revoked pursuant to 38 M.R.S. 342(11-B)(B) and (E) and 06-096 C.M.R. ch. 2, § 27(B) and (E).

Dated this 10th day of April, 2023

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[12] 33 M.R.S. § 478(1)(A) and (B) state that: "An action affecting a conservation easement may be brought or intervened in by:

A. An owner of an interest in the real property burdened by the easement;

B. A holder of the easement"