

SUPERIOR COURT
WALDO COUNTY, SS.

CIVIL ACTION
DOCKET NO. AP-2023-_____

JEFFREY R. MABEE and
JUDITH B. GRACE, individually and as
fee simple owners of certain real property
that BEP's permits authorize Nordic to use; and
THE MAINE LOBSTERING UNION, a
Cooperative Corporation registered and doing
business in the State of Maine; **WAYNE
CANNING** and **DAVID BLACK**,
Commercial lobster and crab license holders
from Belfast, Maine; and **FRIENDS OF THE
HARRIET L. HARTLEY CONSERVATION
AREA**, a Non-Profit Corporation registered in
the State of Maine and an Interested and
Aggrieved Person denied Intervenor status
by BEP (together the "**MGLF Petitioners**");
and **UPSTREAM WATCH**, a Non-Profit
Corporation registered in the State of Maine
and Intervenor in the BEP proceedings;
Petitioners,

v.

**BOARD OF ENVIRONMENTAL
PROTECTION;**

Respondent,
and

NORDIC AQUAFARMS INC.;
Permit Applicant/Party-in-Interest,

THE FISH ARE OKAY;
**ELEANOR DANIELS and DONNA
BRODERICK; NORTHPORT VILLAGE
CORPORATION; LAWRENCE
REICHARD; GULF OF MAINE
RESEARCH INSTITUTE; and
UNIVERSITY OF NEW ENGLAND;**

Intervenors/Parties-in-Interest.

**PETITION FOR REVIEW OF
FINAL AGENCY ACTION
BY THE BOARD OF
ENVIRONMENTAL
PROTECTION
PURSUANT TO
M.R. Civ. P. 80C
AND INDEPENDENT
CLAIMS
FILED BY THE
MGLF PETITIONERS**

INTRODUCTION

Petitioners, Jeffrey R. Mabee and Judith B. Grace (Mabee-Grace” or “Mabee and Grace”); the Maine Lobstering Union, and commercial lobster and crab license holders Wayne Canning and David Black (the “Lobstering Representatives”) (jointly designated by the Board of Environmental Protection (“BEP” or “Board”) as: “the MGL Intervenors”); and Interested and Aggrieved Person¹ the Friends of the Harriet L. Hartley Conservation Area (“Friends”), collectively herein “MGLF Petitioners,” by and through their counsel Kimberly J. Ervin Tucker, hereby file their Rule 80C “Petition for Review of Final Agency Action,” challenging the Board’s Order on Remand dated October 19, 2023, entered by the Board after proceedings undertaken pursuant to an Order of Remand by the Law Court, dated May 10, 2023 (“5-10-2023 Remand Order”), remanding the Board’s Orders dated 11-19-2020 (“2020 Board Orders”), that granted permits and licenses to Applicant Nordic Aquafarms Inc. (“NAF” or “Nordic”).

¹ 06-096 C.M.R. ch. 2, §1(B) defines “Aggrieved Person” as follows:

B. **Aggrieved Person.** "Aggrieved Person" means any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision. The Board will interpret and apply the term “aggrieved person”, whenever it appears in statute or rule, consistent with Maine state court decisions that address judicial standing requirements for appeals of final agency action.

06-096 C.M.R. ch. 2, § 1(J) defines “Interested Person” as follows:

J. **Interested Person.** "Interested Person" means a person who submits written comments on an application or who requests, in writing, receipt of materials related to a particular application. The Department shall maintain a list of interested persons for each licensing proceeding.

06-096 C.M.R. ch. 2, § 1(I) defines “Intervenor” as follows:

K. **Intervenor.** “Intervenor” means a person who, in accordance with the *Maine Administrative Procedure Act*, 5 M.R.S. §§ 9054(1 and 2), and the Department’s rules governing hearings, has been granted leave to participate as a party in a license application or appeal proceeding where a decision has been made to hold a hearing.

06-096 C.M.R. ch. 2, § 1(P) defines “Person” as follows:

P. **Person.** "Person" means an individual, partnership, corporation, government entity, association, or public or private organization of any character; other than the Department.

This Petition also includes independent claims related to violations of Petitioners' due process rights caused by: (i) political interference with the permitting process; and (ii) the use of common counsel from the Office of Attorney General ("OAG") to represent the Commissioner and Board on determinations relating to title, right and interest (TRI), when Petitioners were attempting to appeal decisions by the Commissioner on TRI to the Board. Petitioners assert that 5 M.R.S. § 9055 and principles of due process require use of separate counsel for the Commissioner and Board, and use of a firewall. See, e.g. *Narowetx v. Bd. of Dental Prac.*, 2021 ME 46, 259 A.3d 771; *Mallinckrodt LLC v. Littell*, 616 F. Supp. 2d 128, 143 (D. Me. 2009) ("[T]he Court rejects the proposition that bald assertions that the Office of the Attorney General lacks sufficient personnel to maintain a firewall are sufficient to undermine its adequacy or create an appearance of bias.").

On May 10, 2023, Orders entered in 2020 by the DACF Bureau of Parks and Lands ("BPL") and the Board, granting Nordic permits, licenses and leases -- challenged by Petitioners in prior, separate Rule 80C appeals (Law Court Docket Nos. Wal-22-299 and BCD-22-48) -- were remanded by the Law Court to the BPL and the Board, pursuant to the doctrine of primary jurisdiction "so that the agencies may determine the impact, if any, of [the Law Court's decision in *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, 290 A.3d 79,] *Mabee I* on the challenged approvals." 5-10-2023 Remand Order, p. 4.

Of specific focus on remand were the agencies' respective determinations that Nordic had demonstrated "sufficient title, right or interest" to establish the requisite administrative standing and justiciability of its applications to obtain and/or retain permits, licenses and leases from those agencies.

On remand, the BPL rescinded the submerged lands lease and dredging lease granted, but not yet issued, to Nordic in September 2020, and the subject of a Rule 80C appeal in the Law Court

(Wal-22-299). In contrast, as discussed in more detail below, the Board determined that: “. . . the Law Court’s decision in *Mabee I* does not affect the validity of the issued Licenses.” 10-19-2023 Board Order on Remand, p. 13.

As permitted by the 5-10-2023 Remand Order, this new 80C appeal includes arguments raised previously in BCD-22-48 and new arguments arising from the Board’s proceedings on remand. (5-10-2023 Remand Order, p. 4 (“Upon the issuance of the agencies’ determinations on remand regarding the viability of the approvals, any party is free to raise in a new appeal any argument raised previously and any new argument arising from the agency proceedings on remand.”).

Petitioners submit that, as a matter of law, Nordic has never demonstrated “sufficient” and/or actual title, right or interest in all land proposed for use and development. Accordingly, the 2020 Board Orders must be vacated because they were: (i) entered based on errors of law; and (ii) not supported by any evidence in the Administrative Record, competent or otherwise. Rather, **all of the evidence submitted to the Board**, including all evidence submitted **by Nordic** in 2019 and 2020, demonstrated that Nordic has at no time had sufficient or actual TRI in the upland lot designated as Belfast Tax Map 29, Lot 36 (hereinafter “Lot 36”) or the intertidal land adjacent to Lot 36, to use this land in the manner that the Board’s permits and licenses authorize.

Further, evidence submitted by Petitioners in 2023 on remand, *which was ignored by the Board’s Presiding Officer and never considered by the full Board*, demonstrates that Nordic also lacked and lacks the requisite TRI, sufficient or actual, in 12.5-acres of land on the western side of U.S. Route 1 in Belfast, Maine, necessary to use and develop that parcel in the manner that the Board’s permits and licenses would authorize.

Specifically, in this renewed Rule 80C appeal, Petitioners challenge Respondent's final agency action pursuant to 5 M.R.S. §§ 11001-11008, et seq., and Rule 80C of the Maine Rules of Civil Procedure ("Rule 80C") for the following permits and licenses:

- A-1146-71-A-N
- L-28319-26-A-N
- L-28319-TG-B-N
- L-28319-4E-C-N
- L-28319-L6-D-N
- L-28319-TW-E-N
- W-009200-6F-A-N

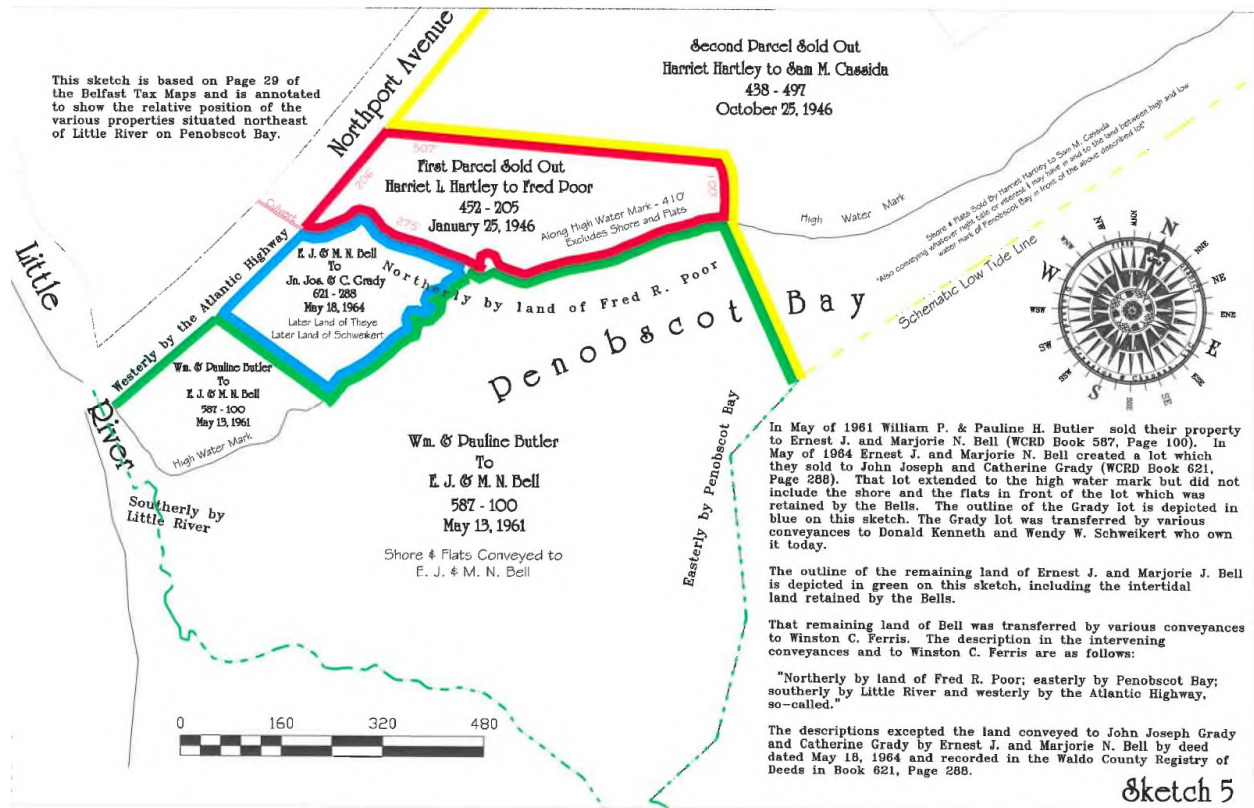
In addition, MGLF Petitioners include independent claims relating to Due Process violations caused by political interference with the permitting process and the use of common legal counsel to advise the Commissioner and Board. Petitioners incorporate Appendices I, II and IV filed in BCD-22-48, as well as the documents and orders contained therein, as though a part hereof and stated herein. Appellants also incorporate by reference exhibits attached to their 10-3-2023 Objection and Motion to Recuse Steven K. Pelletier, as discussed in more detail below.

I. RELEVANT DETERMINATIONS IN THE LAW COURT'S DECISION IN *MABEE I*

The 5-10-2023 Remand Order was issued as a result of the Decision entered by the Maine Supreme Judicial Court, sitting as the Law Court, in *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, 290 A.3d 79 (*Mabee I*). In *Mabee I*, the Law Court determined that:

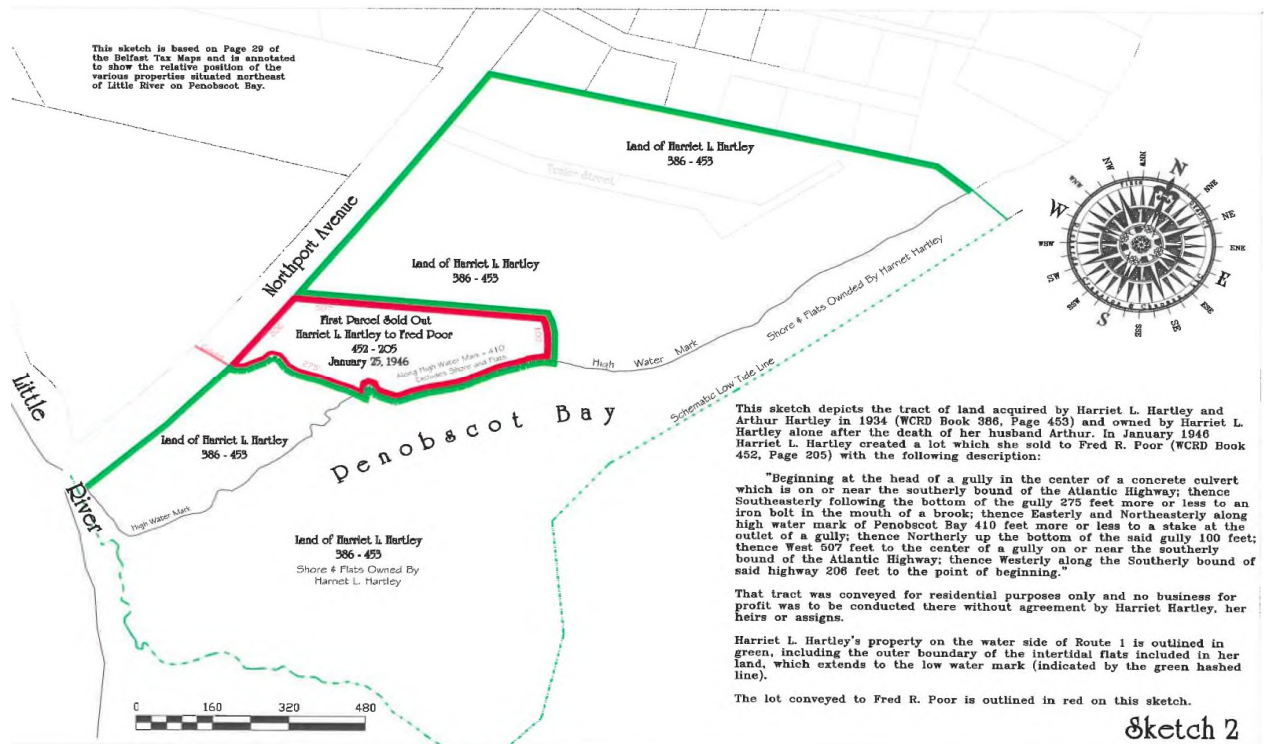
- A. "Mabee and Grace own the intertidal land abutting their own upland property [Lot 38] and the intertidal land abutting the upland properties of the Schweikerts, the Eckrotes, and Morgan [Belfast Tax Map 29, Lots 37, 36 and 35 respectively]. Mabee and Grace's property is outlined in the solid and dashed green lines in Figure 5." *Mabee I*, 2023 ME 15, ¶¶ 14, 17, Figure 5 (below).

FIGURE 5



- B. Plaintiff Friends holds an “enforceable” Conservation Easement, created on April 29, 2019 by Plaintiffs Mabee and Grace, on the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and 35 front (*Mabee I*, ¶¶ 59-61), depicted on Figure 5 above with a green hashed or solid line below the high water mark of Penobscot Bay;
- C. The “residential purposes only” servitude established in the 1946 deed from Harriet L. Hartley to Fred R. Poor (“1946 Hartley-to-Poor deed;” WCRD Book 452, Page 205), “benefiting the holder of the land now owned by Mabee and Grace, runs with the land conveyed to [Fred R.] Poor [indicated on Figure 3 by a red solid line, which now includes Lot 36 and portions of Lot 35], binding Poor’s successors” and enforceable by holders of land benefited by this restriction (i.e. all land highlighted in green in Figure 3 below) (*Mabee I*, ¶¶ 58 and n. 13 (emphasis supplied));

FIGURE 3



- D. Harriet L. Hartley did not convey any intertidal land to Fred R. Poor in the 1946 Hartley-to-Poor deed, and, “therefore, the Eckrotes and Morgan, as successors of Poor never owned the intertidal land abutting their respective upland properties [Lots 36 and 35]” (*Mabee I*, ¶¶ 10, 17, 25-45 and Figures 3 and 5);
- E. “[O]nce it is understood that the Hartley-to-Poor deed did not convey the disputed intertidal land, under the relevant legal principles, the language in the Hartley-to-Butlers abutters’ deed unambiguously conveyed the disputed land to Mabee and Grace’s predecessors in interest.” (*Mabee I*, ¶¶ 46-52).
- F. As a matter of law, the “mouth” of a brook, stream and river “is a fixed point defined by the upland boundary, and the call does not shift with the tide,” but is where “the banks cease to exist” and “cannot be located below the upland banks.” (*Mabee I*, ¶¶ 34-35, n. 8);

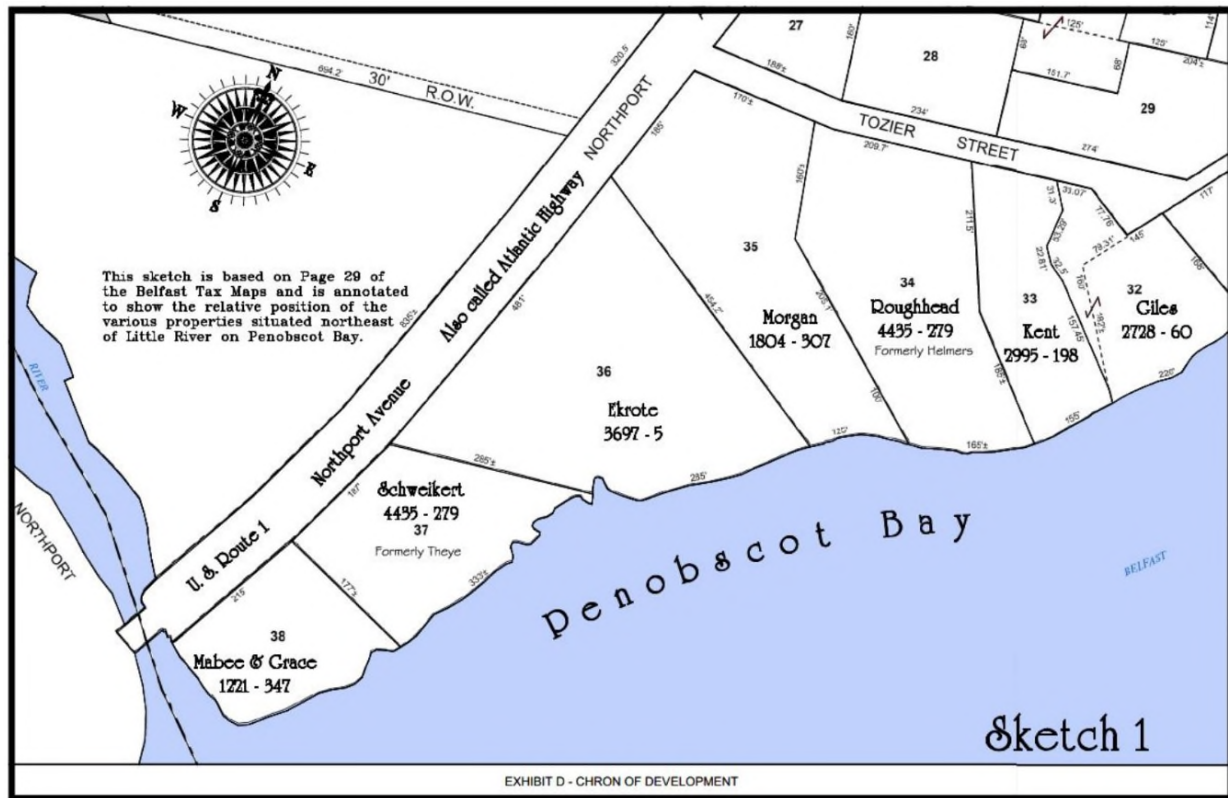
- G. “Nordic’s surveyor [James Dorsky, P.L.S.] asserted at trial that the ‘mouth of a brook’ is ‘basically where the flowing water body . . . enters the receiving water body,’ and, therefore, the mouth of a brook moves with the ebb and flow of the tide. Applying this construction of the term to deed language is impractical in at least two respects. First, it is dependent on the presence of flowing water in the brook, which may not, in fact, be present. *See* 38 M.R.S. § 480-B(9) (listing the characteristics of a ‘channel’ within the definition of “brook”). Second, regardless of where the bodies of water meet, the iron bolt referenced in the [1946 Hartley-to-Poor] deed would not have moved with each ebb and flow of the tide. Although immaterial to our analysis because we find the deed language clear, Mabee and Grace’s surveyor’s definition of ‘mouth of a brook’ was similar to the statutory definition discussed above. He testified that there is a clear distinction between the mouth of the brook and the bay, and he located the mouth of the brook at the high-water mark.” (*Mabee I*, 2023 ME 15, n. 8); and
- H. “[A]ll the surveyors—including the Eckrotes’ surveyor in 2012 and Nordic’s surveyor before he changed his position to one that was favorable to Nordic—read the Hartley-to-Poor deed as excluding the intertidal land. Also, the Hartley-to-Cassida deed, conveying a portion of Hartley’s property only months after the Hartley-to-Poor conveyance, used strikingly different language to make clear that the intertidal land was included in that conveyance. *See supra* ¶¶ 8, 11.” (*Mabee I*, 2023 ME 15, n. 9).

II. PARTIES

A. Petitioners

1. **Jeffrey R. Mabee and Judith B. Grace** are: natural persons; residents of the City of Belfast, Maine; and owners of a parcel of land known as the “Little River Center,” located at 290 Northport Avenue, Belfast, Waldo County, Maine, 04915, designated as Belfast Tax Map Page 29, Lot 38 (“Lot 38”), and more particularly described in the Waldo County Registry of Deeds (“WCRD”), at Book 1221, Page 347.
2. Petitioners Mabee and Grace are husband and wife and own the subject property described in their deed in fee simple as joint tenants.

3. At all times prior to entry by the Board of its Orders granting permits and licenses to Nordic on November 19, 2020, the land owned in fee simple by Petitioners Mabee and Grace included the land and structures on Lot 38 and the intertidal land on which Lots 38, 37, 36 and most of Lot 35 front, as shown on the recorded survey plan recorded in the WCRD at Book 24, Page 34 and described in the Surveyor's Report recorded at Book 4425, Page 165, and depicted on the excerpt of Belfast Tax Map 29 (below).



4. The image below is the westerly view from Penobscot Bay of Lots 38, 37, 36 and 35 and mouth of the Little River at high tide.



5. Since April 2019, Petitioners Mabee and Grace have asserted in proceedings before the Department of Environmental Protection (“DEP”), conducted by both the DEP Commissioner and the Board, that they are the true owners, in fee simple, of the intertidal land on which applicant Nordic improperly has sought, and continues to seek, permits, licenses and leases authorizing it to place three industrial pipes, which are essential accessory structures of its proposed land-based salmon factory in Belfast, Maine.

6. To emphasize their intent to protect this intertidal land from the degradation and destruction that NAF has proposed, Petitioners Mabee and Grace put all of their intertidal land under the protection of a Conservation Easement, in perpetuity, pursuant to the statutory authority in 33 M.R.S.A. § 476, et seq., recorded on April 29, 2019, in the Waldo County Registry of Deeds (“WCRD”) at Book 4367, Page 273.

7. Placement of Nordic’s pipes on, in or over upland Lot 36 would also violate the 1946 “residential purposes only” servitude, that the Law Court in *Mabee I* determined runs with the land and is enforceable by holders of land formerly owned by Hartley that is benefited by this restriction, including Petitioners Mabee-Grace and Friends.

8. Petitioners Mabee and Grace do not consent to Nordic’s proposed taking or use of their intertidal land and use of upland Lot 36 -- which would violate the “residential purposes only” servitude on Lot 36 and the conservation easement on the adjacent intertidal land -- and Mabee and Grace have opposed Nordic’s applications in every local, State and federal administrative proceeding in which Nordic has sought permits, licenses and/or leases that would authorize use and industrial development of Petitioners Mabee-Grace’s intertidal land and/or upland Lot 36.

9. Petitioners Mabee and Grace are abutters of the proposed Nordic project and the true owners of the environmentally fragile intertidal land – located in both Belfast and Northport, Maine -- on, through or under which Nordic seeks to place its three industrial pipelines in Penobscot Bay.

10. Petitioners Mabee and Grace timely asserted their ownership interest in, and Conservation Easement on, the intertidal land on which Nordic seeks to place its seawater intake and wastewater discharge pipes, as well as Nordic’s proposed use of Lot 36, in all Department proceedings beginning in May of 2019.

11. Petitioners have tirelessly, consistently and at great personal expense been forced to file challenges to Nordic’s claims of “sufficient title, right or interest” in Lot 36 and the adjacent intertidal land since April of 2019 – when Petitioners Mabee and Grace first learned that the intertidal land on which Nordic sought to place its pipes was the Petitioners’ intertidal land and that they had a right to enforce the “residential purposes only” servitude on upland Lot 36, established by the 1946 Hartley-to-Poor deed (WCRD Book 452, Page 205).

12. **The Friends of the Harriet L. Hartley Conservation Area** (“Friends”) is a non-profit corporation (T13-B) duly incorporated in the State of Maine on August 30, 2019, Charter No. 20200085ND, in Good Standing, with an office and principal place of business in the City of Belfast, Waldo County, Maine, with a mailing address of P.O. Box 465, Belfast, Maine 04915.

13. Friends holds the Conservation Easement over a portion of the Plaintiffs' property, including all of the intertidal land on which Tax Map 29, Lots 38, 37, 36 and most of 35 front, pursuant to the April 29, 2019, Conservation Easement (WCRD Book 4367, Page 273), created by Mabee-Grace, and an Assignment from the original Conservation Easement Holder, Upstream Watch, dated November 5, 2019, recorded in the WCRD at Book 4435, Page 344.

14. The boundaries of the Harriet L. Hartley Conservation Area are described in Schedules A and B to the Conservation Easement (recorded in the WCRD at Book 4367, Page 273) and shown on the survey plan prepared by Donald R. Richards, P.L.S., L.F., recorded in the WCRD at Book 24, Page 54.

15. **The Maine Lobstering Union** ("IMLU") is Local 207 of the International Association of Machinists and Aerospace Workers (IAMAW), within District Lodge 4 of the IAMAW.

16. The IMLU was incorporated in the State of Maine as a nonprofit fish marketing association.

17. The corporation was organized as a "cooperative corporation" by filing Articles of Incorporation under the Fish Marketing Act, 13 M.R.S.A. §§ 2001-2287, with the Maine Secretary of State, on September 10, 2013.

18. The IMLU is in good standing as an entity according to the Maine Secretary of State. The IMLU's charter number is 20140002CP.

19. For federal tax purposes the IMLU is a "cooperative" under subchapter T of the Internal Revenue Code.

20. The IMLU is an organization comprised of active, licensed lobstermen and sternmen and exists to represent the interests of *only* licensed lobstermen and sternmen (as opposed to other lobster industry participants).

21. The IMLU is the first representative organization organized as a cooperative in Maine to represent lobstermen and sternmen exclusively.

22. The harvesters in the IMLU also have purchased and operate a wholesale and retail business that markets and sells Maine lobsters and crabs harvested by IMLU members and other holders of Maine commercial lobster and crab fishing licenses.

23. The IMLU's business operates under the business name Lobster207.

24. The IMLU represents lobstermen in all Maine Lobster Zones, from Kittery to Cutler, including in Zones C and D, the Zones covering Penobscot Bay, Maine, that would be most directly adversely impacted by Nordic's proposed project and the Board's Final Agency Action.

25. The IMLU has members that fish in the area directly, adversely impacted by the pipelines, dredging, side-casting, dewatering, blasting and wastewater and effluent dumping proposed by Nordic, and in all areas of Zones C and D that will suffer direct, indirect, cumulative, primary, secondary, acknowledged, foreseeable and unforeseeable impacts from the Nordic project, as proposed, in the short- and long-terms.

26. The IMLU has participated in all stages of the Board's permit proceedings, and challenged the Nordic permit and license applications filed with the Department, based on Nordic's lack of sufficient TRI, justiciability, and substantive and procedural defects that will adversely impact the fishing and fishing grounds in Penobscot Bay since at least October of 2018.

27. **Wayne Canning** is the Zone D Lobster Zone Council representative for District 11 lobstermen and is a lobsterman, holding a Maine commercial lobster and crab fishing license.

28. Petitioner Canning fishes out of Belfast, Maine, in the area proposed by Nordic for placement of its intake and discharge pipelines, and the area where wastewater will be discharged.

29. Petitioner Canning has participated in local and State proceedings regarding the proposed Nordic project, including all Department assessments, proceedings and meetings

conducted in connection with Nordic's requested licenses and permits; and Petitioner Canning has submitted and given testimony in opposition to the Nordic project as proposed.

30. Petitioner Canning has solicited input regarding the potential impacts of this proposed project from the Zone D District 11 lobstermen who he represents.

31. Zone D District 11 includes the geographic area where Nordic proposes to place its intake and discharge pipelines and discharge up to 7.7 million gallons per day of warm, brackish wastewater.

32. The construction and placement of Nordic's pipes and its proposed discharge of wastewater into Penobscot Bay will adversely impact Wayne Canning and all District 11 lobstermen, by increasing the risk to life, livelihood and property of Petitioner Canning and similarly situated commercial lobster and crab license holders.

33. Petitioner Canning and similarly situated commercial lobster and crab license holders will suffer irreparable and significant particularized injuries, in a manner and extent that far exceeds the injuries that the general public will suffer as a result of Nordic's revised pipes installation proposal approved by the Board in its November 19, 2020, final agency action, and left in place on remand in 2023 after remand.

34. Petitioner Wayne Canning has challenged the Nordic permit applications based on Nordic's lack of sufficient TRI, justiciability, and substantive and procedural defects that will adversely impact the fishing and fishing grounds in Penobscot Bay since at least October of 2018.

35. **David Black** is a Belfast resident and a lobsterman, holding a Maine commercial lobster and crab fishing license.

36. Petitioner Black has fished for more than 55 years in Belfast Bay and Penobscot Bay out of Belfast, Maine, and fishes in the area proposed by Nordic for placement of its intake and discharge pipelines and the area where wastewater will be discharged.

37. Petitioner Black has participated in local, State and federal administrative filings, proceedings and meetings in connection with this permitting process and has submitted and given testimony in opposition to the Nordic project, as proposed, in the BEP hearings conducted in February 2020, and in the related DMR solicitation of public comments in March 2020.

38. Petitioner Black confirmed, based on his personal experience, the uncompensated, multi-year adverse impacts suffered by the lobstermen in District 11, including him, due to past dredging projects (including the 2003 Belfast Harbor dredging project) and past placement of pipelines that obstruct the movement of lobsters in and around the Bay.

39. Petitioner Black will suffer an increased risk to life, livelihood, and property as a result of Nordic's proposed pipes installation plan proposal, submitted by Nordic and approved by the Board in its 11-19-2020 final agency action and left in place after the 2023 remand.

40. Upstream Watch is a non-profit, 501(c)(3) corporation (T 13-B) duly incorporated in the State of Maine on September 6, 2018, Charter No. 20190094ND, in Good Standing, with an office and principal place of business at 67 Perkins Road in the City of Belfast, Waldo County, Maine.

41. During the period April 29, 2019 to November 5, 2019, Upstream Watch held the Conservation Easement over Plaintiffs' intertidal land on which Tax Map 29, Lots 38, 37, 36 and most of 35 front, described in Schedules A and B to the recorded conservation easement (WCRD Book 4367, Page 273). Subsequently, on 11-5-2019, Upstream assigned Friends as the "Holder" of the Conservation Easement (WCRD Book 4435, Page 344).

42. Upstream Watch intervened as a party in the administrative process in the Board and separately filed a Petition challenging the Board's final agency action entered on 11-19-2020 in the Kennebec County Superior Court, Docket No. AP-20-49, and was Petitioners' co-Appellant in the prior Law Court 80C appeal of the 2020 Board Order (BCD-22-48).

43. Upstream Watch has filed a separate 80C appeal of the 2020 Board Orders and the 10-19-2023 Order on Remand, in Kennebec County, on or about November 15, 2023.

B. Respondent

44. **The Board of Environmental Protection**, as described by the relevant State websites,² is a seven-member citizen board whose members are appointed by the Governor and confirmed by the Legislature.

45. The purpose of the Board is to provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws related to environmental protection and to provide for credible, fair and responsible public participation in department decisions.

46. While the Board is part of the Department of Environmental Protection, it has independent decision-making authority in the areas of its responsibility.

47. The Board fulfills its purpose through rulemaking, decisions on selected permit applications, decisions on appeals of the Commissioner's licensing actions, review of the Commissioner's enforcement actions, and recommending changes in the law to the Legislature. *See*, 38 M.R.S. § 341-B.

48. The Board is statutorily directed to exercise independent judgment on the matters before it.

49. The Board is not bound by the views of others or, in the case of an appeal, by the Commissioner's decision.

² <https://www.maine.gov/dep/bep/index.html>
<https://www.maine.gov/dep/bep/info/BEP%20Overview%20-%20Purpose%20Sept%202019.pdf>

50. Most license applications are processed at the Department staff level and decided by the Commissioner or the Commissioner's designee; however, State law requires that certain license applications be decided by the Board.

51. The statutory criteria for Board jurisdiction over an application are set forth in 38 M.R.S. § 341-D(2):

"The Board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance. A project of statewide significance is a project that meets at least 3 of the following 4 criteria:

- Will have an environmental or economic impact in more than one municipality, territory or county;
- Involves an activity not previously permitted or licensed in the State;
- Is likely to come under significant public scrutiny; and
- Is located in more than one municipality, territory or county."

52. 38 M.R.S. § 341-D(2) also states that the Board has mandatory jurisdiction over projects when a project is "referred to it jointly by the commissioner and the applicant."

53. Here, the Board has mandatory jurisdiction over the Nordic project as both a "project for statewide significance" and because this project was referred to it jointly by the commissioner and Nordic in June 2019.

C. Permit Applicant

54. **NORDIC AQUAFARMS INC.**, (hereinafter "NAF" or "Nordic") is a Delaware corporation with offices in Belfast, Waldo County, Maine, Portland, Cumberland County, Maine and Fredrikstad, Norway.

55. Nordic's "Home Office" and "principal place of business is listed as: 511 Congress Street, Suite 500, Portland, Maine 04101, in filings with the Maine Secretary of State and Delaware Secretary of State.

56. Permit Applicant Nordic Aquafarms Inc. is a foreign Business Corporation, Charter No. 20180521 F which desires to construct and operate a land-based salmon aquaculture

factory.

57. As currently proposed by Nordic, its land-based factory would require the placement of three industrial pipelines into Penobscot Bay, across upland Lot 36, formerly owned by Janet and Richard Eckrote, and on, over and under the intertidal property on which Lot 36 fronts.

58. Pursuant to the Law Court's decision in *Mabee I*, Petitioners Mabee and Grace own the intertidal land adjacent to Lot 36 in fee simple and Friends holds an "enforceable" Conservation Easement on it, where Nordic proposes to place its three industrial pipes and where the Board's permits and licenses would authorize placement of such pipes. *Mabee I*, ¶¶ 10, 17, 45-52, 61 and Figure 5.

59. Pursuant to the Law Court's decision in *Mabee I*, Petitioners Mabee and Grace and Friends have the right to enforce the "residential purposes only" servitude on Lot 36 as holders of land benefited by that restriction and enforce the Conservation Easement on the adjacent intertidal land. *Mabee I*, ¶¶ 58-61 and n. 13.

D. Parties-in-Interest

60. **The Fish Are Okay** is a not-for-profit corporation with a place of business in the City of Belfast, County of Waldo, State of Maine.

61. **The Northport Village Corporation** is a municipal corporation situated in the Town of Northport, County of Waldo, State of Maine.

62. **Eleanor Daniels and Donna Broderick** are a married couple who lived in Belfast, Maine, and were abutters to the upland property on which Nordic proposes to place its industrial fish factory at the time this project was first proposed by Nordic in 2018. Eleanor Daniels is currently the Treasurer of Friends. Parties-in-Interest Daniels and Broderick have participated in opposing Nordic's project as proposed since 2018. Parties-in-Interest Daniels and Broderick are

now residents of Searsmont, County of Waldo, State of Maine.

63. **Lawrence Reichard** is a natural person, who is a journalist by profession, and he is a resident of and/or doing business in the City of Belfast, County of Waldo, State of Maine.

64. **The Gulf of Maine Research Institute** is a non-profit corporation, organized under the laws of the State of Maine with its principal place of business at 350 Commercial Street, Portland, County of Cumberland, State of Maine.

65. **The University of New England** is a private higher education university organized under the laws of the State of Maine, with its principal place of business at 11 Hills Beach Road, Biddeford, County of York, State of Maine.

66. All of the Parties-in-Interest listed above were granted Intervenor status by the Board in 2019, and participated in the hearings conducted by the Board on Nordic's applications, as submitted initially, in February of 2020.

III. JURISDICTION AND VENUE

67. The location of the project for which Nordic sought and seeks retention of permits and licenses from the Board is situated in Belfast and Northport, Waldo County, State of Maine.

68. Final Agency Action by the Respondent Maine Board of Environmental Protection is subject to review under 5 M.R.S. § 11001(1).

69. Under 06-096 C.M.R. ch. 3, § 2(J) of the Maine Department of Environmental Protection Rules, the MGL Intervenors were Intervenors in the license application process concerning the Nordic project and have standing to seek review by this Court.

70. Friends has standing and a statutory right to challenge the Board's 2020 Orders and 10-19-2023 Order on Remand as an Interested and Aggrieved Party and pursuant to 33 M.R.S. § 478(1)(B).

71. As one or more of the Petitioners (and Parties-in-Interest) reside in Waldo County and/or have their principal place of business in Waldo County, and the activity or property which is the subject of the Board’s proceedings is located in Waldo County, venue is proper in the Waldo County Superior Court, pursuant 5 M.R.S. § 11002(1)(A) and (C). However, because the principal place of business of the Board is in Kennebec County, venue is also proper in Kennebec County, pursuant to 5 M.R.S. § 11002(1)(B).

IV. STATEMENT OF THE PROCEDURAL HISTORY AND FACTS OF THE CASE

A. Nordic Project Overview

72. Nordic began publicly proposing to build a land-based salmon factory in Belfast, Maine, in 2018. Infrastructure for the project would be located in Belfast and Northport, Maine.

73. On January 30, 2018, the City of Belfast, Nordic Aquafarms Inc., and the Belfast Water District (“BWD”) entered an agreement to convey land owned by the BWD for the construction of Nordic’s land-based salmon factory in Belfast, Waldo County, Maine.³

74. The 1-30-2018 Options and Purchase Agreement includes an image of the Belfast Water District’s (“BWD”) land to be acquired by Nordic and/or the City, depicting the location of the 12.5-acre parcel (labeled as the “Additional Parcel”) in relation to the BWD’s other land (labeled the “Waterfront Parcel” and “Realty”).⁴ *See*, image below.

³ City of Belfast website on the Nordic Project:
<https://www.cityofbelfast.org/DocumentCenter/View/2176/options-and-purchase-agreement?bidId=>

⁴ City of Belfast website on the Nordic Project, 1-30-2018 Options and Purchase Agreement:
<https://www.cityofbelfast.org/DocumentCenter/View/2176/options-and-purchase-agreement?bidId=>



1. Nordic’s Lack of TRI in 12.5-Acres on the Western side of U.S. Route 1

75. In February of 2018, Nordic, the City of Belfast and the Belfast Water District discovered that a 12.5-acre portion of the land owned by the Belfast Water District, located on the western (inland) side of U.S. Route 1, needed by Nordic to construct its salmon factory as proposed, was burdened by deed restrictions, that run with the land, and were imposed in October 1973, by a deed from the State of Maine, signed by the Governor and Council (WCRD Book 710, Page 1153; “1973 State-to-City deed”).

76. Specifically, the 1973 State-to-City deed states in relevant part:

KNOW ALL MEN BY THESE PRESENTS

“That, the STATE OF MAINE, acting by and through the Governor and Council, on recommendation of the Department of Transportation, under and pursuant to the provisions of 23 M.R.S.A. Section 61, in consideration of ONE (\$1.00) Dollar and other valuable consideration paid by the CITY OF BELFAST, a body corporate and politic located at Belfast, County of Waldo and State of Maine, the receipt whereof it does hereby acknowledge, *does hereby remise, release, bargain, sell and convey and forever quit-claim unto the CITY OF BELFAST, its successors and assigns, a certain lot or parcel of land situated in Belfast for so long as the same shall be used for the protection of a municipal water shed by said Grantee*, said parcel being more particularly described as follows, to wit: . . .

This conveyance is made subject to the following restrictions which *shall run with the land*, to wit: . . .

(4) No buildings will be permitted on the premises herein above described.

(5) The land shall be kept in its natural condition; however, proper husbandry and maintenance of the forest produce existing thereon and such uses of said land that are consistent with the above purpose will be allowed.

(emphasis supplied) (hereinafter “1973 State-to-City deed” and parcel referred to as “1973 Governor’s conveyance” or “12.5-acre parcel”).

77. The stated purpose for the State’s conveyance of this 12.5-acre parcel to the City of Belfast was “the protection of a municipal water shed.” (*See, e.g.*, WCRD Book 710, Page 1153).

78. The reversionary clause in the 1973 State-to-City deed – limiting the conveyance to “the CITY OF BELFAST, its successors and assigns, . . . for so long as the same shall be used for the protection of a municipal water shed by said Grantee” -- is a “fee simple determinable in land” or a “fee simple in land subject to a right of entry for condition broken.” (emphasis supplied).

79. Because the 1973 reversionary clause was created for a public purpose and was included in a deed granted to a political subdivision of the State, this reversionary clause is not subject to the rule of perpetuities, pursuant to 33 M.R.S. § 116(3)(a) and (b).

80. At all times since October 10, 1973, the City of Belfast has known, *or should have known*, that this 12.5-acre parcel was subject to the Conditions and Restrictions in the 1973 State-to-City deed from the State of Maine.

81. In 1987, the City of Belfast conveyed the 12.5-acre parcel, which had been conveyed to the City by the 1973 State-to-City deed, to the Belfast Water District, by Quit Claim Deed.

82. The 1987 City-to-BWD Quitclaim Deed expressly stated that the parcel was subject to the Conditions and Restrictions in the 1973 State-to-City deed. (WCRD Book 1092, Page 145; hereinafter “City-to-BWD deed” or “1987 City-to-BWD deed”).

83. The 1987 City-to-BWD deed states that: “Authorization for this deed was given Mar[ch] 3rd, 1987 by the Belfast City Council” (WCRD Book 1092, Page 146).

84. After counsel for the City of Belfast, Nordic and BWD learned of the restrictions on the 12.5-acre parcel in February 2018, they did not advise Nordic to find an alternative site for the project that was not burdened by restrictions imposed for the protection of a municipal water shed. Rather, these attorneys set about surreptitiously obtaining a release of the restrictions from the Maine Department of Transportation, while concealing the existence of the restrictions from abutters benefitted by them, the public and other relevant regulatory entities.

85. In order for the Belfast Water District (“BWD”) to sell its “water resource land” along the Little River to Nordic for industrial development, the BWD was required to obtain permission from the Public Utilities Commission (“PUC”), by demonstrating that the sale was in the public’s interest and would not have a deleterious impact on water resources.

86. On March 2, 2018, the City of Belfast filed a Motion to intervene in the PUC proceedings concerning whether to approve the BWD’s sale of its Little River property to Nordic. In Belfast’s Motion to Intervene, Attorney Bill Kelly, acting as City Attorney for the City of Belfast, described the City’s relationship to Nordic as “partnering,” stating in relevant part:

[T]he City of Belfast is actively involved in significant efforts through its Administrative, Planning, and Economic Development Departments to facilitate land use and zoning modification, explore economic development resources at every level of government, and to collaborate to obtain all necessary State and Federal permits. Thus, the City of Belfast is effectively “partnering” with N.A.F. on an expedited and focused basis to gather input and data through the public hearing process and thereafter proceed through the various permitting processes.

(Second Amended Complaint in CV-2023-6, Exhibit 48, numbered ¶ 3 (quotation marks in original PUC filing)).

87. Neither the City nor the BWD provided copies of the 1973 State-to-City deed or 1987 City-to-BCD deed to the PUC.

88. In filings submitted to the PUC, the BWD falsely claimed that all BWD land proposed for sale to Nordic was acquired by the BWD in 1919.

89. In granting permission to BWD to sell “water resource” lands to Nordic the PUC specifically stated that all land to be sold was acquired by the BWD in or by 1919 – demonstrating the PUC’s reliance on the incomplete and inaccurate documentation provided to the PUC by the City and BWD.

90. Nordic’s project, as proposed in all local, State and federal regulatory proceedings, would clear-cut and denude the 12.5-acre parcel of its extensive mature tree growth, and fill extensive wetlands and a brook covering a significant portion of this parcel.

91. Indeed, because the soil along the Little River and its aquifer has a high clay content and is, thus, unsuitable for the construction of the tanks needed for the Nordic project, Nordic proposed, and was ultimately granted permits from BEP, that would allow Nordic to remove the entire forest and the underlying naïve soil over a 37-acre area.

92. The area approved for such destruction and alteration by the Board includes all of the 12.5-acre parcel subject to the restrictions (and reversionary clause) in the 1973 State-to-City deed.

93. Nordic proposes, and was approved by BEP, to remove all native soil to a depth of anywhere from 20-feet to 50-feet, and to replace that soil with different soil brought to the site from another—unspecified and undisclosed – location.

94. BEP failed to include any requirements or conditions on the source for this soil or testing requirements to ensure it is free from “PFAS” contaminants in the 2020 Orders granting Nordic permits and licenses pursuant to NRPA and SLODA. *See*, Image below from engineering drawings submitted with and incorporated in Nordic’s 5-24-2019 Site Location of Development

Act (“SLODA”) Application to the Maine Department of Environmental Protection (see area marked in green).⁵



95. Clear-cutting and denuding the 12.5-acre parcel of its extensive mature tree growth, filling the extensive wetlands and brook, and removing the native soil would violate Restriction 5 in the 1973 State-to-City deed, requiring the City of Belfast, its successors and assigns, to keep this parcel in its “natural condition.”

96. Nordic’s project, as proposed, would also include placing large buildings (including Building #1), and the associated industrial infrastructure, on most of the area of the 12.5-acre parcel, in direct contravention of the Conditions and Restrictions in the 1973 State-to-City deed,

⁵ <https://www.maine.gov/dep/ftp/projects/nordic/applications/SLODA/Civil%20Engineering%20Drawings/006-CE110-18076.pdf>

1987 City-to-BWD deed and 2022 BWD-to-Nordic deed (WCRD Book 4776, Page 221), especially Restriction 4.

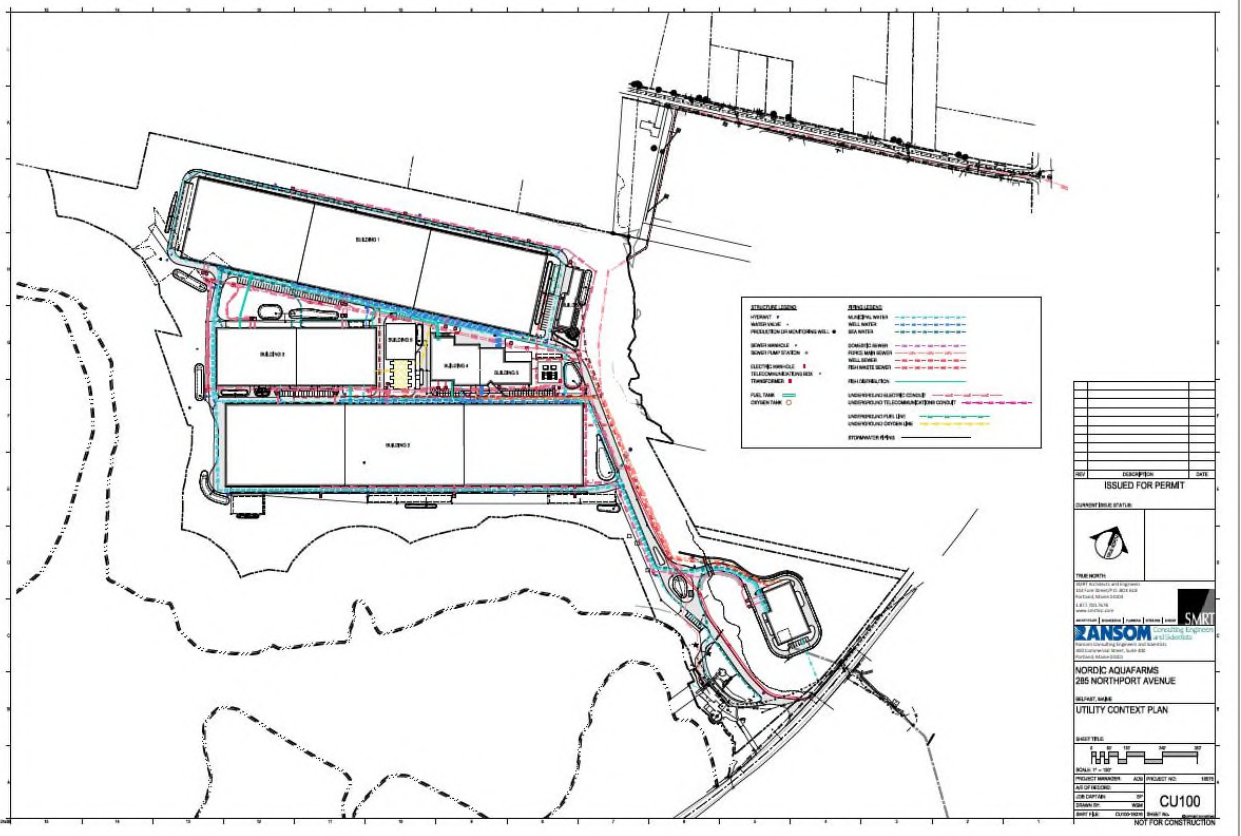


Image obtained from engineering drawings submitted with and incorporated in Nordic’s 5-24-2019 Site Location of Development Act (“SLODA”) Application to the Maine Department of Environmental Protection.⁶

97. On or about November 4 or 5, 2018, DEP in-house counsel Kevin Martin did an independent review of the deeds for the properties that Nordic proposed for its use and development, which included at least the land on the inland western side of U.S. Route 1. Nordic did not include any of these deeds with its MEPDES application – the only applications submitted at that time.

98. DEP Attorney Martin’s deed review revealed the restrictions on the 12.5-acre parcel.

⁶ <https://www.maine.gov/dep/ftp/projects/nordic/applications/SLODA/Civil%20Engineering%20Drawings/037-CU100-18076.pdf>

99. DEP Attorney Martin contacted Nordic’s counsel and agent, Joanna Tourangeau, Esq., regarding the apparent restrictions in the 1973 State-to-City and 1987 City-to-BCD deeds upon discovery of those deeds and restriction.

100. Nordic’s counsel, Joanna Tourangeau, forwarded an unrecorded Deed of Vacation, dated 4-9-2018, signed by the Commissioner of DOT (“4-9-2018 DOT-to-City Deed of Vacation”), that allegedly released *the City of Belfast* (not the BWD which actually had owned the 12.5-acre parcel since March of 1987) from the restrictions in the 1973 State-to-City deed.

101. Nordic’s Attorney Tourangeau sent a transmitting email, dated 11-5-2018, to DEP Attorney Martin, stating in relevant part:

Attached is a copy of the Deed of Vacation the Maine DOT issued to the City of Belfast which extinguishes the “no build” restriction the Department noted in its deed research and review of the deed to the City from the State for the portion of the property delineated in Nordic’s Purchase and Sale Agreement with the City/BWD (the PnS”) as the “Additional Parcel.” You will note that while this deed is dated April of this year [2018] – it has not yet been recorded. Counsel for the City is holding the Deed of Vacation in escrow until such time as the transaction described in the PnS closes.

See, Second Amended Complaint in WALSC-CV-2023-6, Exhibit 13 attachment, Tourangeau email thread and attached unrecorded 2018 DOT-to-City Deed of Vacation.

102. The Department of Environmental Protection did not post this correspondence from Nordic’s counsel Attorney Tourangeau as an addendum to Nordic’s MEPDES application and/or Nordic’s supplemental “TRI” (title, right or interest) documentation on its Major Projects website for the Nordic project in 2018, or at any time thereafter to present.⁷

⁷ See, DEP Major Projects website for the Nordic Project, TRI Supplement, as of September 25, 2023:

<https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/>

Nordic’s MEPDES Application, the only application pending in 2018 in DEP:

https://www.maine.gov/dep/ftp/projects/nordic/applications/MEPDES%20Permit%20Application_Final_Oct%2019,%202018.pdf

103. Nordic did not give notice to abutters of Nordic's proposed Project, including Petitioners Mabee-Grace, of the existence of the restrictions in the 1973 State-to-City deed and 1987 City-to-BWD deed, nor did Nordic file the unrecorded 4-9-2018 DOT-to-City Deed of Vacation in support of its claims of "sufficient TRI" in the DEP-BEP proceedings.

104. When Nordic filed its NRPA, SLODA and Air license applications in May of 2019, Nordic did not provide the deeds to the BWD land it proposed to acquire or the unrecorded 4-9-2018 DOT-to-City Deed of Vacation as supplemental support for Nordic's claims that it had "sufficient" title, right or interest to use all property for which permits and licenses were sought from the Department of Environmental Protection, in the manner proposed by Nordic and allowed by those permits and licenses.

105. On information and belief, during consideration of Nordic's Maine Pollutant Discharge Elimination System ("MEPDES"), Site Location of Development Act ("SLODA"), Natural Resources Protection Act ("NRPA"), and Air permit and license applications, the staff and legal counsel to the Department of Environmental Protection ("Department" or "DEP") and the Board of Environmental Protection ("Board" or "BEP") at no time advised the Board, the public, or Intervenors in those proceedings, including the MGLF Petitioners, of the Conditions and Restrictions on the 12.5-acre parcel in the recorded 1973 State-to-City and 1987 City-to-BWD deeds in any public meeting or hearing, or any written draft or final Decision.

106. Despite the lack of any consideration by the Board of the restrictions in the 1973 State-to-City deed and 1987 City-to-BWD deed during any Board proceedings conducted on the Nordic project from June 20, 2019 to 11-19-2020, including during the Board's hearings conducted on February 10-14, 2020, the 11-5-2018 email from Joanna Tourangeau to Attorney Martin and the attached *unrecorded* 4-9-2018 DOT-to-City Deed of Vacation were inserted in the 2020 Administrative Record as "A.R.Doc. 0036."

107. There is no document recorded in the WCRD or that has been obtained from FOAA that indicates the Governor of the State of Maine or any court of competent jurisdiction ever released to BWD from the restrictions in the 1973 State-to-City deed.

108. On March 11, 2022, Nordic closed on its acquisition of property from the BWD, including the 12.5-acre parcel (WCRD Book 4776, Page 210; “3-11-2022 BWD-to-Nordic deed”).

109. Appropriately, the 3-11-2022 BWD-to-Nordic deed expressly states that the conveyance to Nordic of the BWD’s land, including the 12.5-acre parcel, is “SUBJECT TO” “the terms, conditions and restrictions” in the 1973 State-to-City deed (WCRD Book 710, Page 1153) and 1987 City-to-BWD deed (WCRD Book 1092, Page 145).

110. Specifically, the BWD-to-Nordic deed states:

FURTHER SUBJECT TO the following: ...

2) The terms, conditions and restrictions set forth in the deed from the State of Maine to the City of Belfast Dated October 10, 1973 and recorded in said Registry in Book 710, Page 1153, and as restated in the deed from the City of Belfast to the Belfast Water District dated March 3, 1987 and recorded in said Registry in Book 1092, Page 145.

See, Book 4776, Page 210 at 221.

111. On March 15, 2022, the City of Belfast attempted to release Nordic from the restrictions created to run with the land pursuant to the 1973 State-to-City deed, the 1987 City-to-BWD deed and the 3-11-2022 BWD-to-Nordic deed, by having the Belfast City Manager execute a “Deed of Vacation,” drafted by Nordic’s counsel, dated 3-15-2022.

112. Nordic’s counsel drafted the 3-15-2022 Deed of Vacation for the City Manager to execute on 3-15-2022.

113. Nordic’s counsel recorded the 4-9-2018 DOT-to-City Deed of Vacation and the 3-15-2022 City-to-Nordic Deed of Vacation in the Waldo County Registry of Deeds on 3-17-2022 (WCRD Book 4778, Pages 34 and 35).

114. MGLF Petitioners first discovered Nordic’s problems relating to the legal impediments to using the 12.5-acre parcel on the western side of U.S. Route 1 in March of 2023, upon discovering the curious 3-15-2022 City-to-Nordic Deed of Vacation during an online search of records in the Waldo County Registry of Deeds on or about March 8, 2023.

115. Prior to that time, MGLF Petitioners’ challenges to Nordic’s claims of “sufficient title, right or interest” in the land proposed for use and development were focused on the land located on the eastern side of U.S. Route 1, including the parcel designated as Belfast Tax Map 29, Lot 36, and the intertidal land adjacent to Lot 36, where Petitioners Mabee-Grace and Friends property is located.

116. After discovering the 1973 State-to-City restrictions on the 12.5-acre parcel, Petitioners Mabee-Grace and Friends and abutter Marth M. Block, filed a Declaratory Judgment action to declare the 4-9-2018 DOT-to-City Deed of Vacation and 3-15-2022 City-to-Nordic Deed of Vacation ultra vires, null and void ab initio, in *Mabee and Grace, et. al. v. City of Belfast, et al.*, Docket No. WALSC-CV-2023-6.

117. The Board and its legal counsel violated the Board’s statutory duty to safeguard the environment and water resources, and enforce the restrictions imposed by the State of Maine, on the 12.5-acre parcel during the Nordic permitting process.

118. The NRPA and SLODA permits issued by the Board in 2020, and left in place by the Board in 2023 on remand, are ultra vires and null and void ab initio, because these permits and licenses authorize Nordic to violate restrictions that run with the land, imposed by the State of Maine, binding on Nordic as a successor of the City of Belfast and pursuant to the express terms of the 3-11-2022 BWD-to-Nordic deed.

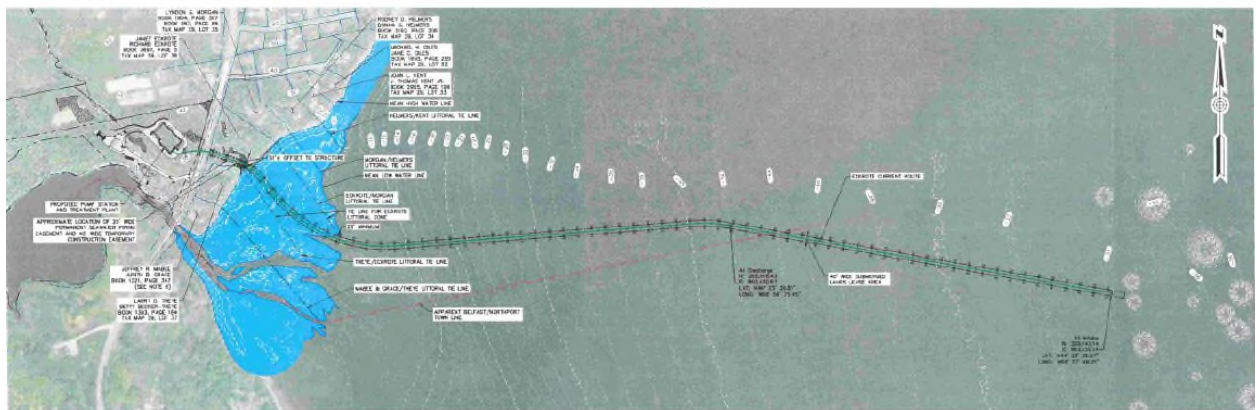
119. Entry of the 2020 NRPA and SLODA permits and licenses was based on errors of law and in the absence of any Record evidence justifying violation of the deed restrictions that run with the land and were imposed by the State of Maine.

120. The 2020 NRPA and SLODA permits and licenses should be vacated because the Board exceeded their statutory authority to grant them and authorize Nordic to violate the 1973 deed restrictions.

2. Nordic has at all times Lacked “Sufficient TRI” to Use Lot 36 And the Adjacent Intertidal Land in the Manner Proposed

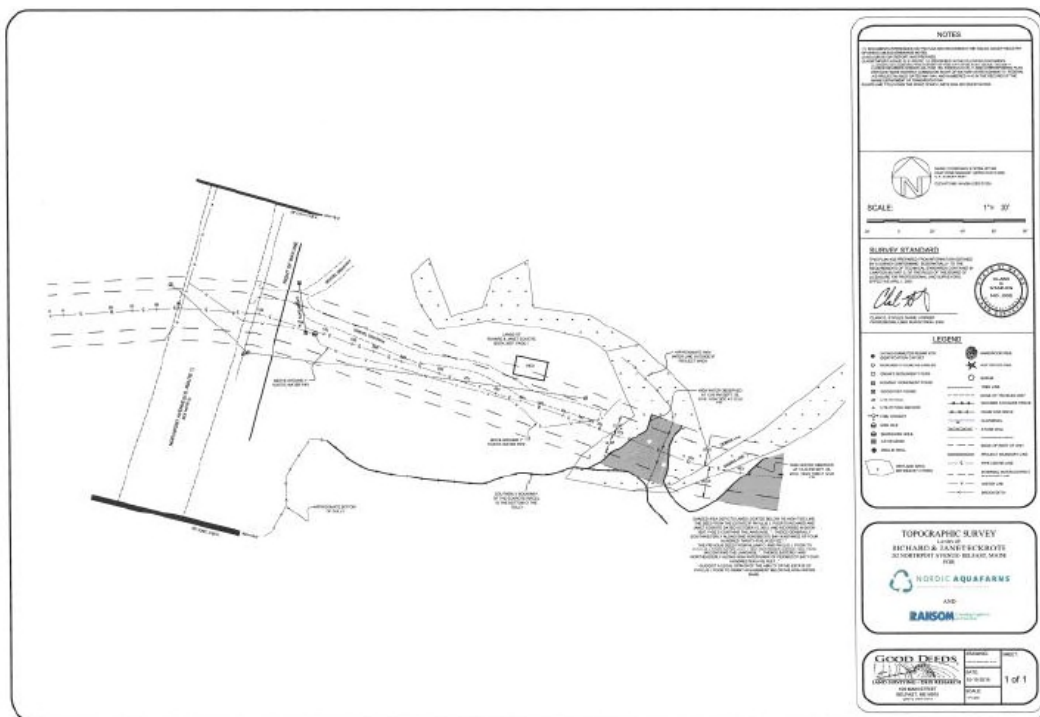
121. To obtain the seawater required for its project and a place to dump 7.7 million gallons *a day* of brackish wastewater, Nordic requires access to Penobscot Bay and placement of two 30” in diameter seawater intake pipes and one 36” in diameter wastewater discharge pipe, extending almost a mile out into Penobscot Bay.

122. Nordic chose a location for its seawater intake and waste water discharge pipes on a shallow estuary near the Little River. The only means of access to Penobscot Bay from this location requires placing Nordic’s 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”). (2020 A.R.Doc. 150, p. 24).



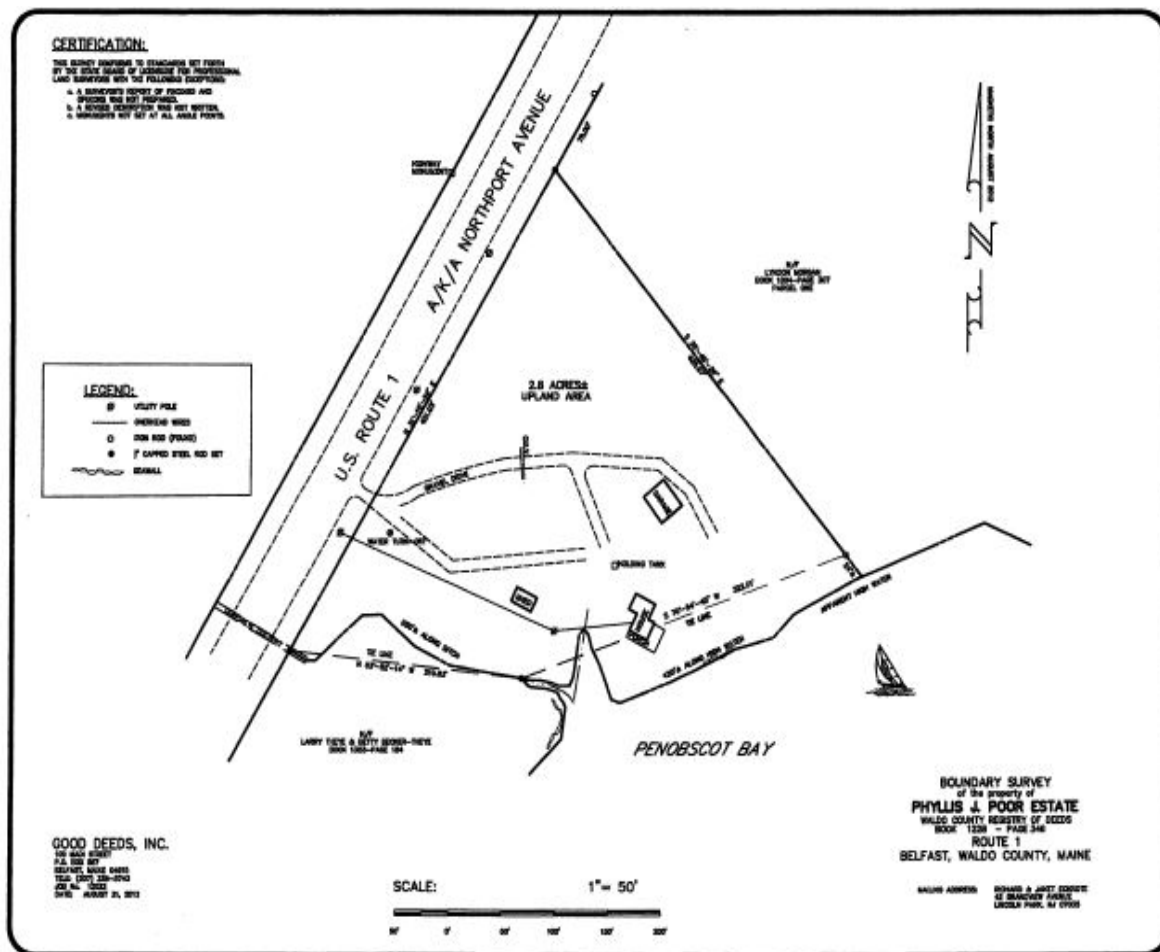
123. In early 2018, Nordic retained Clark Staples, P.L.S., a surveyor from Good Deeds, to survey the Eckrotes' property and adjacent intertidal zone.

124. The 2018 Good Deeds survey cautioned Nordic, stating that there was a discrepancy in the parcel descriptions in the 1991 deed to Phyllis J. Poor (WCRD Book 1228, Page 346) and the 2012 deed to the Eckrotes from the Estate of Phyllis J. Poor (WCRD Book 3697, Page 5). The survey stated in relevant part, in all-CAPS: "I SUGGEST A LEGAL OPINION OF THE ABILITY OF THE ESTATE OF PHYLLIS J. POOR TO GRANT AN EASEMENT BELOW THE HIGH WATER MARK." (2020 A.R.Doc. 0178, p. 4 and 0935i).



125. The 2018 Good Deeds survey is consistent with the 8-31-2012 Good Deeds survey by Gusta Ronson, P.L.S., which shows the eastern (bayside) boundary of the parcel owned by the Estate of Phyllis J. Poor as "425'± ALONG HIGH WATER." (2020 A.R.Doc. 0935j).

126. The 8-31-2012 survey is incorporated-by-reference in the deed description in the 10-15-2012 deed from the Estate of Phyllis J. Poor to the Eckrotes (WCRD Book 3697, Page 5), as the basis of that description.⁸ *Id.*



(2020 A.R.Doc. 0150, p. 25).

127. Neither the 2012 nor 2018 Good Deeds surveys is recorded, and therefore were not accessible to Petitioners, local and State officials involved in reviewing Nordic’s permit applications, or the public, when the Nordic project was initially proposed.

⁸ *Kinney v. Cent. Maine Power Co.*, 403 A.2d 346, 351 (Me. 1979) (“[W]e have held that a survey or plan will ordinarily control an inconsistent call in a deed, *Liebler v. Abbott*, [388 A.2d 520 (Me. 1978)] *supra* at 522; *Ilsley v. Kelley*, 113 Me. 497, 501, 94 A. 939, 940 (1915).”).

128. However, when Nordic entered into an agreement for an easement *option* to bury its pipes in Lot 36 with the Eckrotes on August 6, 2018 (“8-6-2018 EOA”), Nordic had access to both of these surveys ***showing that the boundaries of Lot 36 terminate at the high water mark and, thus, that the Eckrotes do not own the intertidal land on which Lot 36 fronts and, therefore, had no legal capacity to grant Nordic an easement in the intertidal land adjacent to Lot 36.*** See, *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 448, 19 A. 915, 916 (1890) (“One cannot convey land, not create an easement in it, unless he owns it.”).

129. On August 6, 2018, the Eckrotes granted an option to Nordic to acquire a 40-foot wide construction easement and a 25-foot wide permanent easement across their upland property (“Lot 36”), for the purpose of placing Nordic’s three industrial pipes into Penobscot Bay.

130. The 8-6-2018 EOA did not define the boundaries of the easement to be granted along the southern boundary of Lot 36 by metes and bounds, but defined the boundaries of the easement to be granted by an image attached as Exhibit A to the 8-6-2018 EOA (Exhibit A image below).



131. On the face of Exhibit A to the 8-6-2018 EOA (shown above) the construction and permanent easements to be granted to Nordic both terminate at the high water mark of Lot 36 and prior to the right-of-way along Route 1.

132. Neither the text of the 8-6-2018 EOA, attached as an exhibit to Nordic’s various DEP permit and license applications, nor Exhibit A to the EOA, state that the easement to be granted to Nordic by the Eckrotes extends into the abutting intertidal land or grants Nordic the right to use the intertidal land adjacent to Lot 36 for any purpose, including burying its industrial pipes. (See, e.g. 2020 A.R.Doc. 150, pp. 3-16).

133. Nonetheless, throughout all proceedings on Nordic’s applications in the Department, the 8-6-2018 Easement Option Agreement from the Eckrotes to Nordic was represented by Nordic as granting Nordic “sufficient” title, right or interest in Lot 36 and the intertidal land adjacent to Lot 36 to allow Nordic to obtain local, state and federal permits, licenses, and leases authorizing

Nordic to dredge and excavate the intertidal land abutting Lot 36, for the purpose of burying Nordic's industrial pipes.

134. No evidence submitted to the Department, *by Nordic*, supported Nordic's claims that the 8-6-2018 EOA granted Nordic an easement on the intertidal land adjacent to Lot 36.

135. The Department, including both the Commissioner and Board, repeatedly ignored deeds, surveys and surveyor's opinions, prepared for and submitted by Nordic, the unambiguous meaning of which demonstrated that the Eckrotes did not own the intertidal land on which Lot 36 fronts, and thus, as a matter of law, the Eckrotes could not grant Nordic an easement in the intertidal land adjacent to Lot 36.

136. The Board's 2020 Order must be vacated because the TRI determinations contained in all permits and licenses granted to Nordic are based on errors of law and are unsupported by any Record evidence.

B. Factual Background of Dispute

137. Nordic filed its MEPDES application with the DEP in October 2018 (2020 A.R.Doc. 0021a).

138. To demonstrate sufficient title, right or interest ("TRI") to obtain necessary permits, licenses and leases, Nordic relied solely on the 8-6-2018 EOA from the Eckrotes in all local, State and federal permitting and lease proceedings, including the BEP-DEP proceedings relating to the permits and licenses challenged in this and the prior 80C appeals. (2020 A.R.Doc. 0150, pp. 3-16).

139. Copies of the relevant applications and evidence submitted by Nordic to support its TRI claims in the DEP and BEP proceedings are posted on the Department's "major projects" website on the Nordic project and are incorporated herein.⁹

⁹ DEP Major Projects website, 10-19-2018 MEPDES Application, pp. 46-59:

140. The 8-6-2018 EOA, does not define the boundaries of the easement to be granted, if exercised, by metes and bounds, but depicts the boundaries using an image incorporated as Exhibit A (A.R. 150, p. 16; A: 1000-1001).

141. The easement ***terminates at the high-water mark of Penobscot Bay***, pursuant to the express terms in the 8-6-2018 EOA, and, *if exercised*, the 8-6-2018 EOA does not grant Nordic the right to use the intertidal land on which Lot 36 fronts (A.R.Doc. 906d; A: 0988-1001).

142. The 8-6-2018 EOA, *if exercised*, would have only granted Nordic a 25-foot wide permanent easement, and a 40-foot wide temporary construction easement, along the southern boundary of Lot 36.



https://www.maine.gov/dep/ftp/projects/nordic/applications/MEPDES%20Permit%20Application_Final_Oct%202019,%202018.pdf

5-17-2019 TRI Supplement, pp. 3-16

<https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/JBT%20to%20Kavanah%20package.PDF>

143. Beginning in December 2018, and continuing at all times thereafter, MGLF Petitioners have asserted that Nordic lacks the TRI to use Lot 36, and or the adjacent intertidal land, in the manner that the DEP permits and licenses would authorize.

144. MGLF Petitioners and Upstream Watch (“Upstream”) have consistently maintained that:

- (i) The 8-6-2018 EOA, *by its own terms*, terminated at the high-water mark of Penobscot Bay and granted Nordic no right to use the adjacent intertidal land to bury three industrial pipes;
- (ii) Petitioners Mabee and Grace own the intertidal land in which Nordic proposed to bury its three pipes, not Richard and Janet Eckrote (“the Eckrotes”), who had granted the 8-6-2018 EOA to Nordic *on the upland parcel* then owned by the Eckrotes, designated as Belfast Tax Map 29, Lot 36 (hereinafter “Lot 36”);
- (iii) Petitioners Mabee and Grace had created a Conservation Easement, dated 4-29-2019, recorded in the Waldo County Registry of Deed (“WCRD”) at Book 4367, Page 273, on all of the intertidal land that Mabee-Grace own, including the intertidal land adjacent to Lots 38, 37, 36, and 35, which prohibits any dredging or commercial and industrial development of this intertidal land;
- (iv) The Eckrotes had no legal capacity to grant Nordic the right to use upland Lot 36 for commercial and industrial purposes, because that parcel is burdened by a negative easement, that runs with the land, limits the use of that parcel to “residential purposes only,” prohibits any for-profit business being conducted on that parcel; and is enforceable by Mabee and Grace and Friends as holders of land benefited by that servitude.

145. On 12-18-2018 and 1-7-2019 (2020 A.R.Docs. 0075, 0089 and 0090), Upstream Watch and the Lobstering Representatives moved to dismiss Nordic’s MEPDES Application for lack of administrative standing because the 8-6-2018 EOA failed to grant Nordic TRI to use the

intertidal land on which Lot 36 fronts (2020 A.R.Doc. 0906d; A: 0988-1002 @ 0990).¹⁰

146. On 1-22-2019, Brian Kavanah, DEP's Director of the Division of Water Quality Management, sent an email and letter to Nordic's counsel and agent, Joanna Tourangeau, requesting additional TRI-related information by 2-6-2019, including an 11-14-2018 survey by James Dorsky, P.L.S., who had prepared additional unrecorded surveys for Nordic.

147. The 1-22-2019 DEP letter concluded that the 8-6-2018 EOA was not sufficient to demonstrate TRI, stating: ". . . the Easement Purchase and Sale Agreement submitted by Nordic Aquafarms defines the easement area by reference to an Exhibit A that depicts the easement area as stopping at the high-water mark." (2020 A.R.Doc. 0095; A: 1152-1154).¹¹

148. On 1-24-2019 and 1-25-2019, emails were sent to the Governor and her senior staff, including Jerry Reid, Esq., complaining about DEP's 1-22-2019 letter from Director Kavanah. (A: 0196-0199).

149. These communications were sent by Peter Mills, Esq. (the Governor's brother) and Peter DelGreco (President-CEO of Maine & Company – a "non-profit" corporation representing Nordic *on behalf of* the members of its Executive Board (many of which would be financially benefited by Nordic obtaining permits according to DelGreco (2020 A.R.Doc. 0237; A: 0194-0207; 0218-0222)).¹²

150. Mr. Mills asserted that the 1-22-2019 DEP letter could harm Nordic's ability to obtain money from investors and impede Maine's ability to attract this "burgeoning [aquaculture] industry." (A: 0196).

¹⁰ Citations to documents obtained by FOAA Requests after the 2020 Rule 80C appeal was filed, that Respondent's counsel omitted from the 2020 Administrative Record but which were filed in the prior Rule 80C appeal with a motion to amend the Record, and which were included in the Law Court Appendix in BCD-22-48, are referenced with "A:" followed by the page number from the Appendix filed in that prior 80C appeal.

¹¹ DACF BPL reached the same conclusion in a 1-18-2019 letter to Nordic (A.R.Doc. 0906b; A: 1151).

¹² Maine & Company's website lists the members of its Executive Board:
<https://maineco.org/about-us/executive-board-members-of-the-corporation/>

151. After referencing his discussions with the Governor about “the importance of this project to Maine’s economic growth and leading role in an exciting industry,” Mr. DelGreco inferred that Nordic’s treatment in the DEP permitting process could deter similar projects from other aquaculture companies from coming to Maine. (A: 0199).

152. In response to Mr. Mills’ email on 1-25-2019, then-AAG Reid – who had been recently nominated by the Governor to be DEP Commissioner¹³ based on the recommendation of a 14-member selection committee chosen by the Governor-elect, on which Mr. Mills and Mr. DelGreco served¹⁴ – advised Mr. Mills, the Governor and other email recipients, that:

I am meeting with Erik Heim [Nordic’s then-President] this afternoon at 2:00 to try to reassure him that the DEP process will be fair and can work. ***There is a non-trivial title, right and interest problem with their application*** that the opponents have seized on. It’s not clear to me why Nordic hasn’t addressed it, because it would seem to be easily resolvable. I’ll be talking to him about that too. ***It’s not in Nordic’s interest to move forward with a flawed application that will allow for a successful appeal of the permits they are seeking.*** I’m happy to provide people with more details at any time.

(A: 0206 (emphasis supplied)).

153. On 1-25-2019, Mr. Reid (as the supervisor of the Attorney General’s Environmental law division representing the Department) and then-Acting DEP Commissioner Melanie Loyzim – the incoming and current decision-makers for determinations regarding applicant Nordic’s TRI pursuant to 06-096 C.M.R. ch. 2, § 11.D -- had an ex parte¹⁵ meeting with Nordic, including its President Erik Heim (A: 0199, 0219-0222).

¹³ Press Release from the Office of the Governor-Elect, *Governor-elect Mills Selects Jerry Reid as Commissioner of Environmental Protection* (1-1-2019).

<https://www.maine.gov/governor/mills/news/governor-elect-mills-selects-jerry-reid-commissioner-environmental-protection-2019-01-01>

¹⁴ Scott Thistle, *Gov.-elect Mills Names Team That Will Assemble Her New Administration*, Portland Press Herald (11-15-2018).

<https://www.pressherald.com/2018/11/15/gov-elect-mills-names-team-who-will-assemble-new-administration/>

¹⁵ Black’s Law Dictionary online defines “*ex parte*” as: “On one side only; by or for one party; done for, in behalf of, or on the application of, one party only.” <https://thelawdictionary.org/ex-parte/>

154. No notice of, or opportunity to participate in, this meeting was provided to Upstream Watch or the Lobstering Representatives, who had pending motions to dismiss Nordic’s MEPDES application based on the apparent TRI deficiencies it contained.

155. On 1-28-2019 AAG Reid reported on the 1-25-2019 meeting with Nordic to Mr. Mills, Gov. Mills, COS Kennedy, Mr. Ogden and DECD Commissioner-nominee Heather Johnson¹⁶ (A: 0219).

156. By 1-30-2019, Acting Commissioner Loyzim put the Department’s request for additional TRI-related information from Nordic in the 1-22-2019 DEP letter and consideration of the sufficiency of Nordic’s TRI “*on hold*.” (2020 A.R.Docs. 0103, 0104, 0106-0108).

157. On 3-13-2019, after learning of the 1-25-2019 ex parte meeting with Nordic, Acting-Commissioner Loyzim and Commissioner-nominee Reid, Petitioners’ counsel filed a Freedom of Access Act (“FOAA”) request with the Department seeking all documents relating to that meeting. (omitted from 2020 A.R.; 10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 8).

158. On 5-17-2019, Nordic filed NRPA and SLODA applications with the Department and supplemental TRI-related information. (2020 A.R.Docs. 0148, 0150).

159. Nordic continued to rely on the unamended, unexercised 8-6-2018 EOA to support its TRI claim in its 5-17-2019 supplemental-TRI filings (2020 A.R.Doc. 0150), which included: (i) a 5-16-2019 surveyor’s opinion letter from James Dorsky, P.L.S., to Erik Heim (See also, 2020 A.R.Doc. 0935q) that expressly stated that the Eckrotes did not own the intertidal land adjacent to Lot 36, but opined that this intertidal land was owned by “heirs of Harriet L. Hartley”; and (ii) the 8-31-2012 Good Deeds survey (See also, 2020 A.R.Doc. 0935j) that states that the Eckrotes do not

¹⁶ The DECD Commissioner is a dues-paying member of the Executive Board of Maine & Company. <https://maineco.org/about-us/executive-board-members-of-the-corporation/>

own the intertidal land on which Lot 36 fronts and depicts the eastern (bayside) boundary of Lot 36 as the high water mark of Penobscot Bay.

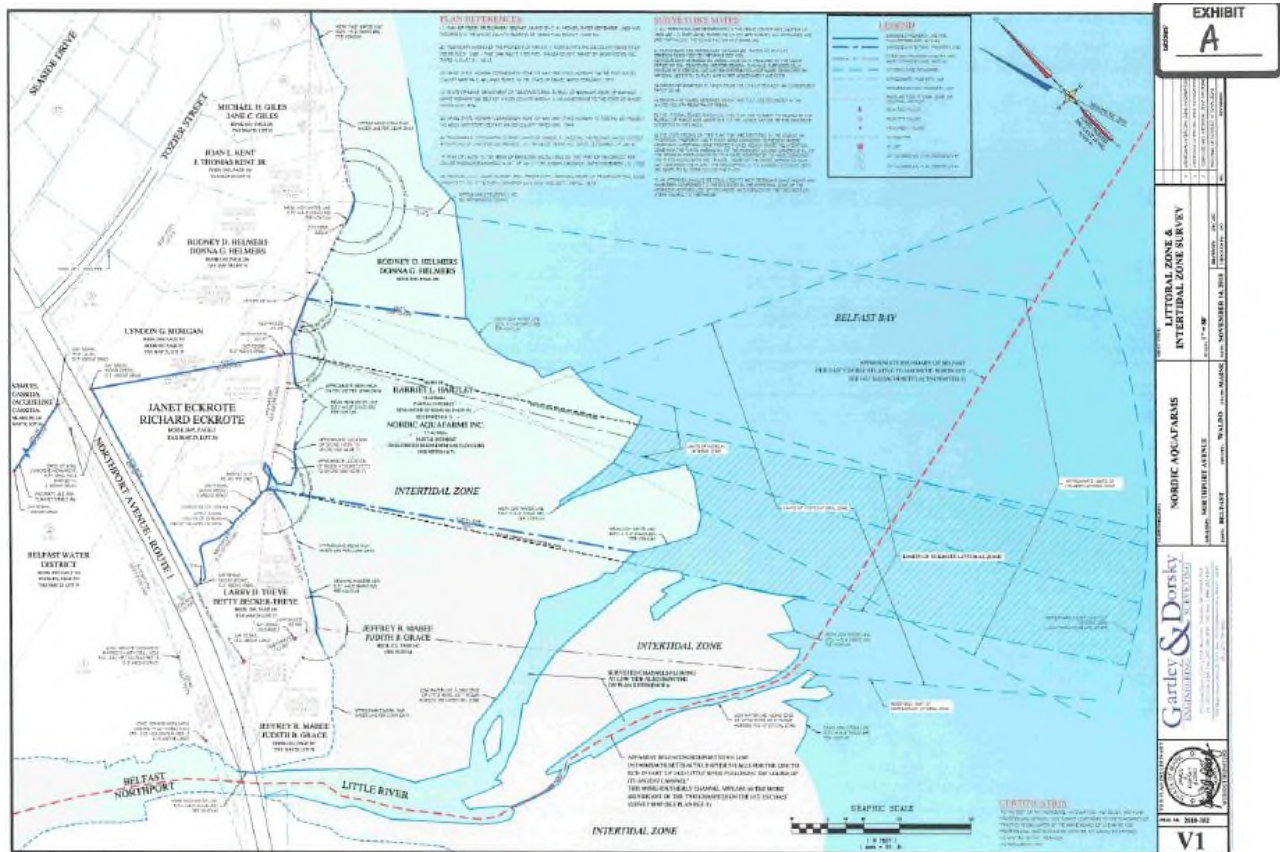
160. On 5-20-2019, Upstream Watch, Mabee-Grace and the Lobstering Representatives challenged the sufficiency of Nordic's TRI submissions in BPL and DEP -- adding ownership claims by Mabee-Grace in the intertidal land on which Lot 36 fronts and the abutting intertidal land, and Upstream Watch's claim as then-holder of a recorded Conservation Easement created by Mabee-Grace on 4-29-2019 (WCRD Book 4367, Page 273; 2020 A.R.Doc. 0155).

161. On 5-29-2019, the Department sent Nordic a letter requesting additional information in support of Nordic's TRI claims. (2020 A.R.Doc. 0170).

162. On 6-10-2019 Nordic filed a 144-page pdf containing documents on which it relied in asserting TRI with the Department (2020 A.R.Docs. 0177-0178), which included: (i) the 2018 Good Deeds survey; and (ii) an unrecorded survey plan by James Dorsky, P.L.S., dated 6-4-2019, showing that: (a) *the Eckrotes' property interest terminates at their high water mark*, (b) the intertidal property on which Lot 36 fronts is allegedly owned by "Hartley Heirs," and (c) NAF allegedly has a "partial interest" in this intertidal land pursuant to "Release Deeds from Hartley Heirs"; (iii) the 5-16-2019 opinion letter from Surveyor Dorsky to Erik Heim stating that the Eckrotes did not own the intertidal land adjacent to lot 36, but opining that "Hartley Heirs" do own it; and (iv) several "Release Deeds" granting unspecified land to Nordic with all information identifying the Grantors redacted (2020 A.R.Doc. 0178, pp. 3, 4, 87-89, 135-144).¹⁷

¹⁷ DEP major projects website:

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



163. On 6-12-2019 @ 1:02 PM the Department received additional proof from Petitioners Mabee-Grace and Upstream that demonstrated Nordic lacked TRI in this intertidal property pursuant to the 8-6-2018 EOA, including the prior quiet title judgment in *Ferris v. Hargrave* (WCRD Book 683, Page 283). (2020 A.R.Docs. 0184 and 0185).

164. In *Ferris v. Hargrave*, the Waldo County Superior Court entered a Final Judgment quieting title in June 1970, in favor of Mabee-Grace’s predecessor in interest, Winston Ferris, in the property with the identical description as Mabee-Grace’s deed (WCRD Book 1221, Page 347). In other words, Petitioners Mabee and Grace provided the Department with proof that a court of competent jurisdiction had already quieted title in the land described in Mabee-Grace’s deed, in June of 1970.

165. On 6-12-2019 @ 1:23:59 PM, an email was sent by Tom Abello of the Governor's staff, scheduling a meeting on 6-13-2019, regarding "Belfast fish farm communications next steps" (A: 0222). This email was sent to: Melanie Loyzim, David Madore (DEP staff), Amanda Beal (DACF Commissioner), Andy Cutko (DACF-BPL) and Scott Ogden (Governor's staff). *Id.*

166. Deputy Commissioner Loyzim then forwarded the Abello email to DEP Commissioner Reid. (A: 0222).

167. The purpose of the meeting, scheduled to take place in the Governor's Office at 1 p.m. on 6-13-2019, was described by Mr. Abello as:

. . . Based on a few conversations with ACF and DEP, I am hoping we can get together tomorrow at 1 pm (here at the Governor's office) to discuss communications around TRI for Nordic. Prior to Friday's deadline, it would be helpful to get everyone on the same page from a messaging standpoint. Please feel free to invite the right folks from your respective offices.

A: 0222 (emphasis supplied).

168. At 3:07 p.m. on 6-13-2019, Appellants' counsel and other interested parties received the Department's revised TRI determination, stating in relevant part:

. . . With respect to the intertidal portion of the property proposed for use, the department finds that the deeds and other submissions, including NAF's option to purchase and easement over the Eckrote property and the succession of deeds in the Eckrote chain of title, when considered in the context of the common law presumption of conveyance of the intertidal area along with an upland conveyance, constitute a sufficient showing of TRI for the Department to process and take action on the pending applications. This determination is not an adjudication of property rights and may be reconsidered by the Department at any time during processing as applicants must have adequate and sufficient TRI throughout the application process. Accordingly, should a court adjudicate any property disputes or rights in a way that affects NAF's interest in the proposed project lands while the applications are being processed, the Department may revisit the issue of TRI and return the applications if appropriate. . . .

(2020 A.R.Doc. 0191, p. 2 of 3; A: 1156).

169. Commissioner Reid accepted Nordic's pending applications, which proposed to dredge 36,000 cy of material in the coastal wetlands of Penobscot Bay, as "complete" without requiring Nordic to first conduct sediment testing pursuant to 38 M.R.S. § 480-E(3)(A).

170. Appellants appealed this TRI determination to the Board and submitted a motion to dismiss Nordic's applications for lack of TRI on 7-12-2019, supplemented on 7-25-2019. (2020 A.R.Docs. 0243, 0268).

171. The Board assumed jurisdiction over the Nordic project on 6-20-2019 and refused to consider Appellants' appeal of the 6-13-2019 TRI determination on 8-23-2019 (2020 A.R.Doc. 0317 (2nd Procedural Order ("P.O."), § 12); A: 1123).

172. On 8-15-2019, the Board refused to include TRI challenges in the adjudicatory hearing on the Nordic Project (2020 A.R.Doc. 0303 (1st P.O.)).

173. On 8-30-2019, the Department *allegedly* responded to Appellants' 3-13-2019 FOAA request with: "all responsive records. . . associated with the Department's Jan. 25th meeting with NAF and subsequent communications up until the date of [the] request." (Omitted from 2020 A.R.).

174. The emails between Jerry Reid and Peter Mills, the Governor, and other members of the Administration regarding the 1-25-2019 ex parte meeting were not included in this FOAA Response and no exceptions log indicating documents were withheld from that Response was provided to Petitioners' counsel.

175. In January 2020, MGLF Petitioners renewed their motion to stay and/or dismiss Nordic's applications for lack of TRI, based on a 12-24-2019 amendment to the 8-6-2018 EOA (2020 A.R.Docs. 0520 and 0517; A: 1006-1011).

176. The 12-24-2019 amendment included a WHEREAS Clause that expressly stated that in providing Nordic with a Letter Agreement, dated 3-3-2019, the Eckrotes neither represented nor warranted that they own any intertidal land on which Lot 36 fronts.

177. MGLF Petitioners' January 2020 renewed TRI-challenge was rejected by the Presiding Officer on 1-31-2020 (2020 A.R.Doc. 0601 (9th P.O.); A: 1134-1135).

178. The Board held an adjudicatory hearing on Nordic's MEPDES, Air Emissions, NRPA and SLODA applications on 2-10-2020 to 2-14-2020, excluding TRI as a hearing topic over MGLF Petitioners' objections.

179. The MGLF Petitioners participated in these hearings, including Friends during the public session.

180. Friends was denied Intervenor status by the Board, but participated in the public portion of the hearing, and subsequently participated in other filings relating to the adverse impact of the project on the conservation easement and Nordic's TRI deficiencies (2020 A.R.Docs. 0857, 0906, 0919, 0935, 0958).

181. The Board closed the Agency Record on 2-14-2020 for matters that were hearing subjects and 2-18-2020 for non-hearing subjects (2020 A.R.Doc. 0657). MGLF Appellants renewed their TRI challenges prior to the close of the Record (2020 A.R.Docs. 0658, 0659, 0663-0666).

182. On 2-14-2020, the Board's counsel announced that the Department of Marine Resources ("DMR") would hold a "hearing" on 3-2-2020 to obtain "public comment" on fishing industry impacts, purportedly to fulfill the requirement in 38 M.R.S. § 480-D(9) for DMR to hold a "hearing" on projects that propose to dredge where commercial fishing is conducted.

183. At the 3-2-2020 DMR meeting, Nordic announced a radically different dredge spoils disposal plan and haul route, *for the first time* proposing taking 20,000 cy of dredge spoils in 110-130 barge loads 5.5 miles across the Bay to Mack Point in Searsport.

184. Attendees at the 3-2-2020 DMR meeting were limited to discussing: (i) impacts to the area to be dredged; and (ii) impacts to the fishing industry of the proposed route to transport dredge spoils.

185. Attendees at the 3-2-2020 DMR meeting were prohibited from discussing the impacts of prior dredging in Belfast Harbor on lobstering; suspension and discharge of sediment outside the pipe corridor; or the impact of nitrogen, water temperature disparities, dewatering and mercury re-suspension on the Bay, biota or lobstering.

186. On April 16, 2020, four members of the Board rejected MGLF Petitioners' TRI challenges after an oral argument (2020 A.R.Doc. 0779).¹⁸

187. The same OAG counsel who had assisted in drafting the Commissioner's 6-13-2019 TRI determination and participated in the 6-13-2019 Abello meeting on messaging regarding Nordic advised the Board on Petitioners' TRI challenges and participated in the oral argument, done on the April 16, 2020 conference call oral argument.

188. MGLF Petitioners and Northport Village Corporation requested reopening the Board record to submit Nordic's new haul route and information relating to impacts from this new dredge spoils disposal and transportation plan.

189. The Presiding Officer denied these requests in the 13th and 14th P.O.'s (2020 A.R.Docs. 0722, 0757).

190. After DMR submitted the revised haul route and other materials filed at the 3-2-2020 meeting with the Board, some new materials were entered in the Agency Record pursuant to the 15th P.O. (2020 A.R.Docs. 0693, 0700-0704, 0708, 0722, 0757, 0758, 0759, 0760-0767, 0768-0768f, 0769-0771, 0790-0793, 0815, 0846).

191. On May 7, 2020, Thomas Abello (Governor's Staff) sent an email to DEP Deputy Commissioner Melanie Loyzim and Commissioner Jerry Reid, forwarding a May 4, 2020, email from Andrea C. Maker (counsel for Whole Oceans land-based salmon farm) seeking a letter of support from the Governor for investors in Whole Oceans. Attached to that email was a draft letter for the Governor's

¹⁸ Friends of Penobscot Bay website:

http://www.penbay.org/aq/nordic/bep_041620/10_bep_nordic_041620_deliberations_2qs_end_7min46sec.mp3

signature prepared by Attorney Maker. The 5-7-2020 Abello email seeks the “reaction” of the DEP Commissioners to the letter stating: “Hey guys – What’s your reaction to this letter? It’s a little over the top in terms of tone, but I [am] wondering about the substance and any potential conflict with Nordic.” (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, pp. 43-45).

192. On May 12, 2020 a revised version of the above letter was signed by Governor Mills stating in relevant part: “. . . The emergence of land-based aquaculture is an opportunity to evolve, diversify and strengthen this industry. My administration strongly supports land-based aquaculture and these critical investments in Maine’s communities. . . We can take a leadership role in this emerging industry on a global scale, becoming an important part of the sustainable food solution and protecting the long-term sustainability of our wild-caught fisheries. . .” (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, pp. 47-48).

Political Interference in the Permitting Process: Alteration of Staff Recommendation to the Board

193. On May 13, 2020 @ 3:50 PM an email was sent by Gregg Wood (Director, Division of Water Quality Management) to Cynthia Bertocci (BEP Executive Analyst), forwarding the Water Quality Bureau’s (“WQB”) Recommendations to the Board “RE: Nordic Aquafarms, Inc. – Application for a Maine Pollutant Discharge Elimination System (MEPDES) Permit” for the “May 20 & 21, 2020 Board Meeting – Deliberative Session.” (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, pp. 50-54).

194. Copies of the 5-13-2020 Wood transmitting email and WQB Memorandum were sent to: AAG Laura Jensen; and DEP Staff: Robert Mohlar, Angela Brewer, Kevin Martin and Brian Kavanah (Director, Bureau of Water Quality). (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 50).

195. The WQB's recommendations to the Board, attached to the email from Brien Kavanah dated 5-13-2020 and later posted on 5-15-2020, concluded that **Nordic could not meet the antidegradation standards in Maine law**¹⁹, as the project was proposed with a nitrogen level of 23 mg/L and self-reported far-field dilution factor of 300:1. (See, 10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 54).

196. The 5-13-2020 transmitting email from Gregg Wood does not appear in the Administrative Record, although the text of the original WQB draft of its recommendations was posted on the Board's website on 5-15-2020. (A: 1089).

197. On May 15, 2020 @ 8:33 AM Brian Kavanah sent an email to Jerry Reid forwarding the 5-13-2020 Gregg Wood email and attached Memorandum of Recommendations for the 5-20/21-2020 Deliberative Session by the Board. (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 50).

198. On May 15, 2020 @ 9:32 AM an email was sent by Cynthia Bertocci, giving notice to the BEP service list, that the agenda and packet materials for the Board's May 20 & 21, 2020 Deliberative Session were posted on the Department's website. The original version of the WQB's recommendations on the MEPDES permit was posted on that site (2020 A.R. Doc. 0831).²⁰

199. On May 15, 2020 @ 9:36 AM Deputy Commissioner Loyzim sent an email to Commissioner Reid, the contents of which were withheld from FOAA production, but were described as: "Work Product: Email discussing deliberative session memo." (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 35).

200. On May 15, 2020 @ 11:37 AM Gregg Wood sent an email to Jerry Reid stating: "***It is my understanding that you have received a phone call from Nordic's legal counsel indicating they are not pleased with my Board memo. More specifically the proposed mass limitation if the Board votes to approve the permitting of the facility.*** Are you interested in talking about this with me and Brian?"

¹⁹ 38 M.R.S.A. §§ 414-A(1)(A)-(C) and 464(4)(F).

²⁰ <https://www.maine.gov/dep/ftp/projects/nordic/2020-05-20-deliberative%20session/2020-05-20%20MEPDES%20BEP%20Memo%20-%20Nordic%20Deliberative%20Session.pdf>

Thanks.” (emphasis supplied) (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 65).

201. On May 15, 2020 @ 11:48 AM DEP Commissioner Jerry Reid sent an email responding to Gregg Wood, with a CC: to Brian Kavanah, stating: “Hey Gregg. Yes I did get a call from her *but I want to be clear that I thought your memo was excellent.* She calls me occasionally but I just make clear that this is the Board’s decision. If you and Brian are free now for a few minutes that would be great. Please call xxx-xxxx. Thanks.” (emphasis supplied) (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 65).

202. On May 15, 2020 @ 13:08:21 Commissioner Jerry Reid sent an email to Deputy Commissioner Melanie Loyzim forwarding the email thread from Gregg Wood and Brian Kavanah with the WQB Recommendations attached and stating: “Have you seen this yet? *Take a look at the nitrogen section.*” (emphasis supplied) (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 50).

203. On May 15, 2020 @ 1:11 PM Commissioner Reid sent an email to: Mary Breton (DEP staff), Brian Kavanah (WQB), Gregg Wood (WQB), Melanie Loyzim (Deputy Commissioner), AAG Scott Boak and AAG Laura Jensen (common OAG legal counsel on Nordic). The contents of this email were withheld from production under FOAA, with the description: “Work Product: Scheduling email chain concerning meeting where work product was discussed.” (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 35).

204. On May 15, 2020 @ 19:52:00 an email was sent from Thomas Abello to Jerry Reid, with a CC: to Melanie Loyzim, Subject: “**Nordic meeting with Gov,**” stating: “Jerry – We are on for Monday [May 18, 2020] at 3 pm. Calendar invite going out soon. Tom” (emphasis supplied) (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 56).

205. On May 18, 2020 @ 7:56 AM Patric Sherman sent an email to Cynthia Bertocci (BEP Executive Analyst), with copies to: “Melanie Loyzim; and 18 DEP and AAG staff,” the contents of which were withheld from production pursuant to FOAA, but which is described on the 7-22-2021 Exceptions Log

as: “Work Product: Discussion/revision of Deliberative Session PowerPoint.” (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 35).

206. On May 18, 2020 @ 1:03 PM Gregg Wood sent an email to Angela Brewer “RE: Nordic,” stating: “Elizabeth Ransom in arguing the average total nitrogen background concentration of 0.25 mg/L is not correct and that it should be more along the lines of 0.19 mg/L. Can you give me a telephone number that I [can] forward her text to. It gives her rationale.” This email was not included in the Administrative Record and not produced pursuant to the Seventeenth Procedural Order – which required all communications between Nordic’s agents and WQB staff regarding the revision of the WQB recommendations to the board be sent to Intervenors. Attached hereto as Exhibit 1.

207. On May 18, 2020 @ 3:00 PM the “Nordic meeting with Gov” was scheduled to take place.

208. On May 19, 2020 @ 9:08 AM Nordic’s agent Elizabeth Ransom sent an email to WQB staff Robert Mohlar and Gregg Wood with the Subject: “FW: Far-field dilution.”

209. Attached to the 5-19-2020 Ransom email were two emails from Nathan E. Dill, P.E. (Project Engineer/Coastal Engineer employed by Ransom Consulting, Inc.), drafted and sent to Ransom on 5-18-2020 @ 2:59 PM and 4:49 PM. Mr. Dill’s email proposes a rationale for changing the far-field dilution factor from 300:1 to 530:1. (2020 AR21268-AR21271).

210. In contrast to the Board hearing, the information provided by Nordic’s agents on the antidegradation issue on May 19, 2020, was not submitted under oath and Intervenors were provided no opportunity to cross examine Nordic’s agents about this new information. As occurred during the Board hearings, Intervenors were denied the ability or opportunity to question DEP staff regarding the basis for the original and revised recommendations to the Board.

211. On May 19, 2020 @ 10:08 AM Angela Brewer (WQB staff) emailed Gregg Wood and Rob Mohlar, stating: “Rob and Gregg, I just talked with Elizabeth. We’re all set. She had gone back to my raw data and associated non-detect flags from an adjacent row into the calculations of mean TN. She is now aware that those non-detect values are in separate cells, denoting that they are associated with other values,

in this case, TP. I also made clear that I would not use flagged data for calculations to be used in a permit.” (2020 AR21274).

212. On May 20, 2020, the Board held its Deliberative Session, via Zoom, during which Intervenors were *prohibited* from speaking or asking any questions.

213. During that session, the WQB employees *orally* presented radically different recommendations on the far-field dilution factor and nitrogen conclusions than those in the WQB memorandum provided to the Board and the BEP service list recipients on 5-15-2020, and posted on the Board’s website.

214. The revised WQB recommendations to the Board were that Nordic *could meet the antidegradation standards* and changed the far-field dilution factor from 300:1 to 530:1.

215. During the Deliberative Session Zoom, Mr. Wood stated that the revised recommendations were based on “communications” received from Nordic. Mr. Wood did not reveal to the Board or Intervenors the nature, timing, or content of the “communications” from Nordic or the identity of the Nordic agent(s) with whom DEP staff had communicated and Intervenors were unable to ask any questions or speak during the session.

216. On May 20, 2020 @ 4:06:36 PM, Upstream Watch’s President Amy Grant sent an email to Ruth A. Burke and Cynthia Bertocci (BEP administrative staff) stating in relevant part:

“. . . We were surprised to see such a significant change to the dilution factor, seemingly overnight. Would you please provide to the service list the calculations performed by DEP that caused this change. Thank you.”

(2020 A.R. Doc. 0841).

217. On May 21, 2020, Brian Kavanah sent an email “RE: Corrected Memorandum” to Gregg Wood, Jerry Reid, Melanie Loyzim and Kevin Martin, and Melanie Loyzim sent a response to that email @ 10:47 AM, both of which were withheld from FOAA Production but were listed on the Exceptions Log provided to Upstream Watch on 9-11-2020, as: “Contains AAG advice and internal discussion.” (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 63).

218. On May 22, 2020 Brian Kavanah sent an email to Melanie Loyzim and Gregg Wood “RE: Record” which was withheld from FOAA Production on the Exceptions Log provided to Upstream Watch

on 9-11-2020, as: “Contains AAG advice and internal discussion.” (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 63).

219. On May 25, 2020 @ 4:52 PM Cynthia Bertocci sent an email to: AAG Scott Boak, AAG Laura Jensen, AAG Peggy Bensinger, DEP BWQ staff Brian Kavanah, Gregg Wood and Rob Mohlar, forwarding “Draft 17th procedural order.” This email and the draft 17th Procedural Order were withheld from FOAA production as “Work Product.” (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 35).

220. On 5-26-2020 @ 12:21:52 PM an email from Thomas Abello to Melanie Loyzim and Jerry Reid, Subject: “And...” states: “I know we’re talking this afternoon, for that: I had a phone call this morning with Peter Delgreco and Tim Walton *about Belfast*. They expressed concerns, frustration, etc. Tom” (emphasis supplied) (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 58).

221. Peter DelGreco is the President and CEO of Maine & Company, which has advocated and represented Nordic and whose members on the Executive Board include corporations that would profit from Nordic obtaining its permits.

222. In August of 2019, Maine & Company sought and was denied Intervenor status in the BEP proceedings, asserting its members’ economic interests in the Nordic project as the basis for intervention (2020 A.R. Docs. 0237, 0317).

223. Tim C. Walton is a registered lobbyist for CIANBRO Construction, a member of the Executive Board of Maine & Company and the company slated to construct portions of the Nordic facility -- including burying the three pipes in Lot 36 and into Penobscot Bay and in the intertidal land owned by Mabee and Grace and held by Friends pursuant to the 4-29-2019 Conservation Easement.

224. On May 26, 2020 @ 3:32 PM Cynthia Bertocci sent an email to Melanie Loyzim, described as: “Work Product: draft 17th procedural order with AAG comments,” which was withheld from FOAA production. (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 35).

225. On May 26, 2020 @ 4:05 PM Commissioner Jerry Reid sent an email to Deputy Commissioner Loyzim, described as: “Work Product: draft 17th procedural order with AAG comments,” also withheld from FOAA production. (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 35).

226. On May 26, 2020 @ 4:25 PM Commissioner Jerry Reid sent an email to Cynthia Bertocci and Deputy Commissioner Loyzim, with the document type described as: “Email: RE: Nordic Aquafarms, Inc.: Pending Application Nos. A-1146-71-A-N; L-28319-26-A-N; L-28319-TG-B-N; L-28319-4E-C-N; L-28319-L6-D-N; L-28319-TW-E-N; W-009200-6F-A-N, with the content described as: “Work Product: discussion of draft 17th procedural order review timing in relation to Upstream Watch motion.” This email was withheld from FOAA production. (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 36).

227. On May 27, 2020 @ 1:17 PM Cynthia Bertocci sent an email to Commissioner Jerry Reid and Deputy Commissioner Loyzim, with the document type described as “Email: RE: Nordic – draft procedural order,” and content described as: “Work Product: draft 17th procedural order and discussion.” This was withheld from FOAA production. (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 36).

228. On May 27, 2020 @ 2:14 PM Commissioner Reid sent an email to Cynthia Bertocci and Melanie Loyzim, with CC: to AAGs Bensinger, Boak and Jensen; and WQB staff Kavanah and Wood, with the document type described as: “Email: RE: Nordic draft procedural order;” and content described as: “Work Product: draft 17th procedural order and discussion.” This was withheld from FOAA production. (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 36).

229. On May 28, 2020 Cynthia Bertocci sent the Seventeenth Procedural Order to the BEP service list, stating: “Presiding Officer Duchesne’s Seventeenth Procedural Order ruling on 1) the renewed

motion to stay proceedings [from the MGL Intervenors including the Lobstering Representatives], and 2) the motion to strike information pertaining to the far-field dilution factor [filed by Appellant Upstream] is attached.” (2020 A.R. Docs. 0858-0860).

230. That Order required DEP staff to provide the communications received from Nordic relating to far-field dilution calculations to all Intervenors by May 29, 2020, and provided Intervenors with time to respond to Nordic’s submission by June 12, 2020.

231. On May 29, 2020, Gregg Wood provided the “correspondence between Nordic and DEP staff re: far-field dilution factor” and Ms. Bertocci transmitted that correspondence to the BEP service list. (2020 A.R.Docs. 0861-0862).

232. On May 29, 2020 Elizabeth Ransom emailed a spread sheet with some columns highlighted in yellow to the BEP service list, with the explanation: “I have attached a response with the information requested in the Seventeenth Procedural Order.” [2020 A.R. Docs. 0863-0864].

233. On May 29 and June 1, 2020, additional requests for information on the communications from Nordic and DEP staff calculations underlying the revised far-field dilution revision were submitted by various Intervenors’ counsel and agents (2020 A.R. Docs. 0866-0873).

234. On June 1, 2020, Ms. Bertocci re-sent the same documents relating to the ex parte communications from Nordic’s agents to WQB staff [A.R. Docs. 0874-0875]. In response to Mr. Dill’s submission (which showed the impact of the projected dilution within the municipal boundaries of the Town of Searsport), “MGL” Petitioners’ counsel filed a notice that Searsport was required to receive notice of Nordic’s applications – but no such notice had been provided, in contravention of 38 M.R.S. § 480-E(1)(A) [2020 A.R. Doc. 0876].

235. The Town of Searsport has never been provided notice, from Nordic or the Department, regarding this project or the potential impacts within its municipal boundaries.

236. In failing to notify the Town of Searport of this change in the proposed dredge spoils disposal and haul Route, announced for the first time on 3-2-2020, the Board violated the requirements in 38-M.R.S. § 480-E(1).

237. On June 2, 2020, the Eighteenth Procedural Order was issued claiming that staff would re-examine the far-field dilution factor based on comments received from Intervenors (2020 A.R. Docs. 0877-0879).

238. On June 9, 2020 @ 2:00 PM, Gregg Wood forwarded an email to Rob Mohlar of DEP-WQB, attached to the 5-29-2020 Ransom email to the BEP service list, stating: “Rob: You may want to ask Elizabeth for the spreadsheet so you can manipulate the data yourself.” (2020 A.R.Doc. 0883). This email thread was not provided to Intervenors until the Record on Appeal was produced in April of 2021.

239. On June 10, 2020, Upstream Watch sent a formal FOAA request for the documents and information they had previously requested on May 21, 2020, regarding the revised far-field dilution factor recommendations and communications from Nordic allegedly prompting those revisions.

240. Upstream Watch’s President, Amy Grant, states: “(Upstream Watch regrets having to make this formal request but we asked the same or substantially the same questions on May 21, 2020 which questions you declined to answer).” (2020 A.R.Doc. 0881).

241. On June 10, 2020, Upstream Watch, through its counsel, filed a “renewed Motion to Strike from the Record the Material Product of Communication between Nordic and DEP staff after the Close of the Record” (2020 A.R.Doc. 0882).

242. On June 10, 2020 @ 2:14 PM, Rob Mohlar responded to Gregg Wood’s 6-9-2020 email, stating: “I was able to convert the document into an excel spreadsheet. I get the same exact number that is suggested by the purple line in the memo.” (2020 A.R.Doc. 0883). This email thread was not provided to Intervenors until the Record on Appeal was produced in April of 2021, in which this email is described as: “Email from Mr. Mohlar stating he has verified the revised far-field dilution factor calculated by Ransom Engineering based on Ransom’s inputs to the model.” *Id.*

243. On June 12, 2020, Upstream Watch filed attachments to its 6-10-2020 Renewed Motion to Strike (2020 A.R.Doc. 0884).

244. On June 18, 2020, Brian Kavanah sent an email described as: “FW: Nordic Draft MEPDES Permit” to Gregg Wood, copied to Jerry Reid and Melanie Loyzim, with the contents described as “Work

Product: Internal draft order.” This email and draft MEPDES order were withheld from the FOAA production to Petitioners. (10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 36).

245. The Seventeenth Procedural Order presents the scenario that the WQB Recommendations were revised in response to information provided by Nordic’s agents correcting errors in the DEP staff’s calculations of the far-field dilution factor (2020 A.R.Doc. 0858, p. 2, §2). But, the omitted documents cast significant doubt on the veracity of this assertion.

246. Instead, the documents omitted from the Administrative Record and/or belatedly produced through FOAA (or described on the 7-22-2021 and 9-11-2021 FOA Exceptions Logs) reveal that changes were made on May 18(@ 7:57 AM to the PowerPoint to be given to the Board – *before* Nathan Dill even wrote his 5-18-2018 emails proposing alternative calculations for the far-field dilution factor to Elizabeth Ransom, **sent on 5-18-2020 at 2:59 PM and 4:49 PM** (2020 AR21268-21271).

247. Thus, the omitted documents suggest that changes were made to the WQB findings presented to the Board on May 20, under the direction of Commissioner Reid and with the assistance of common OAG counsel, as a result of: (i) ex parte communications with Nordic, its agents and counsel; and (ii) political interference with the permitting process relating to the Nordic project.

248. Accordingly, the Board’s 2020 Orders (NRPA, SLODA and MEPDES) should be vacated because the far-field dilution recommendations were altered as a result of political interference and ex parte communications by Nordic’s agents and counsel. Thus, the recommendations on which these Orders were entered, based on bias, mistake, errors of law and in the absence of competent evidence in the Record.

Statutorily Required Sediment Testing Not Performed

249. On 7-9-2020, the Presiding Officer denied MGLF Petitioners' motion to reopen the record to submit the 6-27-2020 Sediment and Analysis Plan ("SAP") that the Corps and U.S. EPA required Nordic to conduct because of the presence of Holtrachem mercury in the area proposed for dredging and pipe installation (2020 A.R.Docs. 0889, 0894 (19th P.O.)).

250. Adequate sediment testing is a prerequisite required prior to processing Nordic's applications which include disposal of dredge spoils through side-casting during construction, dewatering and transportation. 38 M.R.S. § 480-E(3).

251. The Commissioner and Board violated this statutory requirement by proceeding with processing and approving Nordic's applications prior to obtaining the necessary sediment testing to determine the threat posed by this project from disturbing buried HoltraChem mercury identified as present by experts appointed by the federal court in the *Mallinckrodt* litigation.

252. The 2020 Orders should be vacated due to violation of this mandatory statutory requirement, imposed for the protection of the water quality of the waters of the State of Maine and the United States.

Failure to Adhere to the Law Court's Precedent in *Tomasino v. Town of Casco*

253. On July 13, 2020, Mabee and Grace and Friends filed a Motion to Stay or Dismiss Nordic's applications based on this Court's decision in *Tomasino v. Town of Casco*, 2020 ME 96, 237 A.3d 175, revised on 7-20-2020 (2020 A.R.Docs. 0906 and 0906a-0906n).

254. The Presiding Officer denied the Motion (2020 A.R.Doc. 0916 (20th P.O., p. 2; A: 1150), stating:

. . . The Court's decision in *Tomasino* is factually and procedurally distinct from the Nordic matter and does not stand for the proposition that the Board's TRI determination may be reviewed by a court prior to final agency action. The decision in *Tomasino* does not change the Board's assessment. The Board will complete its consideration of Nordic's applications and issue decisions.

Id.

255. Petitioners were denied the right to appeal this decision to the full Board. (2020 A.R.Doc. 0921).

256. The Board entered final Orders on all of Nordic's applications on 11-19-2020 ("2020 Board Orders") (2020 A.R.Docs. 0001-0003; A: 0244-0542), which include determinations that Nordic had demonstrated sufficient TRI based on the 8-6-2018 EOA (A: 0288-0291; 0365-0368; 0416-0421).

257. In its Orders the Board concluded that Nordic had demonstrated "sufficient" title, right or interest.

258. The Board's basis for finding Nordic had demonstrated "sufficient" TRI "to develop the property as proposed for the applications to be processed and decided" was stated as follows in the Order granting Nordic Air License A-1146-71-A-N:

The Board continues to concur with the Department's interpretation of Chapter 2's TRI provisions and its analysis with respect to the intertidal portion of the property proposed for use as set forth in the June 13, 2019 acceptance letter. . . . Pursuant to the Board's interpretation of these TRI provisions, *the Board finds that the applicant has made a sufficient showing of TRI to develop the property as proposed for the applications to be processed and decided. As the Department found in its June 13, 2019 acceptance letter, the deeds and other submissions, including Nordic's options to purchase, and the analysis of the chain of title remain unchanged and remain a sufficient showing for the Board to act on the applications.*

11-19-2020 Air License Order, pp. 3-4 (emphasis supplied); 2020 A.R.Doc. 0003, pp. 3-4.²¹

259. Based on the descriptions of documents on the 7-22-2021 FOA Exceptions Log, it appears that the TRI sections of these Orders were drafted under the supervision of Commissioner Reid with the direct involvement of the same OAG counsel who had both assisted the Commissioner and his designee in drafting the 6-13-2019 TRI determination, and who have advised the Board on consideration and disposition of Petitioners' challenges to Nordic's claims of TRI as well as the substantive issues relating to Nordic's applications. (10-3-2023 MGLF Objection

²¹ DEP Major Projects website for the Nordic project:
<https://www.maine.gov/dep/ftp/projects/nordic/final-signed-orders/Air%20signed%20order%2011-19-20.pdf>

and Recusal Request RE: Steven Pelletier, Ex. 6, p. 38).²²

260. Under such circumstances, the Board's 2020 and 2023 decisions have been tainted by the political interference exerted on the Commissioner(s) and his/her respective staffs and counsel throughout the Nordic project consideration by the Department.

261. Where, as here, the Commissioner and his/her staff are the primary conduits for information and recommendations to the Board on permit and license applications, pursuant to 38 M.R.S. § 342(11-A), the Board process has no firewall protecting it from political interference and influence in and over the permitting process.

262. This due process violation is exacerbated where, as here, the Board has no independent counsel but is advised by the same OAG counsel who have been subjected to political pressure from the Governor and her staff and who have participated in drafting the Orders for the Board with the Commissioner and his/her staff.

263. By using common OAG counsel, without a firewall, to advise the Commissioner and Board, the State has violated 5 M.R.S. § 9055 and basic principles of Due Process.

C. Procedural History of Litigations through Remand

264. The Board originally entered orders granting the above-referenced permits and licenses to Nordic on November 19, 2020.

265. MGLF Petitioners and Upstream Watch timely filed Rule 80C appeals challenging the Board's 2020 final agency action in December 2020, in two separate actions filed in the Superior Courts for Waldo (Docket No. WALSC-AP-2020-0005) and Kennebec (KENSC-AP-2020-0049) Counties. Those actions were consolidated and later transferred to the Business and Consumer Court ("BCD") (Docket No. BCD-APP-2021-0009).

²² See, 10-3-2023 MGLF Objection and Recusal Request RE: Steven Pelletier, Ex. 6, p. 38, 7-22-2020 FOA Exceptions Log entries for emails with the Subject "Draft TRI findings," dated 7-15-2020 @ 2:50 PM and 7-16-2020 @ 11:40 AM.

266. In the 2020 Rule 80C appeals, MGLF Petitioners raised challenges to Nordic's administrative standing and the justiciability of Nordic's permit applications, as well as substantive challenges to the Board's determinations relating to the project, as proposed.

267. Specifically, MGLF Petitioners asserted that Nordic lacked "sufficient" *or actual* title, right and interest ("TRI") in all land required for the project, resulting in Nordic's permit applications lacking justiciability. Those challenged TRI deficiencies related to the land on the eastern (Bay side) of U.S. Route 1.

268. As noted above, after the original 2020 Rule 80C appeals were filed, in February and July of 2021, documents were obtained by third parties through the Freedom of Access Act ("FOAA") that revealed significant and pervasive political interference with the permitting process that appeared to have had a substantive impact on the outcome of decisions by the DEP Commissioner(s) and the Board, which was advised and staffed by the Commissioner(s), their staff, and common OAG counsel.

269. The political interference had been particularly pervasive in influencing decisions by the "Department" relating to the sufficiency of Nordic's claims of title, right or interest and recommendations relating to the far-field dilution factor and antidegradation of the water quality of Penobscot Bay.

270. That political interference appeared to substantively influence determinations by the DEP Commissioner(s) and Board regarding Nordic's claims of TRI in Lot 36 and the adjacent intertidal land.

271. The Board was advised by the Commissioner(s), his/her staff, and common legal counsel, regarding: (i) the Commissioner(s)' threshold determinations relating to Nordic's administrative standing and the justiciability of its permit applications; (ii) denial of Petitioners' request to appeal the Commissioner's 6-13-2019 TRI determination to the Board; (iii) the content

of the TRI determinations “made by” the Presiding Officer and Board on challenges filed by MGLF Petitioners throughout the Board’s review of Nordic’s applications relating to Lot 36 and the adjacent intertidal land; and (iv) the content of the draft Orders submitted to, and final Orders ultimately entered by, the Board in 2020 and in 2023 on remand.

272. The belatedly-produced and obtained FOAA documents included documents responsive to the 3-13-2019 FOAA request that MGLF Petitioners’ counsel had filed with DEP, but which the Department had previously concealed by failing to produce all documents responsive to that FOAA request in the August 2019 FOAA response provided to Petitioners’ counsel.

273. As a result of Petitioners finally obtaining these responsive and troubling documents (or at least a good portion of them), in February and July, 2021, MGLF Petitioners requested that the Administrative Record be amended and that MGLF Petitioners be allowed to amend their Petition to include independent claims relating to the violation of Due Process resulting from the political interference in the permitting process and the representation of the Commissioner and Board by common OAG counsel with no firewall.

274. Specifically, in February 2021, the Governor’s Office provided Intervenor Lawrence Reichard documents relating to the 1-25-2019 ex parte meeting that had never been produced in response to Appellants’ March 2019 FOAA request (A: 0152-0215; D: p. 4, 3-15-2021 MAP, Exs. 1, 8).

275. Intervenor Reichard, after recognizing the significance of the several hundred documents he had received from the Governor’s Office, subsequently forwarded the FOAA response he had received to Petitioners’ counsel by the end of March.

276. After review of these documents by Petitioners’ counsel, on 3-15-2021, Petitioners filed a motion to amend their 80C Petition to add independent claims relating to political interference and bias in the Nordic permitting process, and to conduct discovery related to those

claims (A: 0152-0170).

277. In February 2021, Petitioners' counsel also filed a FOAA request with the Department seeking additional documents relating to political interference with the TRI determinations by the Commissioner in 2019.

278. In support of this motion, Petitioners filed relevant documents from the Reichard FOAA Response as an offer of proof (A: 0194-0207) of the political influence exerted in the Nordic permitting process that influenced the TRI determinations by then-Acting and/or Deputy Commissioner Loyzim and then Commissioner-nominee and Commissioner Jerry Reid, that had prejudiced Petitioners' due process and property rights.

279. On 4-21-2021, the Agency Record was filed (A: 1023-1105).

280. Within 10-days, MGLF Petitioners objected to the Board's counsel regarding the omission of relevant documents from the Reichard FOAA Response.

281. At that time, the Department had still not provided any response to Petitioners' February 2021 FOAA Request.

282. Upstream Watch also objected to other substantive omissions from the April 2021 Record compiled by DEP staff with advice from common OAG counsel.

283. A supplemental Administrative Record filed was filed by Respondent in the Waldo Superior Court on 6-17-2021 (A: 1106-1116); however, this Supplemental Record did not correct the omissions challenged by MGLF Petitioners relating to omission of documents revealed by the Reichard FOAA documents.

284. This Supplemental Record was also provided in a form that MGLF Petitioners could not open on a Mac or PC. The technical issues with the filing were not timely corrected by the Department or its counsel, and the Supplemental Record provided by the Department in a form that could be accessed prior to the 10-day deadline for Petitioners to object to the contents of the

Supplemental Record.

285. On 7-15-2021, Appellants filed additional exhibits in support of their motion to amend the Petition to include independent claims and to conduct discovery, obtained from the Department by Paul Bernacki in July 2021 pursuant to FOAA (A: 0208-0243). Paul Bernacki, a private citizen who has assisted and consulted with Petitioners and their counsel in opposing Nordic's project as proposed.

286. The Bernacki FOAA Response contained the 6-12-2019 emails scheduling the meeting in the Governor's office on 6-13-2019 "to discuss communications around TRI for Nordic" and "to get everyone on the same page from a messaging standpoint." (A: 0222) and emails from Jerry Reid to Peter Mills, the Governor and Heather Johnson reporting that the 1-25-2019 meeting with Nordic "went very well." (A: 0219-0220).

287. Again, the documents were provided in a form that could not be accessed on a Mac or PC and a request for the response to be provided again, *in an accessible format*, was made to Respondent's counsel and the Department.

288. On 7-16-2021, two deeds were recorded in the Waldo County Registry of Deeds that nullified any claim of TRI Nordic had in Lot 36 and the adjacent intertidal land based on the 8-6-2018 EOA.

289. Specifically the deeds recorded on July 16, 2021, included: (i) a deed dated 6-23-2021 from the Eckrotes to the City of Belfast, conveying all of the Eckrotes' TRI in Lot 36 (WCRD Book 4679, page 157); and (ii) a deed dated 7-10-2021 from Nordic to the City of Belfast conveying all of Nordic's TRI, if any, in Lot 36 and the adjacent intertidal land obtained from the "Release Deeds" from the so-called Heirs of Harriet L. Hartley (WCRD Book 4679, Page 160). MGLF Petitioners incorporate these deeds herein, as they appear in the WCRD.

290. The deeds did not reserve any rights Nordic allegedly had under the 8-6-2018 EOA.

291. Nordic did not exercise its option in the 8-6-2018 EOA prior to the Eckrotes' conveyance of Lot 36, which occurred by delivery of the 6-23-2021 deed to the City of Belfast on or about July 15, 2021.

292. The conveyance had the effect of nullifying the unexercised 8-6-2018 EOA, because no reservation of the rights under the 8-6-2018 EOA was made by the parties to that deed and the 7-10-2021 deed from Nordic to the City of Belfast (WCRD Book 4679, Page 160).

293. In August 2021, additional documents were produced by the Department to Petitioners' counsel pursuant to Petitioners' counsel's February 2021 FOAA request. Those documents were in a form that *could* be accessed from a Mac and PC.

294. Those belatedly-produced documents revealed that the DEP staff's recommendations dated May 13-15, 2020, regarding the far-field dilution factor discussed above herein, had been substantively and radically altered.

295. As originally drafted, DEP's WQB staff had concluded that Nordic *could not meet the anti-degradation standard* and that, as proposed, the Nordic project would degrade the water quality of Penobscot Bay from its current water quality classification as "SB."

296. The documents provided pursuant to FOAA in August 2021 reveal that, subsequent to 5-13-2020 but prior to the 5-20-2020 Board "Deliberative Session," the 5-13-2021 "anti-degradation" conclusion by WQB staff (posted to all parties on 5-15-2020) and the related recommendations of staff to the Board, were radically altered, *after*: (i) ex parte communications by Nordic's counsel (Joanna Tourangeau, Esq.) with then DEP Commissioner Jerry Reid; and (ii) political interference by Maine & Co. representatives acting through the Governor and her staff (See, Petition ¶¶ 136-153, *supra*, and related exhibits incorporated by reference herein and attached

hereto).

297. In the prior BCD proceedings, Petitioners filed motions to amend the Administrative Record to add the omitted documents obtained through third-party FOAAs in February and July, 2021, and amend their Petition to add independent claims relating to the political interference and due process violations revealed by the belatedly obtained FOAA documents. Petitioner also sought additional discovery.

298. In response to those motions, the BCD Court entered a series of Orders, dated 11-15-2021, 11-18-2021 and 2-23-2022, denying all relief requested by Upstream Watch and MGLF Petitioners.

299. The BCD Court also affirmed all decisions made by the BEP granting Nordic the above-referenced permits and licenses.

300. Upstream Watch and MGLF Petitioners timely, separately filed Notices of Appeal of those Orders.

301. All parties fully briefed the issues raised in the resulting 80C appeal before the Maine Supreme Judicial Court, sitting as the Law Court, in *Upstream Watch, et al. v. Board of Environmental Protection*, Docket No. BCD-22-48.

302. Before oral argument and/or a decision was entered by the Law Court in the BEP 80C appeal (BCD-22-48), the Law Court entered a Decision on February 16, 2023, in the parallel Declaratory Judgment action to quiet title, *Mabee v. Nordic Aquafarms Inc., et al.*, Docket No. Wal-22-19, that determined that:

- (i) Petitioners Mabee and Grace own the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and 35 front – which included the land in which Nordic proposed to bury its pipes allegedly based on an easement from Richard and Janet Eckrote, who owned upland Lot 36;

- (ii) The Eckrotes and their predecessors in interest back to 1946 never owned the intertidal land adjacent to Lot 36, because the 1946 deed from Harriet L. Hartley to Fred R. Poor (“1946 Hartley-to-Poor deed;” WCRD Book 452, Page 205) severed the upland from the flats and only conveyed a parcel which terminated at the high water mark of Penobscot Bay;
- (iii) Petitioner Friends holds a valid and “enforceable” Conservation Easement on the intertidal land adjacent to Lots 38, 37, 36 and 35, created by Mabee-Grace on 4-29-2019, which prohibits any dredging or industrial development of this intertidal land;
- (iv) The 1946 Hartley-to-Poor deed created a “residential purposes only” servitude on the parcel conveyed to Fred R. Poor that: (a) runs with the land; (b) is binding on successors of Fred R. Poor (which included the Eckrotes, the City of Belfast and Nordic); and (c) is enforceable by holders of land benefited by this servitude (which includes Petitioners Mabee-Grace and Friends). That servitude prohibits any for-profit business being conducted on the parcel conveyed to Fred R. Poor (which includes the eastern (bayside) portions of Lots 36 and 35).

Mabee v. Nordic Aquafarms Inc., 2023 ME 15, 290 A.3d 79 (“*Mabee I*”).

303. *Mabee I* was filed by the MGLF Petitioners as supplemental authority in support of vacating the 2020 BPL and BEP Orders granting Nordic leases, permits and licenses, challenged in Wal-22-299 and BCD-22-48.

304. In response, BEP’s common OAG counsel submitted a letter on March 7, 2023, to the Law Court, stating in relevant part that:

A Department of Environmental Protection permit applicant must demonstrate, to the Department’s satisfaction, sufficient TRI for the application to be deemed complete and maintain sufficient TRI “throughout the entire application processing period.” 06-096 C.M.R. ch. 2, ¶ 11(D). This period ends when the permit is issued.

305. Under the theory advanced by both BEP and Nordic, whether or not an applicant has TRI is: (i) a matter to be determined by “the Department” as a matter of *discretion* not as a matter

of law; (ii) the applicant's TRI, or lack thereof, becomes irrelevant once a permitting decision is made by the Department (i.e. either the Board or Commissioner).

306. BEP and Nordic have consistently failed to acknowledge that having title, right or interest in the property proposed for use and development is an issue that is inextricably intertwined with the jurisdictional determination of whether the applicant has administrative standing – required to present a justiciable issue to the courts and an administrative agency.

307. Thereafter, on May 10, 2023, the Law Court entered an Order remanding the BEP 80C appeal, and a similar Rule 80C appeal against the DACF Bureau of Parks and Lands (*Mabee v. Department of Agriculture, Conservation and Forestry, et al.*, Docket No. Wal-22-299) regarding final agency action granting Nordic a submerged lands lease and dredging lease, to the respective State agencies that had granted the challenged permits, licenses and leases.

308. Specifically, under the doctrine of primary jurisdiction, the Law Court remanded the BPL and BEP appeals to the respective Superior Courts “in turn to remand the matters to the BPL and the BEP so that the agencies may determine the impact, if any, of *Mabee I* on the challenged approvals.” 5-10-2023 Remand Order, pp. 3-4.

309. The Law Court did not retain jurisdiction over the pending 80C appeals and stated “nor should the Superior Court of the Business and Consumer Court.” The Law Court left “to the BPL and the BEP to determine the scope of the proceedings on remand.” *Id.* at p. 4. The Law Court stated in relevant part that:

. . . Upon the issuance of the agencies' determinations on remand regarding the viability of the approvals, any party is free to raise in a new appeal any argument raised previously and any new argument arising from the agency proceedings on remand.

310. On 5-15-2023, the BCD Court remanded the BEP Orders dated November 19, 2020, to the Board for further proceedings.

311. On 5-19-2023, the Board sought reconsideration of the Law Court's 5-10-2023 Remand Order, asserting that:

The Board's position on the title, right or interest (TRI) issue has been set forth in both the Board's April 21 Opposition and its March 7 Letter to the Court (attached as Appendix F): ***this Court's quiet title decision does not impact the determination that Nordic Demonstrated sufficient TRI for the applications to be processed, and that is all that is required under the Boards' rules.*** See, Board Opp. At 7-8; 06-096 C.M.R. ch 2, § 11(D). As stated in the Board's March 7 Letter to the Court, the Department's TRI requirement "is in contrast to the Bureau of Parks and Lands' submerged decisions and leases, which require TRI to be maintained through the lease." See *Southridge Corp. v. Bd. of Env'tl. Prot.*, 655 A.2d 345, 348 (Me. 1995) (although permittee's land claim may fail after permit was issued, permit was not invalid and could be revoked by the agency, and permittee was not deprived of administrative standing). Thus, this case should proceed to be decided on the merits, which have been fully briefed, and need not be remanded to the Board for further consideration of "the impact, if any, of *Mabee I* on the challenged approvals. Order of Remand at 4.

See, 5-19-2023 Board Motion for Reconsideration, p. 5 (emphasis supplied).

312. On 5-30-2023 Upstream filed Appellants' Opposition to the Board's Motion for Reconsideration and Stay.

313. On 6-21-2023, the Commissioner of DEP entered an Order suspending Nordic's NRPA, SLODA and Air Licenses, but leaving the MEPDES permit in place – continuing Nordic's obligation to do testing required by the permit.

314. The DEP Commissioner's 6-21-2023 Suspension Order was entered in response to separate petitions to revoke or suspend the permits and licenses, filed with the Commissioner of DEP by Upstream Watch and the MGLF Petitioners, as well as a request to suspend all permits and licenses (including the MEPDES permit) filed by Nordic. All of those petitions were based on the Law Court's decision in *Mabee I*.

315. The DEP Commissioner based her suspension order on "changed circumstances," citing the decision in *Mabee I*.

316. MGLF Petitioners also requested revocation on the grounds that Nordic had obtained permits and licenses from the Board by misrepresenting or failing to fully disclose all material facts. The Commissioner denied revocation based on this ground.

317. On 6-29-2023, the Law Court denied the Board's Motion for Reconsideration.

318. In both the 2020 Rule 80C appeals against BPL and BEP, and on remand in both agencies, MGLF Petitioners' challenges were focused on the erroneous determinations that BPL, the DEP Commissioner and BEP made regarding the threshold determination whether Nordic had demonstrated "sufficient title, right or interest" in all property proposed for use and development (on the eastern (bayside) of U.S. Route 1, including the upland adjacent to the State's submerged land for which Nordic sought leases from BPL.

319. On remand in both the BPL and BEP proceedings, MGLF Petitioners asserted that the 2020 Orders granting Nordic permits, licenses and leases, entered by both BPL and BEP, should be vacated because those Orders were based on errors of law regarding Nordic's TRI on the eastern side of U.S. Route 1, and were not supported by any evidence in the Administrative Record.

320. Specifically, MGLF Petitioners identified the following errors of law to support MGLF Petitioners' argument that Nordic never had administrative standing to obtain any permits, licenses or leases from BEP or BPL: (i) the 8-6-2018 Easement Option Agreement ("8-6-2018 EOA") between Nordic and the Eckrotes failed to provide Nordic with sufficient TRI to use the intertidal land adjacent to Lot 36, because the boundaries of the easement option, *as defined by Exhibit A of that agreement*, **terminated at the high water mark of Penobscot Bay and included no right to use the adjacent intertidal land**; (ii) the Deeds submitted by Nordic in the Agency Records, unambiguously establish, as a matter of law, that the Eckrotes never owned any intertidal land adjacent to Lot 36 and therefore demonstrated that the Eckrotes had no legal capacity to grant

Nordic an easement to use or develop the intertidal land adjacent to Lot 36; (iii) the Deeds in the Mabee-Grace and Eckrote Chains of Title, all submitted in the Record by Nordic, unambiguously establish, as a matter of law, that Petitioners Mabee and Grace owned and own the intertidal land adjacent to Lots 38, 37, 36 and 35, and therefore demonstrated that the Eckrotes had no legal capacity to grant Nordic an easement to use or develop the intertidal land adjacent to Lot 36; (iii) all of the surveys in the Administrative Record, including surveys commissioned by the Eckrotes lacked legal capacity to grant Nordic an easement to use or develop the intertidal land adjacent to Lot 36; (iv) because Mabee and Grace created a valid and “enforceable” Conservation Easement on the intertidal land adjacent to Lots 38, 37, 36 and 35, that prohibits dredging and commercial and industrial development in the conservation area, Nordic cannot obtain the right to use or develop this intertidal land in the manner that the BEP permits and licenses would authorize; (v) the Eckrotes, Nordic and the City of Belfast, as successors in interest of Fred R. Poor are bound by the “residential purposes only” servitude on upland Lot 36, enforceable by Mabee-Grace and Friends as holders of land benefited by that restriction, and therefore the Eckrotes had no legal capacity to grant Nordic an easement use and develop upland Lot 36 in the manner authorized by the BEP permits and licenses.

321. No evidence in the Administrative Record, including the evidence submitted by Nordic, demonstrated that the Eckrotes owned the intertidal land adjacent to Lot 36. In fact, all evidence in the Administrative Record for both BPL and BEP demonstrated that the Eckrotes did not own the intertidal land adjacent to Lot 36, including: (i) all deeds in the Mabee-Grace and Eckrote chains of title; (ii) all surveys submitted by Nordic and the Petitioners, including those done for Nordic and the Eckrotes by surveyors: Gusta Ronson (8-31-2012), Clark Staples (2018) and James Dorsky (11-14-2018, 11-15-2018, 1-25-2019, 2-22-2019, 5-16-2019, 6-4-2019 and 7-24-2020; (iii) the 5-16-2019 surveyor’s opinion letter from James Dorsky, P.L.S., to Erick Heim;

(iv) the 8-6-2018 EOA; (v) the 3-3-2019 Letter Agreement between Nordic and the Eckrotes; and (v) the 12-24-2019 Amendment of the 8-6-2018 EOA.

322. Since at least July 13, 2020, MGLF Petitioners have asserted that the Board improperly ignored the Supreme Judicial Court's holding in *Tomasino v. Town of Casco*, 2020 ME 96, by determining that NAF had demonstrated sufficient title, right or interest ("TRI") in the Eckrotes' upland lot based on an easement, the factual parameters of which are in dispute and have not been determined by a court of competent jurisdiction.

323. On remand, Petitioners cited these same errors of law and the absence of any record evidence to support the Commissioner's and Board's TRI determinations, and again cited the failure to adhere to *Tomasino*, as grounds to vacate the 2020 Orders and return Nordic's applications as incomplete.

324. In contravention of the Law Court 5-10-2023 Remand Order, "the Board" did not establish a process for considering "the impact, if any, of *Mabee I* on the Board's 2020 Orders. Rather, only the Board's Presiding Officer made the determination regarding that process – with the advice of the same common OAG counsel who had filed the opposition to remand in the Law Court and had represented both the Commissioner(s) and Board on TRI-related issues.

325. The 7-26-2023 Letter from the Presiding Officer that dictated the process in the remand proceedings, limited the Board's consideration of the impacts of *Mabee I* and the Briefs of the parties to only information in the 2020 Administrative Record and prohibited reference in the 10-page briefs to anything outside that Record, unless the information was cited by the Commissioner in her 6-21-2023 Suspension Order. No reply briefs were permitted.

326. In the 7-26-2023 Order, the Presiding Officer unilaterally change the nature of the relief that MGLF Petitioners request on remand, stating:

On July 5, 2023, Mabee-Grace and Friends previously filed with the Board a motion to vacate the Nordic permits, *which I interpret as a request to revoke the Nordic*

permits. . . . The Board lacks authority to revoke licenses or permits issued by the Department, including the Nordic permits issued by the Board. Pursuant to 38 M.R.S. § 342(110B) and Chapter 2, § 25, authority to consider revocation of permits rests with the Commissioner of the Department. The Commissioner separately acted on a prior request of Mabee-Grace and Friends to revoke the Nordic permits, and in the exercise of her discretionary authority, determined that the revocation was not warranted. [Commissioner’s Suspension Order dated June 21, 2023, ¶ 17] Therefore, the Mabee-Grace, Friends and Upstream renewed requests to revoke the Nordic permits are hereby referred to the Commissioner.

7-26-2023 Presiding Officer’s Letter Order, p. 3 (emphasis supplied).

327. On 8-9-2023, Upstream Watch and MGLF Petitioners objected to the process prescribed by the Presiding Officer, which does not conform to the due process requirements in the Department’s Chapter 3 rules.

328. On 8-16-2023, the Presiding Officer issued another letter addressing requests filed by MGLF Petitioners, Upstream Watch and the Northport Village Corporation requesting that the Board either take judicial notice of additional documents or reopen the record to accept new evidence.

329. MGLF Petitioners and Upstream also argued that the matter before the Board on remand is an adjudicatory proceeding governed by Chapter 3 regarding the Board’s rules concerning the conduct of licensing hearings, appeals of decisions of the Presiding Officer to the full Board, and requirements for taking official notice of documents (including public documents like deeds and Orders in other litigation relevant to the matter before the Board – evidence that a Court would be *required* to take judicial notice of pursuant to M.R. Evid 201).

330. The Presiding Officer denied all of the objections to his process. No appeal of the Presiding Officer’s process or rulings were permitted to the Full Board in contravention of the Department’s rules.

331. The Presiding Office also stated that:

. . . . The scope of the matter before the Board is the narrow legal question the Law Court posed on remand: the impact, if any, of the quiet title decision, *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, on the permits issued by the Board.

Therefore . . . no additional evidence is being solicited or permitted in this remand proceeding.

Officially-noticed documents

. . . As a point of clarification, only the Suspension Order document is officially noticed. The filings in the other cases mentioned in the Suspension Order that relate to this proposed project are not officially noticed, but those filing briefs here may in their briefs and oral argument to facts referenced in the Suspension Order.

8-16-2023 Presiding Officer's Letter Order, p. 2.

332. On 8-18-2023 and 8-21-2023 the parties filed their respective 10-page briefs.

333. On 8-23-2023, Upstream filed a reply to Nordic's brief, which MGLF Petitioners joined.

334. On 8-29-2023, the Board's Executive Analyst Bill Hinkel sent a notice to the BEP service list, on behalf of the Presiding Officer stating that the replies – which addressed misstatements of fact and law in Nordic's brief -- would not be admitted in the Record or considered by the Board.

335. On September 7, 2023, BPL, on remand from the Law Court, issued an order rescinding its 2020 submerged lands lease and dredging lease, granted – *but not issued* – to Nordic. The BPL rescission decision Order was based on Nordic's lack of right, title and interest in all upland adjacent to the State's submerged lands, pursuant to the Law Court's decision in *Mabee I*.

336. On September 8, 2023, MGLF Petitioners filed a motion to reopen the Record and take official notice of: (i) the 9-7-2023 BPL rescission decision, since having a submerged land lease is a requirement for Nordic having title, right or interest to obtain the NRPA, SLODA and MEPDES permits and licenses from the Department; and (ii) the 6-12-2023 Order entered on the future course of proceedings in the eminent domain case (WALSC-RE-2021-007), which prohibits the City of Belfast from seeking an order to amend or terminate the Conservation Easement until and unless a final determination is made by the Court that the City's exercise of eminent domain was legal.

337. Specifically, 06-096 C.M.R. ch. 2, § 11(D)(2) states in relevant part that:

. . . 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;

338. Here, Nordic cannot meet this requirement in § 11(D)(2) as a result of the 9-7-2023 BPL rescission decision, Nordic cannot demonstrate that it has TRI because Nordic has not been issued a submerged lands lease and has no pending application for a submerged lands lease pending in BPL.

339. On 8-12-2023, the Presiding Officer stated that official notice would be taken of the 9-7-2023 BPL Rescission Decision, but not the 6-12-2023 Order in the eminent domain case.

340. The 8-12-2023, Order of the Presiding Officer also announced redactions he had made to the briefs submitted by MGLF Petitioners and Upstream Watch.

341. No redactions were made to Nordic's brief – which made false representations regarding Release Deeds that both the Waldo Superior Court and the Law Court in *Mabee I*, had determined had conveyed nothing to Nordic because the Grantors of those Release Deeds (drafted by Nordic's counsel) had no title, right or interest to convey to Nordic. *Mabee I*, 2023 ME 15, ¶ 52, n. 11; *Mabee v. Nordic Aquafarms Inc.*, No. RE-2019-0018, 2021 WL 6932428, at *27 (Me.Super. Oct. 27, 2021).

342. On 9-20-2023, MGLF Petitioners filed objections to the Presiding Officer's redactions to their briefs, and his failure to redact information outside the Record in Nordic's brief. That filing also requested that the Board recommend that the Commissioner revoke the 2020 permits and licenses granted by the Board pursuant to 38 M.R.S. § 342(11-B)(B) and Chapter 2, Rules 25(A), 26(A) & 27(B).

343. On 9-21-2023, Attorney Kevin Martin and AAG Peggy Bensinger briefed the Board on the background of the Nordic Project, with 56 Powerpoint slides which provided a timeline that grossly misrepresented the underlying facts of the project and prior proceedings.

344. On October 2, 2023, MGLF Petitioners received an Order from the Waldo County Superior Court, entered on 9-28-2023 in RE-2021-007 (the eminent domain case), in which the Superior Court remanded the 8-12-2021 Condemnation Order entered by the City of Belfast, based on the Law Court's decision in *Mabee I*.

345. Upon receiving that Order in the mail, MGLF Petitioners filed it with the BEP Service List, counsel for BPL and the Commissioner of DEP.

346. Nordic has asserted that the 8-12-2021 Condemnation Order is a basis for Nordic currently having "sufficient TRI" to retain the permits granted in 2020 by the Board.

347. Of relevance to the BEP proceedings on remand, the 9-28-2023 Remand Order in RE-2021-007, stated that the City Council relied on the "defunct [7-24-2020] Dorsky Survey" that is based on a "misunderstanding of the term 'mouth' [of the Little River].

348. Specifically, the 9-28-2023 Order in RE-2021-007 states:

The City attached the Hartley & Dorsky survey as "Schedule A" to its Order of Condemnation and relies on the survey in the Order to identify the land and interested taken under it. The Hartley & Dorsky survey's apparent misunderstanding as to how the mouth of the Little River should be located therefore may have caused the City to inaccurately identify the extent of the land taken under its Order of Condemnation as a result of the City contemplating its boundary line as being drawn from the point where the Little River discharges into Penobscot Bay as the low-water mark of the Bay instead of at the fixed point where the Little River discharges from the upland. *Compare Richards Aff. Ex. 4 with Belfast, Me. Order of Condemnation Schedule A (August 12, 2021)*. Accordingly, the City's reliance on Hartley & Dorsky's now defunct survey in its condemnation order generates a serious question as to whether the City misidentified its municipal boundary in the order and, as a result, mistakenly condemned and took a segment of land that lies outside of its municipal boundaries."

9-28-2023 Remand Order, p. 5.

349. The 9-28-2023 Remand Order also expressly states that Friends have, through its conservation easement, the right to enforce the "residential purposes only" servitude on upland Lot 36. ("... Friends has an enforceable conservation easement over the intertidal land (which also

includes the right to enforce Mabee and Grace’s equitable servitude [on upland Lot 36]” 9-28-2023 ED Remand Order, p. 3).

350. The 9-28-2023 Remand Order of the 8-12-2021 Condemnation Order was based on determinations in *Mabee I*.

351. On October 3, 2023, MGLF Petitioners filed the 9-28-2023 Remand Order in RE-2021-007 as supplemental authority in support of their pending renewed motion to have the Commissioner of DEP revoke Nordic’s permits and licenses.

352. On October 3, 2023, MGLF Petitioners filed an Objection and Motion to Recuse Board Member Steven K. Pelletier, based on information within the August 2021 FOAA documents. Because the pending Rule 80C appeals had divested the Board of jurisdiction over the Nordic matter in 2020, prior to Petitioner’s counsel obtaining those FOAA documents from the Department, the issue of recusal as neither ripe nor within the board’s jurisdiction until the Law Court remanded the 2020 Orders to the Board for further proceedings.

353. MGLF Petitioners filed eight (8) exhibits in support of their objection and Motion to Recuse Steven K. Pelletier.

354. On October 4, 2023, MGLF Petitioners filed an objection by email with the Board’s Executive Analyst raising due process concerns about the staff briefing by Attorney Kevin Martin and AAG Bensinger, stating that: “The omitted and sanitized version of events presented to the Board concealed the significant political interference with the permitting process that underlies the Nordic Project and documents that were improperly excluded from [the] Administrative Record, or the significance of which were misrepresented to the Board by DEP staff and common counsel for the Commissioner and Board.” The Objection was served on the BEP Service List.

355. Later, on October 4, 2023, Mr. Hinkel responded to MGLF Petitioners submissions dated 9-30-2023, 10-3-2023 and 10-4-2023 – dismissing the import of the issues raised.

356. On 10-11-2023, Notice was sent to the Service List that the Board would consider the issues submitted to it by the Law Court's 5-10-2023 Remand Order on October 19, 2023, at its meeting in Augusta.

357. The Agenda for the 10-19-2023 meeting and all materials relating to the Nordic project, *including a draft Order prepared for the Board by AAG Bensinger*, was posted on 10-11-2023. www.maine.gov/dep/bep/

358. On October 17, 2023, the Presiding Officer issued a letter stating that Mr. Pelletier would address the issues raised in MGLF Petitioners' Objection and Motion to Recuse during the 10-19-2023 Board meeting.

359. At the outset of the Board's consideration of the Nordic project on the agenda, Board Member Steven K. Pelletier, declined to recuse himself from consideration of matters relating to Nordic.

360. Thereafter during the 10-19-2023 Board meeting, oral arguments were presented by: counsel for MGLF Petitioners; counsel Upstream Watch; a representative of Northport Village Corporation; counsel for Nordic Aquafarms Inc.; and DEP Attorney Kevin Martin.

361. At the conclusion of those oral arguments, the Board unanimously voted to sign the draft order, drafted by AAG Bensinger, *without any amendments to that Order*.

362. Generally, the 10-19-2023 Order, as drafted, correctly characterized Petitioners Mabee-Grace and Friends' argument but mischaracterized the Lobstering Representative's arguments.

363. Specifically, the 10-19-2023 Board Order states as follows:

A. Maine Lobstering Union, Wayne Canning, and David Black

9. MLU argues that *Mabee I* established, as a matter of law, that Nordic "cannot, did not, and never could, meet its burden to show sufficient TRI [title, right or interest] . . ." Specifically, MLU contends that they are two impacts from *Mabee I*. First, MLU argues that, because the Law Court interpreted the language of applicable deeds as not supporting a presumption

of intertidal ownership along with the upland, the Department's acceptance of the application and the Board's decision not to return them, both of which referred to such a presumption, were *retroactively rendered erroneous*. Second, MLU argues that the decision in *Mabee I* means that Nordic never could have validly demonstrated TRI because the Law Court ultimately found against the property rights claimed in the applications and supplemental submissions. MLU contends the Department must return the applications pursuant to its authority under Chapter 2 § 11(D). [emphasis supplied]

10. MLU also argues that the Law Court's determinations in *Mabee I*, in connection with facts in the record, demonstrate that Nordic misrepresented or failed to fully disclose facts, which justifies revocation of the Licenses. The Board interprets this argument as disputing the Commissioner's finding in her Suspension Order that Nordic did not attain the Licenses by misrepresenting facts. MLU argues that the project is subject to the "mandatory jurisdiction" of the Board and that the Board, not the Commissioner, has exclusive jurisdiction to suspend, revoke, or modify the Licenses. Thus, MLU contends that the Commissioner erred in issuing the Suspension Order; that, on remand, the Board has the responsibility, authority, and jurisdiction to suspend, revoke, or modify the Licenses; and the Commissioner's Suspension Order should be considered as a recommendation to the Board here.

B. Mabee, Grace, and Friends of Harriet L. Hartley Conservation Area

11. Mabee-Grace/Friends argues that the purpose of the remand was "to provide the Board with an opportunity to re-evaluate its earlier determinations regarding the sufficiency of Nordic's claims of [TRI]." Mabee-Grace/Friends contends that the remand, in effect "has turned the clock back to November 18, 2020," and asks the Board to determine whether, in light of the recent Law Court decision in *Mabee I*, Nordic could have demonstrated sufficient TRI to use and develop the impacted property in the manner the Licenses would allow. Based on this proposed method of TRI analysis, Mabee-Grace/Friends argues Nordic could not have demonstrated sufficient TRI, and therefore the Licenses should be vacated or revoked by the Board. Mabee-Grace/Friends also argues that *Mabee I* establishes as a matter of law that Nordic "cannot, did not, and could never meet its burden to show sufficient TRI," and that the applications for the Licenses should be returned to Nordic.

12. Mabee-Grace/Friends argues that *Mabee I* demonstrates that the Department's prior acceptance of the applications for processing and Board's decision not to return the applications during the processing period were [based on] errors of law, and reiterates its prior TRI positions argued during the processing of the applications for the Licenses.

13. Mabee-Grace/Friends further argues that Nordic cannot now demonstrate sufficient TRI based on the City's eminent domain action.

364. Notably, the 10-19-2023 Board Order states in relevant part that:

22. . . . Nordic contends that the Department’s TRI provision no longer applies after the Department acted on the applications and issued the approvals (the Licenses), and the agency does not retain the authority to return an application after the conclusions of the application processing period. For the following reasons, the Board agrees with the licensee that the applications processing period concluded with the issuance of the Licenses on November 19 2020, and that the return of Nordic’s applications for those Licenses, which were already granted, is no longer an option or within the Board’s authority.

23. The Board finds the plain language of Chapter 2, § 11(D) limits the requirement of demonstrating sufficient TRI by an “applicant” to during the “application processing period,” which necessarily ends when an application is acted on and a license or permit is issued by the Department. The rationale for this limitation is self-evident when considering the purpose of the Department’s TRI requirement as a threshold issue. A requirement to demonstrate and maintain a showing of TRI is not a substantive criterion for Licenses; it is a mechanism that provides the Department with a measure of protection against wasting resources on processing applications for projects that can never come to fruition. This protection only exists during the period when an application is pending before the agency, *i.e.*, when an applicant’s request for a permit is being processed. . . . Once the Department acts on and decides an application and issues a license, it has already expended the agency resources needed to process the application, and the TRI protection is no longer needed. At that point, Department authority may be utilized to address developments that occur after a license has been issued. . . .

28. Upstream Watch argues that the Board, or at least the Department, has the authority to return an application after a license has been issued. Citing the *Madore* case, *see* note 3, Upstream Watch contends that the TRI requirement, extends beyond the Department’s decision date and into the period in which an issued license has been appealed in courts. Upstream Watch argues that TRI must be maintained until an appeal of the agency action works its way through the courts to final judicial resolution. The Board disagrees. . . . the Board finds Upstream Watch’s reference to *Madore* unpersuasive. *Madore* addresses TRI in the context of judicial standing, not a demonstration of sufficient TRI to have an application processed by the Department. *Madore* also involved an applicant whose permit had been denied and who was trying to invoke the court’s jurisdiction in an appeal of that denial to court when he no longer had a legal connection to the property at issue.

29. The Board disagrees with the arguments of MLU, Mabee-Grace/Friends, Upstream Watch, and NVC, that the Law Court’s remand constitutes an instruction from the Court to “turn back the clock” to November 19, 2020, or reconsider the Board’s threshold TRI determinations as if *Mabee I* had been decided prior to the Board ever issuing the decisions. . . .

34. . . . TRI serves a purpose of allowing the Department discretion over the use of its resources; TRI is not designed to serve as an additional venue to adjudicate title claims. . . . A decision by the Department to exercise its discretion to utilize its

resources to process an application is a different and lesser analysis than a court's adjudication of definitive property rights. . . .

35. ... The term "sufficient" is notable for the discretion it provides. An applicant must only demonstrate a colorable claim of TRI, viable enough to convince the Department to expend resources. ...

38. Furthermore, just as quiet title actions do not negate the prior exercise of Department discretion, Department permits do not grant or affect property rights. An issued permit to perform activities on areas identified in that permit does not grant permission to trespass on lands determined to be owned by another.

CONCLUSION:

39. After review of the Law Court's decision in *Mabee I*, consideration of arguments presented in the briefs, and analysis of the applicable laws and regulations, ***the Board finds that its approvals in the Licenses issued on November 19, 2020, are not impacted by the Law Court's February 16, 2023, Mabee I decision.*** The Department's original finding that evidence of sufficient TRI to warrant processing of the applications was demonstrated at that time remains in place, as well as the Board's concurrence with that determination of sufficiency. . . . To the extent the Law Court requests the Board make a determination of issue findings on behalf of the Department with regard to that impact, the Board finds that the Commissioner's Suspension Order constitutes the Department's findings regarding an impact of the *Mabee I* decision on the challenged approvals. ...

For the reasons stated above, the Law Court's decision in *Mabee I* does not affect the validity of the issued Licenses.

365. In sum, the Board's 10-19-2023 Order on remand concludes that: (i) the Law Court's decision in *Mabee I* has no impact on the Board 2020 Orders; and (ii) the Board has no statutory authority to "revoke" the permits issued on 11-19-2020, pursuant to amendment made in 2011.

366. The Board's 10-19-2023 Order is premised on arguments that were made, and rejected, by the Law Court when the Law Court entered its 5-10-2023 Remand Order and 6-29-2023 Order denying the Board's Motion for Reconsideration of the 5-10-2023 Remand Order.

367. Upstream Watch filed an 80C appeal of the 2020 Orders and the decision of the Board on remand on November 15, 2023.

368. MGLF Petitioners timely file this renewed Rule 80C Petition with independent claims.

**MANNER IN WHICH THE PETITIONERS'
HAVE BEEN AND ARE BEING AGGREIVED:**

A. Petitioners Mabee and Grace and Friends

369. If the Board's determinations to grant NAF the requested permits and licenses and to avoid filing the amended and additional applications required by federal and state law, including the CWA, are allowed to stand, the Petitioners will suffer significant adverse damages to the value and merchantability of their real property, as well as its use and enjoyment. Indeed, merely having to participate in these permitting proceedings, where the applicant, and the Grantor of the easement on which the applicant relies to establish "sufficient" TRI, has no actual title, right or interest in the property for which it seeks these permits and licenses, has already cost Petitioners Mabee and Grace and Friends hundreds of thousands of dollars in attorneys' fees, expert witness fees, surveying costs, and other litigation and administrative forum filing costs. All of these costs constitute special damages borne by Petitioners Mabee and Grace and Friends that were caused by NAF's request for permits in the absence of administrative standing and TRI and the Board's refusal or failure to apply the Supreme Court's holding in *Tomasino v. Town of Casco*, 2020 ME 96, to this applicant.

370. NAF's claims of "sufficient TRI" in the Mabee-Grace intertidal land have slandered, and continue to slander, Petitioners Mabee and Grace's title and continue to adversely impact the value and marketability of their real estate. These permits and licenses have also hinder Petitioner Friends' ability to obtain leases and seek funding for grants needed to protect the Conservation Area in its natural condition and to restore the Conservation Area's eel grass beds and access to the Little River by anadromous species, including wild Atlantic salmon.

371. Allowing the Board ignore NAF's lack of actual TRI, and allowing Nordic to maintain permits and licenses that would authorize NAF and its agents to take, use, damage and destroy Petitioners Mabee and Grace's intertidal land, on which Petitioner Friends holds a

Conservation Easement prohibiting such activities, in the absence of Nordic having any actual title, right or interest in that intertidal land, violates Petitioners' rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Art. I, § 21 of the Maine Constitution; and diminishes or destroys the value and marketability of Petitioners' real property and Petitioners Mabee, Grace and Friends' use and enjoyment of this intertidal land in its natural condition.

372. Further, in granting this lease to Nordic, the Board violated the conservation easement, that the Law Court in *Mabee I* determined is enforceable, and the Waldo County Superior Court held, in a 3-2-2022 Stipulated Judgment in RE-2021-007, was not amended or terminated by the 8-12-2021 Condemnation Order entered by the City of Belfast. The Conservation Easement prohibits dredging and protects this intertidal land in its natural condition, in perpetuity, free of any commercial or industrial use or structures. The Board's orders violate the State's obligations to enforce conservation easements in 33 M.R.S.A. § 478, by authorizing uses of the conservation area in ways that violate these protections and prohibitions.

373. Petitioners Mabee-Grace and Friends have, and will continue to suffer special damages, spending hundreds of thousands of dollars to defend and protect their land from theft and degradation in local, State and federal lease, licensing and permitting proceedings (including the second appeal of the Board's license and permit determinations here), as well as the Declaratory Judgment action pending in this Court in RE-2019-18.

374. Without a submerged lands lease or dredging lease from BPL, Nordic cannot construct its pipes, as proposed, or as authorized by the NRPA and SLODA permits. Thus, leaving the Board's permits and licenses issued in 2020 in place in the absence of any possibility that Nordic can obtain the requisite submerged lands or dredging leases from BPL, is incomprehensible and irresponsible. Leaving permits and licenses in place, that were obtained by

Nordic and its counsel through chicanery and false claims of TRI, is inflicting real harm on the true owners and the holder of the Conservation Easement.

B. Lobstering Petitioners

375. The impacts that the Lobstering Petitioners will suffer from this project as proposed include direct impacts on the abundance, distribution, health, access to and commercial value of lobsters in and from Belfast Bay and Penobscot Bay, as well as the potential adverse economic impacts from possible contamination of lobsters caused by disturbing long-buried HoltraChem mercury or discharge of contaminants in the NAF wastewater, which could irreparably damage the reputation for wholesomeness of *all lobsters* marketed and sold under the “Maine Lobster” brand – including but not limited to lobsters that are caught or landed specifically in or from Waldo County in Belfast and Penobscot Bays.

376. Among those impacts is the deposition of process waste into Penobscot Bay, polluting the Bay and impairing the farming of mussels and harvesting of lobsters and crabs, and fouling beaches where IMLU members and Petitioners, and their families swim and fish.

377. In addition, these impacts include permanent physical loss of use and access to traditional fishing grounds by lobstermen, crabbers, urchin fishermen and scallopers in the area of the proposed pipelines and wastewater and effluent dumping, and potential loss of use of a far more expansive area of the Penobscot Bay if the proposed pipeline and wastewater and effluent dumping cause new contamination and/or the re-suspension and spread of long-dormant and buried mercury contamination from Mallinckrodt and HoltraChem, as well as warming the waters of Penobscot Bay (since the proposed effluent is 5° to 33° Fahrenheit warmer than the ambient water temperatures in the Bay).

378. IMLU members and other licensed lobstermen and crabbers, including Petitioners Canning and Black, have already lost the use of approximately 13 square miles of lobstering and

crabbing grounds near this area due to the presence of mercury contamination. This project poses a threat of disturbing similar contamination from the same original sources (Mallinckrodt and HoltraChem), as well as new and as yet not fully revealed additional contamination that will damage the marketability and/or abundance of lobster and crab, as well as other commercially fished species in this area.

379. Nordic's third proposed pipelines route and configuration proposes that a large portion of the intake pipelines and most of the outfall/discharge pipeline would be buried in the intertidal zone originating from the Eckrotes' lot and extending into Belfast and Penobscot Bay. Nordic proposes that these pipes will be buried by use of destructive mechanical trenching, side-casting of dredge spoils and dredging in this fragile and sensitive intertidal estuary. Nordic also proposes to use *blasting* to destroy ledge in this area so that it can bury these pipelines – again disturbing and spreading buried HoltraChem mercury that the federal court's experts, as well as the USACE and USEPA, have determined is buried in this area.

380. Nordic then proposes to place the remaining length of the outfall and intake pipelines along the surface of the Bay beginning at a depth of approximately 35-feet, on brackets located every 15 feet. This construction process would form dangerous underwater obstructions that can entangle lobster and crab fishing gear for approximately a half mile that neither Nordic, DEP nor the Board studied in any meaningful way.

381. Although the applications Nordic filed state that Nordic will remove 4,000-8,000 cy of dredge spoils from the subtidal zone covered by the Bureau's lease and the Board's permits, the March 2, 2020 oral representations by NAF and its agent CIANBRO, made at the DMR meeting, revealed NAF intends to remove up to 15,000 to 20,000 cy of dredge spoils for upland disposal – the contamination or suitability of which has never been required by the Board in contravention to its legal duties under federal and State law.

382. Nordic has filed no written amendment relating to this additional material change and the 11-16-2020 Board Findings and Decision do not include an assessment of the impacts of this material change – instead expressly limiting the Board’s decision to the after-the-fact materials or oral representations submitted to DEP and DMR staff by Nordic and DEP staff recommendations to the Board that ignore the DEP’s own statutory duties and rules. The DEP staff recommendation relating to the materially changed dredge spoils disposal proposal by NAF appear to conceal relevant information from the Board known to staff (according to recently obtained materials acquired by FOAA requests).

383. Nordic’s infrastructure, proposed for placement in, on and above the State’s subtidal land, would inevitably have altered currents in the area, trap wastewater, disrupt and obstruct the movement of lobsters and other sea life, damage or destroy valuable scalloping, lobstering and crabbing grounds where 100 to 200 lobstermen currently fish from Districts 10 and 11, and pose a hazard to navigation by all mariners and increase the risk to life and property to commercial fishermen (including Petitioners) posed by entanglement in the proposed pipes, concrete anchors and guide piles.

384. The Board, and DEP and DMR staff, did no adequate evaluation of the impacts of this proposed project on lobster and crab fishing in this area – relying on the conclusory statements of Nordic and agency staff of DEP and DMR – that were based on no scientific study by Nordic, DMR or DEP.

385. The up to 7.7 million gallons of wastewater that NAF proposes to dump daily into the fertile lobstering grounds of Penobscot Bay will be 5° to 33° Fahrenheit warmer than the natural temperatures of Penobscot Bay – depending on the time of year of the discharge.

386. Dumping wastewater that is significantly warmer than the ambient temperatures of the Bay will adversely impact lobsters and crabs at all stages of development and permanently

harm the Penobscot Bay lobster fishery. To understate such adverse impacts, Nordic has filed “expert” reports falsely claiming that there is no significant lobster presence in this area – news to the almost 200 lobstermen who make a living fishing this area each year.

387. Further, DEP staff have referenced irrelevant data on the temperatures of the water in Belfast Harbor – a shallow and distant body of water – to justify staff’s erroneous recommendations and conclusions to the Board regarding the potential impacts of the proposed project on water quality, seawater temperatures and benthic organisms including lobsters and crabs.

388. The Department of Marine Resources, inexplicably simply ignored these risks in issuing its “evaluation” letters to the Bureau and Board, asserting that there would be no significant impacts to the lobster fishery from this project without any objective, empirical or scientific basis for this bald assertion.

389. But/for the Board granting Nordic permits and licenses, and then leaving them in place even when it is confirmed that Nordic had no actual TRI to use and develop the land in the manner the permits and licenses would authorize, none of the above- referenced adverse impacts would be suffered by the Lobstering Petitioners.

390. The Lobstering Petitioners provided the Board with county-by-county lobster landings data from the Maine Department of Marine Resources dating from 1964 to 2018. This data flatly contradicts the specious claims made by DMR, Nordic and its agents that there are few lobsters in the area where NAF proposes to place its pipelines and that Nordic acknowledges will be directly impacted by its wastewater discharges. This data is incorporated by reference into this Petition as though stated herein.²³

391. This data demonstrates the exponential increase in lobsters and lobster landings in Waldo County as the Bay has begun to recover from past industrial degradation and pollution of

²³ This data can be found online at:
<https://www.maine.gov/dmr/commercial-fishing/landings/documents/lobster.county.pdf>

this area of the Bay. From 1964 to 1999, the Waldo County lobster catch was not significant enough for DMR to even be separately mentioned in its report. From 2000 to 2003, Waldo County's catch was included with the Knox County data. However, beginning in 2004, the Waldo County catch had rebounded enough to be separately reported by DMR.

392. In 2004, the Waldo County catch was 401,706 pounds, worth \$1,762,878 at the dock.

393. However, this data also confirms that the Waldo County catch drastically declined as a result of the effects of the 2003 Belfast Harbor dredge on the upper Bay fishery. In 2005, the catch declined by over 29% to 284,661 pounds. The catch remained under the 400,000- pound range until 2011.

394. In 2011, the catch was 456,016 pounds with a value of \$1,449,663. Since 2014, the Waldo County Catch ranged between 746,704 pounds and 864,528 pounds, with a value in excess of \$3 million each year.

395. The value of the Waldo County lobster catch has a value in the local and Maine economy of three to five times the value of the catch at the dock – meaning the Waldo County lobster catch has an economic worth to the Maine and Midcoast economies of in excess of \$9 million and \$15 million annually.

396. The value of this catch far exceeds the potential annual economic benefits to the Maine and local economy of the proposed Nordic project.

397. This significant economic value would be lost if this project proceeds.

398. The Board erred in ignoring the data submitted by the Lobstering Petitioners that demonstrated that the NAF project, as proposed, will have direct, immediate, significant adverse impacts on lobsters' health and quantities, access to traditional lobster and crab fishing grounds currently used by 100 to 200 lobstermen, the reputation and sustainability of the lobster fishery in

the upper Penobscot Bay, and the reputation for wholesomeness of Penobscot Bay lobster and the “Maine Lobster” brand.

399. Further, the Board erred in relying upon the superficial and conclusory statements submitted by Denis-Marc Nault of the Department of Marine Resources, that limited DMR’s assessment of impacts from this proposed project on Pen-Bay fisheries to only the winter of construction on the lobster fishery – ignoring the impact on the winter crab fishery during this construction period, and ignoring all permanent impacts post-construction from dredging, blasting, trenching, disturbing buried HoltraChem mercury, warming water temperatures, changes in salinity because the discharge effluent will contain 15% freshwater, increases in nitrogen, changes in currents, obstructions and disruptions in lobster habitat and movement, and physical loss of traditional fishing areas.

400. The Board also erred in ignoring the mercury distribution chart prepared by the federal court’s experts during Phase II of the PRMS and submitted to the Board by the Lobstering Petitioners, in favor of a one-page conclusory statement by the Maine Department of Marine Resources that they were “unaware” of any mercury.

401. This PRMS mercury distribution chart shows that the level of contamination from buried HoltraChem mercury in the area NAF proposes to dredge, blast and place its pipelines is 200-300 ng/gm.

402. The Board erred in failing to consider the potential for dangerous entanglements of fishing gear and anchors from this above-ground placement of the pipes.

403. The Board appears to have simply ignored the change in impacts created by the change in Nordic’s proposed installation method.

404. Indeed, the Board utterly failed to consider the greater risks to the lives and property of commercial lobster and crab fishermen and recreational and commercial boaters posed

by NAF's change in the proposed pipelines installation method.

405. While this change in the method for pipeline installation changes the amount of seafloor that the USACE, DEP and the Board calculate will be permanently altered by this proposed project and, thus, *reduces the amount that Nordic was being charged for leases and permits – this change would increase the risk to life and property and adverse impacts to navigation of this proposed project* – a reality ignored by DMR, DEP and the Board.

406. The Board also erred in failing to consider the temporary and permanent impacts on the lobster and crab fishery in Penobscot Bay caused by Nordic and CIANBRO disturbing mercury and other contaminants in the sediment during construction and by the force of the discharge of 7.7 million gallons of wastewater during operation of the NAF facility.

407. In prior 2019 filings, NAF confirmed a level of 239 ng/gm in one of the 3 core samples they took last year. NAF's employee Ed Cotter has told the Belfast Harbor Committee that NAF did not test 7 of the 10 core samples NAF took along the second pipelines route (the route abandoned in March of 2019 by NAF), 2 samples were "inconclusive" for mercury, and one of the 3 tested cores showed 239 ng/gm (just as the Court's experts stated was present. It is significant that NAF found this level of mercury, since NAF confirmed that it did not use the more accurate PRMS core sampling and testing protocol to do its limited testing. The Board erred in failing and/or refusing to consider the results of sediment testing by NAF, mandated in February of 2020 by the USACE and USEPA, for various contaminants including mercury until those tests are accepted by the USACE and USEPA, pursuant to the June 2020 SAP.

408. It is impossible for the Board to make conclusions regarding the temporary or permanent impacts of this proposed project on the existing access of fishermen to this area as a productive commercial fishing resource, without considering the amount and nature of sediment that this project, as proposed, will disturb and re-suspend (including the temporary and permanent

impact of construction and operation of the pipes in Penobscot Bay on the lobster and crab fisheries of the upper Penobscot Bay).

409. It is error for the Board to attempt to defer its responsibility for such decisions to other State or federal agencies. That other agencies have overlapping jurisdiction does not obviate the Board's independent responsibility to make these judgments based on sound science and expert analysis.

C. All Petitioners

410. All of the Petitioners have had to incur an unreasonable cost burden to challenge Nordic's administrative standing. Where, as here, the lease applicant is relying on an easement to demonstrate TRI – an easement the factual parameters and legal validity of which have not been determined by a Court of competent jurisdiction (i.e. *this Court*) – the applicant is devoid of the requisite right, title or interest “in the upland property adjacent to the littoral zone in which the lease or easement is sought,” to have administrative standing.

411. The Board's decision to proceed in the permitting and licensing process was and is contrary to the Law Court's recent holding in *Tomasino v. Town of Case, supra* at ¶ 15, and the requirements in 01-670 C.M.R. ch. 53, § 1.6.B.1. It is unreasonable and error for the Board to grant any permit or license to NAF – shifting the burden on the property owners and this Court to enforce property rights that are guaranteed by law in this State and nation.

412. In the absence of actual TRI, BPL determined that Nordic lacks administrative standing to proceed in the lease process. Because 06-096 C.M.R. ch 2, § 11(D)(2) requires that Nordic have been issued a submerged lands lease or have a pending application for one, and Nordic cannot meet either of these criteria pursuant to the 9-7-2023 BPL rescission decision, Nordic lacks administrative standing and the Board lacks a justiciable issue before it to proceed upon.

413. Until those determinations were made, in the pending separate declaratory judgment action to quiet title (RE-2019-18), the Board was required to dismiss or stay consideration of Nordic's pending applications, pursuant to *Tamasino*. It was error for the Board to grant any permits or licenses to Nordic in the absence of Nordic's administrative standing or a justiciable issue before the Board.

414. The Board exacerbated errors of law it made in 2020 by failing to correct those errors on remand.

415. The Board commits additional errors of law by asserting that Nordic can and should retain permits improperly granted in the absence of any record evidence demonstrating that Nordic had TRI based on the 8-6-2018 EOA when all evidence in the Record, including the evidence prepared by experts for Nordic and submitted by Nordic, demonstrated, as a matter of law, that the Eckrotes never had TRI to grant Nordic an easement to use upland Lot 36 or the adjacent intertidal land for Nordic's commercial and industrial development and use.

WHEREFORE, pursuant to 5 M.R.S. § 11007(4) Petitioners respectfully request that the Court find that each of the referenced decisions of the Board of Environmental Protection, including findings, inferences, conclusions contained therein are:

- (i) In violation of constitutional or statutory provisions;
- (ii) In excess of the statutory authority of the Board and Department;
- (iii) Made upon unlawful procedure;
- (iv) Affected by bias or error of law;
- (v) Unsupported by substantial evidence on the whole record; and/or
- (vi) Arbitrary or capricious or characterized by abuse of discretion,

and vacate the approvals granted to Nordic in 2020, and declare each of them null and void *ab initio*, granting such other relief as is just and proper, and award Petitioners their costs.

ADDITIONAL INDEPENDENT CLAIMS

416. The MGLF Petitioners repeat and reallege the allegations contained in paragraphs 1 through 415 above as if fully set forth herein, and assert the following additional independent claims for relief:

- A. Enforcement of the “residential purposes only” servitude on Lot 36. MGLF Petitioners are entitled to an equitable order enforcing the “residential purposes only” servitude on upland Lot 36 and declaring the Board’s permits and licenses null and void ab initio, to the extent those permits and licenses authorize Nordic, its successors or assigns, to use and develop upland Lot 36 to conduct any for-profit business;
- B. Enforcement of the 4-29-2019 Conservation Easement. MGLF Petitioners are entitled to an equitable order enforcing the protections and prohibitions in the 4-29-2019 Conservation Area on the intertidal land adjacent to Lot 36 declaring the Board’s permits and licenses null and void ab initio, to the extent those permits and licenses authorize Nordic, its successors and assigns, to use and develop the intertidal land adjacent to Lot 36 in a manner that would violate the Conservation Easement.
- C. Violations of MGLF Petitioners’ Due Process Rights Pursuant to Art. I, § 6-A of the Maine Constitution and the 14th Amendment to the U.S. Constitution (and 42 U.S.C. §§ 1983 and 1988). The Department has violated MGLF Petitioners’ constitutionally guaranteed Due Process Rights by: (i) conducting the Nordic permitting process in a manner that included political interference by politically influential advocates for Nordic and ex parte communications with applicant Nordic, its agents, counsel and advocates; and (ii) using the same legal counsel from the Attorney General’s Office to advise the Commissioner, Board, and Board’s Presiding Officer – *without a firewall* – which MGLF Petitioners assert violated 5 M.R.S. § 9055 and created the appearance of bias, as defined by this Court in *Narowetz v. Bd. of Dental Prac.*, 2021 ME 46, 259 A.3d

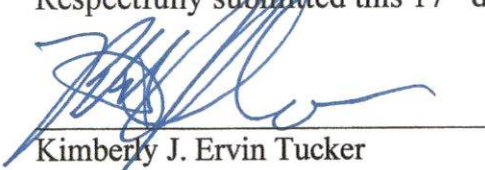
CONCLUSION

In 2020, the Board ignored the Law Court's July 7, 2020 holding in *Tomasino v. Town of Casco, supra*, that: "***in the face of a dispute between private property owners, that requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so***", requires all further consideration by the Board on NAF's pending applications to cease, until this Court rules on the parameters of the NAF-Eckrote easement in the pending Declaratory Judgment action (RE-2019-18). Accordingly, the Board of Environmental Protection erred in proceeding with the above-referenced permit and license applications. pursuant to the Law Court's holding in *Tomasino* and Rule 80B(b). Petitioners respectfully submit that the Board's error in determining the threshold jurisdictional question, regarding NAF's alleged demonstration of "sufficient right, title or interest," so fundamentally infects every other decision that the Board has made, this question requires resolution by the Court before the Petitioners should have to address the other substantive errors made by the Board.

In 2023, the Board failed to, in good faith and in accordance with controlling Law Court precedent, consider the impact of the Law Court's decision in *Mabee I* on the Board's 2020 Orders granting Nordic permits and licenses, in contravention of the Law Court's 5-10-2023 Remand Order.

The 2020 Orders should be vacated because they were based on errors of law and entered in the absence of any record evidence to support Nordic's claims that it had title, right or interest in the land proposed for use and development, in the manner the Department's permits would authorize. The Board, on remand, failed to properly evaluate the impact of the determinations in *Mabee I* on the evaluation of Nordic's administrative standing and whether Nordic presented the Department with a justiciable issue when it filed any of its permit applications.

Respectfully submitted this 17th day of November, 2023.



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