IN THE MATTER OF NORDIC AQUAFARMS INC.

NORDIC AQUAFARMS, INC. Belfast, Northport **and Searsport** Waldo County, Maine 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	))))))))))))	APPLICATIONS FOR AIR EMISSION, SITE LOCATION OF DEVELOPMENT, NATURAL RESOURCES PROTECTION ACT, and MAINE POLLUTANT DISCHARGE ELIMINATION SYSTEM (MEPDES)/WASTE DISCHARGE LICENSES **MGLF PETITIONERS' OBJECTION TO PRESIDING OFFICER'S 7-26-2023 PROCESS LETTER AND OFFER OF PROOF**

This Objection and Offer of Proof are submitted, pursuant to 06-096 C.M.R. ch. 3, § 20(e) and (f), on behalf of Jeffrey R. Mabee and Judith B. Grace ("Mabee-Grace" or "Mabee and Grace"), the Maine Lobstering Union and commercial lobster and crab license holders David Black and Wayne Canning ("the Lobstering Representatives"), and the Friends of the Harriet L. Hartley Conservation Area ("Friends") (collectively "MGLF Petitioners").

In *Narowetz v. Bd. of Dental Prac.*, 2021 ME 46, ¶ 29, 259 A.3d 771, 780, the Law Court reiterated that "[a]n important goal of an administrative procedure act is not only to provide a fair mechanism for regulatory conduct but to instill public confidence in the same." (citations omitted).

The Presiding Officer's July 26, 2023, letter ("P.O. Process letter") states that: "[t]he Law Court left it *to the Board* 'to determine the scope of the proceedings on remand.'" (7-26-2023 letter, p. 1 (emphasis supplied). However, the Presiding Officer unilaterally has declared a process that is anything but fair. Here, the process outlined in the P.O. Process letter fails to comply with the requirements in Chapter 3 of the Department's own rules and fails to provide a fair mechanism to conduct the Board's review of the permits and licenses remanded to the Board by the Law Court in its May 10, 2023 Remand Order. Consequently, the Board must amend that process before public confidence can exist in the Board's remand review of the permits and licenses granted to Nordic Aquafarms Inc, ("Nordic") in 2020.

BACKGROUND

The Law Court has remanded this matter to the Board for a determination of the impact, if any, of the Law Court's 2-16-2023 Decision in *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, 290 A.3d 79 (hereinafter: "*Mabee I*") on the permits and licenses issued by the Board to Nordic.

In *Mabee I,* the Law Court resolved title claims issues raised by Mabee-Grace and Friends in RE-2019-18 and WAL-22-19 that have a direct bearing on whether Nordic ever had the requisite title, right or interest ("TRI") to obtain and use permits, licenses and leases from local, State and federal administrative agencies, including the Department and/or Board of Environmental Protection ("BEP" or "DEP"). In *Mabee I,* the Law Court determined that:

- Plaintiffs Mabee and Grace own the intertidal land on which the parcels designated as Belfast Tax Map 29, Lots 38, 37, 36 and 35 front (*Mabee I,* ¶¶ 10, 17, 25-45, 61 and Figure 5);
- Plaintiff Friends holds an "enforceable" Conservation Easement, created 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);
- 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; AR 0178.pp. 48-49), "benefiting the holder of the land now owned by Mabee and Grace, ***runs with the land* conveyed to Poor, *binding Poor's successors***" (*Mabee I,* ¶¶ 58 and n. 13);
- 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 Figure 3); and
- 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).

In remanding the pending 80C appeals of challenges to the 2020 Orders granting Nordic various State permits, licenses and leases, the Law Court stated in relevant part that:

> . . . When, as here, it is unclear whether an approval challenged on appeal would have been issued given intervening circumstances, the appropriate response is to remand the matter to the agency that issued the approval to make that determination. *Cf. Hannum v. Board of Environmental Protection,* 2003 ME 123 ¶ 17 (remanding to the BEP where the Court could not ascertain from the BEP decision whether the BEP would have reached a different conclusion in the absence of a finding that the court found unsupported by evidence in the record).

> We therefore remand these two appeals to the . . . BPL and the BEP so that the agencies may determine the impact, if any, of *Mabee I* on the challenged approvals. The agencies may choose to make their determinations on the existing administrative records or expand the records to include materials such as a referenced subsequent conveyance after the exercise of eminent domain power that Nordic suggests should result in no change to the viability of the approvals. We leave to the BPL and the BEP to determine the scope of the proceedings on remand.

5-10-2023 Remand Order, pp. 3-4.

MGLF Petitioners submit that the impact of the Law Court's Decision in *Mabee I* is to establish, *as a matter of law*, that Nordic has never had TRI in all of the land proposed for development and use, because the Grantor of the easement option on which Nordic relied to claim TRI never had the legal capacity to grant Nordic an easement for its industrial pipes in either Lot 36 or the adjacent intertidal land.[1] Thus, because applicant Nordic lacked administrative standing, the Board improperly engaged in a substantive review of Nordic's applications, resulting in the Board granting Nordic permits and licenses in November 2020 in the absence of a justiciable issue before the Board. In such a circumstance, vacation of the Board's Orders and dismissal without prejudice of Nordic's applications is the only proper action to be taken on remand.[2] See also, 06-096 C.M.R. ch. 2, § 11(D).

Here, the Presiding Officer has improperly devised a process that allows consideration of matters outside the existing Administrative Record that Nordic asserts "should result in no change

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[1] In the 2-16-2023 email from former DEP Commissioner Jerry Reid to Governor Mills and other official of the Mills' Administration, obtained through FOAA, Attorney Reid describes the Law Court's Decision in *Mabee I* in relevant part as:

> Bad news for Nordic. The Law Court just held that under the terms of Nordic's deed they don't own the intertidal land they need to run their discharge pipe to the bay. . . .
>
> Nordic has justifiably complained about how long it took to get regulatory approvals in the face of a few committed opponents, but this decision is a self-inflicted wound. They put millions of dollars into a project on land that they didn't own, and according to footnote 9, their own surveyor apparently told them that years ago.

See, email thread attached to this objection as Exhibit A.

[2] See, e.g. *Homeward Residential, Inc. v. Gregor,* 2015 ME 108, ¶24, 122 A.3d 947, 954-955 ("The court could not decide the merits of the case when the plaintiff lacked standing . . . Instead, the court could only dismiss the action. Because the court addressed the merits of the complaint for foreclosure in its judgment, we vacate the judgment in its entirety and remand for an entry of a dismissal without prejudice."). *See also*, *Witham Family Ltd. P'ship*, 2015 ME 12, ¶7, 110 A.3d 642 ("Courts can only decide cases before them that involve justiciable controversies."

to the viability of the [Board's 2020] approvals," (e.g. the City's 2021 exercise of eminent domain), but denies MGLF Petitioners and other Interested Parties a right to present any evidence outside the prior Administrative Record that refutes Nordic's new claims of TRI. Such a process is contrary to 06-096 C.M.R. ch. 3, § 20(c) ("Parties will be notified of material so noticed and will be afforded an opportunity to contest the substance or materiality of the matters noticed."). The Presiding Officer's "heads Nordic wins, tails Petitioners lose" process, violates Mabee-Grace's and Friends' due process rights and their respective ***judicially-determined*** property rights detailed in *Mabee I.*

A. Scope of proceedings and additional evidence

1. Prior Evidence Improperly Excluded by the P.O. from the Administrative Record:

The P.O. Process letter states that: "Given the robust administrative record already developed with respect to the Nordic permits and the narrow scope of review directed by the Remand Order, no additional evidence will be solicited or allowed in the remand proceedings." However, significant evidence *presented for the Board's consideration by MGLF in 2020* was previously, erroneously excluded from the Administrative Record by the Presiding Officer.

That evidence includes evidence considered by the Law Court and expressly referenced in *Mabee I,* including surveys prepared by Nordic's surveyor. That improperly excluded, previously-filed evidence must be included in the Record and considered by the Board on remand, including:

- 0935o: 11-14-2018 Dorsky Survey Plan;
- 0935p: Revisions to Dorsky Survey Plan dated 11-15-2018, 1-25-2019, 2-22-2019, 5-14-2019 and 6-4-2019;
- 0935r: 7-31-2019 to 8-2-2019 emails from Surveyor Dorsky to Ed Cotter and 8-2-2019 sketch;
- 0935s: 7-24-2020 Dorsky revision to 11-14-2018 Survey Plan.[3]

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[3] Notably, the Dorsky survey and survey revisions that were excluded from the Board's Record and review by the Presiding Officer in August 2020 (AR 0941) are the same surveys referenced by the Law Court in *Mabee I,* footnote 9, that former DEP Commissioner Reid expressly mentions in his 2-16-2023 email to Gov. Mills. *See also*, the 8-31-

2. MGLF Petitioners have a Right to Provide New Evidience to Refute False Evidence of Nordic's Right to Develop 12.5-acres of land on the western side of Route 1 for its Project:

MGLF Petitioners have a due process right to respond to evidence in the existing Administrative Record that falsely asserts Nordic has a legal right to develop a 12.5-acre parcel on the western side of Route 1, formerly owned by the Belfast Water District. Specifically, Document AR 036 was never expressly considered by the Board in any public session, nor were questions previously raised by Department staff to the Board, Petitioners or the public regarding deeded restrictions, *running with the land* on the 12.5-acres located on the western side of Route 1.

Document AR 036 has been included in the Board's existing Administrative Record. The contents of Document 036 raise issues relating to Nordic's legal right to develop this 12.5-acre parcel. Specifically, the 2020 NRPA and SLODA permits and licenses purport to grant Nordic the right to use 12.5-acres of land, *acquired from the Belfast Water District in March 2022*, in a manner that expressly violates deeded restrictions that *run with the land*, originally imposed by the State of Maine in a 1973 deed from the Governor and Executive Council to the City of Belfast (WCRD Book 710, Page 1153; "1973 State-to-City deed"). These same restrictions were included in the subsequent deed from the City of Belfast to the Belfast Water District in 1987 (WCRD Book 1092, Page 145; "1987 City-to- BWD deed"); and – *more importantly* – were included in the 3-10-2022 deed from the BWD to Nordic (WCRD Book 4776, Page 210 at 222; "BWD-to-Nordic deed").

This 12.5-acre parcel was also conveyed in 1973 subject to a reversionary clause. The 1973 State-to-City deed states it is conveyed to "the CITY OF BELFAST, its successors and assigns, . . . for as long as the same shall be used for the protection of a municipal water shed by

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2012 Good Deeds Survey (AR 0906j), 2018 Good Deeds Survey prepared for Nordic (AR 0906i), and 5-16-2019 Dorsky Opinion Letter to Erik Heim (AR 0935q) which also all locate the eastern (waterside) boundary of the "Eckrotes" property (Lot 36) at the high water mark and include no intertidal land in the boundaries of Lot 36.

said Grantee. . ." Further, the 1973 State-to-City deed imposed restrictions "***which shall run with the land***," including:

> (4) No buildings will be permitted on the premises hereinabove 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 purposes [i.e. protection of a municipal water shed] will be allowed.

WCRD Book 710, at Page 1154 (emphasis supplied).

Nordic purchased this 12.5-acre parcel from the BWD on March 10, 2022 – ***<u>after</u> the Board entered its Orders granting Nordic permits and licenses***. However, the 3-10-2022 BWD-to-Nordic deed expressly states that the conveyance is subject to the above-referenced deed restrictions. Specifically, the 3-10-2022 BWD-to-City Deed states in relevant part that the conveyance is:

> 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 Mach 3, 1987 and recorded in said Registry in Book 1092, Page 145.

WCRD Book 4776, Page 222. The Board never considered the deeded restrictions on use of this 12.5 acres in 2020 hen Nordic was granted permits and licenses. As a result, the NRPA and SLODA permits would authorize Nordic to clear-cut the 12.5-acre parcel, fill in wetlands and a brook, and build a sprawling industrial structure called "Building #1" in direct contravention of the deeded restrictions – imposed for the protection of a municipal water shed along the Little River.

Document 036 of the Administrative Record is an email from Nordic's counsel attached to an unrecorded "Deed of Vacation" from the Maine Department of Transportation to the City of Belfast dated 4-9-2018 releasing *the City of Belfast* from the 1973 restrictions. Nordic's counsel submitted the unrecorded "Release" to falsely suggest that the use restrictions and reversionary clause on the 12.5-acre parcel were no longer in effect.

Neither the BWD nor Nordic were released from these restrictions by the Governor, the Commissioner of DOT nor the Maine Legislature. And, no court of competent jurisdiction has made a determination that Nordic is not bound by the 1973 Deed restrictions on this 12.5-acre parcel. Rather, Mabee-Grace, Friends and fellow-abutter Martha M. Block have filed a declaratory judgment action in the Waldo County Superior Court to determine the enforceability of the 1973, 1987 and 2022 deed restrictions on the 12.5-acre parcel (CV-2023-6). Pursuant to the Law Court's holding in *Tomasino v. Town of Casco,* 2020 ME 96, 237 A.3d 175, Nordic cannot demonstrate sufficient TRI to have administrative standing pending resolution by the courts of the pending dispute regarding the deeds and deeds of vacation relating to this 12.5-acre parcel. Indeed, the pending litigation about the 12.5-acre parcel was cited by Nordic as grounds for suspension of its BEP permits and licenses by the Commissioner.

MGLF Petitioners filed the First Amended Complaint in CV-2023-6, and sixteen exhibits (including all recorded relevant deeds), in support of their motion to the Board to vacate the 2020 Orders (*See*, Motion to Vacate, Exhibit B). The P.O. Process letter improperly excludes the proof of this pending litigation and the recorded deeds relating to the 12.5-acres as evidence in the remand proceedings. Maine precedents and 06-096 C.M.R. ch. 3, § 20(c) require the Board to take "official notice" of this pending litigation and all of these recorded deeds. Further, the issue of Nordic's right to use the 12.5-acre parcel in the manner the 2020 Orders would authorize should be part of the Remand Record and the Board's consideration after remand of whether knowledge of the limits relating to use of this parcel would have impacted that Board's permitting decisions in 2020.

3. Failure to Include All Relevant Orders Entered After November 2020

As noted in the 5-10-2023 Remand Order, *Mabee I* also determined that Friends holds an enforceable Conservation Easement on the intertidal land adjacent to Lot 36, where Nordic

proposes to bury its three industrial pipes. This fact was not altered by the City's 8-12-2021 Condemnation Order. On March 2, 2022, a Stipulated Judgment was *signed by counsel for all parties, including Nordic,* and entered in the eminent domain case (RE-2021-007), at the request of the Attorney General's Office. That Stipulated Judgment expressly determined that the City's exercise of eminent domain and the recording of the 8-12-2021 Condemnation Order (WCRD Book 4693, Page 304) did not, and could not, amend or terminate the Conservation Easement on the intertidal land adjacent to Lot 36, allegedly "taken" by the City.[4]

Thus, pursuant to the 3-2-2022 Stipulated Judgment, even if the City has taken Mabee and Grace's ownership interest in the intertidal land adjacent to Lot 36 by eminent domain, *the City has taken this intertidal land* ***subject to the protections and prohibitions in the enforceable Conservation Easement*** *held by Friends*. In addition, the City -- as a successor of Fred R. Poor bound by the "residential purposes only" servitude on Lot 36 -- is without the legal capacity or right to grant Nordic an easement to use Lot 36 and/or the intertidal land adjacent to Lot 36 in a manner that violates the restrictions in the recorded and still enforceable Conservation Easement or the 1946 "residential purposes only" servitude (WCRD Book 452, Page 205). *Mabee I,* 2023 ME 15, ¶ 58-61, n. 13.

Those restrictions include a prohibition on dredging and commercial or industrial development on the intertidal land to Lot 36 (AR 0739). Pursuant to the 3-2-2022 Stipulated Judgment, the City's use of eminent domain did not, and could not, grant Nordic TRI to use the intertidal land adjacent to Lot 36 in a manner contrary to the Conservation Easement. Thus, the

[4] Specifically, the 3-2-2022 Stipulated Judgment states that:

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

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

3-2-2022 Stipulated Judgment establishes, *as a matter of law*, that neither the City's 8-12-2021 Condemnation Order nor the 9-3-2021 City-to-Nordic easement agreement grant Nordic TRI to bury its pipes in the intertidal land adjacent to Lot 36. Further, contrary to Nordic's counsel's prior claims in a footnote, the use of eminent domain and the filing of the 8-12-2021 Condemnation Order did not amend the Conservation Easement to change the holder from Friends to the City of Belfast.

Accordingly, it was error for the P.O. Process letter to exclude the 3-2-2022 Stipulated Judgment in RE-2021-007, attached as Exhibit J to MGLF Petitioners' 7-5-2023 Motion to Vacate, from the "Scope of proceedings and additional evidence." The Board must consider it on remand.

C. Briefing Schedule and scope

The P.O. Process letter states that: "Briefs are limited to 10 pages, may not include attachments or appendices, and may not reference any new evidence." (p. 2). If the process is going to consider Nordic's claim that it has TRI based on documents outside the Administrative Record, then other parties have an absolute due process right to submit evidence to refute such claims under the Department's rules and basic due process. MGLF Petitioners submit that, absent submission of a new application, the inquiry on remand should be limited to consideration of whether Nordic had TRI based on the 8-6-2018 Easement Purchase and Sale Agreement between Nordic and Richard and Janet Eckrote. That easement option was and still is Nordic's sole basis for claiming TRI in the Administrative Record and Nordic's applications.

The impact of the Law Court decision in *Mabee I* on the Board's determination that Nordic had demonstrated "sufficient TRI" based on the 8-6-2018 Easement option, the 3-3-2019 Letter Agreement between Nordic and the Eckrotes, and the applicability of the Colonial Ordinance presumption of ownership by an upland owner to low water should be the only bases for TRI considered by the Board on remand. In the alternative, if Nordic is permitted to claim TRI through

some subsequent means or documents, then MGLF Petitioners and other interested parties must have a right to present contrary evidence.

D. *Filings already submitted by Mabee-Grace, Friends and Upstream Watch:*

MGLF's position is the same now as it always has been – ***Nordic lacks, and has always lacked, the administrative standing to obtain, maintain or retain permits and licenses from the Department of Environmental Protection.*** **Period.** On July 5, 2023, Mabee-Grace and Friends filed a motion requesting that the Board vacate the permits and licenses pursuant to the authority conferred in 06-096 C.M.R. ch. 2, § 11(D).[5] The Presiding Officer erred in mischaracterizing MGLF's July 5, 2023 filing as a "motion to revoke" pursuant to 38 M.R.S. § 341(11); and erred, *as a matter of law*, in asserting that Board lacks the authority to vacate permits based on a lack of TRI.[6]

CONCLUSION

MGLF's 7-5-2023 arguments and additional evidence, and the additional proof offered herein, should be considered by the Board on remand pursuant to 06-096 C.M.R. ch. 3, § 20(c), (d) and (f) and ch. 2 , § 11(D).

Dated this 9th day of August, 2023.

/s/ Kimberly J. Ervin Tucker
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[5] 06-096 C.M.R. ch. 2, § 11(D):

> An applicant must maintain sufficient title, right or interest throughout the entire application processing period. . . . The Department may return an application, after it has already been accepted as complete for processing, if the Department determines that the applicant did not have, or no longer has, sufficient title, right or interest.

The Law Court defines the "permit processing period" during which TRI must be maintained by a permit applicant as including the 80C appellate period. *Madore v. Maine Land Use Regul. Comm'n*, 1998 ME 178, ¶ 17, 715 A.2d 157, 162 (A litigant must possess a present right, title, or interest in the regulated land which confers lawful power to use that land or control its use when invoking the jurisdiction of the court and throughout any period of appellate review.).

[6] "The department shall consist of the Board of Environmental Protection, in the laws administered by the department called 'board,' and of a Commissioner of Environmental Protection, in the laws administered by the department called 'commissioner.'" 38 M.R.S. § 341-A(2).

Feeley, Timothy J

From: Mills, Janet T
Sent: Thursday, February 16, 2023 1:58 PM
To: Reid, Jerry
Cc: Kennedy, Jeremy; Johnson, Heather; Abello, Thomas; Feeley, Timothy J
Subject: Re: Nordic Title Decision - Vacated

Oh boy. This is not a good message for Maine..

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From: Reid, Jerry <Jerry.Reid@maine.gov>
Sent: Thursday, February 16, 2023 1:56:37 PM
To: Mills, Janet T <Janet.T.Mills@maine.gov>
Cc: Kennedy, Jeremy <Jeremy.Kennedy@maine.gov>; Johnson, Heather <Heather.Johnson@maine.gov>; Abello, Thomas <Thomas.Abello@maine.gov>; Feeley, Timothy J <Timothy.J.Feeley@maine.gov>
Subject: Nordic Title Decision - Vacated

Bad news for Nordic. The Law Court just held that under the terms of Nordic's deed they don't own the intertidal land they need to run their discharge pipe to the bay. This was a private dispute among neighbors, and the State was not as party. This is not necessarily the end of the project, because the Town of Belfast has separately purported to take the same intertidal land by eminent domain in order to resolve this dispute and allow for the discharge pipe to reach the bay. But that exercise of eminent domain is being challenged in a separate case in Superior Court. The most immediate question is whether Nordic will continue to fight these battles or decide to walk away.

Nordic has justifiably complained about how long it took to get regulatory approvals in the face of a few committed opponents, but this decision is a self-inflicted wound. They put millions of dollars into a project on land that they didn't own, and according to footnote 9, their own surveyor apparently told them that years ago:

2023 ME 15 Mabee (maine.gov)

EXHIBIT A