



BOARD ORDER

IN THE MATTER OF

NORDIC AQUAFARMS, INC.)
Belfast and Northport, Waldo County)
)
L-28319-26-A-N)
L-28319-TG-B-N) BOARD PROCEEDING ON REMAND
L-28319-4E-C-N) DECISION AND ORDER
L-28319-L6-D-N)
L-28319-TW-E-N)
A-1146-71-A-N)
ME0002771)
W-009200-6F-A-N)

On November 19, 2020, the Board of Environmental Protection (Board) issued to Nordic Aquafarms, Inc. (Nordic or licensee) a Site Location of Development Law and Natural Resources Protection Act permit, # L-28319-26-A-N / L-28319-26-A-N / L-28319-26-A-N / L-28319-26-A-N / L-28319-26-A-N (NRPA/Site Law Permit), an air emission license #A-1146-71-A-N (Air License), and a wastewater discharge license/Maine Pollutant Discharge Elimination System Permit # ME0002771/W009200-6F-A-N (MEPDES Permit) (collectively the Licenses) to construct and operate a land-based aquaculture facility. The Licenses were timely appealed to the Business and Consumer Court, which affirmed the Board’s Decisions on February 23, 2022. Further appeals were taken to the Maine Supreme Judicial Court, sitting as the Law Court. While the appeal of the Board’s Licenses was pending, the Law Court issued a decision in a separate case, *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, 290 A.3d 79 (*Mabee I*), a quiet title action involving a portion of the property on which the licensed Nordic facility would be located. On May 10, 2023, in the appeal of the Board decisions, the Law Court issued a remand order directing the Business and Consumer Court to further remand the matter to the Board to consider the impact, if any, of the Law Court’s *Mabee I* decision on the Licenses issued by the Board. The Business and Consumer Court further remanded the matter to the Board with similar directions on May 15, 2023. Based on the record in this proceeding, including briefs, records of which official notice has been taken, pertinent information in the underlying licensing record, and the oral arguments, the Board makes the following findings and conclusions.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND:

1. On November 19, 2020, the Board issued the Licenses approving construction and operation of a land-based recirculating aquaculture system for the production of Atlantic salmon, including associated wastewater discharge and air emissions. At full buildout,

the proposed project would encompass 37.9 acres of developed area, and would impact freshwater wetlands, coastal wetlands, streams, and Tidal Waterfowl and Wading Bird Habitat. In addition, the project is licensed to discharge a monthly average of 7.7 million gallons per day of treated wastewater into Belfast Bay, a Class SB water, and operate eight generator engines with an annual fuel limit.

2. On February 16, 2023, the Law Court issued its decision in *Mabee I*. In that decision, the Court held that a deed conveying the lot over which Nordic later obtained the right to an easement, to cross with intake and discharge pipes, did not convey the intertidal land with the upland. The Court's decision states that the intertidal land was eventually conveyed to Jeffrey Mabee and Judith Grace (Mabee/Grace). In addition, the Court held that Mabee/Grace hold an enforceable "residential purposes only" deed restriction on the related upland property. The Court's decision also states that a conservation easement created by Mabee/Grace in 2019 over the intertidal land is enforceable. Mabee/Grace assigned that conservation easement to Upstream Watch, who later assigned it to the Friends of Harriet L. Hartley Conservation Area (Friends).
3. On May 10, 2023, the Law Court remanded the appeals of the Board's decisions issuing the Licenses to the Business and Consumer Court, without vacating the Licenses, with instructions to further remand the matter to the Board so that the agency "may determine the impact, if any, of *Mabee I* on the challenged approvals." The Law Court also noted that the Board had discretion to make its determination on the existing administrative record or expand the record, and to "determine the scope of the proceedings on remand."
4. Prior to the remand, following the Law Court's issuance of *Mabee I*, petitions to suspend or revoke the licenses were submitted to the Commissioner by Mabee/Grace/Friends and Upstream Watch. In response to those petitions, on April 28, 2023, the Commissioner initiated license suspension proceedings pursuant to 38 M.R.S. § 342(11-B) and Department of Environmental Protection (Department) Rule Chapter 2 § 27.¹ On June 21, 2023, the Commissioner issued an order (Suspension Order) suspending the Air License and NRPA/Site Law Permit until final disposition of: 1) all challenges to the actions by the City of Belfast (City) to take by eminent domain relevant property interests, including those related to the intertidal area and the deed restriction, in a manner that will allow the project to be completed; and 2) any action to amend or terminate the conservation easement in a manner that will allow the project to be completed. The Commissioner found that *Mabee I* and those other proceedings constituted a change in circumstances justifying her suspension of two of the three Licenses.²

¹ Nordic filed a response to the petitions stating that it agreed to a suspension of its licenses and waiving its right to a hearing regarding a suspension. Nordic opposed revocation of its licenses.

² The Board notes that the Commissioner did not suspend the MEPDES Permit, which authorizes the discharge of wastewater from the proposed facility. By suspending the Board order authorizing the construction of the project as a whole (the NRPA/Site Law Permit), the Commissioner's order suspended Nordic's ability to construct the wastewater infrastructure necessary for such a discharge. However, because the MEPDES Permit is not suspended,

5. On July 26, 2023, Robert Duchesne, serving as Presiding Officer for the Board in this matter, issued a letter describing the scope of the proceedings on remand. The record of the Board's proceedings leading to the issuance of the Licenses was not reopened, but the Board took official notice of the following documents: 1) the remand orders from the Law Court and the Business and Consumer Court; 2) the Law Court's opinion in *Mabee I*; 3) the Commissioner's Suspension Order; and 4) the decision dated September 7, 2023, by the Bureau of Parks and Lands (BPL) that rescinded BPL's prior findings and decisions dated September 4, 2020, and September 11, 2019.
6. The Presiding Officer invited parties to the Law Court appeal and other intervenors in the underlying Board licensing proceeding to file briefs regarding the legal impact of *Mabee I* on the Board's approvals of the Nordic Licenses. No reply briefs or other further filings were permitted. Parties to the Law Court appeal and intervenors from the underlying Board licensing proceeding that filed briefs with the Board were allowed to make oral arguments to the Board with respect to their briefed positions.
7. The Board received timely briefs from: 1) the Maine Lobstering Union and commercial lobster and crab license holders Wayne Canning and David Black (collectively, MLU); 2) Mabee/Grace and the Friends (collectively, Mabee-Grace/Friends); 3) Upstream Watch; 4) Northport Village Corporation (NVC); and 5) Nordic.
8. On September 21, 2023, Department staff, in their role of staff to the Board, provided a briefing to the Board on the procedural history and background with respect to the underlying Board licensing proceeding and subsequent developments leading up to the Law Court's remand to the Board. Notice of this Board briefing was provided to the service list for this Board remand proceeding on August 22, 2023, and was identified as a topic on all versions of the Board's agenda for its September 21, 2023 meeting. At the briefing, the Presiding Officer stated that any objections to the briefing could be raised before the Board during allotted oral argument time at the Board meeting on October 19, 2023.

II. Positions of the Parties

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

9. MLU argues that *Mabee I* establishes, 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 there 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

the ambient water quality sampling and modeling requirements in that license remain in effect. These ongoing license requirements are not affected by *Mabee I*, the City's eminent domain actions, or related litigation.

Department's acceptance of the applications 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 application and supplemental submissions. MLU contends the Department must return the applications pursuant to its authority under Chapter 2 § 11(D).

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 "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 that 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 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.

C. Upstream Watch

14. Upstream Watch makes three arguments regarding the impact of *Mabee I*. First, it contends that the Law Court has asked the Board to re-examine, in light of *Mabee I*, Nordic's prior submissions during the application processing to demonstrate TRI. Upstream Watch argues that those submissions cannot support a finding of sufficient TRI given *Mabee I*, and therefore the Board is required to return the applications for the Licenses. Second, Upstream Watch argues that Nordic's obligation to maintain TRI extends beyond the issuance of the Licenses through the judicial appeal period.³ Thus, Upstream Watch contends that if Nordic no longer has TRI to construct the project, the applications for the Licenses must be returned even after the Licenses were issued. Lastly, Upstream Watch argues that Nordic should not be allowed to argue that it has maintained TRI based on the City's eminent domain actions.

D. Northport Village Corporation

15. NVC contends that the Board must revoke the Licenses because the underlying licensing record has been proven incompatible with *Mabee I*. NVC argues that, pursuant to *Mabee I*, the only allowable use of the upland lot occupied by the project is residential based on deed restrictions, and that Nordic must demonstrate its use will not exceed residential use. NVC argues that Nordic cannot make such a demonstration. Further, NVC argues that should the Board reopen the licensing record to consider additional evidence of TRI, such submissions would not cure the residential use requirement.⁴

E. Nordic Aquafarms

16. Nordic argues that the Law Court's decision in *Mabee I* cannot impact the project approvals because the Board does not retain jurisdiction to review TRI after completing its application review and issuing the Licenses. Nordic contends that the Board has authority to modify the Licenses pursuant to a procedure set forth in statute and

³ Upstream Watch cites the Law Court's decision in *Madore v. Maine Land Use Regulation Commission*, 1998 ME 178, 715 A.2d 157 (*Madore*), as supporting the proposition that TRI must be maintained throughout the entirety of a judicial appeal. As discussed further below, the Board disagrees with that assertion here.

⁴ NVC challenges the Board's process on remand, including the Board's decisions to take official notice of certain documents and to consider that information without reopening the licensing record. NVC suggests that, in order to consider new information, the Board must allow "formal permitting submissions, testimony, cross examination, and formal response to comments," in alignment with the procedures in place during the prior public hearing process.

Department rule, but it does not have authority to retroactively alter acceptance of the applications for the Licenses as complete or authority to revoke the Licenses.

17. Nordic argues that an applicant must only maintain sufficient TRI throughout the Department's application processing period, and that this application processing period ends upon completion of the administrative action, which Nordic contends was the issuance of the Licenses. Nordic argues that, because the Law Court issued *Mabee I* after the Board issued the Licenses, *Mabee I* was a development occurring outside the application processing period and is thus irrelevant to findings and conclusions in the Licenses. Nordic contends that the effect of the *Mabee I* decision on the Licenses may be considered only pursuant to the Commissioner's separate authority to suspend or revoke issued licenses.
18. Nordic argues that the Board should affirm the Suspension Order issued by the Commissioner, which addressed the changed circumstances resulting from the Law Court's decision in *Mabee I* and other matters, and/or modify the Licenses to incorporate the terms of the Commissioner's Suspension Order.

III. Discussion, Analysis, and Conclusions of Law

A. The Question Before the Board

19. In its remand, the Law Court directed the Board to determine what impact, if any, the Court's opinion in *Mabee I* has on the Board's approvals – i.e., the Licenses. To make this determination, the Board must address the general applicability of the Department's TRI requirement following the issuance of a license, as well as the extent of the Board's authority to potentially take action on remand here after the issuance of the Licenses.
20. As an initial matter, the full Board concurs with the framing of the question on remand to the Board and all aspects of the process set forth in the Presiding Officer's letters and other communications issued in these remand proceedings. The full Board agrees that the question on remand is a narrow legal question that does not require or call for the reopening of the fulsome underlying licensing record or consideration of any new evidence other than those materials that have been the subject of the Board's official notice.

B. The Department's Threshold TRI Requirement

21. The Board first addresses the role of TRI, the relevance and meaning of the term "application processing period," and the period of time for which an applicant and licensee must maintain TRI. A showing of sufficient TRI is not a licensing criterion for the Department; rather, it is a threshold issue that an applicant must adequately address

in order for an application to the Department to be deemed complete for processing.⁵ Chapter 2 § 11(D) sets forth the TRI requirement for applicants for a Department license and states: “Prior to acceptance of an application as complete for processing, an applicant shall demonstrate to the Department’s satisfaction sufficient title, right or interest in all of the property that is proposed for development or use.” This Department provision requires an applicant to sufficiently demonstrate a legally cognizable expectation of being able to use the site in the way that would be authorized by the requested permit such that it would warrant the Department’s processing of the application. Further, Chapter 2 § 11(D) states: “An applicant must maintain sufficient title, right or interest throughout the entire application processing period” and “[t]he 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.”⁶

22. Parties filing briefs in this remand proceeding have differing views on the applicability of this TRI provision at this point in time. As discussed above, MLU, Mabee-Grace/Friends, and Upstream all seek return of the applications for the Licenses pursuant to Chapter 2 § 11(D), arguing that *Mabee I* determined that Nordic did not have or no longer has sufficient TRI, thus requiring the Board’s return of the applications. 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 application 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 the Licenses; it is a mechanism that provides the Department with a measure of protection against wasting agency resources on processing applications for projects that

⁵ The Department’s threshold TRI requirement differs from that applicable in the Bureau of Public Lands (BPL) remand proceeding, which resulted in the recent rescission of the submerged lands lease granted to Nordic, following a similar remand from the Law Court. BPL rules, in Chapter 53, state that when a holder of a submerged lands conveyance loses TRI, then the lease or easement shall be invalid and all leasehold or easement interests in the Submerged Lands shall be extinguished. The Department licenses do not convey the right to use public property and therefore the Department’s regulations do not contain language equivalent to BPL’s ongoing TRI requirement.

⁶ The Board notes this decision is discretionary (The Department *may* return an application . . .”). Lack of TRI, at any point in the proceeding, does not represent a mandatory obligation on the Department to return an application.

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. For this reason, the Department has the discretion to return an application: 1) prior to its acceptance as complete for processing, and 2) any time between acceptance and the end of the application processing period, should events affect an applicant's TRI before the Department issues a decision on its application. 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, other Department authority may be utilized to address developments that occur after a license has been issued.

24. The plain language of the terms used within Chapter 2 § 11(D), such as “applicant,” “application,” and “application processing period,” especially when viewed in the greater context of all provisions of Chapter 2, establish clear distinctions between actions applying to applicants and applications prior to the Department's issuance of a license, during the “application processing period,” and other administrative matters that largely apply to licenses and licensees after issuance of a license.⁷
25. The Board finds that Chapter 2 distinguishes between the application processing period and subsequent actions that may affect licenses. “Applicant” and “application” are used exclusively in the context of this processing period or in reference to events that occurred during this time period, a period that ends when the final agency action issues. At that point, the rule references the “licensee” rather than the “applicant.” For example, suspensions, revocations, modifications, and corrective actions apply to already-issued licenses and can generally only be invoked if certain different Department criteria are met, and each of these post-processing actions by the Department require notice and an opportunity for a hearing to the licensee.⁸
26. The Board notes that this framework for the rule, as well as the concept of the application processing period, is derived from statute, where the scope of the application process is even more clear. Title 38, Section 344, which is titled “Processing of applications,” provides clear beginning and end points for the application processing period; it begins when the application has been accepted as complete for processing by the Department and ends with a Department decision approving or disapproving the application. Processing of applications, decisions on applications, and appeals of Department decisions are three distinct concepts under Section 344 and the

⁷ In addition, specific procedural regulations contemplate scenarios where TRI is explicitly absent and permits are still valid. Chapter 2, Section 21(C)(4) discusses procedures for transferring existing licenses in cases where the original permittee *no longer has TRI*. In those cases, an applicant for transfer is authorized to submit the application without the signature of the original licensee, thereby transferring the license to the current holder of TRI. Were the Board to interpret a strict and mandatory TRI provision throughout the life of a permit, this would be inconsistent with its own rule.

⁸ 5 M.R.S. § 10004 provides for a waiver of the hearing requirement based on limited circumstances that are not present here.

Department's rules, with processing subject to further time limits under a different statute, 38 M.R.S. § 344-B, governing when the Department must issue a decision on an application.

27. The arguments made by MLU, Mabee-Grace/Friends, and Upstream Watch, that the Law Court's decision in *Mabee I* requires the return of applications already decided by the Department because *Mabee I* is counter to the Board's findings made years earlier, would be inconsistent with, and would violate, the Board's rules and governing statutes. It would also circumvent statutory rights and process afforded a licensee after an application is decided and a license is issued by the Department. In effect, such arguments would result in revocation of the Licenses here without following the separate statutory and rule process for revocation of licenses, without the hearing required by Department rules and the Maine Administrative Procedures Act, and without the Board having the authority to revoke a permit, which by statute, 38 M.R.S. § 342(11-B), is given to the Commissioner rather than the Board. On these bases, the Board rejects the requests to return the applications.
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. To implement Upstream Watch's approach would require the Board to ignore the unambiguous language in Chapter 2 § 11(D) limiting such actions to "applicants" and the "application processing period," and the statutorily defined concept of application processing inseparably linked to this analysis. The Board also 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. Such arguments effectively urge the Board to retroactively reconsider the acceptance of the applications as complete for processing and its determinations not to return the applications, well after those applications were finally processed and the Licenses issued by the Department. The Board finds that such arguments are contrary to the Department's statutes and Chapter 2 requirements and do not support the return of any applications at this point. The Board finds that it has no such authority to return any applications on this basis, which in any event would be contrary to other Department

authority given that the Licenses here, although subject to the Commissioner’s separate Suspension Order, have not been invalidated or vacated.⁹ Neither the Business and Consumer Court nor the Law Court has vacated any of the challenged approvals, and the Board’s analysis on this issue remains unchanged.

C. Acting on Licenses Post-Issuance

30. Apart from actions taken on applications, the Department derives authority to take subsequent action on licenses through certain statutory duties delegated to either the Commissioner or the Board. The Commissioner’s express statutory duties include, if certain criteria are met, authority to revoke or suspend licenses and permits, 38 M.R.S. § 342(11-B), and the power to recommend that the Board modify or take corrective action on a license, 38 M.R.S. § 342(11-A). The Board has no statutory authority to revoke or suspend licenses and permits, but has statutory authority to modify or issue an order prescribing necessary corrective action at the request of the Commissioner, 38 M.R.S. § 341-D(3).¹⁰ Pursuant to her statutory authority, and based on changes in circumstances at least partially in response to the Law Court’s decision in *Mabee I*, the Commissioner issued her Suspension Order dated June 21, 2023, that suspended two of the three Licenses issued to Nordic by the Board. The Commissioner has not requested that the Board modify any of the Licenses.

31. MLU, Mabee-Grace/Friends, Upstream Watch, and NVC argue that *Mabee I*, constitutes a change in circumstances, a criterion justifying revocation of the licenses. The Board interprets arguments calling for revocation in this remand proceeding to be requests for

⁹ The Board notes that in some previous remands, courts have vacated a decision by the Board based on a substantive review of the actual merits of a final Department decision. In such situations, courts have at times substantively interpreted a Department licensing standard with instructions to apply the court’s particular analysis on remand. However, no such substantive review or remand directive by the Law Court has occurred here, and no decision or any of the Licenses has been vacated. Rather, the Law Court’s remand here is based on the doctrine of primary jurisdiction, which allows the agency with primary decision-making authority over a matter the opportunity to address the issue in the first instance. Thus, the Law Court’s remand explicitly directs the Board to, in the first instance and prior to any substantive review by the courts, address the issue and make findings regarding the impact, if any, of *Mabee I* on the challenged approvals. The Law Court’s remand order further notes that, once the Board’s determination on remand is issued, parties are then free to raise “in a new appeal any argument raised previously and any new argument arising from the agency proceedings on remand.”

¹⁰ The Board’s power to revoke or suspend licenses was removed by the Legislature in P.L. 2011, ch. 304, §§ H-7, H-16, & H-17. Specifically, the Legislature removed the language in 38 M.R.S. § 341-D(3) granting power to the Board to suspend or revoke licenses and created 38 M.R.S. § 342(11-B) granting that authority to the Commissioner. The Legislature also amended language to ensure other provisions were consistent with this change; notably similarly shifting criteria for suspension and revocation from 341-D(3) to 342(11-B), removing suspension and revocation as actions requiring a recommendation by the Commissioner to the Board in 342(11-A), and amending 38 M.R.S. § 414-A to accomplish the same change in power regarding waste discharge licenses. This landmark legislation in regulatory reform is still commonly referred to by its legislative document number, LD 1.

the Board to initiate proceedings to revoke the permits.¹¹ Mabee-Grace/Friends argues that the Board has authority to revoke licenses because it assumed jurisdiction over the processing of the application and that therefore the Commissioner's Suspension Order merely constitutes the Commissioner's recommendation to the Board.

32. The Board rejects all such arguments, which are inconsistent with the statutory authority delegated to the Board and the Commissioner, respectively. The Board finds that the requests for the Board to revoke the Licenses would exceed the Board's authority. The duties and powers granted to the Commissioner and the Board, respectively, are clear. The Commissioner has exclusive statutory authority pursuant to 38 M.R.S. § 342(11-B) to suspend or revoke Department licenses. Thus, even if the Board were to agree that the *Mabee I* decision constitutes a sufficient change in circumstances to justify initiating revocation proceedings with respect to any of the Licenses, the Board is not empowered to initiate such proceedings or revoke any of the Licenses.¹²
33. While the Law Court directed the Board to consider the effect, if any, of certain intervening circumstances on its Licenses (the decision in *Mabee I*), the Board finds that consideration of intervening circumstances after the issuance of the Licenses by the Board is a power vested primarily with the Commissioner – specifically, within the criteria considered in the context of suspension and/or revocation proceedings, or through recommendations to the Board to modify or issue corrective actions, two powers vested expressly in the Commissioner rather than the Board. The Commissioner initiated suspension proceedings resulting in her Suspension Order, which made findings discussing the impact of *Mabee I* and other changed circumstances on the permitted approvals. Following those proceedings, where the statutorily-granted right to a hearing was waived by the licensee (Nordic), the Commissioner exercised her discretionary authority to suspend certain permits in the Suspension Order issued on June 21, 2023. No appeals of the Suspension Order were filed with either the Board or the Superior Court and therefore the Board has no jurisdiction regarding the Suspension Order.

D. The Purpose of the Department's Threshold TRI Requirement

34. The Department's threshold for acceptance of an application is sufficient TRI to process the application and is not based on confirmation of that TRI in a court of Law. As discussed above, the reason for this is that TRI serves a purpose of allowing the Department discretion over the use of its resources; TRI is not designed to serve as an

¹¹ The Board throughout this proceeding has interpreted motions by opponents in relation to its regulations and redirected them to the appropriate equivalent Department procedure. During the application processing period, motions to dismiss and vacate were interpreted as requests to return the application; post-decision, those motions have been interpreted as petitions to revoke.

¹² In alignment with this view, the Board has referred to the Commissioner petitions to revoke that have been incorrectly directed to the Board. Those petitions and other petitions submitted following the Commissioner's Suspension Order are currently under review by the Commissioner. The Suspension Order was the result of prior petitions and represents the proper exercise of the Commissioner's authority to address changed circumstances.

additional venue to adjudicate title claims. The Department has consistently emphasized this position since acceptance,¹³ which is consistent with the Department's historical interpretation. 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 Board and the Department are not courts; they are not equipped to resolve private property disputes or complex title claims. Importantly, neither the Department's procedures, nor court precedent, requires or even authorizes them to serve in such an adjudicatory role. When the Department accepts an application as complete for processing, or continues to process an application in the face of challenges to TRI, it does not resolve those issues or predict the ultimate outcome of title proceedings. Rather, such a threshold Department TRI determination is a discretionary determination made on the evidence at that time. 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 its resources.
36. The Law Court has upheld a challenged Department permitting decision where the Department had found that the licensee had demonstrated sufficient TRI to land that was subject to a title dispute to allow it to consider the application. The Court acknowledged the possibility that a court hearing the title dispute might determine that another party actually owned the property. In that event, however, the Court noted that the situation could be addressed through the Department's discretionary authority to revoke the permit. *See Southridge Corp. v. Bd. of Env'tl. Prot.*, 655 A.2d 345, 348 ("it is possible that Cormier may not prevail in his adverse possession claim to the Southridge property. Should this happen, his permit might be revoked. This possibility, however, neither deprives Cormier and those he represents of their current interest in the land nor their administrative standing.").
37. The Board finds that this approach is reasonable because ultimately the underlying rationale for the TRI requirement is to grant the Department some degree of control over how it utilizes its resources. When a court issues a decision that might compromise a project's ability to move forward, that does not affect the Department's prior discretionary TRI determinations. It cannot retroactively render a decision to accept the application in error, nor does it create an affirmative duty to return an application already decided, or revoke a license. The Department is free to consider the circumstances and whether the possibility the project may not proceed justifies another action, such as suspension or revocation. Post-licensure, the Department may consider whether those changed circumstances justify suspension or revocation of a license,

¹³ In the acceptance letter for Nordic's consolidated applications, the Department noted that "[t]he TRI provision cannot, however, be interpreted as compelling the Department to perform an exacting legal analysis of competing ownership claims to determine the ultimate ownership of a property . . . [and] . . . rejects any such interpretation as directly counter to the purpose of the TRI provision and cannot afford to allow its permitting proceedings to be transformed into the equivalent of an administrative agency quiet title action.

whether further conditions are necessary in such an order, or whether the Department's prior expenditure of resources justifies maintaining the license as is. Quiet title decisions are court actions independent from those Department determinations which are discretionary.

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.

IV. CONCLUSION:


39. After review of the Law Court's decision in *Mabee I*, consideration of arguments presented in the briefs, and analysis of 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. These discretionary Department findings were not legal determinations of ownership of any property interests, which involve matters of complex property law for resolution by the courts. An impact of the *Mabee I* decision has been that it was a basis for the suspension of two of the permits by the Commissioner, which the Board finds is the appropriate mechanism to address post-licensing developments. To the extent the Law Court requests the Board make a determination or 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.

THEREFORE, based on the findings above, the Board concludes the following:

1. The application processing period for the applications associated with the challenged approvals ended when the Licenses were issued, on November 19, 2020, and Title, Right, or Interest is not required to be maintained subsequent to that period;
2. The requests that the Board return the applications or revoke the permits exceed the Board's authority;
3. The Board does not have authority to revoke the licenses; and
4. For the reasons stated above, the Law Court's decision in *Mabee I* does not affect the validity of the issued Licenses.

DONE AND DATED AT AUGUSTA, MAINE THIS 19th DAY OF OCTOBER, 2023.

BOARD OF ENVIRONMENTAL PROTECTION

By: 
Robert Duchesne, Presiding Officer