

**STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
BOARD OF ENVIRONMENTAL PROTECTION**

**IN THE MATTER OF**

**NORDIC AQUAFARMS, INC.**  
**Belfast and Northport**  
**Waldo County, Maine**

A-1146-71-A-N  
L-28319-26-A-N  
L-23819-TG-B-N  
L-28319-4E-C-N  
L-28319-L6-D-N  
L-28319-TW-E-N  
W-009200-6F-A-N

**UPSTREAM WATCH'S  
PETITION TO REVOKE  
OR SUSPEND PERMITS  
ISSUED TO NORDIC  
AQUAFARMS, INC, ON OR  
ABOUT NOVEMBER 19, 2020**

Intervenor UPSTREAM WATCH, a not-for-profit corporation, situated in the City of Belfast, County of Waldo and State of Maine ("Upstream"), petitions the Commissioner of Environmental Protection ("Commissioner") under Title 38, Chapter 2, Section 342(11-B)<sup>1</sup>, and the Maine Department of Environmental Protection Rules (the "Rules" or "DEP Rules"), 06-096, C.M.R. Chapter 2, Sections 25(A) and (B) for institution of Revocation or Suspension Hearings

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<sup>1</sup> **11-B. Revoke or suspend licenses and permits.** Notwithstanding Title 5, section 10051, after written notice and opportunity for a hearing pursuant to Title 5, chapter 375, subchapter 4, the commissioner may revoke or suspend a license whenever the commissioner finds that:

- A. The licensee has violated any condition of the license;
- B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
- C. The licensed discharge or activity poses a threat to human health or the environment;
- D. The license fails to include any standard or limitation legally required on the date of issuance;
- E. There has been a change in any condition or circumstance that requires revocation or suspension of a license;
- F. There has been a change in any condition or circumstance that requires a corrective action or a temporary or permanent modification of the terms of the license;
- G. The licensee has violated any law administered by the department; or
- H. The license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990.

For the purposes of this subsection, "license" includes any license, permit, order, approval or certification issued by the department and "licensee" means the holder of the license.

followed by an ORDER revoking or suspending the following permits awarded to Nordic Aquafarms, Inc. (“Nordic”) on November 19, 2020:

PERMITS:

MPDES Permit:	ME0002771
Waste Discharge License:	W009200-6F-A-N
Air Emission License:	A-1146-71-A-N
SLODA/NRPA Licenses:	
	L-28319-26-A-N
	L-23819-TG-B-N
	L-23819-4E-C-N
	L-23819-L6-D-N
	L-23819-TW-E-N

As required by Title 38, Chapter 2, Section 342(11-B), and the DEP Rules, Chapter 2, Sections 25 and 27, Upstream states the criteria for revocation or suspension listed in the statute and Rules, and the factual basis for this petition, as follows:

**I. CRITERIA FOR REVOCATION**

Title 38, Chapter 2, Section 342(11-B) and Rules, 06-096 C.M.R. Chapter 2, Section 25(B) and Criterion of Section 27(B) and (E):

- Section 27(B) Criterion. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
- Section 27(E) Criterion. There has been a change in condition or circumstances that requires revocation or suspension of [Nordic’s] license[s].

**II. FACTS SPECIFYING THE MISREPRESENTATION,  
THE OMISSION OR FAILURE TO DISCLOSE,  
AND THE FACTUAL BASIS FOR ALLEGING THAT  
THE LICENSE WAS OBTAINED BY  
A FORM OF MISREPRESENTATION**

- A. Section 27(B) CRITERION. Nordic misrepresented to the Department of Environmental Protection (“DEP” or “Department”) and to the Board of Environmental Protection (“BEP” or “Board”) that it had sufficient title, right or interest (“TRI”) in all of the property that is proposed for development or use.**

1. On May 17, 2019, Nordic Aquafarms, Inc. (“Nordic”) submitted four consolidated applications for permits under the Maine Pollution Discharge Elimination Act

(MPDES), combined with a permit under the Maine Wastewater Discharge Act, a permit under the Maine Clean Air Act, a permit under the Site Location of Development Act (SLODA) and a permit under the Natural Resources Protection Act (NRPA).

2. Pursuant to Department Rules, 06-096 C.M.R. Ch. 2, Section 11(D), “[p]rior to acceptance of an application...,” an applicant shall demonstrate to the Department’s satisfaction sufficient title, right or interest (“TRI”) in all of the property that is proposed for development or use. An applicant must maintain sufficient TRI throughout the entire application processing period. Evidence of TRI may include deeds, easements, option agreements, and any other such evidence the Department deems acceptable to demonstrate sufficient TRI.

3. On June 13, 2019, the Department determined the above Nordic permit applications to be “complete for processing” and that “Nordic demonstrated title, right or interest sufficient for the applications to be processed pursuant to Chapter 2, Section 11(D) of the Department’s Rules”. *See* DEP (Kevin Martin) Letter to J. Tourangeau (June 13, 2019), a true copy is attached hereto as Exhibit A.

4. Nordic’s sole demonstration of TRI was an agreement between Mr. and Mrs. Eckrote (the “Eckrotes”), owners of land across Route 1 from the proposed facility, and Nordic in which the Eckrotes agreed to convey to Nordic an easement through the Eckrotes’ upland from Route 1 to the high-water line of Penobscot Bay, in which easement area Nordic might install its industrial pipes through upland areas of the Eckrotes’ land and through the intertidal land between the Eckrotes’ upland and Penobscot Bay. This agreement ignored the “residential use only” restriction that burdened the Eckrotes’ upland since 1946. *See* Exhibit B which is a true copy of the Eckrote/Nordic Easement Purchase and Sale Agreement (Aug. 6, 2018).

5. Nordic and the Eckrotes knew, or should have known, that since 1946, the Eckrotes' upland property was burdened by a restriction limiting it to residential uses and "no business for profit is to be conducted there," as it was clear from the Waldo County Land Records. *See* Exhibit C, a true copy of a deed of Harriet L. Hartley to Fred Poor dated January 25, 1946 (Book 452, Page 205) (the "Use Restriction").

6. Nordic and the Eckrotes knew, or should have known, that the Eckrotes did not own the intertidal land between the Eckrotes' upland and Penobscot Bay as early as 2012, because the Eckrotes' land was surveyed at that time in connection with conveyance of that land from the estate of Mrs. Eckrote's late mother to Mr. and Mrs. Eckrote and *the survey showed the Eckrotes' eastern property line at the high water line of Penobscot Bay*. This survey for the "Phyllis J Poor Estate" shows a "Mailing Address" for the Estate as "Richard and Janet Eckrote, 42 Grandview Avenue, Lincoln Park, New Jersey 07035". *See* Exhibit D, a true copy of a Deed of R. Kenneth Lindell and Barbara Gray, co-personal representatives of the Estate of Phyllis J. Poor to Richard and Janet Eckrote; *see also* Exhibit E, Boundary Survey of the property of Phyllis J. Poor Estate prepared by Gusta Ronson (the "Ronson Survey").

7. The intertidal land located between the Eckrotes' upland and Penobscot Bay (the "Intertidal Land") has been owned by Jeffrey Mabee and Judith Grace ("Mabee and Grace") at all times relevant to the Nordic project.

8. On April 29, 2019, Mabee and Grace encumbered the intertidal land including the intertidal land between the Eckrote land and Penobscot Bay, with a Conservation Easement that prohibited the pipeline use contemplated by Nordic and the Eckrotes. This Conservation Easement was not mentioned in the Nordic statement of TRI in their application filed on May 17, 2019. Despite this knowledge, the Eckrotes attempted to sell or lease an easement on or through

that land, upland and intertidal land, to Nordic. *See* Exhibit F, a true copy of the Conservation Easement Deed from Jeffrey R. Mabee and Judith B. Grace to Upstream Watch dated April 29, 2019 (Book 4367, Page 273).

9. Nordic knew, or should have known, before it filed its applications that the Eckrotes' land was burdened by a "residential purposes only" restriction and that the Eckrotes did not own the intertidal land. Nordic commissioned three (3) surveys of the intertidal land between the Eckrotes' upland and Penobscot Bay, and none of the surveys showed the Eckrotes owning the Intertidal Land. One, dated October 15, 2018, prepared by Clark Staples of Good Deeds, cautioned that the advice of an attorney was warranted regarding the intertidal land; another, by Jim Dorsky of Gartley & Dorsky dated November 14, 2018, showed ownership in "heirs of Harriet J. Hartley," partial interest and "Nordic Aquafarms, Inc." partial interest. A third by the same surveyor, following a discussion with Nordic's lawyer, showed "Ownership unclear" and referred to a note. That note provided:

- a. Reference is made to a deed from Ernest and Marjory Bell to John and Catherine Grady recorded in Book 621 Page 288 dated May 18, 1964. This deed contains a description of upland property. If the presumption that the flats were conveyed with the upland holds, then the area labeled Ownership Unclear in front of the Schweikert property would be owned by the Schweikerts. If that presumption does not hold, the area in front of the Scheweikert labeled Ownership Unclear would currently be owned by Jeffery Mabee and Judith Grace.
- b. An attorney should be consulted to help determine what rights may have been conferred to the Eckrotes in the intertidal zone by the apparent historic use of the shore as evidenced by the two sets of steps leading to the shore.

None of the surveyors commissioned by Nordic or the Eckrotes could confirm Nordic's representation to the DEP that the intertidal land between the Eckrotes' upland and Penobscot Bay was owned by the Eckrotes, as claimed by Nordic and the Eckrotes in the Nordic permit

applications. *See* Exhibit G, true copies of surveys of Good Deeds (Oct. 15, 2018) and Gartley & Dorsky (Nov. 14, 2018).

10. By a letter dated May 16, 2019, which was stamped with his surveyor's seal, James Dorsky informed Nordic that Harriet Hartley had severed and retained the Intertidal Land abutting the Eckrotes' upland with the 1946 Hartley-to-Poor Deed.<sup>2</sup>

11. By a sixteen page "Motion to Dismiss" dated July 12, 2019, accompanied by numerous exhibits, Intervenors Mabee and Grace presented evidence to BEP that the Eckrotes were barred from allowing an industrial use in their upland due to a land use restriction and that the Eckrotes did not own the intertidal land below their upland. Therefore, Nordic had not demonstrated TRI as required by the statute. *See* Exhibit H, a courtesy copy of Intevornor's Petition to Dismiss for Lack of title, Right or Interest Filed by Jeffrey R. Mabee and Judith B. Grace (July 12, 2019) (exhibits omitted). On August 23, 2019, the Presiding Officer denied the Motion. *See* Schedule I, a true copy of the BEP's Second Procedural Order (Aug. 23, 2019).

12. Intervenors Mabee and Grace then asked that TRI be included in the list of topics for the Hearing on the Nordic applications. On November 1, 2019, the Presiding Officer denied the request. The Presiding Officer noted the Board's awareness of the dispute and pending litigation "over ownership of the intertidal lands where portions of Nordic's proposed pipeline would be located ...." The Presiding Officer stated that the Board would "not hear testimony on

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<sup>2</sup> With his May 16, 2019, opinion letter, James Dorsky wrote the following to Eric Heim (Nordic's president):

"This conveyance created a boundary line across the flats between the flats northerly of this line that were conveyed to Cassida and the flats southerly of this line that *Hartley would have still owned in front of Poor* (now Eckrote and Morgan) and southerly to the Little River."

*See* Exhibit J, a true copy of James Dorsky's letter dated May 15, 2019.

[TRI] at the hearing. The issue is better suited to written evidence and argument than to live testimony and cross-examination.” *See* Exhibit K, a true copy of a the BEP’s Third Procedural Order (Nov. 1, 2019).

13. On November 4, 2019, Intervenors Mabee and Grace appealed that ruling to the full Board which heard the appeal by “written evidence and argument” on November 8, 2019. The Board denied Intervenors Mabee and Grace’s appeal. “Following oral argument on the matter of TRI, the Board voted 4-0 in favor of a motion to deny the appeal of the Intervenors ... and uphold the Presiding Officer’s ruling that TRI will not be an issue for oral testimony and cross-examination at the hearing. It was noted that the issue could be addressed through written submissions.” *See* Exhibit L, a true copy of the BEP’s Fourth Procedural Order (Nov. 8, 2019).

14. On January 8, 2020, Intervenors Mabee and Grace renewed their Motion to Dismiss based upon proceedings that had occurred in the United States District Court concerning the same matter. On January 31, 2020, the Presiding Officer denied Intervenors renewed appeal. *See* Exhibit M, a true copy of the BEP’s Ninth Procedural Order (Jan. 31, 2020).

15. On February 4, 2020, Intervenors renewed their Motion to Dismiss and requested an adjudicatory hearing on the topic of TRI, as it was jurisdictional in nature and needed to be resolved prior to beginning the Hearing on substantive issues. On March 20, 2020, the Presiding Officer denied Intervenors’ request. *See* Exhibit N, a true copy of the BEP’s Twelfth Procedural Order (Mar. 2, 2020).

16. Following the four-day February 2020 Hearing, the Board scheduled a April 9, 2020, Board meeting “at which oral argument will be heard on MGL’s (Intervenors’) motions to Dismiss Nordic’s applications for lack of title right or interest and to conduct an adjudicatory hearing on the issue of TRI.” *See* Exhibit O, a true copy of the BEP’s Thirteenth Procedural

Order (Mar. 16, 2020). That hearing was rescheduled for April 16, 2020, remotely due to Covid-19. *See* Exhibits O and P, true copies of the BEP's Thirteenth Procedural Order and Fourteenth Procedural Order (Apr. 3, 2020). The Record of Procedural Orders through the Twenty-Third Procedural Order (Oct. 21, 2020) contains no evidence that the TRI adjudicatory Hearing was ever held.

17. The Law Court is competent to adjudicate issues of title and it did so regarding the Eckrotes' land on which Nordic attempted to show TRI. *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, \_\_\_ A.3d \_\_\_.

18. In *Mabee*, the Law Court decided on February 16, 2023, that the Eckrotes' upland is burdened by a valid restriction prohibiting any non-residential use. That restriction precludes installation of industrial pipes. That was clear from the land records since 1946. Because of that restriction, Nordic cannot install its industrial pipes through the Eckrotes' land from Route 1 to the high water mark of the Bay. *See* Exhibit Q, a true copy of *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, \_\_\_ A.3d \_\_\_.

19. In addition, the Law Court ruled in the above referenced case that the Eckrotes never owned any intertidal land between the Eckrotes' upland and Penobscot Bay. Because the Eckrotes did not own any intertidal land, they could not give Nordic any right to install its industrial pipes through the intertidal land between the Eckrote upland and into Penobscot Bay. The Law Court further ruled that: (i) the intertidal land was owned by Jeffrey Mabee and Judith Grace and (ii) the intertidal land was covered by a conservation easement which Mabee and Grace granted to Upstream (and which Upstream subsequently assigned to Friends of Harriet Hartley). *Id.*



20. Upstream Watch and others attempted to demonstrate to the BEP and DEP prior to, and at the permit hearings, all of the forgoing and attempted to place in the BEP record the surveys by Ronson, Staples, and Dorsky, and did place into the record the 1946 deed revealing the restrictive covenant and the Eckrotes' lack of ownership of the intertidal land in question, but any such demonstration was consistently disallowed by the Presiding Officer. *See* Exhibits I, K, L, M, N, O & P.

21. The ruling by the Law Court establishes that from May 17, 2019, when Nordic filed its applications, each of which required a demonstration of TRI, to November 19, 2020, when the permits were awarded to Nordic by BEP, the residential restriction was in place, the Eckrotes did not own the intertidal land and Nordic lacked TRI in violation of DEP Rule 06-096 C.M.R. Chapter 2, Section 11(D).

22. Nordic never demonstrated TRI as to any of their permits, nor could Nordic demonstrate TRI because, as the Law Court ruled, Nordic's alleged sources of TRI did not exist.

23. By withholding the 1946 deed containing the Use Restriction, and the three surveys showing that the Eckrotes did not own the intertidal land, Nordic deceived the BEP and DEP regarding ownership of the land in question and its availability for Nordic's use as proposed.

24. Nordic's deception regarding TRI and the unnecessary burden placed on State resources thereby, provides ample ground for revocation of Nordic's permits under Title 38, Chapter 2, Section 342(11-B) and DEP Rules 06-096 C.M.R. Chapter 2, Section 25(B) & Section 27(B) Criterion.

**B. Section 27(E) CRITERION: Change in Circumstances or Conditions**

25. The ruling of the Law Court in *Mabee* constitutes a change in circumstances or

condition which is ground for revocation of Nordic's permits under Title 38, Chapter 2, Section 342(11-B) and DEP 06-096 C.M.R. Chapter 2, Section 25(B) and Section 27(E) Criterion.

26. If some justification can be argued for the BEP finding that it was satisfied that Nordic had "sufficient title, right or interest for the application to be processed," that justification evaporated with the decision of the Law Court in *Mabee*.

27. The decision in *Mabee* laid bare the false assertions that Nordic used to persuade the DEP/BEP into finding TRI where none existed.

28. Had Nordic submitted accurate documentation, such as the surveys that it concealed from BEP and the Use Restriction on the Eckrotes' upland, the applications could not have been processed and the permits would not have been issued.

### III. PRAYER FOR RELIEF

Wherefore, the decision of the Law Court in *Mabee* having laid bare the falsehoods presented to the DEP, it is clear the permits were and are void *ab initio* for lack of TRI and the Commissioner/Board should revoke each and every permit enumerated above.

Dated: March 9, 2023

Respectfully submitted,



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