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	)	**MEMORANDUM OF LAW IN SUPPORT OF UPSTREAM WATCH'S PETITION TO REVOKE OR SUSPEND PERMITS ISSUED TO NORDIC AQUAFARMS, INC, ON OR ABOUT NOVEMBER 19,2020**

I. PETITIONER'S STATEMENT OF THE CASE

Nordic Aquafarms, Inc. ("Nordic") misled the Department of Environmental Protection ("DEP") and Board of Environmental Protection ("BEP") when Nordic applied for permits in May, 2019, and in the proceedings thereafter during the permit process. They did so by misrepresenting and failing to disclose the truth relevant to Nordic's claim of title, right or interest sufficient to support its applications pending before the DEP and BEP. Therefore, pursuant to Maine statute and agency rule, the Commissioner must revoke the permits obtained by this ruse.

II. STATEMENT OF FACTS

A. The Eckrotes never held title to the tidal flats or intertidal zone.

Jeffery Mabee and Judith Grace ("Mabee/Grace") own land between Route 1 and Penobscot Bay at the Little River in Belfast Maine. Their land includes the intertidal land on which Nordic falsely claimed a right to install its discharge pipes (the "Intertidal Land").

Mabee/Grace's predecessor in title, Harriet Hartley ("Hartley"), long ago sold building lots to third party buyers along Route 1 adjacent or near the present Mabee/Grace property, but in so doing Hartley and her successors retained the Intertidal Land.

At all times pertinent to this Petition, the Intertidal Land has been owned by Mabee/Grace. One of the lots sold was to Mr. Fred Poor who died and was survived by Mrs. Poor. Mrs. Poor's daughter is Janet Eckrote. When Mrs. Poor died in 2012, the lot was devised to Janet and Richard Eckrote (collectively "Eckrotes").

In 2012, the Eckrotes commissioned surveyor Gusta Ronson of the firm Good Deeds to perform a survey of the parcel that the Estate of Eckrote passed to the Eckrotes. Gusta Ronson performed the survey for the Eckrote Estate. That survey shows a mailing address of the Eckrote Estate to be the address of Janet and Richard Eckrote in New Jersey. That survey clearly shows the east boundary of the land to be conveyed from the Eckrote Estate to the Eckrotes to be the high-water line of Penobscot Bay, meaning that the Eckrotes did not own the Intertidal Land. Gusta Ronson confirmed her opinion in a letter dated August 26, 2019, to Petitioners' surveyor, Donald R. Richards in which she stated: "We found no deeded information or language that indicated fee title of this parcel included the intertidal zone and by language at its creation specifically stops at high water." The Good Deeds Survey is attached to the Petition as Exhibit E and Gusta Ronson's letter is attached to this Memorandum as Exhibit R.

B. The Eckrote upland was burdened by a use restriction which prohibits Nordic's use of the Eckrote land for their industrial activities.

Since the time of the 1946 deed from Harriet Hartley to Fred Poor, the title to the property acquired by the Eckrotes in 2012 from Janet Eckrote's mother's estate was burdened by a "residential purposes only" restrictive covenant. *See* Petition, Exhibit C, a true copy of the deed out of Harriet Harley to Fred Poor dated January 25, 1946 and recorded in the Waldo

County Registry of Deeds at Book 452, Page 205. That 1946 deed provided "The lot or parcel of land herein described is conveyed to Fred R. Poor (Janet Eckrote's father) with the understanding it is to be used for residential purposes only, that no business for profit is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns."

C. The Eckrotes' Agreement with Nordic.

In 2017 and 2018, when Nordic sought access to Penobscot Bay to run its water intake pipes and, more significantly, its wastewater discharge pipe into Penobscot Bay, in contravention of the deed restriction against all but residential uses of their land, the Eckrotes agreed to provide to Nordic an easement across their upland in order for Nordic to place its pipes in the ground on the Eckrote land on route to the Bay. The area of the proposed easement was shown on a "sketch" accompanying the agreement. That sketch shows the easement stopping at the high-water mark of Penobscot Bay. *See* Exhibit S, a true copy of the agreement between the Eckrotes and Nordic submitted to the BEP.

The Eckrotes and Nordic then falsely asserted ownership of the Intertidal Land between the Eckrote upland and Penobscot Bay based on the Eckrotes' deed and falsely claimed a call to the sea, and in contravention of the survey provided by Good Deeds to the Eckrotes when they acquired the upland from the Estate.

D. Nordic's Surveyor, James Dorsky, Informed Nordic in 2019 that the Eckrotes Did Not Own the Intertidal Land.

Nordic retained surveyor James Dorsky to act as Nordic's expert in connection with the permitting process before the State of Maine agencies.

By letter to Nordic's president Eric Heim dated May 16, 2019, James Dorsky ("Dorsky") provided Nordic with a stamped surveyor's opinion stating that Harriet Hartley retained the

intertidal land abutting the Eckrotes' upland with the Hartley-to-Poor deed. *See* Petition Exhibit J.

With his Preliminary Sketch Plan (*see* Exhibit T, a true copy of Dorsky's SK2 Survey rev. Jan. 25, 2019, attached hereto), Dorsky showed the intertidal land as being severed from the Eckrotes' upland, with "N/F Harriet L. Hartley" as the owner of the intertidal land abutting the Eckrotes' and Morgan's upland, and Mabee/Grace being the owner of the intertidal land abutting the Schweikert upland. *See* Petition Exhibit J and Exhibits T and U (a true copy of Dorsky's VI Survey rev. Feb. 22, 2019) attached hereto. Dorsky's February 22, 2019, survey revision shows N/F Hartley owning the Intertidal Land abutting the Eckrotes and Morgan upland. *See* Exhibit U.

E. Nordic Fabricated a claim that the Intertidal Land was conveyed by Heirs of Harriet Hartley to Nordic.

When Upstream and other intervenors demonstrated that the Eckrotes did not own the intertidal land which Nordic needed for its discharge pipes, Nordic created a false narrative that Harriet Hartley unintentionally retained the Intertidal Land at the time of her 1946 conveyance of upland to Fred Poor and that the "Heirs of Harriet Hartley" had conveyed the Intertidal Land to Nordic.

Nordic, through its counsel, engaged a third party, Elizabeth Hunter, to search of Ancestry.com to identify heirs of Harriet Hartley. Nordic then paid the so-called heirs to execute release deeds to Nordic. In doing so, Nordic ignored the fact that title records in the Waldo County Registry of Deeds demonstrate that Harriet Hartley retained no Intertidal Land and Harriet Hartley's probate records show she died owning no real estate.

Nordic then convinced its surveyor to show Nordic as an owner of the Intertidal Land on permitting submissions. In his May 14, 2019, "Littoral Zone & Intertidal Zone Survey," James

Dorsky showed "Heirs of Harriet L. Hartley" and "Nordic Aquafarms Inc." as the owners of a "Partial Interest" in the Intertidal Land abutting the Eckrotes' and Morgan's upland and he continued to show Mabee/Grace as the owner of the Intertidal Land abutting the Schweikerts' upland. *See* Exhibit V (a true copy of Dorsky's VI Survey rev. May 14, 2019) attached hereto. Dorsky's June 4, 2019, survey shows "Heirs of Harriet L. Hartley" and Nordic Aquafarms as the owner of the intertidal land abutting the Eckrotes' and Morgan's upland and Mabee/Grace owning the intertidal land abutting the Schweikerts' upland. *See* Exhibit W (a true copy of Dorsky's VI Survey rev. June 4, 2019) attached hereto.

In his July 24, 2020, "Intertidal Zone Survey," Dorsky listed "Ownership Unclear" on the intertidal land the Eckrotes' upland. *See* Exhibit X (a true copy of Dorsky's VI Survey rev. July 24, 2020) attached hereto.

On every survey plan (*see* Petition Exhibit G and Exhibits T-X attached hereto), Nordic's surveyor, Dorsky, indicated that the Eckrotes' eastern (waterside) boundary terminates at the high-water mark.[1]

While Nordic was fully aware that: (i) Mabee/Grace rightfully claimed title to the intertidal land, and (ii) Mabee/Grace had granted Upstream Watch a valid conservation easement in the intertidal land prohibiting Nordic from installing its pipes, Nordic continued throughout the BEP and DEP proceedings to claim right, title and interest in the intertidal land.

F. The DEP determination on TRI.

[1] At his July 2020 deposition, when James Dorsky was asked whether it was his opinion that Janet and Richard Eckrote owned fee title to the intertidal land abutting their upland, he testified: "[T]hey may or they may not." *See* Exhibit Y at 107 (a true copy of excerpts of Dorsky's trial testimony of June 24, 2021 is attached hereto). When Dorsky was asked whether he had an opinion as to whether Nordic owns fee title in the intertidal land abutting the Eckrotes' upland, he testified: "I'm not sure." *See* Exhibit Y at 109.

DEP and the BEP accepted Nordic's false claims of title to the intertidal land and on June 13, 2019, determined that Nordic made a sufficient demonstration of Right, Title or Interest in all of the land necessary to build and operate its proposed project. Over intervenors' objection, the permit application process was allowed to proceed.

G. Nordic Knew it Had No Valid Claim to use the Intertidal Land for its Industrial Purposes.

During the permitting process before the DEP and BEP, Nordic was fully aware, based on the Good Deeds survey, the survey work by James Dorsky, and James Dorsky's opinion letter, that the Eckrotes did not own the Intertidal Land and therefore Nordic had no right, title and interest in the intertidal land.

On July 12, 2019, Intervenors Mabee and Grace filed a motion to dismiss the permit applications for want of TRI. Even though the Presiding Officer denied the motion, Nordic was on notice that the Eckrotes did not own the intertidal land in question.

H. The Eckrote upland was burdened with a land use restriction forbidding its use for Nordic's pipes.

Since 1946, the title to the property acquired by the Eckrotes in 2012 from Janet Eckrote's mother's estate, was burdened by a use restriction. *See* Petition Exhibit C. That 1946 deed provided "The lot or parcel of land herein described is conveyed to Fred R. Poor [Janet Eckrote's father] with the understanding it is to be used for residential purposes only, that no business for profit is to be conducted there unless agreed to buy Harriet L. Hartley, her heirs or assigns." *Id.*

The Eckrotes agreed to provide to Nordic an easement across their upland in order for Nordic to place its pipes in the ground on route to the Bay. Note the sketch accompanying the Agreement shows the easement stopping at the high-water mark of Penobscot Bay. *See* Exhibit

S. That easement clearly violated the deed restriction dating from 1946. In its February 16, 2023, decision the Maine Supreme Judicial Court, sitting as the Law Court, confirmed the viability of that deed restriction. *See Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶ 53, ___ A.3d ___, a courtesy copy is attached hereto at Exhibit Z). Even if the Eckrotes actually provided the bargained for easement, Nordic could not have lawfully used it.

Nordic and the Eckrotes entered into the above-referenced agreement knowing that it violated the deed restriction against non-residential uses of the Eckrote land. Even if that easement were lawful, it would only have brought Nordic's pipes to the high-water mark of Penobscot Bay.

I. The Eckrotes never owned the Intertidal Land between their upland and Penobscot Bay

Nordic still had to run its pipes through the Intertidal Land between the Eckrotes' upland and the Bay. Nordic repeatedly, albeit incorrectly, claimed in court proceedings that the 1947 Hartley-to-Poor deed had a call to the sea which triggered a presumption that the intertidal land had been conveyed to the Eckrotes' predecessor, Fred Poor. However, under Maine law, it is perfectly lawful to sever ownership of the intertidal land from ownership of the upland. The Hartley-to-Poor deed called for a boundary "along the high-water mark of Penobscot Bay," which unambiguously severed the intertidal land from the upland conveyed to Poor. The Law Court ruled that the Intertidal Land was severed from the upland, the Intertidal Land was never owned by the Eckrotes, and the intertidal land was owned by Mabee and Grace. *See Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ___ A.3d ___, attached hereto at Exhibit Z.

In *Mabee* the Law Court confirmed the Eckrotes never owned the intertidal land between their Upland and Penobscot Bay.

So, Nordic could not cross the Eckrotes' upland because of the land use restriction. Nordic could not cross the intertidal land because the owner, Mabee/Grace, did not permit it and the people who granted permission did not own it.

J. The Conservation Easement.

Then there is the Conservation Easement which the Superior Court has ruled is valid and the Law Court has ruled covers the intertidal land. The Conservation Easement expressly prohibits the industrial activities which Nordic seeks to conduct within the intertidal land.

On April 29, 2019, Mabee/Grace established and granted a Conservation Easement in conformance to the statute. The original holder of the easement was Upstream Watch. Upstream Watch assigned that duty to the Friends of Harriet L. Hartley. In *Mabee*, the Law Court affirmed the existence and validity of the Conservation Easement. That Easement prevents any dredging or digging in the conserved land. That precludes Nordic from installing its underground pipes.

Nordic cannot cross the Eckrotes' upland because of the land use restriction. Nordic cannot cross the intertidal land between the Eckrotes upland and the Bay because the Eckrotes never owned it. Nordic cannot violate the restriction's placed on the conserved land by the Conservation Easement.

K. Maine Law on Title, Right or Interest.

Standing is a threshold issue demonstration of which is a prerequisite to action by a court or an administrative body. "Standing of a party to maintain a legal action is a "threshold issue" and our courts are only open to those who meet this basic requirement." *Tisei v. Town of Ogunquit*, 491 A.2d 564 (Me. 1985), citing *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984). To have standing to challenge a municipality's land use regulations, a party must possess sufficient title, right or interest in the land to confer upon him lawful power

to use it or to control its use. *Walsh v. City of Brewer*, 315 A.2d 200, 207 (Me 1974). Justiciability requirements in land use proceedings are not applied in any unique fashion.

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. "Without that interest the controversary becomes nonjusticiable, as there is no possibility of effective relief arising from a judicial resolution of the facts before the court." *Madore v. Maine Land Use Regulation Com'n*, 1998 ME 178, ¶ 17, 715 A.2d 157. The DEP will review an application for a permit only when the applicant has demonstrated "sufficient title, right or interest in all of the property which is proposed for development or use." *Southridge Corp. v. Board of Environmental Protection,* 655 A.2d 345, 347 (Me. 1994). "An applicant for a license or permit to use property in certain ways must have the kind of relationship to the...site that gives him a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license he seeks." *Murray v. Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983)(citations omitted)(internal quotations omitted), and *Walsh, super*. Nordic never had such a relationship, cognizable expectation, nor power.

As the court pointed out in *Southridge supra*, and other cases, if litigation reverses the basis of a claim of title, right or interest (in that case litigation over adverse possession) "his permit might be revoked". *Southridge,* 655 A.2d at 438. Given the Law Court reversed the factual predicate of Nordic's claim of right, title or interest to use the intertidal land, the permits obtained thereby should be revoked.

III. CONCLUSION

Maine Statutes, Title 38, Chapter 2, Section 342(11-B) and the DEP Rules provide that the Commissioner may revoke any permit that the applicant has obtained by "misrepresenting or

failing to disclose fully all relevant facts" or when there has been a "change in any condition or circumstance that requires corrective action...." 06-096 C.M.R. ch. 2, § 27(B) & (F).

Nordic misrepresented to the DEP that the Eckrotes' upland could be used for the installation of Nordic's industrial pipes running from its proposed wastewater treatment plant to Penobscot bay.

Nordic misrepresented to the DEP that the Eckrotes owned the intertidal land between the Eckrotes' upland and Penobscot Bay and that Nordic had right title and interest in the intertidal land based on Nordic's easement agreement with the Eckrotes.

Nordic and the Eckrotes misrepresented to the DEP that the Conservation Easement was invalid.

These were assertions were all false, as the Law Court determined in *Mabee. Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ___ A.3d ___.

Because of the Nordic false claims of right, title and interest in the Eckrotes' upland and the intertidal land for Nordic's industrial activities, the DEP has unnecessarily expended resources to study and evaluate:

1. An elaborate storm water management system.
2. The amount of and effect of nitrogen surcharging the water of Penobscot Bay
3. The efficacy of Nordic's proposed wastewater treatment plant, a task made more difficult because Nordic refused to disclose what fish food it would use thereby depriving DEP of the ability to evaluate the effectiveness of the wastewater treatment plant for the particular waste proposed.
4. By modelling, the effects of the Nordic's proposed air emissions from its 8 diesel generators and comparing those emissions to the National Ambient Air Quality Standards without Nordic supplying the data from the other on-site or nearby emissions as required by State and federal law.
5. Whether or not Nordic would provide adequate back up power in case of a power outage when Nordic refused to disclose its power needs against which to measure the adequacy of its back up power.
6. The effects of removal of nine (9) streams and associated wetlands.
7. The effects of removing some 37 acres of soil, 20 – 50 feet deep, and replacing that soil with different "more suitable" soil.

8. Estimating the flows in the Upper West Penobscot Bay without any data for the purpose of determining dissipation of the discharged Schmutz.

Because of the Nordic false claim of right, title and interest, the BEP spent countless hours with staff managing thousands of pages of application materials and pre-filed testimony, conducting a 4-day contested hearing, addressing the post hearing briefs and motions, preparing draft permits, receiving and considering comments on those permits, and issuing final permits, not to mention assisting the Assistant Attorney General to defend the Appeal from the award of those permits, as well as the resources and hours of the Office of the Attorney General spent to respond to the appeals, including research, assembling the agency record, and preparation of briefs and arguments.

None of this work and expense was necessary. It occurred, and undermanned DEP staffers worked hard, and Maine taxpayers paid for it in lieu of more worthy projects, because Nordic knowingly and willfully deceived the DEP and BEP with its claims of right, title and interest.

Dated: March 9, 2023

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