

STATE OF MAINE

DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY

IN RE: APPLICATION OF NORDIC AQUAFARMS, INC.

UPSTREAM WATCH AND
MAINE LOBSTERING UNION'S
FIRST COMMENT IN OPPOSITION
REGARDING APPLICANT'S
ALLEGED TITLE, RIGHT OR
INTEREST

COUNTY OF WALDO,
CITY OF BELFAST AND
TOWN OF NORTHPORT

DATE: April 22, 2019

**FIRST COMMENT IN OPPOSITION
BY UPSTREAM WATCH AND MAINE LOBSTERING UNION**

THE APPLICATION OF NORDIC AQUAFARMS, INC. IS INCOMPLETE. THE BUREAU MUST REQUEST FROM THE APPLICANT ADDITIONAL INFORMATION, OR DISMISS THE APPLICATION.

This First Comment in Opposition is filed on behalf of Upstream Watch and the Maine Lobstering Union, which are both incorporated entities under Maine law, the addresses and contacts for which are already of record in this matter.

As stated in more detail below, the pending application for submerged lands lease must be deemed incomplete, pursuant to 01-670 C.M.R. ch. 53, § 1.7 A. 4, because the applicant, Nordic Aquafarms Inc. ("hereinafter "NAF"), has not provided a "detailed site plan" in support of its application for submerged lands lease, as required by 01-670 C.M.R. ch. 53, § 1.7(A)(3). of the Submerged Lands Rules and by Section 3.B. of the DACF-BPL Submerged Lands Application.

This is NAF's third proposed route for its intake and outfall pipelines, needed to obtain a submerged lands lease from the Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands (hereinafter "DACF-BPL" or "the Bureau"). Like NAF's prior two efforts, NAF has failed to submit an adequate "map" of its site plan that conforms to even the most basic requirements or law or rule. As a result, this third supplement to NAF's application must be rejected by the Bureau as incomplete, pursuant to 01-670 C.M.R. ch. 53, § 1.7(A)(4).

Under Maine law and rule, the applicant bears the burden for filing an application that demonstrates the existence of TRI and administrative standing, as well as a detailed site plan that adequately reveals the location of the proposed project. To date, NAF has failed to meet either of these burdens, despite multiple bites at the apple to satisfy its responsibilities. Due process and due diligence demand that NAF's third supplemental submission be rejected, as both inadequate and incomplete, for failure to submit the surveys and other documents incorporated by reference in the map for their third proposed pipeline(s) route.

BACKGROUND:

On September 26, 2018, Nordic Aquafarm, Inc. (“NAF”) submitted an application for a Submerged Lands Lease to the DACF Bureau of Parks and Lands, which included a “map” of its proposed pipeline(s) route and requested lease area. The pipeline(s) route on this first “map” was designated as: “Option 2A”. Option 2A proposed to enter the Bay from a lot in Belfast, Maine, owned by Richard and Janet Eckrote, pursuant to an easement for a 25-foot strip on one side of the Eckrotes’ property. A picture of the area allegedly covered by the Easement was attached to the Easement Agreement as Exhibit A. NAF’s first pipeline(s) route was generally configured in a straight-line off of the Eckrotes’ property into the Bay.

The “map” of the Option 2A pipeline(s) route, submitted with NAF’s application for submerged lands lease, claimed that the project was located completely within the city limits of Belfast, Maine. The “map” had no municipal boundary lines revealed on it and was cropped to cut-off all properties located in the Town of Northport that would be adversely impacted by the proposed project and lease. The legend of the “map” incorporated-by-reference a boundary and topographic survey prepared by Good Deeds, Inc., dated April 2, 2018, and stated that the proposed pipeline route was “received from Cianbro Corporation.”

DACF-BPL accepted NAF’s application as complete. However, during the comment period, objections were filed asserting that the proposed Option 2A pipeline(s) route crossed the intertidal and littoral zones of private property owners who did not consent to this use of their property – land in which the applicant NAF had no TRI.

In response, the Bureau advised NAF’s counsel by email to submit a revised pipeline(s) route that met the TRI requirements in law and rule.

On November 20, 2018, NAF submitted a radically amended pipeline configuration, Option 2 (the “Twisted Sister”), to DPL as a “supplement” to its pending application for a submerged lands lease. The second “map,” submitted by NAF with its Option 2 pipeline(s) route, claimed to incorporate two surveys: a boundary and topographic survey prepared by Good Deeds, Inc., dated April 2, 2018, and a littoral zone and intertidal zone survey prepared by James Dorsky, PLS of Gartley & Dorsky Engineering and Surveying, dated November 14, 2018.

Like NAF’s first “map,” the second pipeline(s) route “map” omitted any images for the impacted Northport properties and NAF continued to claim the project was only located in Belfast, Maine. Like the first pipeline(s) route, this second route again entered the Bay from the Eckrote property in Belfast, Maine, and, like Option 2A, the new circuitous route in “Option 2” also crossed the intertidal and littoral zone lands of private property owners who did not and do not consent to this use of their land.

In response to NAF’s Option 2 submission, on December 18, 2018, Upstream Watch and the Maine Lobstering Union filed a motion to dismiss the pending submerged lands lease application and the pending DEP MEPDES permit application for lack of TRI. Upstream Watch and the Maine Lobstering union specifically attacked the facial insufficiency of the Eckrote Easement to

demonstrate TRI, since the Easement's Exhibit A terminated at the mean high water mark of the Eckrotes' lot – granting no rights in the intertidal zone (if the Eckrotes had any such rights).

On January 18, 2019, the Bureau sent a letter to NAF's counsel requiring NAF to submit additional proof of its TRI for the Option 2 pipeline(s) route by April 18, 2019.

A similar letter was sent by DEP on January 22, 2019, giving NAF until February 7, 2019 to provide proof of TRI. NAF was required to produce the November 14, 2018 Dorsky survey as part of its required response to DEP.

On January 28, 2019, DEP amended the time line for NAF to submit proof of TRI. DEP deferred resolution of the question of NAF's TRI by consolidating review of all applications required by DEP into one unified process – the question of NAF's TRI was deferred until all applications (NRPA, SLODA, MEPDES and Air) were filed by NAF. Further, the Board of Environmental Protection was designated as the reviewing entity for all substantive reviews of the consolidated applications, although it appears that DEP would review the TRI issue. As a result of DEP's later action, the February 7, 2018 deadline for NAF to file the 2018 Dorsky survey was nullified. NAF has failed to produce the Dorsky survey to any agency to date.

At some time on or around March 27, 2019, NAF through its counsel filed another supplement to its submerged lands application with DACF-BPL. Rather than filing proof of TRI in support of the Option 2 pipeline(s) route, NAF has submitted a revised "map" of yet a *third* pipeline(s) route, new schematics for the pipelines, and two versions of a letter allegedly amending NAF's Easement over the Eckrotes' lot.

Like the first two maps, this new map of the third pipeline(s) route, dated 3-15-2019 but having no name designation from the applicant on the "map", incorporates by reference the 4-2-2018 Good Deeds, Inc. survey and the November 14, 2018 Dorsky survey. Further, this third "map" incorporates by reference a second, amended Dorsky survey dated February 22, 2019. Yet again, NAF has failed to submit any of these three surveys, that were incorporated by reference, with its application "supplement." Like the prior two pipeline(s) routes, this third proposed pipeline(s) route enters the Bay from the Eckrotes' lot in Belfast, Maine.

DEFECTS IN NAF's "MAPS" THAT RENDER ITS APPLICATION INCOMPLETE:

A copy of the 'map' of NAF's third pipeline(s) route, along with the two previously filed "maps", are attached hereto and made a part hereof as composite Exhibit A. This third NAF "map," like every other "map" filed to date with the Bureau by NAF, is defective on its face.

All of the "maps" submitted by NAF are legally deficient in the following ways:

- They are undated;
- They are not certified by a Registered Land Surveyor or Licensed Civil Engineer, or by any other appropriate Maine professional;

- They incorporate by reference surveys that are not provided and are not on file with the Bureau or in any public location, including the Waldo County Registry of Deeds; and
- They omit all images of the properties in Northport affected by the proposed lease and pipeline(s) route(s).

Not only does this “Belfast” applicant propose to discharge wastewater from Belfast into the waters of Northport, but it proposes to physically place much of its pipelines within the municipal boundaries of Northport. Meanwhile, this applicant chooses to pretend that Northport does not exist at all on its “maps” submitted to the Bureau – cropping out all Northport properties from its submissions.

More importantly, NAF attempts to imbue its legally deficient submission(s) with the imprimatur of legitimacy by incorporating-by-reference the Good Deeds, Inc. 4-2-2018 survey and the two Dorsky surveys (dated 11-14-2018 and 2-22-2019) – without producing those surveys to demonstrate that the information on the “maps” submitted is supported by the actual surveys. Indeed, it is inconceivable that the incorporated and referenced survey(s) would support these maps, since the maps omit so much essential information.

In a futile attempt to understand the third map and plan submitted by NAF, Upstream Watch and the Maine Lobstering Union retained the services of Donald Richards, P.L.S., L.F. A copy of Mr. Richards’ seminal work, *Maine Principles of Ownership Along Water Bodies*, 42 Me. L. Rev. 35 (2018), is appended hereto, Exhibit B.

Mr. Richards has advised that he cannot *properly* evaluate the map or the application of NAF as they have been submitted -- ***and neither can the Bureau*** -- for the reasons eloquently expressed in Mr. Richards’ letter of April 12, 2019, attached hereto and incorporated herein as Exhibit C.

As the court noted in *LaFleur v. International Paper Co.*, 1987 Me. Super. LEXIS 95, *7:

Incorporation by reference has been defined as: [*7]

"The method of making one document of any kind become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter the same as if it were fully set out therein."

Black's Law Dictionary (Revised 4th Ed.), Incorporation.

To incorporate a separate document by reference is to declare that the former document shall be taken as part of the document in which the declaration is made, as much as if it were set out at length therein. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360, 363 (N.C. 1978) (citation omitted).

Here, the map of the third pipeline(s) route, submitted as part of the third supplement to NAF’s submerged lands lease application, incorporates by reference two prior surveys of James Dorsky and one prior 2018 survey by Good Deeds, Inc. The purpose of this reference and incorporation

is to give greater weight to the legally deficient “map” that is submitted. However, due process and due diligence demand that all of these surveys be produced and provided to both the DACF-BPL and interested parties submitting comments.

Prior to a determination that the pending application is “complete” NAF must be required to produce:

- The 2018 Good Deeds, Inc. survey referenced in the NAF maps;
- The November 14, 2018 Dorsky survey;
- The February 22, 2019 Dorsky survey amendment;
- The 2012 Good Deeds, Inc. survey that was incorporated by reference into the probate deed from the Estate of Phyllis Poor to Richard and Janet Eckrote, which concerns the Eckrotes’ TRI in any intertidal lands;
- The 2018 Hodge title search of the Eckrotes’ and surrounding properties completed for NAF’s counsel; and
- All relevant deeds relating to the Eckrotes’ alleged title to intertidal zone land.

Based on the foregoing deficiencies, Upstream Watch and the Maine Lobstering Union request that Bureau declare the application of NAF incomplete and return the application to the applicant as provided in 01-670 C.M.R. ch. 53, §1.7 (A)(4) of the Submerged Lands Rules, or stop the process and toll the comment period, extending it indefinitely until the applicant provides the information necessary to *properly* review the application, as the applicant is required to do by the law of this jurisdiction (see page 3 of Mr. Richards’ letter at Exhibit C for relevant legal citations which are incorporated herein by reference).

Respectfully Submitted,



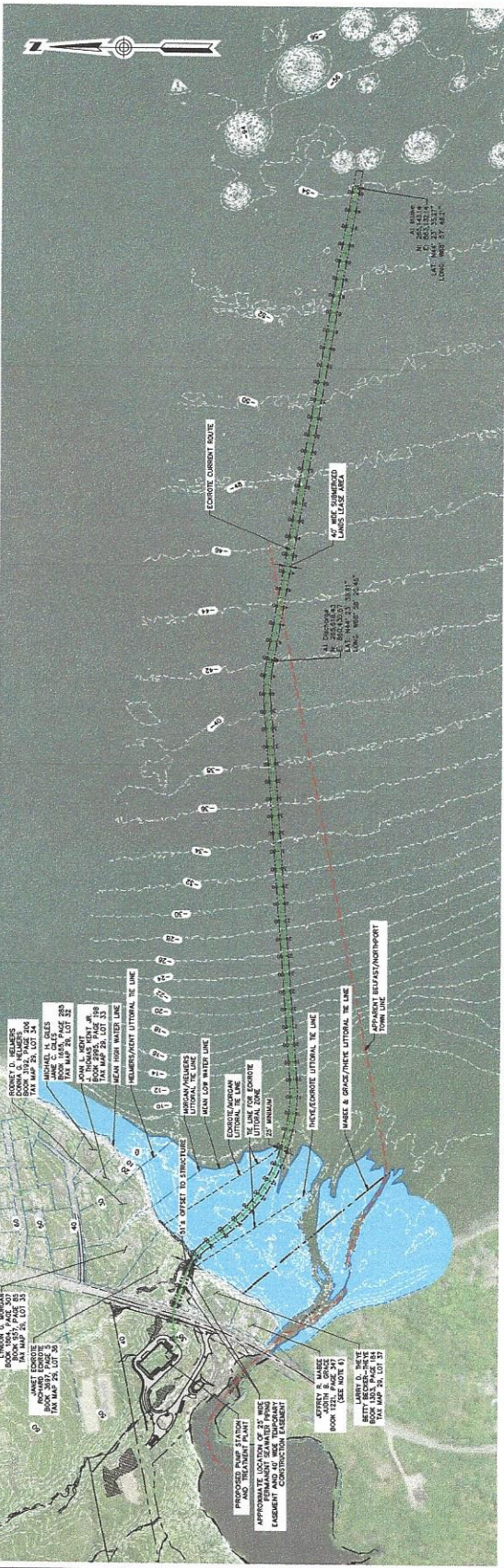
Kimberly J. Ervin Tucker
Maine Bar No. 6969
48 Harbour Pointe Drive
Lincolnton, Maine 04849
P: 202-841-5439
k.ervintucker@gmail.com

Copies of this filing are being filed with staff of DACF BPL, courtesy copies to DEP, and electronically served on counsel for NAF.

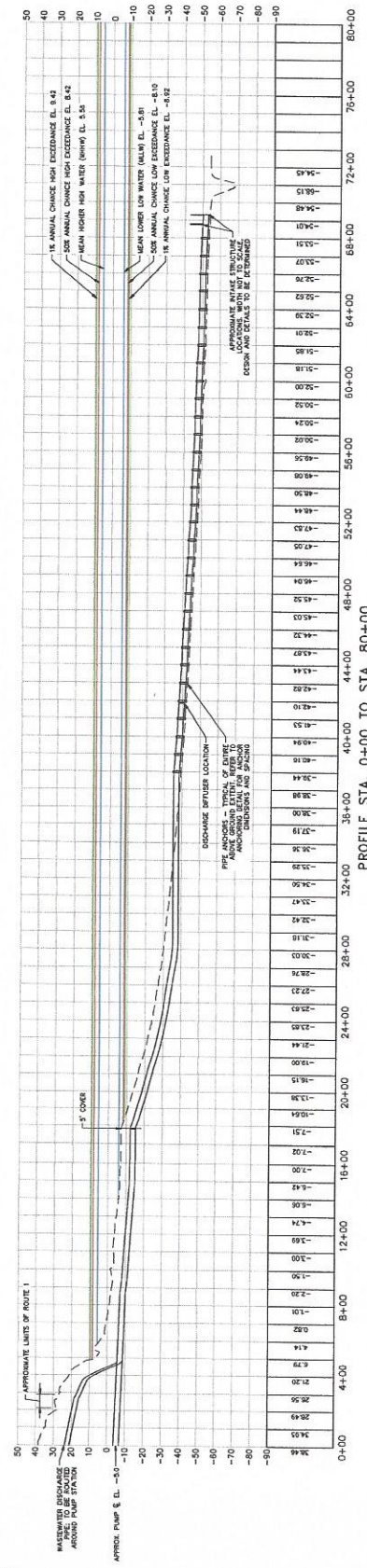
COMPOSITE

EXHIBIT

A



PLAN
SCALE: 1" = 300'



PROFILE STA. 0+00 TO STA. 80+00
VERTICAL SCALE: 1" = 30'
HORIZONTAL SCALE: 1" = 300'

- NOTES:**
1. ALL DIMENSIONS UNLESS OTHERWISE SPECIFIED ARE APPROXIMATE IN LOCATION AND SHALL BE VERIFIED BY THE CONTRACTOR.
 2. PIPE ALIGNMENT IS SEEBACK GREATER THAN 25 FEET FROM THE LINE.
 3. BATHYMETRY DATA PROVIDED BY MARIANNAU ASSOCIATES, INC. IN DECEMBER 2018. ONLY REFER TO ANCHORAGE DETAILS FOR EXISTING PIPE CONDUITS IN EXISTING TRENCHES.
 4. ALL DIMENSIONS ARE TO THE CENTERLINE OF THE PIPE UNLESS OTHERWISE NOTED.
 5. VERTICAL DATA IS REFERENCED TO NAVD83 (DEET).

PLAN REFERENCES:

1. 2000 STATE MAP NO. 103 MAIN STREET, BALDWIN, ME 04816, (207) 338-5740
2. 2000 STATE MAP NO. 103 MAIN STREET, BALDWIN, ME 04816, (207) 338-5740
3. 2000 STATE MAP NO. 103 MAIN STREET, BALDWIN, ME 04816, (207) 338-5740
4. 2000 STATE MAP NO. 103 MAIN STREET, BALDWIN, ME 04816, (207) 338-5740
5. 2000 STATE MAP NO. 103 MAIN STREET, BALDWIN, ME 04816, (207) 338-5740

41 Huxley Drive
Portland, Maine 04103
www.ransomeng.com

CONSULTING ENGINEERS AND SCIENTISTS

REV	DESCRIPTION	DATE

ISSUED FOR PERMIT - DRAFT
03-15-19

CURRENT ISSUE STATUS:

TRUE NORTH

PROJECT: NORDIC AQUAFARMS
CLIENT: NORDIC AQUAFARMS
PROJECT MANAGER: BELFAST MAINE
JOB CHIEF: CS101

SCALE: GRAPHIC SCALE BEFORE BIND
PROJECT NUMBER: 1820
JOB NUMBER: CS101

NOT FOR CONSTRUCTION

WOODARD & CURRAN
 COMMITMENT & INTEGRITY DRIVE RESULTS
 41 Hudson Drive
 Portland, Maine 04102
 800.425.4382 | www.woodardcurran.com

NO.	DESCRIPTION	DATE

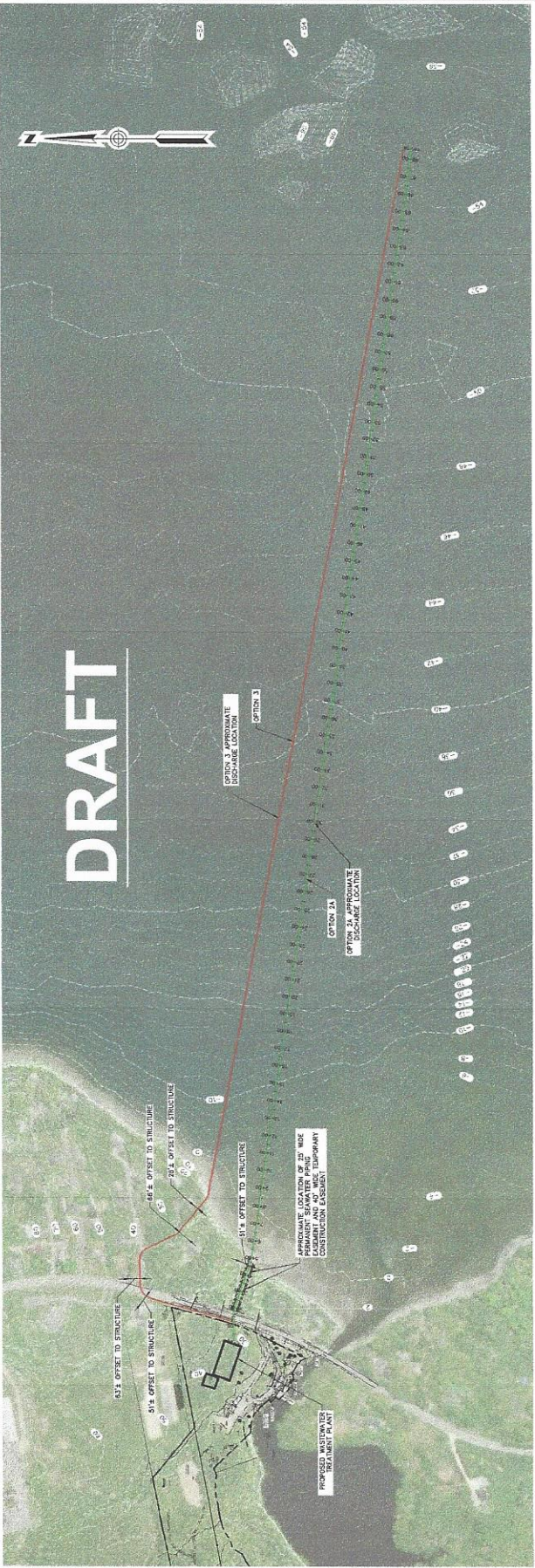
DESIGNED BY: JFC
 CHECKED BY: PJP
 CADD: C-20049

INTAKE/DISCHARGE PIPELINE
 OPTION 2A

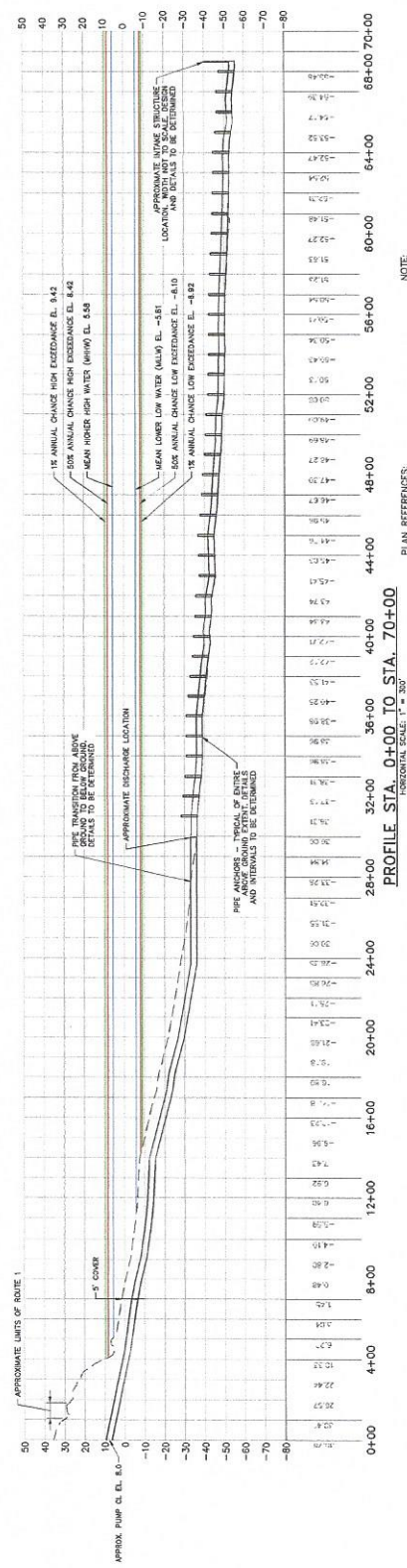
MANIFOLD

CHANGRO

OPTION 2A
 SHEET 1 OF 100



PLAN
 SCALE: 1" = 300'



PROFILE STA. 0+00 TO STA. 70+00
 VERTICAL SCALE: 1" = 30'
 HORIZONTAL SCALE: 1" = 300'

- PLAN REFERENCES:
- ROADWAY & TOPOGRAPHIC SURVEY DATED 4-2-2018 BY 02000 DRESHER INC. 108 MAIN STREET, BELFAST, ME 04915. (DOT) 3385-043
 - PROPOSED PIPE ROUTES OBTAINED FROM THE MANIFOLD OFFICE OF SEA. HIGH://www.maine.gov/dep/water
 - BATHYMETRY DATA SETS OBTAINED FROM THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA) WEBSITE. DATE OF BATHYMETRY ARE DATED 1947 AND 1982.
 - VERTICAL DATUM IS REFERENCED TO NAVD83 (FEET).
 - PROPOSED PIPE ROUTES (MWF FILES) OBTAINED FROM CHANGRO CORPORATION.
- NOTE:
 * RECORDED FEATURES ARE APPROXIMATE IN LOCATION AND SCALE.

GRAPHIC SCALE BEFORE USING
 1" = 300'

NOT FOR CONSTRUCTION

WOODWARD CLYDE CURRAN
 COMMITMENT & INTEGRITY DRIVE RESULTS
 41 Hilditch Drive
 Portland, Maine 04102
 800.433.4322 | www.woodwardclay.com

DESIGNED BY: JAC
 CHECKED BY: JAC
 DATE: 02/17/2024 (2024-02-17)

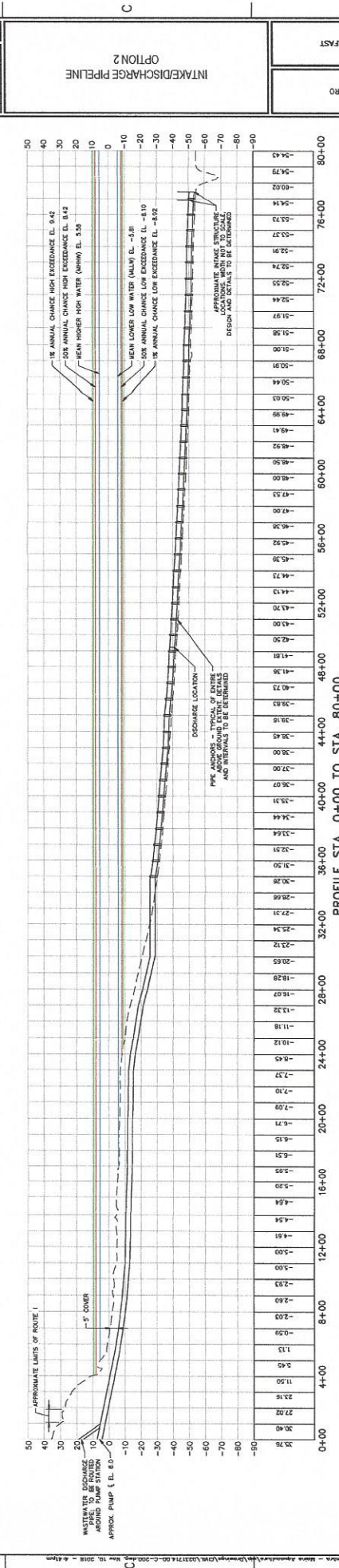
PROJECT NO: 2023174-03
 DATE: NOVEMBER 2023
 SHEET NO. 2 OF 3

OPTION 2

MAN BELFAST
 CAMBRO



PLAN
 SCALE 1" = 300'



PROFILE STA. 0+00 TO STA. 80+00
 SCALE 1" = 300'

- PLAN REFERENCES:**
1. 5000 BELFAST STATION SURVEY, CONDUCTED BY BROWN AND CALDWELL ENGINEERS, INC. (2007) 335-5743
 2. 2 FOOT CLEAR CONTIGUOUS FROM THE MANE
 3. BATHURST DATA PROVIDED BY NEMANEC&U ASSOCIATES
 4. LITTORAL ZONE & INTERIOR ZONE SURVEY IS BASED ON 50 BATHURST STREET, 1.00 BOWEN, 0.50 CAMDEN, ME
 5. VERTICAL DATUM IS REFERENCED TO MAGEE (FEET)
 6. CAMBRO CORPORATION (DATE FILED) RECEIVED FROM
- NOTES:**
- PIPE ALIGNMENTS ARE APPROXIMATE IN LOCATION AND SCALE
 - PIPE ALIGNMENT IS SETBACK GREATER THAN 25 FEET FROM LITTORAL ZONE

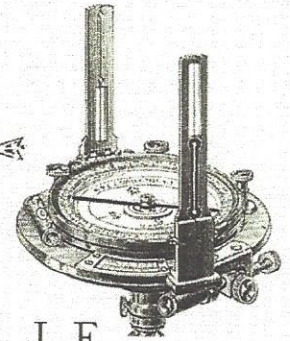
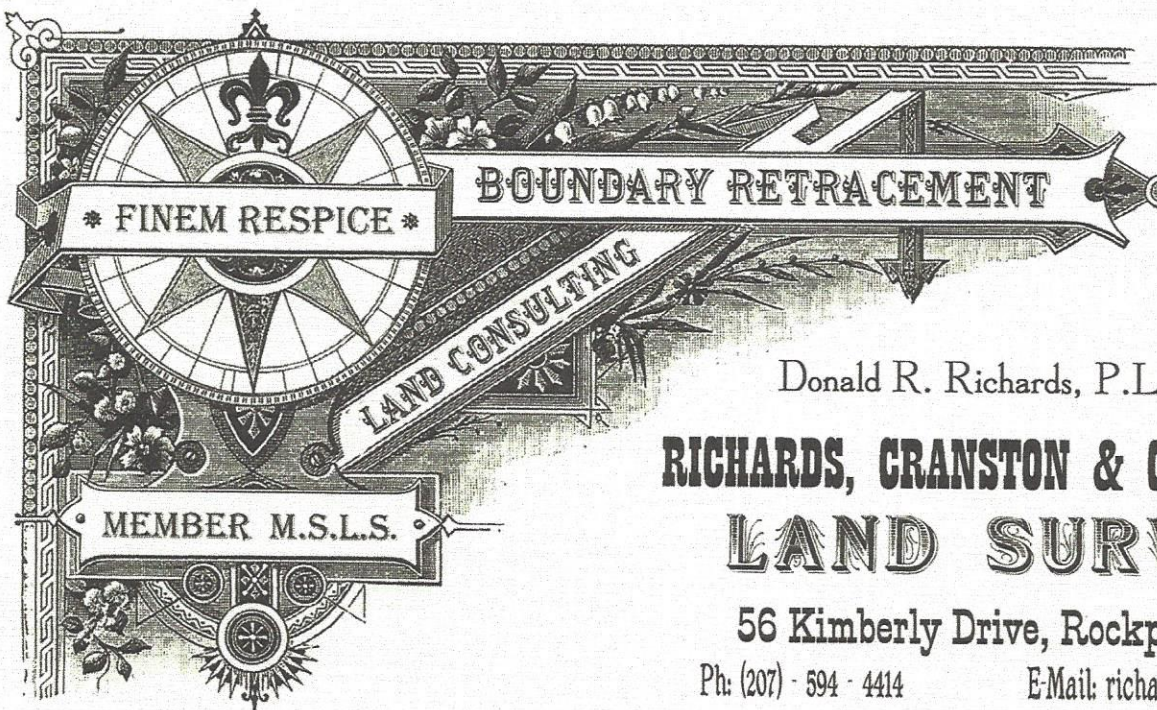
DRAFT - NOT FOR CONSTRUCTION

300' 0' 300' 600'

CHECK GRAPHIC SCALE BEFORE USING

EXHIBIT

C



Donald R. Richards, P.L.S., L.F.

RICHARDS, CRANSTON & CHAPMAN, LLC
LAND SURVEYS

56 Kimberly Drive, Rockport, ME 04856

Ph: (207) - 594 - 4414

E-Mail: richards @ free.midcoast.com

April 12, 2019

David Losee, Esq.
7 Highland Avenue
Camden, Maine 04843

Re: Nordsic Aquafarms application matters

Dear David,

I have begun to review the application materials from Nordic Aquafarms and have noted upon them references to surveys by Good Deeds of Belfast, Gartley and Dorsky from Camden and bathymetry data provided from Normandeau Associates, Environmental Consultants. To properly review the accuracy of that work it would be appropriate to review the documents provided to the applicant which bear the signature and seal of the respective professionals. If the plans prepared by Ransom Consulting Engineers, Woodward and Curran and SMRT are an accurate reflection of the work of other professionals those final plans should bear the professional seal of the professional who will stand behind the work. It may be that there has been some inadvertent misinterpretation of the primary document in the preparation of the application documents which frequently happens but I cannot review the boundary lines and other data on the basis of the application documents that I have in hand. If there is no survey document signed by a professional land surveyor included with the application material the conclusion must be that none was prepared.

It is my understanding that you or members of Upstream Watch have made a request to review the documents cited on the face of the application plans and have been refused access. This situation is problematic. If referred to in an application the document designated becomes a part of the application, even a material and essential part of the

application. By the reference the party reviewing the documentation is chargeable with notice of what the document, plan or survey contains. In a process requiring civil and public scrutiny, to withhold an important document referred to which is not of public record is to deny regulative agencies and any party reviewing the application essential information, a practice repugnant to public policy and tantamount to fraud. The citing of the documents gives an air of compliance and competence but absolutely no substance.

As I have discussed with you, the private property rights in the intertidal zone are very important in this situation. There are private property rights in the intertidal zone which may be subject to invasion by trespass. The applicants need to show what they have rights to, the limits of other parties rights and that documentation must be supported by a qualified professional. I cannot review these matters which they should be documenting without doing the work that they are charged with preparing. It would not seem appropriate to move ahead with the application process before those issues are openly documented and included in the formal application.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Donald R. Richards', written in a cursive style.

Donald R. Richards

Incorporation by reference: a doctrine in law: the terms of a contemporaneous or earlier writing, instrument, or document capable of being identified can be made an actual part of another writing, instrument, or document by referring to, identifying, and adopting the former as part of the latter. (Merriam Webster online dictionary)

This doctrine is particularly important in matters of real estate transfer and review.

The theory behind the Liebler-Ilsley rule holds that when a grantee takes under a deed which specifically refers to a certain survey or plan, he is chargeable with notice of what the plan or survey contains. **Kinney v. Central Maine Power Co., 403 A.2d 346, 351 (Me. 1979)**

Where land is conveyed according to a plan, to which reference is made in the conveyance, it becomes a part of it, as much so, as if it were incorporated in the conveyance. This is a well established rule of construction. **Lincoln v. Wilder, 29 Me. 169, 179 (1848)**

The plan is referred to in the description and makes a necessary part of the description, and cannot be disregarded. **Eaton v. Knapp, 29 Me. 120, 122 (1848)**

Where the plan is referred to in a deed our doctrine is, that as to the boundaries of the land and what there is upon the plan affecting the location of the premises conveyed, it is sufficient to prove the plan and its contents; and especially, should this rule be applied to the plaintiff's deed, because the plan is referred to in a description of her land, and the existence of the streets and Jefferson Lane upon it are made boundaries of her land. She is chargeable with full notice of the contents of the plan. **Danforth v. Bangor, 85 Me. 423, 428 (1893)**

When a grant or deed of conveyance of land contains an express reference to a certain plan, such plan, in legal construction, becomes a part of the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed. The proprietors of the Kennebec Purchase v. Tiffany, 1 Maine, 219; McElwee v. Mahlman, 117 Maine, 406. **Bradstreet v. Winter, 119 Me. 30, 38 (1920)**

By reference as a part of the description in each deed, the plan is made a material and essential part of each conveyance with the same force and effect as if copied into each deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed. McElwee v. Mahlman, 117 Maine, 402, 406. Bradstreet v. Winter, 119 Maine, 30, 38. Erskine v. Moulton, 66 Maine, 276, 280. Nor does it make any difference that the plan is not recorded; it is sufficient to prove the plan and its contents. Danforth v. Bangor, 85 Maine, 423, 428. **Perkins v. Jacobs, 124 Me. 347, 349 (1925)**