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March 8, 2023

VIA ELECTRONIC MAIL

Matthew Pollack, Esq.  
Clerk of the Law Court  
Maine Supreme Judicial Court  
205 Newbury Street, Room 139  
Portland, ME 04112-4125

Re: Upstream Watch, et al. v. Board of Environmental Protection, et al.  
Docket Number BCD-22-48

Dear Mr. Pollack:

By letter to Matthew Pollack, Clerk of the Law Court, dated March 7, 2023, concerning Upstream Watch, et al. v. Board of Environmental Protection Docket Number BCD-22-48, Assistant Attorney General Margaret A. Bensinger attempted to advise the Law Court as follows:

*A Department of Environmental Protection permit applicant must demonstrate, to the Department' satisfaction, sufficient TRI for the application to be complete and maintain sufficient TRI "throughout the entire application processing period." 06-096 C.M.R. ch. 2. Sec. 11(D). This period ends when the permit is issued.*

This statement of law is inaccurate.

The application processing period does not end when the permit is issued. In *Madore v. Maine Land Use Regulation Commission*, 715 A. 2d 157, 161, (1998) the Law Court, discussing the justiciability of a proceeding held:

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. (Emphasis supplied).

In the case relied upon by Attorney Bensinger, *Southridge Corp. v. Board of Environmental Protection*, 655 A.2D. 345, 347, the Law Court said:

The DEP will review an application for a permit only when the applicant has demonstrated "sufficient right, title or interest in all of the property which is proposed for development or use....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

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having the power to use the site' in the ways that would be authorized by the license he seeks". (Citing Walsh v. City of Brewer, 315 A.2d. 200, 207 (1974).” And later, “We fully acknowledge that 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.”

Attorney Bensinger continues: “*Nothing in the Department’s Rules or permits here require the licensee to maintain TRI after the permit’s issuance.*” Perhaps not, but the Madore ruling by the law Court does.

Given the Law Court’s February 14, 2023 decision in Mabee, et al. v. Nordic Aquafarms, Inc. (2023 Me 15), it has now been determined that Nordic has no right, title and interest to use the intertidal land for its discharge pipes, as the Eckrotes had no basis to grant Nordic an easement in the intertidal land. While Upstream has presented a broad range of arguments in its appeal for revoking the state permits, Nordic’s lack of right, title and interest in the intertidal land compels a finding that the permits should be revoked ab initio.

If you has any questions concerning this matter, please contact me.

Very truly yours,

*/s/ David B. Losee*

David B. Losee, Bar No. 6500

/lk  
cc: Margaret A. Bensinger, AAG  
Kimberly Ervin Tucker, Esq.  
David M. Kallin, Esq.  
Ronald W. Schneider, Jr., Esq.  
David J. Perkins, Esq.