

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
BOARD OF ENVIRONMENTAL PROTECTION
DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY

IN RE: APPLICATION OF NORDIC AQUAFARMS, INC. UPSTREAM WATCH AND MAINE
MPDES PERMIT #ME0002771 LOBSTERING UNION'S
MOTION
APPLICATION FOR SUBMERGED LANDS LEASE TO DISMISS
City of Belfast, Waldo County

This Motion to Dismiss is submitted on behalf of Upstream Watch (“Upstream”) and the Maine Lobstering Union (“IMLU”), both corporate entities registered with the Maine Division of Corporations. Upstream and IMLU respectfully submit that the MPDES permit application submitted by Nordic Aquafarms, Inc. (“Nordic”) is fatally flawed and must be dismissed for lack of Right, Title and Interest (“RTI”). Nordic’s deficiencies in RTI are fatal and incurable for the reasons set out more fully below.

Memorandum of Law:

Background:

Nordic Aquafarms, Inc. (Nordic) proposes to construct and operate (or to transfer title to others who may attempt to operate) a very large land-based salmon fish farm at the southern extreme of the City of Belfast, Maine. In connection therewith, and essential thereto, Nordic proposes to construct and operate three pipes, two 30” water withdrawal pipes and one 36” wastewater discharge pipe. These pipes would extend from its proposed facility on the west side of US Route 1 on land currently of the Belfast Water District, under the said US Route 1 and to the east over

1000' into Belfast Bay, a protected cove of Penobscot Bay, and beyond through private property not owned by Nordic.

In order to construct and install said pipes, Nordic must obtain a lease of the “submerged lands” over or through which it proposes to excavate and install its pipes. The State of Maine holds the Submerged Lands in trust for the benefit, rights and use of the general public. The issuance of any lease to any private party requires that the applicant demonstrate that it holds proper “right, title and interest” to the land in question and that “careful consideration of the impacts of such conveyances on public trust rights as well as a just and fair compensation to the public for the private use of the Submerged Lands.”

In order to discharge its waste through the 36” pipe into Penobscot Bay without violating the Federal Clean Water Act and companion Maine statutes, Nordic must apply for and obtain a Federal and State permit to discharge under those acts. Any applicant for a permit to discharge under Clean Water Act must demonstrate proof that the applicant has sufficient “Right, Title, or Interest” to the lands needed to create and support its proposed discharge.

Both the Statutes and Rules governing the lease of submerged lands and the discharge of waste to the waters of the United States assign to Nordic the burden of proof that it has acquired and possesses sufficient “Right, Title, or Interest” in all of the land on which the pipes will be located from its facility on the land of the Belfast Water District on the west to the pipe termini in Penobscot Bay on the east. To the date hereof, Nordic has failed to demonstrate proper “Right, Title, or Interest” to the land on which the pipes are proposed to be situated, and as is demonstrated below, Nordic cannot ever do so.

Nonetheless, on or about October 9, 2018 The Department of Agriculture, Conservation and Forestry found that Nordic had submitted an application that was “complete for processing.” On or about November 9, 2018, the Department of Environmental Protection found that Nordic’s application was “complete for processing.” A factual predicate for such a finding was that the respective departments found proper “right, title or interest.” No such factual predicate exists.

Applicable Law:

The Maine Law on Submerged Lands is found at Chapter 53: “Submerged Lands Rules”.

“B. General Terms and Conditions

1. Right, Title or Interest in Adjacent Land

a. An applicant for a lease or easement must demonstrate sufficient right, title or interest in the upland property adjacent to the littoral zone in which the lease or easement is sought as follows:

(1) When the applicant owns the property, a copy of the deed(s) to the property shall be supplied.

(2) When the applicant has a lease on the property, a copy of the lease shall be supplied. The lease shall be of sufficient duration and other terms, as determined by the Bureau, to permit construction and reasonable use of the facility.”

The Maine Rules on Clean Water Act discharge permits is found at Chapter 2 of the Department of Environmental protection Rules

The Department of Environmental Protection Rules, Chapter 2, Section 11, subsection B, provides: “The Determination that an application is accepted as complete for processing is based on staff’s determination that...sufficient title, right or interest has been demonstrated pursuant to Section 11 (D)...” Section 11 (D) provides:

Title, right or interest. Prior to acceptance of an application 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. An applicant must maintain sufficient title, right or interest throughout the entire application processing period.

Methods of proving title, right or interest include, but are not limited to, the following:

- (1) When the applicant owns the property, a copy of the deed(s) to the property must be supplied;
- (2) When the applicant has a lease or easement on the property, a copy of the lease or easement must be supplied. The lease or easement must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care, where required. If the project requires a submerged lands lease from the State, evidence must be supplied that the lease has been issued, or that an application is pending and likely to be approved.
- (3) When the applicant has an option to buy or lease the property, a copy of the option agreement must be supplied. The option agreement must be sufficient, as determined by the Department, to give rights to title, or a leasehold or easement of sufficient duration and terms to permit the proposed construction and use of the property including closure and post closure care, where required;

The 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. No fees will be refunded if an application is returned for lack of continued title, right or interest.

Argument as to Nordic's Right, Title or interest.

On the west: The Nordic facility. Nordic proposes to construct a facility to be located on land currently of the Belfast Water District located to the west of US Route 1 on the extreme southerly portion of the City of Belfast, Maine, immediately adjacent to the northerly bound of the Town of Northport, Maine. See map, Exhibit A attached hereto and made a part hereof. From that facility, three pipes, two 30" water intake pipes and

one 36” wastewater discharge pipes are proposed to be constructed in an easterly direction, under US Route 1, across private property, and into Belfast Bay.

First problem: US Route 1. The first obstacle for Nordic to reach the Bay is US Route 1. US Route 1 runs in a north/south direction forming a barrier between Nordic’s proposed facility and the Bay. To cross US Route 1 with three pipes, Nordic must file an “Application for Private Facility Exception License” from the State of Maine Department of Transportation. To the date hereof, there is no evidence that Nordic has even applied, much less been awarded a license. Without that license, Nordic must confine its activities to the west side of US Route 1 and can never reach the Bay which is, of course, on the east side of US Route 1. Because Nordic has no license to cross US Route 1, it does not have “Right, Title or Interest” in the land from its proposed facility to the Bay and both Nordic’s application for a Submerged Lands Lease and its application for a discharge permit must fail as legally insufficient.

Second Problem: Nordic’s lease with Richard and Janet Eckrote. Nordic entered into an “Easement Purchase and Sale Agreement” with the Eckrotes on August 6, 2018. That agreement purports to convey to Nordic from the Eckrotes a permanent easement to a strip of land running from US Route 1 to Belfast Bay. That strip of land measures 40’ in width for construction purposes and is therefore a temporary easement, and 25’ for the permanent location of the pipes. That easement is shown on a map or plan attached to the Agreement, (see Exhibit B attached hereto and made a part hereof) but the Agreement provides that final adjustments as to location are possible, except that the easement must remain “south of the old barn and the existing driveway entrance.” There are at least four deficiencies with that easement location, no matter how adjusted.

The first deficiency is that it violates the zoning regulations of the City of Belfast, is therefore illegal, and thus cannot be used for the pipelines. The Belfast Zoning Regulations, at Section 102-684, require a minimum sideline setback or buffer of 50’ (see Exhibit C attached hereto and made a part hereto). The entire east end of the easement, no matter how the configuration is adjusted, is in the sideline setback and therefore cannot be used. Therefore, Nordic has no lawful easement for its pipelines across the Eckrote property.

The second deficiency is that even if the easement were re-negotiated to a different location on the Eckrote land, a location that did not violate the sideline setback regulations, the pipeline easement is still violative of the Belfast Zoning Regulations. The pipeline is an “accessory structure.” It is not a primary structure. The primary structure is the proposed building on the land of the Belfast Water Bureau, west of US Route 1. The accessory structure on the Eckrote property is not accessory to any structure on the Eckrote lot. Therefore, use of the easement for the pipeline accessory to a primary use on a different lot. That accessory use is not permitted and is thus illegal and again deprives Nordic of a right to use the Eckrote land for its pipeline. Further, these pipes are accessory to an industrial use which is not authorized within the Res II Zoning area. Although the amended ordinances authorize intake and outfall pipes in the Res II zone, these pipes must be judged by the use to which they are accessory - and that industrial use is not permitted in the Res II Zone.

The third deficiency is that much of the easement area is wetlands.¹ Quite a bit of the wetlands areas are currently flagged in the field so they are obvious to the casual observer. The Maine wetlands law provides that Nordic must obtain a permit to destroy wetlands per DEP Rules, Chapter 310. In addition to the flagged wetlands on site, the easement runs to the Bay and thus runs into and through a coastal wetland. The first 75’ of wetland running upgradient from the bay is considered “Adjacent to a Protected Resource” and is afforded special protection. Since Nordic has not filed to obtain any wetlands permits at all, or prove its exemption

¹ Per DCF Rules, Chapter 310, Preamble: The legislature has found that the State’s freshwater wetlands, great ponds, coastal wetlands, rivers, stream, and brooks are resources of state significance, that these resources have great scenic beauty and unique characteristics, unsurpassed recreational, cultural, historical, and environmental value of present and future benefit to the citizens of the State, and that uses are causing the rapid degradation and, in some cases, the destruction of these critical resources, producing significant adverse economic and environmental impacts and threatening the health, safety and general welfare of citizens of the State. The Legislature has also found that the cumulative effect of frequent minor alterations and occasional major alterations of these resources poses a substantial threat to the environment and economy of the State and its quality of life. The terms “wetland”, “wetlands”, “waterbody”, and “waterbodies” are used interchangeably and collectively in this rule to refer to freshwater wetlands, great ponds, rivers, streams, brooks, coastal wetlands, and the areas adjacent to them.

from the regulatory requirements, its proposed disturbance of the wetlands without a permit is illegal again depriving Nordic of any right to use the Eckrote easement for its pipeline.

The fourth deficiency is that the easement only extends to the high-water line of the Eckrote property. See Exhibit A. Use of this easement would only allow Nordic to reach the high tide line and would not grant to Nordic any access to the intertidal zone and Penobscot Bay.

Nordic has no right to use the Eckrote easement for its pipeline. Even if Nordic had the right to cross US Route 1, which it lacks, gaining access to the Eckrote land and the easement acquired on that land by Nordic provides Nordic with no right to use that easement for the pipeline. Beyond that, the purported easement does not reach Penobscot Bay and is therefore useless for Nordic's pipeline.

Third Problem: The intertidal zone and littoral zone rights of others beyond the easement. As it proceeds from US Route 1 to the termini of the pipes, Nordic must be concerned about three categories of land: the upland, the intertidal zone and the littoral zone. The upland area is the dry land for which the owner typically possesses title in "fee simple absolute" or clear title vesting solely in the owner. The intertidal zone is the land between the mean high tide line and the mean low tide line. That land is owned similarly to the upland area except that in the intertidal zone the public has the right to trespass for purposes of "fishing, fowling or navigation." Below the mean low tide line and extending out 1000 feet lies the littoral zone associated with each upland property. The side lines of the littoral zone associated with each upland property are determined by drawing a line between the two points at which the upland parcel meets the mean high tide line (the "base line") and extending sidelines perpendicular to the base line to a point 1000' beyond the mean high tide line. See Department of Agriculture, Conservation and Forestry Rules Chapter 53. In that littoral zone the State of Maine holds the submerged land in a trust for the people of Maine. This gives rise to the process by which one applies to the State for a lease of the aforementioned public lands. Assuming, *arguendo*, the upland easement deficiencies discussed did not exist, Nordic's "Option 2" pipeline route requires easements and/or non-objection letters from many property owners. Although impossible to see from the "Option 2" map prepared by Nordic and widely circulated, which shows only the

properties in Belfast, the pipe location violates the property rights and trespasses on property owned by people in Northport. As the Belfast and Northport intertidal and littoral property lines extend oceanward, they are perpendicular, intersecting and overlapping, and thus their attendant rights are in conflict. This is not shown on Nordic's "Option 2" map for reasons that seem clear. The conflicting property rights would have been revealed and Nordic's lack of Right, Title or Interest would be clear. Two surveys exist that doubtless show the Northport properties and thus show the conflicting interest and trespass contemplated by the pipeline shown on "Option 2." Those two surveys are referenced on the "Option 2" map but Nordic will not allow the surveyors to release those surveys. Various citizens, including people in Northport, have requested that DEP and the Department of Agriculture, Conservation and Forestry require Nordic to release the surveys, or file them with the agencies where under Freedom of information, citizens could pay the requisite fee and obtain copies. Nordic refuses.

By the use of private surveys, tax maps, overflights, GPS data and other information, Northport citizens have created a map showing Nordic's trespass on the intertidal zone of some landowners and the use of the littoral zone of others, all without any attempt to seek permission. The lack of easements, titles, or permission of any sort from property owners makes the section of the pipeline plan, "Option 2," illegal as well. See map, Exhibit D, attached hereto and made a part hereof.

Remedy: Both the Department of Agriculture, Conservation and Forestry and the DEP have created a process, a substantial component of which is a finding that an application is "complete for review." That finding triggers the next steps in the administrative review process. That finding requires the staff to conclude that the applicant has proper "Right, Title or Interest" in the subject property and project. In the case of the Department of Agriculture, Conservation, and Forestry, there is no direct penalty for misleading the agency about having proper "Right, Title and Interest", but any lease so obtained is revocable by the Department. In the case of DEP, the Rule, Chapter 2 Section 11 (D) provides that: "The 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.”

Any finding of “completeness” of the Nordic application either for a Submerged Lands Lease or for an MPDES permit is legally deficient and cannot stand. This, then, is to move and request that the Department of Agriculture, Conservation and Forestry and the Department of Environmental Protection follow the law and reverse their respective findings that the Nordic applications are complete for processing, and return the applications to the applicant reserving for the applicant an opportunity to re-apply should it ever acquire proper right title or interest as required by law.

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EXHIBITS



- ... A land based agriculture operation may discharge wastewater to and use water from a spring or fresh water body.
- (1) Research laboratory.
 - (2) Professional office.
 - (3) Storage facility/warehouse.
 - (4) Docks, floos, and similar uses that occur below annual tide.
 - (5) Hydropower generation.
 - (6) Significant groundwater well.
 - (7) Significant water intake or significant water discharge/effluent pipe.
 - (8) Accessory nonresidential structures that are 500 square feet or greater in size and accessory nonresidential uses (as a permitted use or nonconforming use of record).
 - (9) South telecommunications facilities.

Excluded
C

High

Sec. 102-683. Prohibited uses.

Only those uses specifically listed as permitted uses requiring Code Enforcement Officer review or permitted uses requiring Planning Board review are allowed within the Route One South Business Park District. All other uses are prohibited.

Sec. 102-684. Dimensional standards for nonresidential uses and nonresidential structures located in the Route One South Business Park District.

(a) **Minimum lot size and minimum lot frontage requirements for nonresidential uses.**

A lot (property) that is occupied by a nonresidential use shall be a minimum of 87,120 net square feet (2 net acres) in size and shall have a minimum of 250 linear feet of road frontage, if the lot has frontage on a road. This lot size requirement applies regardless if the lot is connected to public sewer or uses a subsurface system for wastewater disposal.

(b) **Minimum structure setback requirements for nonresidential structures.**

- (1) The following minimum setback requirements shall apply to nonresidential structures and accessory structures to said nonresidential structures that are located on a lot (property) that does not have road frontage on Perkins Road:
- (ALSO REFERENCE OPTION B.I, PLANNING BOARD RECOMMENDATION)
- Front - 50 feet
 - Side - 50 feet
 - Rear - 50 feet

All structure setbacks shall be measured from the respective property lines. If a lot does not have frontage on a road, the front setback requirement shall not apply and all structures shall comply with the side and rear setback requirements.

