

STATE OF MAINE
WALDO, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-2023-009

JEFFREY R. MABEE and JUDITH B.)
GRACE, THE MAINE LOBSTERING)
UNIOIN, WAYNE CANNING and)
DAVID BLACK, and FRIENDS OF THE)
HARRIET L. HARTLEY)
CONSERVATION AREA,)

Petitioners,)

v.)

BOARD OF ENVIRONMENTAL)
PROTECTION,)

Respondent,)

NORDIC AQUAFARMS INC.,)

Permit Applicant/)
Party-In-Interest,)

UPSTREAM WATCH, THE FISH ARE)
OKAY, ELEANOR DANIELS and)
DONNA BRODERICK, NORTHPORT)
VILLAGE CORPORATION, LAWRENCE)
REICHARD, GULF OF MAINE)
RESEARCH INSTITUTE, and)
UNIVERSITY OF NEW ENGLAND,)

Parties-In-Interest.)

UPSTREAM WATCH’S OBJECTION TO
BOARD OF ENVIRONMENTAL
PROTECTION’S MOTION FOR STAY

INTRODUCTION

On December 27, 2023, the Board of Environmental Protection, by and through the Office of the Attorney General (“Board”), filed its Motion to Stay this Rule 80C appeal on the basis that: (i) the Land Permit and the Air Permit have been suspended by the Commissioner of the Department of Environmental Protection (“DEP”), (ii) Nordic’s project and its issued permits/licenses (collectively “Permits”) may ultimately need to be amended, (iii) Nordic does

not have a submerged lands lease from the Bureau of Public Lands (“BPL”), and (iv) Nordic’s Water Permit expires in November of 2025; and, given these many considerations and to conserve the Court’s resources, the appeals before the Court should be stayed. With its motion, the Board accurately identifies some of the many problems with the Nordic Permits, but the Board fails to identify the root cause and the appropriate judicial response.

The root cause of all the problems identified by the Board is that Nordic lacks title, right, and interest (“TRI”) in the intertidal land needed for Nordic’s discharge and intake pipes. Without access through the intertidal land, Nordic’s project cannot proceed. Nordic has no prospect of ever obtaining TRI because the intertidal land is subject to a conservation easement that prohibits the laying of Nordic’s pipes, and the land on which Nordic proposes to lay its pipes is subject to a residential use only restriction.

The appropriate response to Nordic’s lack of TRI is not to stay and defer action, resulting in prolonged litigation that is pending on multiple fronts/venues. The Law Court already issued the appropriate judicial response with its remand to the Board for the Board to determine whether the Permits are still viable. The Board now wants to insulate from review indefinitely both its initial permitting decision and the Board’s refusal to address whether the Permits are still viable.

A stay here would be contrary to the mandate of Rule 1 which is to “secure the just, speedy, and inexpensive determination of every action.” More delay to secure judicial review of the Board’s permitting decisions that the Board left on remand undisturbed, with briefs largely already written, and with a record fully assembled, is unwarranted. The Board had the opportunity to render the Permits void and refused to do so, even though it is beyond dispute that

that the Nordic project as permitted can never be built given the lack of TRI. The Motion to Stay should be denied.

A. This Rule 80C Appeal is Before the Superior Court Due to the Law Court's Remand Which Should be Addressed at This Time with a Revocation of the Nordic Permits.

This case involves an appeal of the Board's response to a remand from the Maine Supreme Judicial Court, acting as the Law Court, Docket No. BCD-2022-48¹, and from the Maine Superior Court, Business & Consumer Court, Docket No. BCD-APP-2021-009², for the Board to "determine the impact, if any, of the Law Court's decision in *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79 ["*Mabee*"], on the BEP's approval of Nordic Aquafarms Inc.'s ["Nordic"] permit applications."³

In *Mabee* decided on February 16, 2023, the Law Court opined that the Eckrotes' upland is burdened by a valid restriction against any non-residential use. *Id.* ¶¶ 53, 56-58. That restriction precludes installation of industrial pipes. That was clear from the land records since

¹ Order of Remand (May 10, 2023), *reconsideration denied*, Order Denying [Board of Environmental Protection] Motion for Reconsideration (June 29, 2023). For the convenience of the court, true copies are attached hereto as Exhibit 1.

² Per the Law Court,

When, as here, it is unclear whether an approval challenged on appeal would have been issued given intervening circumstances, the appropriate response is to remand the matter to the agency that issued the approval to make that determination. *Cf. Hannum v. Board of Environmental Protection*, 2003 ME 123, ¶17 (remanding to the BEP where the Court could not ascertain from the BEP decision whether the BEP would have reached a different conclusion in the absence of a finding that the Court found unsupported by evidence in the record)... Upon the issuance of the agencies' determinations on remand regarding the viability of the approvals, any party is free to raise in a new appeal any argument raised previously and any new argument arising from the agency proceedings on remand.

Law Court Order of Remand at 3-4 (May 10, 2023).

³ *Mabee v. Bd. Of Environmental Protection*, No. BCD-APP-2021-009, Order of Remand at 1-2 (Me. B.C.D. May 15, 2023).

1946. Because of that restriction Nordic could not install its industrial pipes through the Eckrotes' land from Route 1 to the high-water mark of the Penobscot Bay.

In addition, the Law Court opined that the Eckrotes never owned any intertidal land between the Eckrotes' upland and Penobscot Bay. *Id.* ¶¶ 10, 29-45, 60. 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 Eckrotes' upland and into Penobscot Bay.

In the bright light of *Mabee*, Upstream Watch argued on remand to the Board that (i) Nordic failed to demonstrate that it had title, right or interest ("TRI") to the land needed to execute its proposed development, (ii) Nordic's application should have been returned to it, and (iii) the Permits should not have been granted but instead revoked. The Board, however, has elected to keep the failed Nordic project on life-support by suspending, and not revoking, the permits for which Nordic fails to demonstrate TRI.

Maine law requires that Nordic maintain TRI throughout the appeal period that followed the issuance of the Nordic Permits. The application processing period does not end when the permit is approved, and an appeal is filed. In *Madore v. Maine Land Use Regulation Com'n*, 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.*" 1998 ME 178, ¶ 17, 715 A.2d 157 (emphasis supplied). Given that the Law Court has determined that Nordic lacks TRI in the intertidal land, Nordic's permits are clearly invalid, *as a matter of law*.

A board has no authority to adjudicate an application when not supported by TRI. *See Murray v. Inhabitants of Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) ("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.”); *see also Madore v. Maine Land Use Regulation Com’n*, 1998 ME 178, ¶¶ 9-14, 715 A.2d 157; *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345, 348 (Me. 1995); *Rancourt v. Town of Glenburn*, 635 A.2d 964, 965-66 (Me. 1993); *Walsh v. City of Brewer*, 315 A.2d 200, 205-207 (Me. 1974).

There is no dispute that in the licensing proceeding part of the property Nordic proposed to use included certain intertidal land to lay its industrial pipes. Nordic sought to demonstrate to the Board that Nordic had sufficient TRI to that land based on an option to enter into easement agreement with the Eckrotes, who claimed to be fee owners of that land. Obviously, the viability of the option depended on whether the Eckrotes had any rights to convey, for if they did not, then the option to obtain the easement was a sham. And if a sham, Nordic had no basis to apply for the permits sought, and the DEP had no basis to process the application, issue any approval or any permits.

During the adjudicatory process, the Board refused to hear evidence that the option to obtain the easement was a sham. Despite compelling evidence offered,⁴ the Board accepted its lawyer’s legal advice and the Board refused to look beyond the four corners of the TRI documentation presented by the applicant, the option to obtain an easement. The Board also refused to follow the Law Court’s decision in *Tomasino v. Town of Casco*, 2020 ME 96, 237 A.3d 175, that instructed administrative agencies like the Board that when questions are raised whether the proffered TRI actually allows the applicant to make use of the property in the manner allowed if they were granted a permit to do so, and rights have not been factually

⁴ As noted in *Mabee*, three surveyors told Nordic that the Eckrotes did not own the intertidal land. *Mabee*, 2023 ME 15, ¶ 44 n.9, 290 A.3d 79.

determined by a court with jurisdiction to do so, then the permitting process should not proceed until a court declaration issued. *Id.* ¶¶ 7-15. Despite knowing a quiet title action was pending, the Board ignored *Tomasino* and proceeded to act on the applications and being well aware that the rug could be pulled away from Nordic at any time through an adverse decision in the quiet title action and that is what happened.

To compound matters, on remand, the Board refused to address whether the Permits remain viable, under the mistaken view that the adjudicatory process had ended and therefore the Board had no basis to revisit its decision. The Board ignored that due to the appeal and the remand Order the adjudicatory process was not final. In fact, on remand, the Board reopened the record.

The administrative record is largely assembled, the briefs are mostly written, and it is time for judicial review of both the initial permitting decisions and the Board's decision on remand that was premised on the faulty assumption that the licensing proceeding had ended.

The types of relief the Court can grant under the Administrative Procedures Act, 5 M.R.S. § 11007(4)(C) are:

Reverse or modify the decision if the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by bias or error of law;
- (5) Unsupported by substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion.

Among the relief Upstream Watch will be requesting is that this Court reverse the Board's decision on remand whereby the Board refused to consider whether the Permits remain viable, and to remand to the Board with instructions to rescind the Permits, given in light of the

Mabee decision, the court can take judicial notice what is plain as day, Nordic does not and never had TRI.

CONCLUSION

For all the above reasons, Upstream Watch respectfully requests that the Board's Motion to Stay be Denied.

Dated: January 4, 2024

/s/David B. Losee

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Dated: January 4, 2024

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