

**STATE OF MAINE**  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF

NORDIC AQUAFARMS INC.	)	
	)	
A-1146-71-A-N	)	
L- 28319-26-A-N	)	NORDIC AQUAFARMS INC.
L-28319-TG-B-N	)	RESPONSE TO SUSPENSION
L-28319-4-E-C-N	)	REQUEST AND SEPARATE
L-28319-L6-D-N	)	PETITION TO REVOKE OF
L-28319-TW-E-N	)	THE FRIENDS OF THE HARRIET
W-009200-6F-A-N	)	L. HARTLEY CONSERVATION
	)	AREA AND INTERVENORS
	)	MABEE AND GRACE
	)	
	)	

NORDIC AQUAFARMS INC. (“Nordic”), licensee in the above captioned matter, supports suspension of the above captioned permits (“Permits”) pursuant to 38 M.R.S. § 342 (11-B)(E)-(F) and Chapter 2 of the Department of Environmental Protection’s (“Department”) Rules Sections 25 and 27 because of a change in circumstances.<sup>1</sup> While the Reply to Nordic’s Response to Upstream Watch’s Petition to Revoke or Suspend and Suspension Request and Separate Petition to Revoke Submitted by the Friends of the Harriet L. Hartley Conservation Area and Intervenors Mabee and Grace (Friends/Mabee/Grace Petition) is improper, Nordic consents to its incorporation as support for Commissioner suspension of the Permits consistent with Nordic’s Response to Upstream. The Friends/Mabee/Grace Petition contains no evidence that Nordic misrepresented or failed to fully disclose all relevant facts nor that the changed circumstances (litigation over property rights)

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<sup>1</sup> Nordic incorporates its April 7, 2023 Response to Upstream Watch Petition to Suspend or Revoke and Suspension Request (“Nordic Response to Upstream”) and its email to the associated service list dated April 12, 2023 into this response.

requires revocation of the Permits. Thus, Friends/Mabee/Grace fail to present the Commissioner with any grounds for exercising her discretionary enforcement action to revoke the Permits.<sup>2</sup> Instead, these facts, as in other recent cases before the Commissioner, constitute changed circumstances supporting suspension of the Permits such that all deadlines, terms and conditions are tolled pursuant to 38 M.R.S. § 342 (11-B) (E)-(F) and 06-096 C.M.R. ch. 2 § 27 (E)-(F) as discussed in Nordic’s Response to Upstream. Nordic waives its right to a hearing regarding any such suspension and looks forward to a prompt Commissioner decision.<sup>3</sup>

**I. Court Cases Declaring the Property Rights Underlying the Evidence of RTI Considered by the Department During the Permits Processing Period do not Retroactively Transform that Evidence into Misrepresentations or Failure to Disclose Relevant Facts Requiring Revocation of the Permits.**

The Department properly found that Nordic established administrative standing to apply for and receive the Permits issued by the Board of Environmental Protection in November of 2020 based on Nordic’s submission of documentation of sufficient connection to the land on which the project is located to allow construction of the project it applied to the Department to approve (i.e the right, title and interest (“RTI”) component of administrative standing). 06-096 C.M.R. ch. 2 § 11(D); *see also Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) (administrative standing “is intended to prevent an applicant from wasting an administrative agency’s time by applying for a permit that he would have no legally protected right to use.”). The Department’s administrative rules specify what is a sufficient connection to the land to constitute RTI. *Id.* The Department’s rules require only that the Department look at the face of documents submitted with an application to ascertain whether it includes sufficient RTI to accept an application as complete

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<sup>2</sup> The Commissioner is authorized by 38 M.R.S. § 342 (11-B) (E)-(F) to suspend and/or temporarily or permanently modify the Permits to address changed circumstances. Any such decision is within the Commissioner’s sole discretion. 06-096 C.M.R. ch. 2 § 25 (F).

<sup>3</sup> On April 12, 2023 Mr. Lannan circulated two emails commenting on the Upstream Petition and the Friends/Mabee/Grace Petition. Department Rules do not allow such filings. 06-096 C.M.R. ch. 2 § 25(B). Nordic respectfully requests that neither be considered.

for processing. *Id.* Further, Department Rules only require maintenance of evidence of RTI for the permit processing period. *Id.*; *see also* March 7, 2023 Letter from AAG Bensinger to the Law Court in Upstream’s Appeal of the Permits at 1 (“This period ends when the permit is issued.”).

While project opponents and Nordic may disagree (and did, *ad infinitum*) about whether Nordic’s RTI submissions document a valid property interest, the Department need not, should not, and cannot, decide that question. The only question the Department properly could, and did, decide, is that Nordic’s submissions constituted substantial evidence of RTI compliant with Chapter 2, Section 11 of the Department’s Rules. Friends/Mabee/Grace can, and are, appealing the Department’s decision on RTI pursuant to Maine Rule of Civil Procedure 80C. Likewise, Friends/Mabee/Grace can, and did, file suit to obtain a court decision on actual property ownership. Neither of these lawsuit decides the other. Put simply, just like a Law Court decision upholding the Department’s acceptance of RTI would not change who actually owned the property at issue, its decision on quiet title does not retroactively mean that the Department erred in finding that Nordic submitted substantial evidence of RTI. For these reasons, an applicant is not required to submit the full chain of title to a property in order to establish RTI- they need only comply with the Department’s application requirements.

That said, in this case, as Friends/Mabee/Grace is well aware, the administrative record includes the full chain of title for the properties on the water side of U.S. Route One (and the Department devoted hours to hearing argument and reviewing thousands of pages of documentation regarding the use restriction on the former Eckrote property), the Deed of Vacation from the Maine Department of Transportation (“MDOT”) to the City of Belfast (“City”) for any use restriction included in the original deed from MDOT to the City, and a copy of the pending Bureau of Parks and Lands application for a submerged lands lease. Thus, the documents listed as Nordic’s failure

to disclose or misrepresentation supporting revocation in the Friends/Mabee/Grace Petition, were considered by the Department in issuance of the Permits.

The Law Court decision, in February of 2023, that the Eckrotes did not own the intertidal land that was the subject of Nordic's documentation of RTI, *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, \_\_\_ A.3d \_\_\_, came after issuance of the Permits- i.e. after the conclusion of the processing period within which Chapter 2, Section 11 of the Department's Rules requires that an applicant maintain before the Department substantial evidence of RTI to support administrative standing. 06-096 C.M.R. ch. 2 § 11(D); *see also* March 7, 2023 Letter from AAG Bensinger to the Law Court in Upstream's Appeal of the Permits at 1 ("This period ends when the permit is issued.").

Before this decision, the Superior Court, looking at the merits of all the RTI documents (and many more) presented to the Department, found the opposite. Put simply, the courts deciding the property ownership issue took more than two years after issuance of the Permits to decide actual ownership- and they disagreed. Because these decisions occurred after issuance of the Permits and because the administrative record contains each and every document listed in the Friends/Mabee/Grace Petition that was in existence during the processing period for the Permits (even though unnecessary to support a Department RTI determination), these documents, or any changed meaning of them flowing from recent court decisions, do not constitute misrepresentations or failure to provide relevant information requiring revocation of the Permits.

## **II. Changed Circumstances do Not Warrant Revocation but do Warrant Suspension.**

Since issuance of the Permits, as mentioned above and in the Nordic Response to Upstream, and prior to either of the judicial determinations of property rights relevant to the agreement with the Eckrotes that Nordic submitted as part of its evidence of RTI supporting administrative standing for the Department to review applications for the Permits, the City acquired the oceanfront upland

across the street from the Nordic project and other public lands around the upper and lower reservoirs that the City obtained for a public park- which upland was formerly referred to as the Eckrote parcel. (Exhibit A to the Nordic Response to Upstream) The City, in order to obtain the public benefits associated with an interconnected trail system and acres of land from the upper reservoir to the ocean as well as the benefits to the Belfast Water District and the City from the economic development and other benefits associated with the Nordic project, exercised its municipal eminent domain authority by taking the Mabee/Grace intertidal, the conservation easement associated with the portion of the Mabee/Grace intertidal adjacent to City owned land, and any use restriction impacting these lands.<sup>4</sup> (Exhibit B to the City Response to Upstream) The City granted Nordic (and recorded) a permanent easement and a construction easement for the project. (Exhibit C to the Nordic Response to Upstream) Mabee/Grace appealed the City's exercise of eminent domain to Superior Court, which dismissed the majority of claims and stayed certain other claims pending Law Court review of its prior title decision in Nordic's favor. (Exhibit D to the Nordic Response to Upstream) Following the Law Court's recent declaration of the Mabee/Grace property rights, the Superior Court restarted action on the Mabee/Grace challenge to the City's exercise of eminent domain. (*Id.*) In other words, while the Permits fully evaluate and assure compliance with environmental law (subject, of course, to the still-pending appeals), final judicial resolution of the relevant property rights remains ongoing. A final decision by Maine's highest court on the City's eminent domain action as to the intertidal,

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<sup>4</sup> Title to property taken through eminent domain passes to the municipality immediately upon service of the order of condemnation and check or upon recordation of appropriate documents, whichever comes first. *Luce v. City of Portland*, 556 A.2d 656, 657–58 (Me. 1989). In circumstances where a conservation easement cannot be amended or terminated without a court order, *see* 33 M.R.S. § 477-A(2)(B), the property interest of the holder still transfers by eminent domain to the municipality, *see* 33 M.R.S. § 476(2)(A) (a municipality is a qualified “Holder” of a conservation easement), even where the fee ownership also transfers to the municipality by eminent domain, *see* 33 M.R.S. § 479(10) (allowing the holder of a conservation easement to also be the owner of the fee, without merger of the easement and the fee). In the pending eminent domain proceeding, there was no stay or preliminary injunction of the title transfer to the City—which transfer occurred as a matter of law. Accordingly, title lies with the City (just as the City is the holder of the conservation easement burdening the relevant intertidal zone) unless or until their eminent domain action is overturned.

use restrictions, and conservation easement, as well as on a new declaratory judgment action by Mabbe/Grace (Exhibit E to Nordic Response to Upstream) (“Final Ownership Decision Date”) is likely at least two years away.

Because the Law Court hasn’t yet finally declared property rights, and because project opponents continue to file new lawsuits alleging property use issues, changed circumstances warrant the suspension of permits and tolling of all the deadlines, terms and conditions contained therein, until those judicial proceedings come to an end. This is the very purpose of suspension proceedings- to pause action on the Permits until there is a final decision on the underlying property rights which the Department cannot itself resolve and which court actions cannot themselves effectuate.

None of these changed circumstances constitute misrepresentations or withholding of relevant facts or warrant revocation. Indeed, given the City’s exercise of eminent domain and the associated automatic transfer of title and the easement the City issued Nordic, Nordic could, in theory, commence project construction like Central Maine Power recently did in the face of similar legal challenges. Nordic is not following that path. Instead, Nordic is asking that the Department suspend the Permits as discussed in the Nordic Response to Upstream, in order to allow for the Permits and ongoing property litigation to follow similar trajectories and avoid the environmental impacts associated with project construction under the Permits which could be impacted by the ongoing property litigation.

And yet, the Permits require construction within various deadlines, and compliance with various terms and conditions if the Commissioner does not act to suspend them, and toll the deadlines, terms and conditions contained therein, to address the current changed circumstances. In order to begin construction, Nordic must comply with numerous submission and condition compliance requirements which the Department must review and process. Moreover, as the plethora

of appeals to-date establishes (including an appeal of compliance with a standard air license condition allowing for extension), construction prior to the Final Ownership Decision Date would doubtless result in numerous additional challenges both at the Department level and in court. None of that is in the interest of the parties, or of administrative or judicial economy.

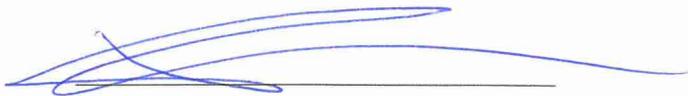
Accordingly, although Nordic opposes revocation of the Permits, Nordic agrees that suspension of all the above captioned Permits is appropriate such that all deadlines, terms and conditions therein are tolled pursuant to 38 M.R.S. § 342 (11-B) (E)-(F) and 06-096 CMR ch. 2 §27(F).

### **CONCLUSION**

Nordic supports suspension of the Permits and tolling of all associated deadlines, terms and conditions of those Permits. Furthermore, because dissolution of any suspension order on the Final Ownership Date may create confusion regarding the time remaining for compliance with Permit conditions, Nordic asks that the suspension order specify that if the City receives favorable decisions on the Final Ownership Decision Date, that all deadlines, terms and conditions in the Permits be calculated as if the Permits issued as of the Final Ownership Decision Date. Nordic also respectfully requests that the suspension order specify, for the sake of clarity, that the Permits remain transferrable during the suspension period and that the Commissioner may consider whether future circumstances warrant dissolution of the suspension order prior to the Final Ownership Decision Date. Nordic waives its right to a hearing on any such suspension of the Permits. Friends/Mabee/Grace fail to present any misrepresentations or failure to disclose fully all relevant facts or changed circumstances requiring revocation of the Permits. Consequently, the Commissioner cannot revoke the Permits.

Dated: April 17, 2023

Respectfully submitted,



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