IN THE MATTER OF NORDIC AQUAFARMS INC.

NORDIC AQUAFARMS, INC.	)	APPLICATIONS FOR AIR EMISSION,
Belfast, Northport **and Searsport**	)	SITE LOCATION OF DEVELOPMENT,
Waldo County, Maine	)	NATURAL RESOURCES PROTECTION ACT, and
	)	MAINE POLLUTANT DISCHARGE ELIMINATION
A-1146-71-A-N	)	SYSTEM (MEPDES)/WASTE DISCHARGE
L-28319-26-A-N	)	LICENSES
L-28319-TG-B-N	)	
L-28319-4E-C-N	)	**BRIEF ON REMAND SUBMITTED BY**
L-28319-L6-D-N	)	**MGF APPELLANTS**
L-28319-TW-E-N	)	
W-009200-6F-A-N	)	Dated: August 21, 2023

This matter is before the Board of Environmental Protection ("Board" or "BEP") on remand from the Law Court of the 80C appeal in BCD-22-48 of the Board's 11-19-2020 Orders. The Law Court's purpose in remanding the 2020 Orders to the Board, was to provide the Board with an opportunity to re-evaluate its earlier determinations regarding the sufficiency of Nordic's claims of title, right or interest ("TRI"), and reconsider the TRI issue with the benefit of judicial determinations regarding the disputed title claims and property rights. In effect, the Law Court's remand has turned the clock back to November 18, 2020, and asks the Board if it knew on 11-18-2020, what it knows now, would the Board have determined on 11-19-2020 that: (i) Nordic had demonstrated "sufficient TRI" in the disputed property to obtain permits and licenses from the Board; and (ii) Nordic could use and develop the impacted property in the manner the permits would allow. The answer to both questions must be yes to retain the permits and licenses. Here, the answer to both questions is no – as discussed in more detail below.

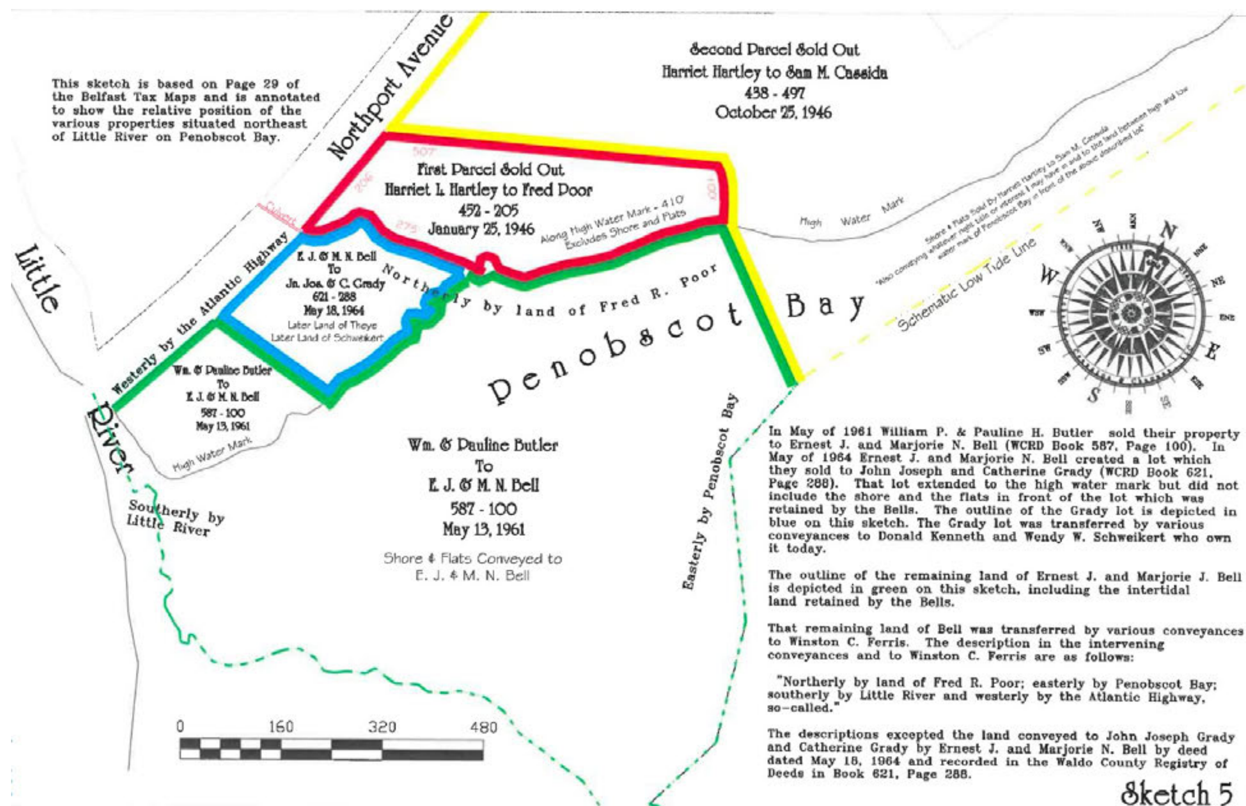
This Brief is submitted on behalf of the MGF Appellants,[1] who assert that the 2020 Orders should be vacated or revoked by the Board based on the judicial determinations made by the Law Court in *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, 290 A.3d 79 (hereinafter "*Mabee I*"). The determinations in *Mabee I* establish, as a matter of law, that Nordic cannot, did not, and *could*

[1] On remand, Jeffrey R. Mabee and Judith B. Grace (Mabee-Grace" or "Mabee and Grace") and Interested and Aggrieved party the Friends of the Harriet L. Hartley Conservation Area ("Friends) (collectively herein "MGF Appellants"), file their brief in support of vacating or revoking the Board's 11-19-2020 Orders granting Nordic Aquafarms Inc. ("Nordic") the above-referenced permits and licenses and returning Nordic's permit applications for lack of title, right or interest ("TRI") in the land proposed for use and development, pursuant to 06-096 C.M.R. ch. 2, § 11.D and 5 M.R.S. § 10004. MGF Appellants also join, adopt and incorporate the Lobstering Appellants' Brief referencing Chapter 2, § 27(B) as a basis for vacating the 2020 Orders on remand; and the Brief filed on 8-18-2023 by Appellant Upstream Watch ("Upstream").

never meet its burden to show "sufficient TRI" to use the property proposed for development in the manner the permits and licenses would allow. Thus, the applications should be "returned" to Nordic, as mandated by 06-096 C.M.R. ch. 2, § 11(D).[2] The Law Court's 2-16-2023 Decision in *Mabee I* determined, as a matter of law and fact, that:

A. "Mabee and Grace own the intertidal land abutting their own upland property [Lot 38] and the intertidal land abutting the upland properties of the Schweikerts, the Eckrotes, and Morgan [Belfast Tax Map 29, Lots 37, 36 and 35 respectively]. Mabee and Grace's property is outlined in the solid and dashed green lines in Figure 5." *Mabee I,* 2023 ME 15, ¶¶ 14, 17, Figure 5 (below).

FIGURE 5



B. Plaintiff Friends holds an "enforceable" Conservation Easement, created in April 2019 by Plaintiffs Mabee and Grace, on the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and 35 front (*Mabee I,* ¶¶ 59-61), depicted on Figure 5 above with a green hashed

[2] 06-096 C.M.R. ch. 2, § 11(D) states in relevant part that: "**Title, Right or Interest.** Prior to acceptance of an application as complete 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. ... 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."

or solid line below the high water mark of Penobscot Bay;

C. The "residential purposes only" servitude established in the 1946 deed from Harriet L. Hartley to Fred R. Poor ["1946 Hartley-to-Poor deed;" ; A.R. 0178, pp. 48-49], "benefiting the holder of the land now owned by Mabee and Grace, ***runs with the land*** ***conveyed to* [*Fred R.*] *Poor*** [indicated on Figure 5 by a red solid line, which now includes current Lot 36 and portions of Lot 35]***, binding Poor's successors***" (*Mabee I,* ¶ 58 and n. 13 (emphasis supplied));

D. Harriet L. Hartley did not convey any intertidal land to Fred R. Poor in the 1946 Hartley-to-Poor deed, and, therefore, the Eckrotes and Morgan, as successors of Poor never owned the intertidal land abutting their respective upland properties [Lots 36 and 35] (*Mabee I,* ¶¶ 10, 17, 25-45 and Figures 3 and 5);

E. "[O]nce it is understood that the Hartley-to-Poor deed did not convey the disputed intertidal land, under the relevant legal principles, the language in the [1950] Hartley-to-Butlers abutters' deed unambiguously conveyed the disputed [intertidal] land [adjacent to Lots 36 and 35] to Mabee and Grace's predecessors in interest." (*Mabee I,* ¶¶ 46-52).

F. As a matter of law, the "mouth" of a brook, stream and river "is a fixed point defined by the upland boundary, and the call does not shift with the tide," but is where "the banks cease to exist" and "cannot be located below the upland banks." (*Mabee I,* ¶¶ 34-35, n. 8); and

G. "Nordic's surveyor asserted at trial that the 'mouth of a brook' is 'basically where the flowing water body . . . enters the receiving water body,' and, therefore, the mouth of a brook moves with the ebb and flow of the tide. Applying this construction of the term to deed language is impractical in at least two respects. First, it is dependent on the presence of flowing water in the brook, which may not, in fact, be present. *See* 38 M.R.S. § 480-B(9) (listing the characteristics of a 'channel' within the definition of "brook"). Second, regardless of where the bodies of water meet, the iron bolt referenced in the [1946 Hartley-to-Poor] deed would not have moved with each ebb and flow of the tide. Although immaterial to our analysis because we find the deed language clear, Mabee and Grace's surveyor's definition of 'mouth of a brook' was similar to the statutory definition discussed above. He testified that there is a clear distinction between the mouth of the brook and the bay, and he located the mouth of the brook at the high-water mark." (*Mabee I,* 2023 ME 15, n. 8).

MEMORANDUM OF LAW AND ARGUMENT

In order to be eligible to apply for a permit, one must have the type of relationship to a site "that gives ... **a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license [sought]**." *Murray v. Town of Lincolnville,* 462 A.2d 40, 43 (Me.1983) (emphasis supplied). In *Tomasino v. Town of Casco*, 2020 ME 96, ¶¶ 14-15, 237 A.3d 175, 180–81, the Law Court reiterated its prior holdings in *Murray* and in *Rancourt v. Town of Glenburn*, 635 A.2d 964, 965 (Me. 1993), that: "***the applicant must demonstrate not just any right, title, or interest in the property but a right, title, or interest in the property that allows the property to be used in the manner for which the permit is sought*** . . .".

Nordic has ***never*** demonstrated that it had the requisite TRI in Lot 36 (formerly owned by the Eckrotes) and/or the intertidal land adjacent to Lot 36 that would allow it to use that property ***in the manner for which the BEP permits and licenses are sought***. [redacted] Accordingly, the Board should vacate or revoke the Orders entered on 11-19-2020 and return Nordic's applications pursuant to Chapter 2, §§ 11(D), 26 and § 27(B) and 5 M.R.S. § 10004(1).

A. The Eckrotes' Predecessors-in-Interest never received Title to the Intertidal Land on which Lot 36 Fronts and, thus, *could not grant Nordic* an Easement to Use the Intertidal Land on which Lot 36 Fronts

One can only convey, ***or grant an easement in***, land that he has received. *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 19 A. 915, 916 (1890). *See also, Gravison v. Fisher*, 2016 ME 35, ¶ 59, 134 A.3d 857, 875, as corrected (June 30, 2016), and *abrogated* (on other grounds) *by Dupuis v. Ellingwood,* 2017 ME 132, ¶ 59, 166 A.3d 112. Here, the ownership determinations made in *Mabee I* establish, as a matter of law, that the Eckrotes never had the legal capacity to grant Nordic an easement (or easement option) to use Belfast Tax Map 29, Lot 36 ("Lot 36") or the adjacent intertidal land, because: (i) neither the Eckrotes, nor their predecessors-in-interest back to 1946, were conveyed the intertidal land adjacent to Lot 36; and (ii) upland Lot 36 is burdened by a "residential purposes only" servitude that runs with the land and binds Poor's successors. Accordingly, the Board's 2020 TRI determinations were made based on ***errors of law*** and should be reversed by the Board on remand, and Nordic's applications returned pursuant to Chapter 2, § 11(D).

B. No Evidence in the Administrative Record Supports Nordic's claim of having "Sufficient" TRI to Obtain *or Retain* Permits and Licenses from the Board

The Board's 2020 Orders erroneously concluded that Nordic had demonstrated that it had "sufficient" TRI to obtain permits and licenses from the Board, based on ***errors of law*** relating to

the interpretation of the evidence submitted in the Record by Nordic to support its TRI claims. For example, the Board's Final Air License Order states in relevant part:

> The Board continues to concur with the Department's interpretation of Chapter 2's TRI provisions and its analysis with respect to the intertidal portion of the property proposed for use as set forth in the June 13, 2019 acceptance letter. . . . Pursuant to the Board's interpretation of these TRI provisions, *the Board finds that the applicant has made a sufficient showing of TRI* *to develop the property as proposed* *for the applications to be processed and decided*. As the Department found in its June 13, 2019 acceptance letter, *the deeds and other submissions, including Nordic's options to purchase, and the analysis of the chain of title remain unchanged and remain a sufficient showing for the Board to act on the applications*.

11-19-2020 Air License Order, pp. 3-4 (emphasis supplied).[3]

From October 2018 forward, the sole basis on which Nordic based it claims of "sufficient" TRI in its applications filed with the Department was (and still is) the 8-6-2018 Easement Option Agreement from the Eckrotes ("8-6-2018 EOA").[4]

However, by its own terms, that easement terminates at the high-water mark of Lot 36 and granted no right to use the adjacent intertidal land. *See*, 1-22-2019 Kavanah letter (A.R. 0095).

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[3] DEP Major Projects website for the Nordic project:
https://www.maine.gov/dep/ftp/projects/nordic/final-signed-orders/Air%20signed%20order%2011-19-20.pdf

[4] DEP Major Projects website for the Nordic project:
https://www maine.gov/dep/ftp/projects/nordic/applications/

Indeed, ***all*** of the Record evidence, *primarily submitted by Nordic itself,* demonstrated -- *as a matter of law and fact* -- that the Eckrotes had no TRI in the intertidal land on which Lot 36 fronts and, therefore, the Eckrotes had no legal ability to grant Nordic an easement in that intertidal land.[5] The Department (both the Commissioner *and* Board), in concluding to the contrary, erred *as a matter of law* – and improperly granted permits and licenses to Nordic in the absence of a justiciable issue or any competent Record evidence supporting those prior TRI determinations.

Nordic's evidence submitted on 6-10-2019 illustrates this point. On 6-10-2019, Nordic submitted all of the deeds in Mabee-Grace's and the Eckrotes' chains of title (A.R.0164; 0164a; 0178, pp. 5-30, 43-86), as well as two surveyors' plans and a surveyor's opinion (A.R.0178, pp. 3-4, 87-89) to bolster Nordic's TRI claims that the 8-6-2018 EOA (A.R.0906d) demonstrated Nordic had "*sufficient*" TRI to obtain permits and licenses authorizing it to bury three industrial pipes in the Eckrotes' upland lot (Lot 36) and the adjacent intertidal land.

Rather than demonstrating TRI, the deeds, surveys and plans submitted by Nordic to BEP and BPL showed that ***the Eckrotes owned no intertidal land and Lot 36 terminated at the high water mark of Penobscot Bay***. ***ALL of these surveys were all prepared by surveyors retained by the Eckrotes or Nordic*** (Gusta Ronson, P.L.S. (A.R. 0243, Ex. 3; 0935j), Clark Staples, P.L.S. (A.R. 0178, p. 4) and James Dorsky, P.L.S. (A.R. 0178, p. 3)). All of the survey plans submitted to BEP by Nordic, and the 5-16-2019 Surveyor's Opinion Letter from James Dorsky to then-President of Nordic Erik Heim (A.R. 0178, pp. 87-89; 0935q), concluded that the Eckrotes owned no intertidal land adjacent to their parcel.[6] Accordingly, the Board erred, as a matter of law, in simply ignoring the unambiguous conclusions of Nordic's own surveyors that the Eckrotes owned no intertidal land in which to grant an easement. *See, e.g. Mabee I,* n. 9.

Likewise, neither the 3-3-2019 Letter Agreement between Nordic and the Eckrotes (A.R.0906e) nor the 12-23-2019 Amendment of the 8-6-2018 EOA (A.R. 0517 & 0906h) amended the boundaries of the easement option depicted on Exhibit A of the 8-6-2018 EOA (A.R. 0906d & 0935d), nor represented or warranted that the Eckrotes owned the intertidal land. Instead, the second WHEREAS clause in the 12-23-2019 amendment plainly states:

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[5] *See also,* Nordic's concession that *Mabee I* established that the 8-6-2018 EOA never conferred TRI on Nordic to use Lot 36 or the adjacent interest land in the manner allowed by BEP's permits. 8-14-2023 Response, p. 7.

[6]

> WHEREAS, as specified in the March 3, 2019 Letter Agreement, any easement rights Seller grants with respect to the intertidal zone and U S Route 1 adjacent to their real property are *limited to whatever ownership rights we may have* in and to said areas, *if any*, and *no representation or warranty is made as to any such ownership rights*;

(emphasis supplied) (A.R. 0517, p. 3). Again, the Board and its counsel simply erred, *as a matter of law*, in ignoring the plain language in the 3-3-2019 Letter Agreement and 12-23-2019 amendment to the 8-6-2018 EOA, submitted to DEP-BEP by Nordic on 1-7-2020.

In sum, ***there was never any Record evidence to support Nordic's TRI claims or the Board's conclusion that Nordic had demonstrated "sufficient TRI" to present the Board with a justiciable issue and obtain permits and licenses from the Board***. In the absence of Nordic having demonstrated administrative standing and, thus, failing to present a justiciable issue for Board resolution, the Board improperly considered and ruled on substantive matters in granting the 2020 Orders. As a result, the 2020 Orders must be vacated or revoked by the Board and Nordic's applications returned, pursuant to 06-096 C.M.R. ch. 2, § 11(D).[7] See, Chapter 2, §§ 26 and 27.

C. Nordic Cannot Demonstrate "Sufficient TRI" now based on the City's 8-12-2021 Condemnation Order or the 9-3-2021 City-to-Nordic Easement

In an effort to preemptively nullify an adverse judicial determination in the title claims case and appeal -- holding that: (i) Mabee and Grace own, and Friends holds an enforceable Conservation Easement on, the intertidal land adjacent to Lot 36; and/or (ii) upland Lot 36 is burdened by the 1946 "residential purposes only" servitude that runs with the land and binds Poor's successors --

On 8-12-2021, the City entered a Condemnation Order purporting to "take": (i) Mabee-Grace's ownership interest in the intertidal land adjacent to Lot 36; (ii) Mabee-Grace's right to enforce the "residential purposes only" servitude on upland Lot 36; and (iii) Friends' Conservation Easement on the intertidal land adjacent to Lot 36. The City's 8-12-2021 Condemnation Order

[7] See, e.g. *Homeward Residential, Inc. v. Gregor,* 2015 ME 108, ¶24, 122 A.3d 947, 954-955 ("The court could not decide the merits of the case when the plaintiff lacked standing . . . Instead, the court could only dismiss the action. Because the court addressed the merits of the complaint for foreclosure in its judgment, we vacate the judgment in its entirety and remand for an entry of a dismissal without prejudice."). *See also*, Witham Family Ltd. P'ship, 2015 ME 12, ¶7, 110 A.3d 642 ("Courts can only decide cases before them that involve justiciable controversies."

is the subject of a pending 80B challenge with additional independent claims (BELSC-RE-2021-007). On 9-3-2021, the City also granted Nordic an easement to use Lot 36 and the adjacent intertidal land to bury its industrial pipes in Lot 36 and the adjacent intertidal land, as well as build an industrial pump house on Lot 36. The uses permitted by the 9-3-2021 City-to-Nordic easement are in direct contravention of both the 4-29-2019 Conservation Easement, that the Law Court determined was "enforceable" in *Mabee I*, and the "residential purposes only" servitude on upland Lot 36, that the Law Court determined in *Mabee I* ***runs with the land*** and ***is binding on successors-in-interest of Fred R. Poor*** (which would include the Eckrotes, Belfast and Nordic). *Mabee I,* ¶¶ 2, 58-61, n. 13.

Neither of these subsequent actions by the City and Nordic created a basis for Nordic to demonstrate TRI in Lot 36 or the adjacent intertidal land, because these actions have failed to vest Nordic with a legally cognizable right to use Lot 36 or the adjacent intertidal land in a manner that the BEP permits and licenses would allow.

1. *8-12-2021 Condemnation Order*

On 3-2-2022 the Waldo Superior Court, entered a Stipulated Judgment in *Mabee, et al. v. City of Belfast, et al.,* RE-2021-007 ("the eminent domain case"), that expressly states that ***the City's exercise of eminent domain did not amend or terminate the Conservation Easement*** on the intertidal land adjacent to Lot 36 (7-26-2023 Suspension Order, p. 2, ¶ 3). Thus, to the extent the 8-12-2021 Condemnation Order resulted in a transfer of Mabee-Grace's ownership interest in the portion of their intertidal land adjacent to Lot 36 that is within the municipal boundaries of the City of Belfast, the City (and/or Nordic) has taken that land ***subject to the prohibitions and protections in the still-enforceable Conservation Easement held by Friends***.

In addition, in *Mabee I*, the Law Court established a definition of the "mouth of a river" that rejected the definition employed by the City, and the City's and Nordic's Surveyor James Dorsky, P.L.S., in entering its Condemnation Order. Pursuant to the definition of "mouth of a river" established in *Mabee I,* the City erred in "taking" intertidal land outside its municipal boundaries. .

Maine law does not permit such extra-territorial takings.

Further, Nordic has sought and obtained a suspension of its permits based, in part, on the inevitable years of litigation that will occur before the Law Court determines whether the City's exercise of eminent domain was constitutionally or legally proper, including whether the City has taken land outside its municipal boundaries. Until a court of competent jurisdiction has made those determinations, Nordic cannot rely on the 8-12-2021 Condemnation Order as a basis for asserting that it currently has sufficient TRI. *See, e.g. Tomasino v. Town of Casco,* 2020 ME 96, ¶ 15, 237 A.3d 175, 181.

2. *9-3-2021 City-to-Nordic Easment*

Judicial determinations in *Mabee I* and the 3-2-2022 Stipulated Judgment have declared that the 2019 Conservation Easement is still enforceable and the 1946 "residential purposes only" servitude on Lot 36 is ***binding on Poor's successors*** – which include the City and Nordic. Thus, the City was without the legal capacity to grant Nordic an easement that authorizes uses of Lot 36 and the adjacent intertidal land that violate either the 2019 Conservation Easement on the intertidal land adjacent to Lot 36 or the "residential purposes only" servitude on upland Lot 36. Consequently, Nordic cannot demonstrate that the 9-3-2021 easement confers sufficient TRI to use the property for which Nordic has sought and obtained permits and licenses from BEP in 2020, in the manner allowed by the 2020 Orders. Accordingly, Nordic does not have, and cannot demonstrate, administrative standing to *retain* those 2020 permits and licenses based on the 9-3-2021 City-to-Nordic easement.[8]

CONCLUSION

Pursuant to *Mabee I,* Nordic has never had sufficient TRI in all land proposed for development and use to *obtain, maintain or retain* permits or licenses from the Board, pursuant to 06-096 C.M.R. ch. 2, § 11.D. Further, Nordic's lack of TRI means that Nordic has always lacked

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[8] *Tomasino v. Town of Casco,* 2020 ME 96, ¶ 15, 237 A.3d 175, 181 ("Whatever minimum 'right, title or interest' is required . . . , we conclude that, in the face of a dispute between private property owners, that requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so.").

the administrative standing to present the Board with a justiciable issue on which to act.

Because ***Nordic has always lacked administrative standing***, Nordic never presented a justiciable issue to the Board for substantive action. Thus, the prior Orders entered by the Board on 11-19-2020 should be vacated or revoked because those Orders were entered based on: (i) errors of law (revealed in part by the Law Court's 2-16-2023 Decision in *Mabee I*) and (ii) a lack of evidence in the Administrative Record supporting Nordic's claim of TRI in all land for which it seeks (and was erroneously granted) permits and licenses by the Board. *See, e.g.,* 5 M.R.S. §§ 10004 and 06-096 C.M.R. ch. 2, §§ 11(D), 26 and 27(B) & (E). In addition, Nordic cannot demonstrate TRI currently exists based on either the 8-12-2021 Condemnation Order [redacted] entered by the City of Belfast or the 9-3-2021 City-to-Nordic easement [redacted] Indeed, in pursuing its ultra vires use of eminent domain to benefit Nordic, the City of Belfast has even illegally attempted to take land that is ***outside the municipal boundaries of Belfast***, pursuant to the definition of "mouth of a river" established in *Mabee I,* 2023 ME 15, ¶¶ 34-35, n. 8.

Mabee I and the 3-2-2022 Stipulated Judgment in RE-2021-007 already resolved that the City was without legal capacity to grant an easement authorizing Nordic to use Lot 36 or the adjacent intertidal land in a manner that: (i) violates the 1946 "residential purposes only" servitude on Lot 36; (ii) violates the protections and prohibitions in the enforceable 4-29-2019 Conservation Easement; or (iii) includes intertidal land outside the municipal boundaries of the City of Belfast. Accordingly, Nordic cannot demonstrate that it has "sufficient" TRI based on the 8-12-2021 Condemnation Order or the 9-3-2021 City-to-Nordic easement -- the validity, factual parameters and terms of which are in dispute in pending litigation (RE-2021-007) and have not been determined by a court of competent jurisdiction. *See, e.g., Tomasino v. Town of Casco*, 2020 ME 96, ¶¶ 14-15, 237 A.3d 175, 180–181. Based on the prior Administrative Record, the judicial determinations in *Mabee I,* and the current state of the facts and law, the 2020 Orders should be vacated or revoked by the Board and Nordic's applications returned to Nordic for lack of sufficient TRI pursuant to Chapter 2, §§ 11(D) and 27(B) & (E).

Dated this 21st day of August, 2023. *<u>/s/ Kimberly J. Ervin Tucker</u>*

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