

STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

NORDIC AQUAFARMS INC.	)
Belfast and Northport	)
Waldo County, Maine	)
	) REMAND OF AIR EMISSION,
A-1146-71-A-N	) SITE LOCATION OF DEVELOPMENT,
L-28319-26-A-N	) NATURAL RESOURCES PROTECTION ACT,
L-28319-TG-B-N	) and MAINE POLLUTION DISCHARGE
L-28319-4E-C-N	) ELIMINATION SYSTEM (MEPDES)/
L-28319-L6-D-N	) WASTE DISCHARGE LICENSES TO
L-28319-TW-E-N	) CONSIDER IMPACT OF QUIET TITLE
W-009200-6F-A-N	) DECISION

**NORDIC AQUAFARMS INC. BRIEF**

In compliance with Presiding Officer Duchesne’s July 26, 2023, August 10, 2023 and August 16, 2023 procedural correspondence in the above captioned matter, Nordic Aquafarms Inc. (“Nordic”) hereby submits the below brief addressing the Board of Environmental Protection (“Board”) regarding the question presented by the Law Court on remand. Specifically, the impact, if any, of *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, 290 A.3d 79 (“Mabee I” or “Quiet Title Decision”) on the above captioned permits for the Nordic project in Belfast, Maine (“Project Approvals”).

In brief, the Quiet Title Decision can not impact the Project Approvals. The Department of Environmental Protection does not retain jurisdiction to review right, title and interest (“RTI”) after completing application review and issuance of the applied for approval. The Department of Environmental Protection’s (“Department”) jurisdiction over changed circumstances after issuance of an approval is statutorily defined. The Commissioner may suspend or revoke approvals while the Board may modify or prescribe corrective action pursuant to approvals. Here, in response to the Quiet Title Decision and after review of facts regarding the status of Nordic’s current RTI, the Commissioner issued an order suspending the requirements to start construction of Nordic’s Belfast project pursuant to the Project Approvals until resolution of outstanding litigation regarding Nordic’s rights to use the property interests that were the subject of the Quiet Title Decision (“Suspension Order”). The Suspension Order was not timely appealed to this Board

or to Court and is, thus, a final Department decision on the impact of the Quiet Title Decision on the Project Approvals.

Accordingly, the Board's response to the Law Court's question regarding the impact of the Quiet Title Decision on the Project Approvals must be that the Department does not review RTI outside the application processing period but did issue the Suspension Order after concluding that the Quiet Title Decision constituted changed circumstances pursuant to 38 M.R.S. § 342(11-B)(E) and 06-096 C.M.R. ch. 2 §§ 25 and 27(E). While the Board could opt to go further and modify the Project Approvals to incorporate the terms of the Suspension Order pursuant to 38 M.R.S. § 341-D(3) and 06-096 C.M.R. Ch. 2 § 26 and 27(F), it can neither retroactively alter acceptance of the applications underlying the Project Approvals as complete nor revoke the Project Approvals.

### **BACKGROUND**

On November 19, 2020, the Board, as part of and on behalf of the Department, issued the Project Approvals setting terms by which the construction and operation of a land-based recirculating aquaculture system for the production of Atlantic salmon, including associated wastewater discharge and air emissions could comply with Maine's environmental laws. *See generally* Suspension Order at ¶1. The Department repeatedly considered RTI throughout its multi-year review process.

In February of 2023, more than two years after issuance of the Project Approvals, Maine's Supreme Judicial Court decided the Quiet Title Decision. In the Quiet Title Decision, the Law Court held that a deed conveying land in Belfast over which Nordic later obtained rights to an easement for intake and discharge pipes did not include the intertidal land. Suspension Order at ¶2. The Quiet Title Decision found that the intertidal land was eventually conveyed to Mabee/Grace. *Id.* In addition, the Law Court held that Mabee/Grace hold an enforceable "residential purposes only" servitude that runs with the land (Residential Purposes Restriction) on the related upland property. *Id.* The Law Court's decision also states that a conservation easement over the intertidal land created by Mabee/Grace in 2019 (Conservation Easement), which was granted to Upstream, who later assigned it to Friends, is enforceable. *Id.*

In her June, 2023 Suspension Order, following review of petitions from Upstream, Mabee/Grace and Nordic—all asking that the Department suspend or revoke the Project Approvals in part because the Quiet Title Decision constituted changed circumstances—the Commissioner addressed changed circumstances, including the Quiet Title Decision, by suspending the effectivity

of those Project Approvals and tolling construction deadlines in the Project Approvals pending a final court decision resolving outstanding property ownership issues.

More recently, the Supreme Judicial Court ordered remand of the Project Approvals to the Board to consider a narrow question: “the impact, if any, of [... the Quiet Title Decision] on the challenged approvals.” Law Court Remand Order at 3-4. The Remand Order also authorized the Board to: “choose to make their determinations on the existing administrative records or expand the records to include materials such as a referenced subsequent conveyance after the exercise of eminent domain power that Nordic suggests should result in no change to the viability of the approvals.” Law Court Remand Order at 4. The Law Court Remand Order was to the Business Court Docket of Superior Court, which then remanded, with substantially identical language, to the Board. These two remand orders are jointly referred to herein as the Remand Order.

### **ANALYSIS**

The Department possesses administrative authority to protect human health and the environment via a suite of laws (statutes and regulations) regarding air, land, water and waste. The Department is without authority to assess or determine property rights. The only time the Department possesses authority to receive evidence regarding property rights is in assessing whether an applicant for an approval pursuant to a statute administered by the Department possesses sufficient connection to the land at issue for the Department to be relatively confident it is not wasting its time in reviewing that application. The Department’s authority to ascertain the RTI component of administrative standing terminates when the permit processing period closes- i.e. when the permit applied for is issued (or denied).

The Department also possesses statutory and regulatory authority to take certain actions on approvals after issuance of those approvals and upon receipt of evidence of certain circumstances. Specifically, the Commissioner is authorized to suspend or revoke approvals. The Board is authorized to modify or prescribe corrective action pursuant to approvals. The circumstances under which the Commissioner or Board may exert this authority each include a change of circumstances. The Commissioner, following review of the Quiet Title Decision, issued the Suspension Order which prevents commencement of Project construction (and tolls deadlines to start construction) pending final resolution of the ongoing property disputes referenced in the Mabee/Grace brief. Here, while the Board may properly find that the Quiet Title Decision does not impact the Project Approvals because the obligation to establish RTI terminates upon issuance of the Project

Approvals, and/or the Board may ratify the Suspension Order as the Department's answer to the Remand Order question as to the impact of the Quiet Title Decision on the Project Approvals, and/or the Board may modify the Project Approvals to incorporate the terms of the Suspension Order, the Board is without authority to suspend or revoke those approvals as requested in the briefs of Mabee/Grace and Upstream.

**I. The Quiet Title Decision does not Impact the Department's Finding of RTI Sufficient to Support Nordic's Administrative Standing.**

The Department properly found that Nordic established administrative standing to apply for and receive the Project Approvals issued by the Board 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 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 for processing. *Id.* Further, Department Rules only require maintenance of evidence of RTI for the permit processing period. *Id.* This is because RTI is assessed only as a component of administrative standing and the requirement to maintain administrative standing (i.e. the right to appear before an agency and request action) expires upon completion of that administrative action. 06-096 C.M.R. ch. 2 § 11(D) ("An applicant must maintain sufficient title, right or interest throughout the entire application processing period") (emphasis added).

Throughout Department proceedings on the Project Approvals, intervenors<sup>1</sup> filed numerous motions and comments relating to RTI. The record before the Board included not just the RTI documentation from the Eckrotes but also deeds from heirs of the original property owner releasing the intertidal property and any use restrictions based on expert surveyor information provided to Nordic indicating that if the Eckrotes did not own the intertidal it had been retained by

---

<sup>1</sup> Upstream Watch ("Upstream"), Friends of Harriet L. Hartley Conservation Area and Jeffrey Mabee and Judith Grace ("Mabee/Grace"), and Northport Village Corporation ("NVC").

the original property owner and passed automatically to her heirs. *See* Nordic Responses to Department Requests for Additional RTI Information dated May 24 and June 26, 2019. Mabee/Grace sought reconsideration of the Department's RTI determination five times before the Board record closed. Nordic Land Approval at ¶2 (pages 10-13). The full Board heard oral argument before deciding two of the Mabee/Grace motions. *Id.* After argument and deliberation, the Board voted unanimously to deny their request to hold an adjudicatory hearing on the issue of RTI and to deny their motions. *Id.* The balance of the motions were likewise denied by the Presiding Officer. In the Project Approvals, the Board again found Nordic had demonstrated sufficient TRI for the Board to process the applications and approve the licenses, setting forth its reasoning in each of its decisions. *Id.*

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. *Id.*; *accord Southridge Corp. v. Bd. of Env't Prot.*, 655 A.2d 345, 348 (Me. 1995) (where the administrative record reflects a quiet title lawsuit pending during the application processing period, that is sufficient to meet the administrative standing requirements during the application period, even if the outcome of that litigation could lead to subsequent action like suspension or revocation). 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. Mabee/Grace can, did, and likely will again, appeal the Department's decision on RTI pursuant to Maine Rule of Civil Procedure 80C. Likewise, Mabee/Grace can, and did, file suits to obtain court decisions on who holds actual property rights. None of these lawsuits decides the other. Put simply, just like a Law Court decision upholding the Department's acceptance of RTI (or its determinations that, if built, the project would comply with environmental laws) would not change who actually owned the property at issue, the Law Court's Quiet Title Decision does not retroactively mean that the Department erred in finding that Nordic submitted substantial evidence of RTI sufficient to establish standing to invoke the administrative process that lead to the Project Approvals.

The Quiet Title Decision, finding that the Eckrotes did not own the intertidal land that was the subject of Nordic's documentation of RTI, came after issuance of the Project Approvals- 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 substantial evidence of RTI supporting

administrative standing before the Department. 06-096 C.M.R. ch. 2 § 11(D). Before this decision, the Superior Court, looking at the merits of all the RTI documents presented to the Department (and many more), found the opposite. The courts deciding the property ownership issue took more than two years after issuance of the Project Approvals to decide actual ownership- and they disagreed. Because these decisions occurred after issuance of the Project Approvals, thus outside the permit processing period, they are irrelevant to the findings and conclusions within the Project Approvals and, instead, may be considered only as changed circumstances under the Department’s Rules and the relevant statutory authority.

The Quiet Title Decision does not retroactively undermine the Department’s previous determinations that Nordic established sufficient administrative standing for the Board to determine that the Project, if built, would comply with the various environmental laws administered by the Department. The Board cannot revoke this prior determination.<sup>2</sup> Instead, the Quiet Title Decision was properly considered by the Department as changed circumstances supporting issuance of the Suspension Order. *See* Suspension Order at ¶16.

## **II. The Department Issued the Suspension Order Because the Quiet Title Decision Constitutes Changed Circumstances Relevant to the Project Approvals.**

Since issuance of the Project Approvals, 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. *See* Suspension Order at ¶3. The City 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>3</sup>

---

<sup>2</sup> The request by Upstream and Mabee/Grace that the Board “return” Nordic’s applications for the Project Approvals (the only remedy for a failure of administrative standing during the permit processing period), would have no legal impact given that the Board already issued the Project Approvals. If the Board attempted such action now, the Project Approvals, which finally resolved Nordic’s applications, would remain in effect (albeit subject to appeal and the Suspension Order). The Project Approvals cannot be voided by returning the Project applications even if the Board possessed authority to revoke those Project Approvals, which it does not.

<sup>3</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

*Id.* The City granted Nordic a permanent easement and a construction easement for the project. *Id.* Mabee/Grace appealed the City's exercise of eminent domain to Superior Court. *Id.* Following issuance of the Quiet Title Decision, the Superior Court restarted action on the Mabee/Grace challenge to the City's exercise of eminent domain. *Id.* In other words, while the Project Approvals fully evaluate and assure compliance with Maine environmental law (subject, of course, to appeal), 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, use restrictions, and conservation easement, as well as on a new declaratory judgment action by Mabee/Grace is likely at least an additional two years away.

Given the City's exercise of eminent domain, the associated automatic transfer of title, and the easements 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 did not follow that path. Instead, Nordic joined requests by Upstream and Mabee/Grace to suspend the Project Approvals pursuant to the Commissioner's authority under 38 M.R.S. § 342(11-B)(E) and Sections 25 and 27(E) of Chapter 2 of the Department's Rules. Following review of these petitions, and consideration of the Quiet Title Decision, the Commissioner issued the Suspension Order stating, in part:

12. With regard to the allegations of misrepresentation or failure to disclose fully all relevant facts, the Department finds that the licensee did not obtain the Licenses by misrepresenting or failing to disclose all relevant facts. Both petitioners, as intervenors to the underlying licensing proceeding, raised the majority of the contentions present in the petitions prior to and during the licensing process. The Department was aware of and considered the underlying deeds, use restrictions, and legal arguments presented by both the licensee and opponents to the project. While the licensee may not have supplied all existing surveys, other surveys would not have provided the Department with legal certainty on the issue of TRI, which only the courts can resolve.<sup>1</sup> As such, the Department does not find that the licensee obtained the license by failing to disclose documents or by misrepresenting relevant facts.

<sup>1</sup>It is notable that the Superior Court in its decision, *Mabee v. Nordic Aquafarms*, No. RE-2019-0018, 2021 Me. Super. LEXIS 103 (Oct. 27, 2021), on an even more fulsome record developed during a multi-day trial, decided the intertidal ownership conveyed with the upland and that Mabee/Grace did not possess title, right, or interest in the intertidal.

13. Mabee/Grace/Friends also allege misrepresentations regarding removal of use restrictions on the northwest portion of the property at issue, regarding the

---

the City is the holder of the conservation easement burdening the relevant intertidal zone) unless or until its eminent domain action is overturned.

eminent domain process, and regarding the conservation easement in the intertidal area. While characterized as misrepresentations or the failure to disclose relevant facts, the claims, in both cases, appear to be based on alleged deficiencies in the instruments or applicable authority to remove deed restrictions. The Department acknowledges that the claims, if proven, could constitute a change in condition or circumstance; however, they do not at this time support suspension.

14. Lastly, the Department agrees with the petitioners and the licensee that the Law Court's quiet title decision on the intertidal lands proposed for development and the uncertainty resulting from the pending eminent domain appeal, including any effects on the Residential Purposes Restriction and the Conservation Easement, collectively constitute a change in circumstances potentially requiring suspension. Given the degree of potential impacts resulting from the project, and the uncertainties resulting from the Law Court's quiet title decision, the eminent domain appeal, and the Conservation Easement, the Department finds that the 38 M.R.S § 342(11-B)(E) and Chapter 2, § 27(E) criterion to suspend a license is met.

Suspension Order at ¶¶ 12-14. No one— not Nordic, Upstream or Mabee/Grace— appealed the Suspension Order. The Suspension Order is, thus, the final Department decision regarding the impact of the Quiet Title Decision on the Project Approvals. *See* Suspension Order at §§IV and V. Simply put, until the property ownership issues are finally resolved by the Law Court and the Department lifts the Suspension Order, there can be no construction compliant with the Project Approvals.

The Board is without authority to revoke or suspend the Project Approvals. *Compare* 38 M.R.S. § 341-D(3) and 06-096 C.M.R. ch. 2 §26 *with* 38 M.R.S. § 342(11-B)(E) and 06-096 C.M.R. ch. 2 § 25. Consequently, the Board cannot do as Mabee/Grace and Upstream ask and void the permits. Instead, the Board may put forward the Suspension Order as the Department's answer to the Remand Order question regarding the impact, if any of the Quiet Title Decision on the Project Approvals—namely, that the Quiet Title Decision constitutes changed circumstances resulting in issuance of the Suspension Order. Alternatively (or additionally) the Board may modify the Project Approvals to incorporate the terms of the Suspension Order pursuant to the Law Court's directive and its own authority to modify issued licenses to address changed circumstances.

## **CONCLUSION**

The Quiet Title Decision does not impact the Project Approvals because the Department is without jurisdiction to review RTI (or administrative standing) following issuance of said



approvals when there is no longer pending action before it requiring standing. Following consideration of the Quiet Title Decision, the Department acted, pursuant to the Commissioner's statutory and regulatory authority, by issuing the Suspension Order based in part on the determination that the Quiet Title Decision constituted changed circumstances. The Board should affirm the Suspension Order as the Department's response to the question presented in the Remand Order and/or modify the Project Approvals to incorporate its terms.

Dated: August 21, 2023



---

Joanna B. Tourangeau, Bar No. 9125  
David M. Kallin, Bar No. 4558  
Attorneys for Licensee  
*Nordic Aquafarms Inc.*

Drummond Woodsum  
84 Marginal Way, Suite 600  
Portland, ME 04101  
207-772-1941