STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

NORDIC AQUAFARMS, INC	
Belfast and Northport	)
Waldo County, Maine	)
	)
A-1146-71-A-N	)
L-28319-26-A-N	)
L-28319-TG-B-N	)
L-28319-4E-C-N	)
L-28319-L6-D-N	)
L-28319-TW-E-N	)
W-009200-6F-A-N	)

NORDIC RESPONSE TO INTERVENOR'S MOTIONS ON RIGHT, TITLE AND INTEREST

Nordic Aquafarms, Inc. ("Nordic" or "NAF") submits this response to Jeffrey R. Mabee's and Judith B. Grace's[1] ("Intervenor" or "Grace/Mabee") February 14[2] and 18, 2020 renewed petitions to the Board of Environmental Protection ("Board") to dismiss or for lack of or hold an adjudicatory hearing on title, right or interest in Nordic's applications before the Board (together, herein, the "Petition").

The Petition is without merit.

I. The Department and the Board Previously Heard all Mabee/Grace's Requests Regarding TRI.

On June 13, 2019, nearly a year ago, following months of back and forth regarding right, title and interest ("TRI") the Commissioner of the Department of Environmental Protection ("Department"), pursuant to Chapter 2, Section 11(D) of the Department's Rules, determined that Nordic's applications to the Department were complete, including establishing TRI. Specifically, with regard to TRI, the Commissioner's completeness determination states:

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[1] The February 18, 2020 Petition also lists "Interested and Aggrieved Parties Friends of the Harriet L. Hartley Conservation Area." Friends of the Harriet L. Hartley Conservation Area ("Friends") is not a party. On February 11, 2020 the Presiding Officer denied Friends' late filed request for Intervenor status. Eleventh Procedural Order at § 1. As such, Mabee/Grace wrongly argues that Friends "is an Aggrieved Person pursuant to 06-096 C.M.R. ch. 2 § 1(B)." Petition at 3-5. Chapter 2 defines Aggrieved Person as a status granted by this Board. The Board denied that status in denying Friends late filing on February 11, 2020.

[2] By email dated February 14, 2020, counsel for Intervenors Mabee/Grace and the Lobstering Representatives (as well as Friends) initially moved to dismiss Nordic's applications and request an adjudicatory hearing on TRI.

A determination that an applicant has demonstrated TRI sufficient for an application to be processed requires a showing of a legally cognizable expectation of having the power to use the site in the ways that would be authorized by the permits being sought. The purpose of this requirement is to allow the Department to avoid wasting its finite resources reviewing applications for projects that can never be built. If the applicant is unable to show a sufficient property interest in the site proposed for the project, pursuant to the TRI threshold requirement in Chapter 2 §11(D), the Department can return the application at the outset without devoting time and resources to its processing. In any TRI analysis under Chapter 2, the Department may look beyond an applicant's initial submissions and may request additional information and consider submissions of interested persons as necessary to judge whether adequate credible evidence has been submitted by the applicant and a sufficient showing of TRI has been made to warrant expending Department resources to process the application. The TRI provision cannot, however, be interpreted as compelling the Department to perform an exacting legal analysis of competing ownership claims to determine the ultimate ownership of a property. That ultimate conclusion can only be made by a court. Moreover, the Department rejects any such interpretation as directly counter to the purpose of the TRI provision and cannot afford to allow its permitting proceedings to be transformed into the equivalent of an administrative agency quiet title action. So long as the applicant is able to make a showing of TRI in the subject property that is sufficient to justify the processing of the application, the Department will generally consider this threshold requirement to be satisfied and move to evaluate the merits of the application.

With that understanding, the Department has reviewed the applications and the MEPDES application addendum (aligning the proposed project's pipe locations in the pending MEPDES application with the pipe locations in the other more recent applications) submitted by NAF and has considered all supplemental TRI material that both NAF and various interested persons have submitted. With respect to the intertidal portion of the property proposed for use, the Department finds that the deeds and other submissions, including NAF's option to purchase an easement over the Eckrote property and the succession of deeds in the Eckrote chain of title, when considered in the context of the common law presumption of conveyance of the intertidal area along with an upland conveyance, constitute a sufficient showing of TRI for the Department to process and take action on the pending applications. This determination is not an adjudication of property rights and may be reconsidered by the Department at any time during processing as applicants must have adequate and sufficient TRI throughout the application process. Accordingly, should a court adjudicate any property disputes or rights in a way that affects NAF's interest in the proposed project lands while the applications are being processed, the Department may revisit the issue of TRI and return the applications if appropriate.

On June 15, 2019, Mabee/Grace filed an action in Waldo County Superior Court claiming that Nordic should be barred from stating to this Board that its applications are supported by TRI.

On July 12, 2019, Mabee/Grace submitted a petition to dismiss the Nordic applications for lack of TRI with an alternative request for an adjudicatory hearing on the issue of TRI. The Presiding Officer, in the Second Procedural Order dated, August 23, 2019, denied these requests and held that:

> Pursuant to my authority under Chapter 3, § 4(C), paragraphs (8), (9), and (12), and as stated at the conference, I decline to return the applications based on a lack of TRI at this time, and I deny the request for a preliminary hearing on the issue of TRI.

Second Procedural Order at § 12. Counsel for Mabee/Grace objected to this ruling and preserved the issue for appeal. *Id.*

On November 1, 2019, Presiding Officer Duchesne issued the Board's Third Procedural Order rejecting Mabee/Grace's request that TRI be a hearing topic and stating:

> Intervenors Jeffrey Mabee and Judith Grace [...] requested that one of the hearing issues be whether Nordic has demonstrated sufficient title, right or interest (TRI) to pursue permits for the proposed project. The Board is aware of the dispute over ownership of the intertidal lands where portions of Nordic's proposed pipelines would be located, and that ownership of this land is currently being litigated. The Board will not hear testimony on this issue at the hearing. The issue is better suited to written evidence and argument than to live testimony and cross-examination. The parties may submit written evidence and argument on the issue but are asked to refrain from re-submitting evidence that is already in the record.

Third Procedural Order at § 1(D).

On November 4, 2019, Mabee/Grace appealed this decision to the full Board. They requested that TRI be a topic at the hearing, with testimony of witnesses and cross-examination. The Board heard this appeal on November 7, 2019 and unanimously upheld the Presiding Officer's ruling that TRI will not be an issue for oral testimony and cross-examination at the hearing. The Board noted that the issue could be addressed through written submissions. Fourth Procedural Order at § 1(G).

On November 18, 2019, Mabee/Grace filed a Motion to suspend or terminate these Board proceedings based on TRI objections and reiterated this request by email dated November 26, 2019. In the Fifth Procedural Order, the Presiding Officer determined that:

> there has been no change to the applicant's Title, Right, or Interest (TRI) that warrants the rescission of the Fourth Procedural Order or the termination or suspension of these Board proceedings.

Fifth Procedural Order at § 2.

On December 20, 2019, Waldo County Superior Court issued a decision (attached as Exhibit 1) dismissing Mabee/Grace's claims that Nordic should be barred from asserting TRI before this Board. That decision found that Nordic has a First Amendment right to pursue these permit applications and that an agency decision on the standing question presented by TRI is fundamentally different from a decision on who actually owns the land. *See* Exhibit 1 at 7-8 and fn. 4.

On January 8, 2020, Mabee/Grace submitted another request that the Board reconsider whether Nordic demonstrated sufficient TRI. In support of this request, Attorney Tucker submitted a transcript of a telephonic oral argument on a motion in the federal court case being litigated between Mabee/Grace and the property owners that refers to renewal of the easement option submitted by Nordic on January 7, 2020. The Presiding Officer denied this request noting previous similar requests by Mabee/Grace. Ninth Procedural Order at § 4.

Parties' pre-filed rebuttal testimony was due January 17, 2020. Despite TRI not being a hearing topic, a Mabee/Grace witness submitted hearing testimony on TRI that was stricken from the hearing record but remains in the administrative record. Ninth Procedural Order at § 1(A).

By e-mail dated February 7, 2020, Attorney Tucker requested that the two new Board members doing a site visit be briefed concerning the TRI issues. She also requested that a list of documents concerning TRI be provided to the two Board members before the site visit. Board member Sanford has been on the Board since June 27, 2019 and received the filings that other Board members have received. New Board member Mr. Pelletier was briefed on the issue by staff and counsel prior to the site visit and was provided the materials that the other Board members previously received. *See* Tenth Procedural Order at § 3.

At the Board hearing, on February 12, 2020, Nordic provided the Board with statements from its surveyor and an engineer at the same company, swearing under oath to the falsity of certain sworn testimony submitted to the Board by a Mabee/Grace witness regarding TRI. While the purpose of these statements was not to address TRI but, rather, to demonstrate the willingness of the Mabee/Grace witness to lie under oath in testimony to the Board, that testimony was not presented to the full Board. It is, however, in the administrative record as Nordic Exhibit 41. Twelfth Procedural Order at § 4.

On February 14 and again on February 28, 2020, after the end of the Board hearing dates, Mabee/Grace again petitioned the Board to terminate its review and dismiss Nordic's applications or to conduct an adjudicatory hearing on TRI.

II. Mabee/Grace's Latest TRI Filing has No New Information.

The Department (whether it be the Commissioner, the Presiding Officer, or the full Board on appeal) has heard numerous formal requests on TRI from Mabee/Grace as narrated, in part, above. The latest iteration contains nothing new. It is either an improper appeal of the Commissioner's June 13, 2019 completeness determination or an improper appeal of one of the

Presiding Officer's many decisions not to dismiss Nordic's applications for lack of TRI. There is no information in the latest TRI request that differs in any significant way from what the full Board already heard and decided in November of 2019. As such, the Mabee/Grace request should be denied.

As a practical matter, the Mabee/Grace request makes no sense. A determination that Nordic does not have TRI is a standing determination. In other words, the Board would be deciding- after it held a hearing on Nordic's applications- that it didn't have authority to hear Nordic's applications because Nordic did not have standing to present those applications in the first place. Such a decision would also defy the very purpose of jurisdictional requirements, like standing, which are to avoid unnecessary cost, delay and use of administrative resources. Mabee/Grace preserved the TRI issue for appeal (many months ago at this point) and will have another chance to present all of these arguments in court should the Board issue a decision approving Nordic's applications. If the Board denies Nordic's applications, the TRI issue is moot. If the Board grants the Mabee/Grace request, then Nordic will appeal that decision to court and then return to the Board to continue this process. Thus, the Mabee/Grace request makes no sense.

III. The Commissioner's Completeness Determination is not a "Final License Decision" thus Intervenor's Attempt to Appeal that Decision to the Board is Improper.

As a preliminary matter, while Mabee/Grace framed their filing as a "renewed motion to dismiss" Nordic's applications before the Board, the gravamen of the Petition is a challenge to the Commissioner's June 13, 2019 determination of completeness of Nordic's applications before the Department. A key component of the Commissioner's completeness determination under Chapter 2 is that Nordic demonstrated sufficient title, right, or interest ("TRI"). Throughout the Petition, Intervenor references this decision. Petition at 2, 6-7.

There is no mechanism in the Department's Rules allowing for appeal to the Board of a Commissioner completeness determination. As the Board stated in its letter dated June 27, 2019 "the Commissioner's completeness determination is not a final licensing decision appealable to the Board." There is, thus, no basis for the Board to revisit the Commissioner's June 13, 2019 completeness determination much less a justification to "dismiss NAF's applications for lack of TRI."[3] Petition at 25.

The Commissioner's completeness determination for the major projects within the Board's original jurisdiction is simply the administrative mechanism triggering the Board's substantive review of those applications. The Board correctly pointed out in its June 27, 2019 letter that, as the applicant, Nordic must continue to demonstrate TRI throughout the permit application process, and that the Board "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." Intervenor acknowledges there is no new information regarding a change in Nordic's TRI status. Mabee/Grace is simply resubmitting the same information that the Commissioner considered when making the initial completeness

[3] Board jurisdiction may arise in one of two ways: original jurisdiction over licensing criteria applicable to an application, and jurisdiction over appeals of the Commissioner's final licensing decisions. Chapter 2, §§ 17, 24.

determination. These issues are preserved in the record for any appeal of a final Board decision on the merits of Nordic's applications.

The May, 2019 applications and subsequent updates regarding TRI in May and June of 2019 included copies of the agreements to purchase, lease, or obtain an easement over all of the property that is the subject of the Nordic applications. The June 13, 2019 Commissioners' Completeness Decision discusses these submissions. Mabee/Grace claim that a December, 2019 amendment to one of the agreements means that Nordic no longer has TRI. Petition at 9. This is false.

Many of the original land agreements were negotiated in 2017-2018. At that time, the anticipated permitting period was significantly shorter than that which transpired. As such, many of the agreements had annual or even shorter renewal periods. The agreement regarding the intertidal at issue had to be renewed in December of 2019. By that time, the owners of that land had been sued in state and federal court by Mabee/Grace. Nordic had also been sued by Mabee/Grace in state court. It is often the case when entering into a realty agreement that the owner of the land "represents and warrants" to the person seeking an interest in their land that they can convey the land without damages to that person. In other words, if there was a lawsuit brought against the potential buyer, the owner would cover the costs associated with that lawsuit. When the agreement was extended in December, 2019, Nordic agreed to an extension which explicitly disclaimed such a representation and warranty by the owners of the intertidal. In other words, Nordic is not asking them to pay Nordic's litigation costs from the Mabee/Grace lawsuit. Contrary to Mabee/Grace's claim, this language has no effect whatsoever on whether the owners do or do not own the intertidal and certainly does not imply that they do not believe they own the land that has been the home of generations of their family going back over 70 years.

IV. Nordic met the Low Bar for Right, Title and Interest.

Whether considered by the Commissioner or the Board, the purpose and method of determining TRI are identical.[4] Chapter 2 § 15(D). As noted above, the Department's threshold determination of TRI is meant to prevent the Board from wasting its time weighing the substance of an application if the applicant lacks a "legally cognizable expectation of having the power to use the site in the ways that would be authorized by the permits being sought." June 13, 2019 Commissioner's Office Completeness Determination. The TRI requirement thus "cannot . . . be interpreted as compelling the Department to perform an exacting legal analysis of competing ownership claims to determine the ultimate ownership of a property. That ultimate conclusion can only be made by a court." *Id.* Under Chapter 2, the mechanisms whereby an applicant may demonstrate TRI include the furnishing of a deed, lease, or easement demonstrating sufficient interest in the proposed site. Case law cited by the Intervenor establishes that even where these instruments or rights are contested by another party, they are sufficient to establish TRI until or unless the dispute is resolved against the applicant in court. Petition at 5, 13-15.

[4] As noted in our letter of June 21, 2019, while the Board is technically included within the "Department," as that term is used in Chapter 2, Chapter 2 §11 plainly delegates the administration completeness determination to the Commissioner.

In the case the Intervenor cites, *Southridge Corp. v. Board of Envtl. Protection*, 655 A.2d 345 (Me. 1994), the Law Court found that an applicant had sufficient TRI for the Board process to move forward where the applicant claimed rights to a portion of the site through adverse possession, a claim that was being contemporaneously challenged by the record owner in a judicial quiet title proceeding. The Law Court found that "it is possible that [the applicant] may not prevail in his adverse possession claim to the [disputed] property. Should this happen, his permit might be revoked. This possibility, however, neither deprives [the applicant] of [his] current interest in the land nor [his] administrative standing." *Id.* at 348.

After reviewing submissions made by Nordic and the interested parties (including Intervenor), the Commissioner's June 13, 2019 completeness determination states that Nordic's demonstration of an easement purchase option of intertidal land contained within the deed of the Eckrotes, along with the Eckrote's chain of title and a common law presumption that a conveyance of upland includes adjacent intertidal lands suffice to meet the low threshold of TRI. Mirroring *Southridge*, the Commissioner noted that "should a court adjudicate any property disputes or rights in a way that affects Nordic's interest in the proposed project lands while the applications are being processed, the Department may revisit the issue of TRI and return the applications if appropriate."[5]

There is clear agreement between case law, Chapter 2, and the Commissioner's completeness determination: the TRI determination is separate and distinct from an action to quiet title, and such a pending legal action has no bearing on an applicant's demonstration of TRI unless and until the applicant receives an adverse decision that destroys the foundation upon which TRI was granted. Here such a matter is currently before the Waldo County Superior Court. Intervenor filed a quiet title action days after filing their first request that this Board decide TRI. That court action properly asserts the same quiet title claims that Intervenor improperly seeks to have the Board decide.

As such, the Intervenor attempts to do exactly what the Commissioner cautioned against—using the Commissioner's TRI determination to litigate a proxy battle to a quiet title proceeding. The Intervenor does not dispute that Nordic's application contains documentation of legally protected rights to use the entirety of the lands subject to the application, but rather that the Intervenor holds a superior claim. Whether the Intervenor is ultimately correct or mistaken is a question that falls squarely within the jurisdiction of the courts, *see Southridge*, but, regardless, their concession that Nordic has a claim means that all parties agree that the low bar for TRI for administrative standing is met.

[5] Notably, the Waldo County Superior Court cited *Southridge* for the same proposition in dismissing Mabee/Grace's attempts to prohibit Nordic from seeking these permits based on submission of evidence of TRI. Exhibit 1 at fn 4.

V. The Ferris Quiet Title Decision from 1970 is Irrelevant to the Current Dispute between Nordic and the Intervenor.

The Intervenor makes much of a 1970 quiet title judgment[6] which they falsely assert settled the title status of "all of the intertidal land on, under or over which NAF proposes to place its industrial pipelines." Petition at 2, 6, 15-21.

Even if the Board had the jurisdiction to weigh the merits of the claims to the intertidal as Intervenor asks, the 1970 quiet title action *Ferris v. Hargrave* does not alter the TRI analysis. *Ferris* does not relate to the intertidal zone. Indeed, it is completely silent as to any intertidal zone, and quiets title only to the following four-sided abutters description:

> Northerly by land of Fred R. Poor; Easterly by Penobscot Bay; Southerly by Little River and Westerly by the Atlantic Highway, so called.[7]

The only issue presented in *Ferris* was whether Genevieve Hargrave was married and properly conveyed the land described in the first paragraph of the Ferris deed description. Ferris is silent on the issues presented in the current quiet title action namely: where on the face of the earth is the boundary line "northerly by land of Fred R. Poor"? [8]

A simple reading of the above description is that the southerly line of Fred Poor's property is the northerly line of the Ferris property. Intervenor presents a novel theory that the four-sided description somehow also tacks on an additional strip of intertidal zone stretching in front of Fred R. Poor's property all the way to the land of Cassida and including the intertidal of three of their neighbors (including those on either side of the Eckrotes). Intervenor reshapes the simple four-sided description into something more akin to the shape of Oklahoma, with a pan-handle.[9] This novel theory about the shape of the property was never discussed nor addressed in the *Ferris* case, making it completely irrelevant to the current issue now pending before the Superior Court, let alone the Board.

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[6] *Ferris v. Hargrave*, Docket No. 11275 (Me. Super. Ct. Waldo Cty., Apr. 10, 1970).

[7] This language is an abutters description that bounded the property to the north by Fred Poor, not by Sam Cassida (who would have been the northerly abutter if the intertidal land in front of Fred Poor had been included in the abutters description). That same abutters description was carried forward to Mabee and Grace, and that same abutters description was used in the 1970 quiet title action *Ferris v. Hargrave*. Thus, that 1970 quiet title action has no effect on the analysis beyond what already existed with regard to the 1950 outconveyance.

[8] Notably, the Ferris deed contains the following language:

> TOGETHER with all our right, title and interest in and to that portion of the premises which lies between high and low water mark, commonly designated as the flats.

The *Ferris* quiet title action excluded this language, demonstrating that, contrary to Intervenor's assertions, it *did not* resolve claims to the intertidal zone, and certainly not claims to the intertidal *in front of* the Poor property.

[9] The new fifth side is neatly depicted in green and yellow in the Bay on Sketches 3 and 4 of the pdf entitled Chron Lot Devlpmt attached to the Mabee/Grace submission on February 18, 2020. The need for a call to Cassida is likewise described in Surveyor Richards' statement which makes clear that calls to intertidal lands are land calls. An unambiguous abutter's description including the Eckrote intertidal in the Mabee/Grace chain would include a call to Cassida.

In sum, even if the Board could properly hear an appeal of the Commissioner's completeness decision and therein quiet title (which it cannot), the decision in *Ferris v. Hargrave* is irrelevant to the TRI question.

VI. Conclusion

For the above reasons, Nordic respectfully asks Presiding Officer Duchesne and the Members of the Board to reject the Petition.

Signed: March 12, 2020

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