



## NEWS RELEASE

Portland, May 16th, 2019

Nordic Aquafarms Inc  
511 Congress Street  
Portland, ME 04102

Media contact: Marianne Naess, Commercial Director. Mobile 207 323 6733

### **Nordic Aquafarms replies to the BPL regarding intertidal rights claims made by opponents**

Nordic Aquafarms has submitted a full and complete response to the property claims made by project opposition. All documentation is provided in the enclosed attachments that were submitted to the BPL. Below we address some of the highlights:

*Project opponents claim that BPL and DEP should deny Nordic Aquafarms' application because the opposition has a conservation easement over the land where the project intake and outfall will go. The opposition also claims that the Eckrotes are not the rightful owners of the intertidal in front of their property.*

Nordic Aquafarms' filings with the BPL conclude that Nordic Aquafarms has right, title, and interest sufficient for the BPL to issue a submerged lands lease. Nordic Aquafarms remains confident in its position and is moving forward with the permitting process.

Nordic Aquafarms' surveyor and legal expert disagree that the Mabee/Grace own any portion of the Eckrote's property. This is explained in detail in the BPL filings.

*Project opponents claim that Nordic has no right to cross the US Route 1.*

On February 13, 2019, the City of Belfast issued a conditional permit authorizing NAF to open Route 1 and install its intake and outfall piping.

*Project opponents claim that the project is not allowed because of language in a 1946 deed. The restriction says that the lot or parcel of land herein described is conveyed to Fred R. Poor (predecessor in title to the Eckrotes) with the “understanding it is to be used for residential purposes only, that no businesses for profit are to be conducted there unless agreed to by Harriet L. Hartley, her heirs and assigns.”*

Nordic Aquafarms is unaware of any assignments of this restriction and has obtained release deeds from Hartley’s heirs.

Finally, to the citizens of Maine and Belfast we would like to reaffirm our commitment to an open and transparent process. Our team works extremely hard and with diligence to get things right. Our Maine employees are proud of their work and of the many benefits they will help bring to the Belfast community.

Nordic Aquafarms is making major investments in Belfast and Maine which have a long pay-back period given 3-4 years “time-to-market” in land-based finfish projects. Our projects require a long-term commitment to the communities we operate in. We are staying the course and remain committed to Belfast. We renew our invitation to those with questions or concerns about the project to call or come by our offices any time. Our door is always open to open communication and honest disagreement.

May 16, 2019

Carol DiBello, Submerged Lands Coordinator  
Submerged Lands Program, Bureau of Parks and Lands  
Maine Department of Agriculture, Conservation and Forestry  
22 State House Station  
Augusta, ME 04333

RE: Nordic Aquafarms, Inc. Submerged Land Lease Application

Dear Coordinator DiBello:

This letter is Nordic Aquafarms, Inc.'s ("NAF") response to Upstream Watch (UW") and Maine Lobstering Union ("MLU") "Comment #2" letter dated May 1, 2019. For ease of reference, each of the UW and MLU arguments is restated in italics herein below with a reference to NAF's response there below in standard font.

**Losee Comment 6a.** *NAF must cross US Route 1 with its pipes from the west side where its treatment plant is proposed, to the east side where Penobscot Bay is found. NAF does not have permission to cross over, under or across US Route 1.*

**Tucker Comment VII(b)** *NAF has no right to cross US Route 1, a federal highway, with its pipelines and, to date, has failed to submit proof that it even has sought a permit from any regulatory agency with the authority to grant the necessary permits.*

**NAF Response:** Please see the May 8, 2019 letter from the City of Belfast Planning and Codes Director Marshall responding to this comment and enclosing the February 13, 2019 Conditional Permit to Open Street issued to NAF for installation of pipes across U.S. Route 1 between the Belfast Water District and Eckrote properties (attached hereto as Exhibit 1).

**Losee Comment 6b.** *Assuming it can cross US Route 1, NAF must cross land of Janet and Richard Eckrote. The Eckrotes own land running from US Route 1 to the mean high-water line of Penobscot Bay. See the Eckrote deed – attached. As the deed reveals, the Eckrotes do not own the land between the mean high-water line and the mean low-water line. The Eckrotes granted to NAF an option to purchase an easement over the southern portion of their land, but that proposed easement stops at the mean high-water line. It has to stop there. That is all the Eckrotes own. The Eckrote easement cannot get NAF to the mean low-water line and so NAF cannot reach the submerged land that the State might lease to it.*

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**Tucker Comment II(i)** Janet and Richard Eckrote, the owners of the residential upland lot across and under which NAF proposes to place its three industrial accessory pipeline (“the Eckrotes’ upland lot” or “the Eckrote lot”) do not, and never did, own the intertidal land on which their lot fronts and therefore cannot, and never could, grant NAF an Easement to place its pipelines on, over or under this intertidal land.

**Losee Comment 6c.** NAF recently submitted two writings by which it attempted to show that the Eckrotes wanted to give NAF whatever interest they had in and to the intertidal zone between their property and the Bay but, since they don’t own any interest in the intertidal land, the writings are meaningless.

**NAF Response:** Please see the attached May 16, 2019 Letter from Mr. Dorsky, P.L.S. (attached hereto as Exhibit 2), May 16, 2019 Letter from Attorney David M. Kallin (attached hereto as Exhibit 3); and 2012 Good Deeds survey (attached hereto as Exhibit 4).

**Losee Comment 6d.** In addition, the Eckrote land is restricted to residential uses. “The lot or parcel of land herein described is conveyed to Fred R. Poor (predecessor in title to the Eckrotes) with the understanding it is to be used for residential purposes only, that no businesses for profit are to be conducted there unless agreed to by Harriet L. Hartley, her heirs and assigns.” Pipes are not residences. You can’t live in them.

**Tucker Comment II (ii)** The Eckrotes’ upland lot is encumbered by a covenant that states this lot or parcel “is to be used for **residential purposes only**” and “**no business for profit** is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns.” (emphasis supplied). This covenant was imposed by a deed executed in 1946 between Harriet L. Hartley and Fred R Poor (a predecessor in interest to the Eckrotes and Janet Eckrote’s grandfather). See Waldo County Registry of Deeds at Vol. 452, Page 205, attached in Composite Exhibit A. This covenant runs with the land in perpetuity. As a result, the Eckrotes cannot, and never could, grant NAF an Easement to place its industrial accessory structure pipelines – which are essential accessory structures to their for-profit business – on, over or under any portion of the Eckrotes’ upland lot without prior approval from Harriet Hartley’s heirs and/or assigns, which approval has not been sought or granted.

**NAF Response:** Please see the attached May 16, 2019 Letter from Attorney David M. Kallin (attached hereto as Exhibit 3) explaining the irrelevance of this restriction to the Bureau’s consideration of NAF’s Submerged Land Lease application. NAF sought and received releases from heirs of Hartley. Following a review of the Hartley chain of title, which UW and MLU state they also conducted, NAF is unaware of any deeds conveyed by Hartley which assign this right to enforce the personal restriction between Hartley and Poor.

**Losee Comment 6e.** The easement location on the Eckrote property runs generally along the southerly bound of that parcel. Much of the easement is within 45’ of the side line of the

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*property. Construction this close to a property line is prohibited by the zoning rules of the City of Belfast.*

**Tucker Comment VII(c)** *Use of NAF's purported 25-foot permanent easement across a limited portion of the upland property owned by the Eckrotes to install its proposed pipes is illegal because it violates the City's 50-foot side-yard setback zoning requirements for accessory structures in the revised Belfast Ordinances.*

**NAF Response:** Please see the May 8, 2019 letter from the City of Belfast Planning and Codes Director Marshall responding to this comment and attached hereto as Exhibit 1.

**Losee Comment 6f.** *The NAF pipeline would be constructed within the proposed easement. The zoning rules of the City of Belfast prohibit the use of any commercial or industrial accessory use in a residential zone. The Eckrote parcel is a residential zone.*

**Tucker Comment VII(d)** *Use of NAF's purported easement across upland property owned by the Eckrotes to install its proposed pipes is illegal because the intake and outfall pipelines are not accessory structures of a permitted principal residential use in the Res II Zone, but rather an illegal extension of an accessory structure that is an essential and integral accessory structure of an industrial use that is not permitted within the Res II Zone and is proposed to extend off the lot on which the principal use of the accessory structure is attached – in violation of the Belfast zoning ordinances controlling land use.*

**NAF Response:** Please see the May 8, 2019 letter from the City of Belfast Planning and Codes Director Marshall responding to this comment (attached hereto as Exhibit 1).

**Losee Comment 6g & 6h.** *The land in the intertidal zone between the Eckrote land and the Bay is owned by Jeffrey Mabee and Judith Grace. Mr. Mabee and Ms. Grace strongly object to NAF's attempt to trespass on their land and will resist any attempt by NAF or the State of Maine to do so.*

*The Mabee/Grace land is subject to a Conservation Easement in favor of Upstream Watch, a non-profit corporation located in Belfast. Upstream Watch has enforcement rights and is authorized to protect the use of the conserved land*

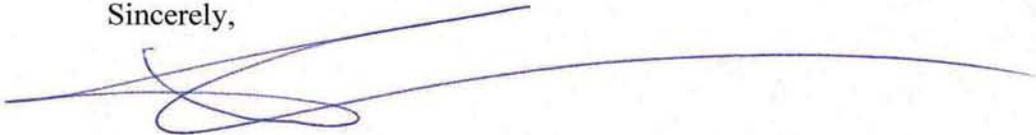
**Tucker Comment II(iii)** *The true owners of the intertidal land on which the Eckrotes' upland lot fronts, Jeffrey R. Mabee and Judith B. Grace, do not consent to the placement of NAF's industrial pipelines on any portion of their land, including their intertidal land. To ensure the protection and preservation of their intertidal land, Jeffrey R. Mabee and Judith B. Grace have placed the portion of their intertidal land from the Little River to the North side of the Eckrote upland lot under a Conservation Easement to protect and preserve this land in its current natural condition, free of any commercial or industrial, accessory or principal structures, in perpetuity. The Holder of that Conservation Easement is Upstream Watch.*

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**NAF Response:** Please see the attached May 16, 2019 Letter from Mr. Dorsky, P.L.S. (attached hereto as Exhibit 2), May 16, 2019 Letter from Attorney David M. Kallin (attached hereto as Exhibit 3); and 2012 Good Deeds survey (attached hereto as Exhibit 4).

We appreciate the opportunity to address the comments raised by UW and MLU and your patient review of this project. Please do not hesitate to let us know if you have questions.

Sincerely,

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Joanna B. Tourangeau



# CITY OF BELFAST, MAINE 04915

131 Church Street

## CODE & PLANNING DEPARTMENT

Phone: (207) 338-1417 ext. 125

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Email: [planningandcodes@cityofbelfast.org](mailto:planningandcodes@cityofbelfast.org)

May 8, 2019

Carol DiBello  
Submerged Lands Coordinator  
Submerged Lands Program, Bureau of Parks and Lands  
Maine Dept of Agriculture, Conservation and Forestry  
22 SHS  
Augusta, ME 04333

RE: Nordic Aquafarms, Inc. Intake/Outfall Pipe Proposal - Revision

Dear Ms. DiBello:

The Belfast City Council, at its Council meeting of May 7, 2018, authorized me to submit comments on behalf of the City and City Council regarding the revised Nordic Aquafarms, Inc request for a submerged lands lease permit. The City, in offering these comments, is not taking a position in support of or in opposition to the project or permit application. There are, however, several issues that the City would like to ensure that the Bureau of Parks and Lands (BPL) considers in rendering a decision on this application. In addition, we offer responses to several comments regarding City Zoning requirements and permit requirements made in a letter to you dated April 24, 2019 from David Losee and in comments submitted in a letter to you dated May 1, 2019 from Kim Ervin Tucker (on behalf of Upstream Watch and the Maine Lobstering Union) dated May 1, 2019. The City, as the local regulatory authority on City Zoning and the governmental entity responsible for issuing road opening permits, believes that we should make you aware of our position on such matters.

In early April 2018 you reached out to the City and asked if the Belfast Harbor Advisory Committee had any comment to offer on the current Nordic Aquafarm application. The Harbor Advisory Committee considered this application at its meeting of April 24, 2018, accepted comment from persons who attended the meeting (4 persons offered comment), and then discussed and considered its comments. The Harbor Advisory Committee identified 3 overall concerns. As the Harbor Advisory Committee is an advisory Committee to the Belfast City Council, they presented their comments as recommendations to the City Council and asked that the Council consider supporting such and to offer said comments to the BPL. The Council, at its meeting of May 7, voted to support the Harbor Committee's concerns.

The City asks that the BPL consider the following concerns in rendering its decision on the Nordic Aquafarm application:

- 1) The project will involve the installation of underwater pipelines, some of which will be buried, and some of which will be exposed. The City asks that the area in which all three underwater pipes are located be well marked with buoys to prevent fouling of fishing gear or anchors, and that the end points of all pipes similarly be well marked.
- 2) The City has received information that there may be mercury buried in the bottom of the Bay where the pipelines are proposed to be installed. The City has concerns that dredging associated with the installation of the intake and discharge pipes could result in the potential release of mercury deposits and that the release of mercury could have an adverse impact on the lobster fishery in the area. The City asks that the BPL work with all appropriate agencies to assess and further research this issue.
- 3) The City has heard concerns that the discharge from the proposed discharge pipe may increase water temperature in the surrounding area. We are concerned that an increase in water temperature could have an adverse impact on the lobster fishery in the area. The City believes that this issue warrants further research by appropriate agencies and that the BPL consider this concern in its decision.

The City recognizes that the BPL may not independently have the resources or expertise to research the above concerns and that some may be issues that are more within the regulatory purview of other agencies. That said, the BPL could assist in ensuring that the issues that you consider in rendering a decision on a permit, particularly unreasonably interfering with fishing or other existing marine uses of the area, are fully explored and researched.

The Code and Planning Department reviewed the current Permit application submitted to the BPL and also has reviewed some of the comment provided to the Bureau, some of which also was provided directly to either the Belfast Harbor Advisory Committee or to the City Council. In our review of the letter dated April 24 from David Losee and the letter dated May 1 from Kim Ervin Tucker, copies attached (excerpt of Tucker letter), we identified 3 specific comments that directly involve an interpretation/application of City Ordinance requirements or issues associated with City permitting authority. The Council, at its meeting of May 7, voted to provide City comment on these concerns. Our intent is to ensure that the BPL, in its deliberations, is aware of how the City would interpret the local Ordinances or local permitting requirements that are in question.

***Losee Comment 6a.** Nordic must cross US Route 1 with its pipes from the west side where its treatment plant is proposed to the east side where Penobscot Bay is found. Nordic does not have permission to cross over, under or across US Route 1.*

***Tucker Comment b** (Page 20 of letter). NAF has no right to cross U.S. Route 1, a federal highway, with its pipelines and, to date, has failed to submit proof that it even has sought a permit from any regulatory agency with the authority to grant necessary permits.*

**City Response:** The Maine Dept of Transportation has determined that the City has jurisdiction over the section of Route 1 where the Nordic intake and discharge pipes will be constructed. This section of Route 1 is located within the Urban Compact zone. The City, in the Urban Compact Zone, is responsible for making decisions regarding concerns such as the issuance of driveway/entrance permits and road opening permits. The City, on November 8, 2018, provided

a letter to Cianbro Corporation (Nordic contractor), that identified overall City terms for issuing a road opening permit for Route 1 (Northport Avenue). On February 20, 2019, the City issued a conditional road opening permit for the work that Nordic Aquafarm proposes in Route 1. I have attached the February 20, 2019 Road Opening Permit that the City has issued for the Route One work. The approved Permit identifies the Conditions of Approval that apply to the City Road Opening Permit. We believe that Nordic Aquafarm has secured the necessary permit rights from the City to install the proposed pipelines within the bounds of the right-of-way for U.S. Route One.

***Losee Comment 6e.** The easement location on the Eckrote property runs generally along the southerly bound of that parcel. Much of the easement is within 45' of the side line of the property. Construction this close to a property line is prohibited by the zoning rules of the City of Belfast.*

***Tucker Comment c (Page 20).** Use of NAF'S purported 25-foot permanent easement across a limited portion of the upland property owned by the Eckrote's to install its proposed pipes is illegal because it violates the City's 50-foot side-yard setback zoning requirements for accessory structures in the revised Belfast zoning ordinances.*

**City Response:** The Eckrote property is located in the Residential II zoning district (reference attached excerpt of zoning map). This property has been located in the Residential II zoning district since 1985. The City did not change the zoning district classification for this property when it adopted amendments to its Zoning (Chapter 102) and Shoreland (Chapter 82) Ordinances on April 17, 2018 and October 16, 2018; most of these amendments are associated with the Nordic Aquafarm project. The side line setback from a property line in this zoning district is 15 feet (not 50 feet), and this setback requirement has not changed since 1985. Continuing, the improvements that Nordic Aquafarms proposes are buried pipelines. The City has never required any buried infrastructure to comply with setback requirements from a property line.

I also note that the City has not yet received a permit application from Nordic Aquafarms for any local zoning or shoreland permits. Thus, the City is uncertain of the final location of any pipeline that may be proposed to be installed on the Eckrote property. The Belfast Planning Board will be responsible for the review of such permit applications. The Planning Board will make the decision regarding how the project location does or does not comply with City Ordinance requirements. Thus, in responding to this issue, the City simply notes that the correct side line setback for the RES-II zone is 15 feet (not 50), and that it is City staff's opinion that even this amount of setback would not apply because this is a buried pipeline.

***Losee Comment f.** The Nordic pipeline would be constructed within the proposed easement. The zoning rules of the City of Belfast prohibit any commercial or industrial accessory use in a residential zone. The Ekrote parcel is (in) a residential zone.*

***Tucker Comment d (Page 20 & 21).** Use of NAF's purported easement across upland property owned by the Eckrotes to install its proposed pipelines is illegal because the intake and outfall pipes are not accessory structures of a permitted principal residential use in the RES II zone, but*

*rather an illegal extension of an accessory structure that is an essential and integral accessory structure of an industrial use that is not permitted within the RES II Zone and is proposed to extend off the lot on which the principal use of the accessory structure is attached -- in violation of Belfast zoning ordinances controlling land use.*

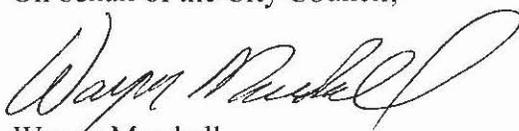
**City Response:** The City, on October 16, 2018 (and previously on April 17, 2018) adopted specific amendments to both its Zoning Ordinance for the Residential II zone (Chapter 102, Zoning), and to its Shoreland Ordinance for the Limited Residential District (Chapter 82, Shoreland), to allow the installation of both significant water intake and significant water outfall/discharge pipes in both the Residential II and Limited Residential Districts. The City also adopted amendments to Chapter 66, General Provisions, and Chapter 82, Shoreland, to define what constitutes a significant water intake and a significant water discharge pipe. The definition the City adopted for a significant water intake or significant water discharge pipe is as follows:

*"SIGNIFICANT WATER INTAKE OR SIGNIFICANT WATER DISCHARGE/ OUTFALL PIPE. A water intake or water discharge/outfall pipe used by a private person to service at least 50,400 gallons during any week and 36,000 gallons on any day that originates onshore and crosses above or below ground in or through a waterbody or land area identified on the City Official Shoreland Zoning Map or Official Zoning Map and that is subject to Shoreland regulation."*

All of the Eckrote property on which Nordic Aquafarms proposes to install its pipelines is located in the Residential II zoning district and most of this property and all of the area that may be affected by the proposed pipelines is located in the Limited Residential District of the Shoreland zone. The pipelines that Nordic Aquafarms proposes to install will involve the intake of volumes of water and the discharge of volumes of wastewater that greatly exceed the volumes identified in the definition of a Significant Water Intake or Significant Water Outfall/Discharge Pipe identified the adopted City definition. The City finds that the Ordinance amendments it adopted do not support the allegation in the Losee and Tucker letters.

The City of Belfast appreciates the opportunity to offer comment on this application. If you have any questions regarding the City's comments I ask that you direct such to me at 338-1417 x 125, or at [wmarshall@cityofbelfast.org](mailto:wmarshall@cityofbelfast.org).

On behalf of the City Council,



Wayne Marshall  
Director, Code & Planning

applicant did not have, or no longer has, sufficient title, right or interest.” 06-096 C.M.R. ch. 2.11.D.

Indeed, pursuant to the BPL rule, a loss of TRI in the upland property, suffered at any time after a Submerged Lands lease or easement from BPL is granted, will extinguish the submerged lands lease entirely. Specifically, the BPL rule states in relevant part that: “[I]f the holder’s right, title or interest in the upland terminates, then the lease or easement shall be invalid and all leasehold or easement interest in the Submerged Lands shall be extinguished.” 01-670 C.M.R. ch. 53, § 1.6.B.1(b). The language is not discretionary.

Here, NAF’s third pipeline(s) route is as lacking in TRI as their first two proposed routes and their application for a Submerged Lands lease and any filed DEP applications is contrary to law and must be rejected accordingly.

#### **VII. SUMMARY OF NAF’S ADDITIONAL “TRI” DEFICIENCIES COMMON TO ALL THREE PROPOSED PIPELINE(S) ROUTES**

For at least the following reasons, NAF does not have, and cannot acquire, access to Penobscot Bay through the intertidal lands located between the upland property owned by the Eckrotes and Penobscot Bay:

- a. A review of the relevant deeds from the Waldo County Registry of Deeds reveals that the intertidal land between the high water mark along the Eckrotes’ upland lot and Penobscot Bay is not owned by Janet and Richard Eckrote, meaning that neither the Eckrotes’ Easement to NAF or its subsequent letters and/or the alleged acknowledgement from the Eckrotes relating to the intended scope of the Easement option give NAF sufficient TRI in the upland property adjacent to the littoral zone in which the submerged lands lease is sought by NAF.
- b. NAF has no right to cross U.S. Route 1, a federal highway, with its pipelines and, to date, has failed to submit proof that it even has sought a permit from any regulatory agency with the authority to grant the necessary permits.
- c. Use of NAF’s purported 25-foot permanent easement across a limited portion of the upland property owned by the Eckrotes to install its proposed pipes is illegal because it violates the City’s 50-foot side-yard setback zoning requirements for accessory structures in the revised Belfast Ordinances.
- d. Use of NAF’s purported easement across upland property owned by the Eckrotes to install its proposed pipes is illegal because the intake and outfall pipelines are not accessory structures of a permitted principal residential use in the Res II Zone, but rather an illegal extension of an accessory structure that is an essential and integral accessory structure of an industrial use that is not permitted within the Res II Zone and is

proposed to extend off the lot on which the principal use of the accessory structure is attached -- in violation of the Belfast zoning ordinances controlling land use.

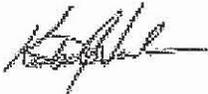
- e. Use of NAF's purported easement across upland property owned by the Eckrotes to install its proposed pipes is illegal because the Eckrotes' property is encumbered by a covenant that runs with the land in perpetuity, imposed by a deed from Harriet L. Hartley to Fred R. Poor (Janet Eckrote's grandfather), located at Vol. 452, Page 205 (See Composite Exhibit A), restricting the use of this land to residential use only and prohibiting any for profit business to be conducted on this parcel, in perpetuity, without prior permission of Harriet Hartley's heirs and assigns, including the current owners of two adjacent properties. This covenant cannot be altered by changes in any local zoning ordinances.

Note: Subparagraphs b, c, and d above were discussed in Comment Number 1 by Upstream Watch and the Maine Lobstering Union, incorporated herein as if fully set forth. Said Comment Number 1 was dismissed by BPL clearly contrary to law. Upstream Watch and the Maine Lobstering Union reserve their rights to contest the dismissal of Comment Number 1 by BPL in this proceeding, any ancillary proceeding, or in an independent proceeding of their choosing.

### CONCLUSION

For the foregoing reasons, NAF's application for a submerged lands lease should be dismissed for lack of TRI. This application can be resubmitted if NAF obtains TRI in properly zoned land at a future time. However, in the absence of administrative standing now, no further substantive review is appropriate by any State agency at this time.

Respectfully submitted,



Kimberly J. Ervin Tucker  
Maine Bar No. 6969  
48 Harbour Pointe Drive  
Lincolnville, Maine 04849  
P: 202-841-5439  
[k.ervintucker@gmail.com](mailto:k.ervintucker@gmail.com)

Copies of this filing are being jointly filed with appropriate staff of DACF

Doc # 5

David Loesse  
Upstream Watch Ltr.

Carol DiBello, Submerged Lands Coordinator  
Submerged Lands Program, Bureau of Parks and Lands  
Maine Department of Agriculture, Conservation & Forestry  
22 State House Station, Augusta, Maine 04333

RE: Submerged Lands Lease Application  
Nordic Aquafarms, Inc.

Dear Carol:

This letter conveys "Comment #2" by Upstream Watch and the Maine Lobstering Union concerning the application of Nordic Aquafarm, Inc. for a submerged lands lease in the City of Belfast and Town of Northport, Maine. The Comments' author is Attorney Kim Ervin Tucker. The points below are a summary of what is explained at length in Comment #2.

Comment #2 makes the following points, each with supporting documentation and/or caselaw.

1. Nordic Aquafarms proposes to construct a water treatment and pumping facility on land currently owned by the Belfast Water District on the west side of Route in the southern most extreme of the City of Belfast.
2. Nordic proposes to discharge its wastewater through a 36" pipe in to Penobscot Bay. Nordic proposes to withdraw water from Penobscot Bay in two (2) 30" pipes alongside its discharge pipe.
3. The submerged land under Penobscot Bay, beyond the mean low water line, on which Nordic would place its pipes, is held in a public trust for all the people, for which the State of Maine asserts that it is Trustee. Placement of pipes on the land held in a public trust for the people of the State of Maine requires a lease from the State.
4. The State of Maine designated the Department of Agriculture, Conservation and Forestry (DACF), Bureau of Parks and Lands (BPL) as the State's agent for such leases. BPL has promulgated Rules to define the leasing process.
5. A fundamental rule of that leasing process is the requirement that an applicant demonstrate it has sufficient "title, right, or interest" (TRI) to cross all properties between the applicant and the submerged lands it wishes to lease. If an applicant cannot demonstrate sufficient TRI, its application is insufficient and must be rejected. In this case, Nordic has no interest at all in the intertidal land, so there can be no question about whether the interest is "sufficient". If there is no interest at all, there is no basis for Nordic's application.
6. Nordic has failed to meet its TRI burden, and Nordic cannot meet its TRI burden. Here is why.





- a. Nordic must cross US Route 1 with its pipes from the west side where its treatment plant is proposed, to the east side where Penobscot Bay is found. Nordic does not have permission to cross over, under or across US Route 1.

- i. For this reason, Nordic has no TRI.

- b. Assuming it can cross US Route 1, Nordic must cross land of Janet and Richard Eckrote. The Eckrotés own land running from US Route 1 to the mean high-water line of Penobscot Bay. See the Eckrote deed – attached. As the deed reveals, the Eckrotés do not own the land between the mean high-water line and the mean low water line. The Eckrotés granted to Nordic an option to purchase an easement over the southern portion of their land, but that proposed easement stops at the mean high-water line. It has to stop there. That is all the Eckrotés own. The Eckrote easement cannot get Nordic to the mean low water line and so Nordic cannot reach the submerged land that the State might lease to it.

- i. For this reason, Nordic has no TRI.

- c. Nordic recently submitted two writings by which it attempted to show that the Eckrotés wanted to give to Nordic whatever interest they had in and to the intertidal zone between their property and the Bay but, since they don't own any interest in the intertidal land, the writings are meaningless.

- i. For this reason, Nordic has no TRI.

- d. In addition, the Eckrote land is restricted to residential uses. "The lot or parcel of land herein described is conveyed to Fred R. Poor (predecessor in title to the Eckrotés) with the understanding it is to be used for residential purposes only, that no businesses for profit are to be conducted there unless agreed to by Harriet L. Hartley, her heirs and assigns". Pipes are not residences. You can't live in them.

- i. For this reason, Nordic has no right to use the Eckrote land for a commercial or industrial pipe.



- e. The easement location on the Eckrote property runs generally along the southerly bound of that parcel. Much of the easement is within 45' of the side line of the property. Construction this close to a property line is prohibited by the zoning rules of the City of Belfast.

- i. For this reason, Nordic has no right to construct its pipe within the proposed easement.



- f. The Nordic pipeline would be constructed within the proposed easement. The zoning rules of the City of Belfast prohibit the use of any commercial or industrial accessory use in a residential zone. The Eckrote parcel is in a residential zone.

- i. For this reason, Nordic has no right to use the Eckrote land for a pipeline.

- g. The land in the intertidal zone between the Eckrote land and the Bay is owned by Jeffrey Mabee and Judith Grace. Mr. Mabee and Ms. Grace strongly object to Nordic's attempt

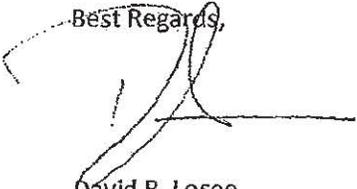
to trespass on their land and will resist any attempt by Nordic or the State of Maine to do so.

- i. For this reason, Nordic has no TRI.
- h. The Mabee/Grace land is subject to a Conservation Easement in favor of Upstream Watch, a non-profit corporation located in Belfast. Upstream Watch has enforcement rights and is authorized to protect the use of the conserved land.

- i. For this reason, Nordic has no TRI, as required by law.

The point is this: had Nordic submitted any modicum of evidence in the form of a title search (we know that Nordic, through its lawyers, had one performed over a year ago), or surveys (we know that Nordic or its consultants had at least 4 surveys prepared in the last year), BPL would know Nordic has no rights in the critical intertidal land. Title or right or interest is not, nor can it be "Sufficient" if it does not exist. Nordic's application is insufficient as a matter of law. There is no discretion involved.

Best Regards,



David B. Losee

CITY OF BELFAST, MAINE 04915

Public Works

Tel: 338-2375 115 Congress St.  
Fax: 338-0251

City Hall

131 Church Street Tel: (207) 338-3370  
Fax: (207) 338-6222

Permit to Open Street

I, Nordic Aquafarms, Inc. agree to repair any and all damage done to

Northport Avenue (US Route 1) approximately 50 feet north of the centerline of the Water District entrance for a length of approximately 150 feet north for the full pavement width of approximately 44 feet. (150' x 44')

(sidewalk, street/road) during the construction or utilities to be installed for the

Nordic Aquafarms aquaculture project.

I agree to completely backfill all trenches excavated across US Route 1 (At these locations)

All these will be repaired back to the original design when project is completed unless approved by the City of Belfast.

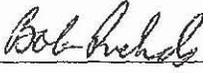
Date February 13, 2019

Signed:   
Owner or Project Manager

Phone: (860) 625-1908

Ed Cotter, Project Director -- Nordic Aquafarms, Inc.  
Print Name

Calculated and reviewed By:

Signed: 

Public Works Director or Agent

Permit Fee: \$

Paid: \$ \_\_\_\_\_ Check # \_\_\_\_\_  
Method of Payment

Fee = 150' x 44' / 9 x .165 x \$800 = \$96,800

Permits are calculated on the following: Needs at least 4" of Pavement back in trench  
And 24" of 4" gravel compacted.

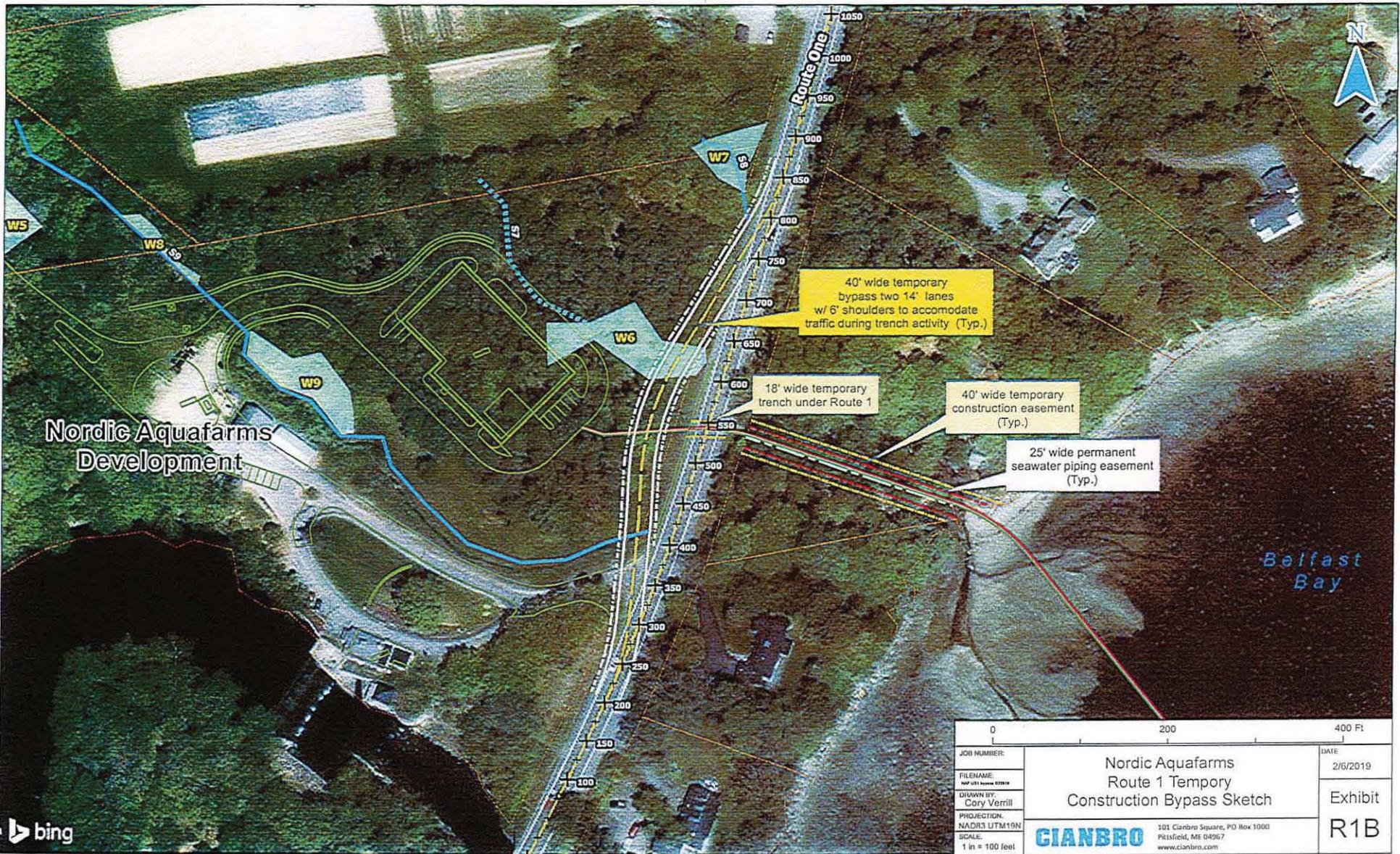
Length X Width divided by 9 X .165 X \$800.00 = Permit Fee

A minimum fee of \$1,000.00 per opening will be charged regardless of calculated fee.

Permit fee is refundable after completion of project and a final inspection by Public Works Director. Project must be found to be satisfactory to the City of Belfast.

REFUND POLICY: All permits issued between October 15th and May 15<sup>th</sup>, the fees will be held until after May 15th when a final inspection can be completed. (This is to allow for ground frost and any settling of the trenches)

CC: City Clerk's Office and Planning & Development Office



Nordic Aquafarms  
Development

Belfast Bay

0		200		400 Ft	
JOB NUMBER:	Nordic Aquafarms Route 1 Tempory Construction Bypass Sketch				DATE: 2/6/2019
FILENAME: MAP 031 Issues 02816					Exhibit R1B
DRAWN BY: Cory Verrill					
PROJECTION: NAD83 UTM19N					
SCALE: 1 in = 100 feet			101 Cianbro Square, PO Box 1000 Pittsfield, ME 04967 <a href="http://www.cianbro.com">www.cianbro.com</a>		



**ADDITIONAL TERMS AND CONDITIONS**  
**CONDITIONAL ROAD OPENING PERMIT TO NORDIC AQUAFARMS**  
**ISSUED BY BOB RICHARDS, PUBLIC WORKS DIRECTOR**  
**FEBRUARY 20, 2019**

Bob Richards, Public Works Director, City of Belfast, has reviewed the February 13, 2019 Road Opening Permit application submitted by Nordic Aquafarms. He has approved the Conditional Issuance of this Permit and has signed the Permit application on behalf of the City. City issuance of the Conditional Road Opening Permit is subject to Nordic Aquafarms complying with the following Additional Terms and Conditions.

1. Nordic Aquafarms shall provide the City detailed engineering and construction plans for the installation of two discharge pipes and 1 intake pipe for all areas located within the City right-of-way for Northport Avenue (Route One). Nordic Aquafarms shall provide said plans to the City a minimum of twenty-one calendar days prior to the start of any construction. The City will review the construction plans and identify any concerns that it may have regarding the proposed construction. The City Director of Public Works must approve the construction and engineering plans before Nordic Aquafarms can initiate any construction. The construction and engineering plans, at a minimum, shall include the following information:
  - 1.1 The location and depth of the installed pipes.
  - 1.2 The location and size/width of the trench cut on Northport Avenue.
  - 1.3 Description of fill materials that will be installed in the trench cut, particularly the top 3 feet of the cut, and how said materials will be compacted.
  - 1.4 Description of how replacement paving will be installed, including the type of pavement materials and the thickness of the pavement. City requires the replacement asphalt that is installed to be equal to the depth and quality of existing pavement, and will make the final determination regarding the depth of replacement asphalt that must be installed after inspecting the road cut made during project construction.
  - 1.5 Plans must identify the location of other utilities in the road, such as the existing water line, and other infrastructure within the road right-of-way, such as culverts, drainage swales, utility poles and the like, and how the project will avoid adverse impacts to said utilities.
  - 1.6 The plan must identify erosion control measures that will be installed and how the contractor will maintain the erosion control measures during project construction.
2. The engineering and construction plans (reference 1 above) submitted by Nordic Aquafarms shall include a narrative description that, at a minimum, addresses the following concerns:
  - 2.1 Description of when construction will occur. City prefers that construction occur before Memorial Day or after Labor Day. If construction is proposed between Memorial Day and Labor Day, Nordic Aquafarms shall be required to demonstrate why construction needs to occur during that time period and measures that Nordic Aquafarm shall take to

address public safety and traffic concerns associated with the increased traffic volumes that occur during that time of year.

- 2.2 A description of the length of time to complete construction and a schedule for all construction activities. The schedule also shall identify any proposed construction activities that would occur at night and how Nordic Aquafarms would conduct night-time activities, including how the potential adverse impacts on area residents from night-time construction would be addressed.
  - 2.3 The project construction narrative must identify a traffic management program. The program must identify who will perform these services and devices that will be used to safely manage traffic.
  - 2.4 The narrative must identify the contractor that Nordic Aquafarms will engage to perform project construction work. The City shall be provided a list of contact information for all persons involved with project construction, including a 24 hour emergency contact person.
3. Nordic Aquafarms, upon final City approval of this Conditionally issued permit, and prior to the start of any construction, shall provide the City a check for the total amount of the 'escrow account' associated with issuance of a permit. The estimated amount of this fee is \$96,800; reference Conditional Permit Application. The Public Works Director, in his review of the final project construction and engineering plans referenced in 1 above, shall determine if this estimated fee is accurate or if any adjustments to the amount of the fee (greater or lesser amount) are warranted. Post completion of project construction, the City Public Works Director shall determine when or if it is appropriate to release any or all of the funds in this 'escrow account', or if the City must use any or all of the funds to make repairs to the construction work performed by Nordic Aquafarms and its contractor(s).
  4. The Public Works Director, at his discretion, shall have the authority to engage the services of City Engineer, Olver Associates, to conduct a peer review of the adequacy of the construction and engineering plans (reference 1 above) prepared by Nordic Aquafarms. If the Public Works Director deems that a peer review is warranted, Nordic Aquafarms shall be responsible for paying any and all costs associated with the services provided to the City by Olver Associates. If the Public Works Director chooses to require a peer review, Nordic Aquafarms shall provide the City a check in the amount of the estimated cost of such services at the time that the Public Works Director determines the services are necessary. If the cost of services provided by City Engineer exceeds the estimated cost of services, Nordic Aquafarms shall be responsible for paying all additional costs incurred by the City. If the cost of services are less than the estimated cost, the City shall return all unexpended funds to Nordic Aquafarms.
  5. The Public Works Director, at his discretion, shall have the authority to engage the services of City Engineer, likely Olver Associates, to inspect project construction performed by Nordic Aquafarms and its contractor(s) associated with the installation of the intake and discharge pipes in the City right-of-way and the repair of the existing road and infrastructure, and to assess if said work satisfies City requirements. If the Public Works Director deems that inspection services are warranted, Nordic Aquafarms shall be responsible for paying any and all costs associated with the services provided to the City by

the engineering firm selected by the City. If the Public Works Director chooses to require inspection services be provided by City Engineer, Nordic Aquafarms shall provide the City a check in the amount of the estimated cost of such services at the time that the Public Works Director determines the services are necessary. If the cost of services provided by City Engineer exceeds the estimated cost of services, Nordic Aquafarms shall be responsible for paying all additional costs incurred by the City. If the cost of services are less than the estimated cost, the City shall return all unexpended funds to Nordic Aquafarms.

6. It is expressly understood that City issuance of this Conditional Road Opening Permit is based upon information provided to the City by Nordic Aquafarms in their February 13, 2019 Road Opening Permit application. The City, following its review of the additional information that must be submitted by Nordic Aquafarms to satisfy requirements of this Permit application and the accompanying Additional Terms and Conditions, shall have the authority to revise any or all of the Additional Terms and Conditions identified in this Conditional Permit issued on February 20, 2019, and to establish any new Terms and Conditions that should apply to the final Road Opening Permit.





Eckrote Property  
Limited Residential  
District of Shoreland  
Zone shown in Orange

Excerpt - City  
Shoreland Map

**Gartley & Dorsky**  
ENGINEERING & SURVEYING

May 16, 2019

Erik Heim  
President, Nordic Aquafarms  
Via email @: [erik.heim@nordicaquafarms.com](mailto:erik.heim@nordicaquafarms.com)

RE: Ownership of Intertidal Zone in front of Eckrote Property  
Northport Avenue, Belfast, Maine

Dear Mr. Heim:

I am writing this letter to you at the request of David Kallin, Esq. of Drummond Woodsum. The purpose of this letter is to address a conclusion made by another surveyor, Donald R. Richards, PLS of Richards, Cranston & Chapman, LLC, in a letter to David Losee, Esq. dated April 30, 2019 that the intertidal zone in front of the Eckrote property is owned by Jeffrey R. Mabee and Judith B. Grace. I disagree with Mr. Richards' conclusion.

The property in Belfast along the shore of Penobscot Bay from the Little River northerly for more than 1,600 feet (this would end more than four current-day parcels northerly of the Eckrote property) was owned in 1946 by Harriet L. Hartley.

The first parcel that Hartley conveyed along this shoreline included the shore frontage now owned by the Eckrotes (Tax Map 29, Lot 36) and Lyndon G. Morgan (Tax Map 29, Lot 35) and was described in a deed to Fred R. Poor dated January 25, 1946 and recorded in Book 452, Page 205 of the Waldo County Registry of Deeds. Mr. Richards interprets this deed as severing the intertidal zone or flats from the upland. Mr. Richards concludes that Hartley retained the flats in front of the upland she conveyed to Poor.

The series of conveyances thereafter, do not support the conclusion that the intertidal zone would convey to the predecessors in interest of Mabee/Grace. The second parcel that Hartley conveyed along this shoreline included the shore frontage now owned by Helmers (Tax Map 29, Lot 34), Kent (Tax Map 29, Lot 33), Giles (Tax Map 29, Lot 32) and a small amount beyond Giles northerly line. This second parcel was described in a deed to Sam M. Cassida dated October 25, 1946 and recorded in Book 438, Page 497 of the Waldo County Registry of Deeds. This deed from Hartley to Cassida clearly conveyed the flats with the upland by stating "*Also conveying whatever right, title or interest I may have in and to the land between high and low water marks of Penobscot Bay in front of the above described lot*". This conveyance created a boundary line across the flats between the flats northerly of this line that were conveyed to Cassida and the flats southerly of this line that Hartley would have still owned in front of Poor (now Eckrote and Morgan) and southerly to the Little River.

The third parcel that Hartley conveyed along this shoreline included the shore frontage now owned by Theye (Tax Map 29, Lot 37) and Mabee/Grace (Tax Map 29, Lot 38). This third parcel was described in a deed to William P. Butler and Pauline H. Butler dated September 22, 1950 and recorded in Book 474, Page 387 of the Waldo County Registry of Deeds. This deed from Hartley to the Butlers described the land being conveyed as “*Northerly by land of Fred R. Poor; easterly by Penobscot Bay; southerly by Little River and westerly by the Atlantic Highway, so-called*”. Mr. Richards concluded that this description “*necessarily includes the shore and the flats in front of the Eckrote property and northerly to the extent of the Fred R. Poor tract*”. I disagree. The call to be bounded by Penobscot Bay does cause the conveyance to include the flats with the upland. However, I believe that the northerly limit of the flats that were conveyed to the Butlers should be determined by applying what is known as the Colonial Method, which would create another boundary line across the flats, as happened in the Cassida deed. The westerly or landward end of this boundary line is at the common corner between the land conveyed to Poor and the land conveyed to the Butlers at the high water mark. This would be a boundary line between flats owned by the Butlers to the south and land retained by Hartley to the north.

The description in the deed to the Butlers is what is sometimes referred to as an “abutters description”. It is not a “metes and bounds” description that would include measurements around the property. In an abutters description the boundaries are described by calling for the adjoining property owners or monuments around the perimeter of the property being described. If Harriet Hartley had intended to convey to the Butlers the flats in front of the land she had conveyed to Fred R. Poor, the abutters description would have also stated *Northerly by land of Sam M. Cassida* since Cassida was a northerly abutter to Hartley’s remaining flats.

It is common for deeds conveying land along the shore, even when the language in the description clearly includes the flats, to not specify what portion of the flats is being conveyed. When the description fails to clearly describe the boundaries of the flats being conveyed, Maine courts have long held that the method for determining those limits, or the direction of the property line from high to low water, is the Colonial Method.<sup>1</sup> Since the abutters description from Hartley to the Butlers does not call for Cassida as a northerly abutter, it reads like a deed describing the upland portion being conveyed along with a call to the Bay, which would include the flats in front of that upland, but that does not clearly describe the limits of the flats being conveyed. Again, this is a common method of describing shorefront properties without defining the direction of the property line being created across the flats.

Ernest J. and Marjorie N. Bell, successors in title to the Butlers, conveyed what is now the Theye property to John and Catherine Grady in 1964 (Book 621, Page 288) without the flats. The Bells then conveyed their remaining property to Willis C. and Virginia K. Trainor in 1966 (Book 652, Page 116) by using the same abutters description that had been used in the Hartley to Butler deed and then excepted what they had conveyed to the Gradys in 1964. This same language has been carried forward to the deed to Jeffrey R. Mabee and Judith B. Grace (Book 1221, Page 347) resulting in Mabee and Grace owning the flats in front of their upland property and the flats in front of the Theye’s upland property.

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<sup>1</sup> Emerson v. Taylor, 9 Me. 42 (1832); Portsmouth Harbor, Land & Hotel Co. v. Swift, 82 A. 542, 109 Me. 17

I should also point out that, separate from a record title issue, the Eckrotes may have an adverse possession claim to the intertidal zone in front of their property. I have been told, but have not independently verified, that one the Eckrotes is a grandchild of Frederick Poor. It appears that the Eckrote property has been in the same family since the conveyance from Harriet Hartley. There is a plaque on the house near the shore that says "The Eckrote House, Est. 1949" suggesting the age of the house. There are two sets of steps leading to the shore from the upland near the house. One set is a combination of stone and wood. The other is a set of stone steps. Both sets of steps appear to have been there a long time. Your legal counsel will be able to help you review this information along with their own research to help determine the status of the actual ownership of the intertidal zone in front of the Eckrote property.

Sincerely,

**Gartley & Dorsky Engineering & Surveying, Inc.**

A handwritten signature in black ink, appearing to read "James A. Dorsky". The signature is written in a cursive, flowing style.

James A. Dorsky, PLS  
Senior Vice President

Cc: David M. Kallin, Esq.  
Drummond Woodsum

May 16, 2019

Carol DiBello  
Submerged Lands Coordinator  
Submerged Lands Program, Bureau of Parks and Lands  
Maine Department of Agriculture Conservation and Forestry  
22 State House Station  
Augusta, ME 04333

RE: Nordic Aquafarms, Inc. Submerged Land Lease  
Application

Dear Coordinator DiBello:

At the Bureau of Parks and Land's ("Bureau") request, this letter responds to right, title, and interest issues in the intertidal zone raised with regard to the submerged lands lease application of Nordic Aquafarms, Inc. ("NAF").

Here, NAF's administrative standing is being challenged under opponents' interpretation of two aspects of a deed to Fred R. Poor dated January 25, 1946 and recorded in Book 452, Page 205 of the Waldo County Registry of Deeds. The first is an alleged severance of the intertidal zone from the upland, and the second is an alleged private restrictive covenant contained in that deed. Even if the Bureau could look to a prior deed from 1946 as part of its standing analysis, which it cannot do, *see Britton I*, 2009 ME 60, ¶ 6 & n.3, neither issue impacts NAF's administrative standing.

The submission by Upstream Watch and Maine Lobstering Union includes a letter from the surveyor Don Richards that concedes that the 2012 deed to the Eckrotes creates "color of title" to the intertidal zone through its use of a monument "along said Bay." This color of title definitively establishes sufficient right, title, and interest for administrative standing, even if that "color of title" were later determined in a Court action to be, in Mr. Richards' words, "only a semblance of title based on a defective description." Moreover, I disagree with Mr. Richards' conclusion that the chain of title to Jeffrey R. Mabee and Judith B. Grace that was bounded "northerly by land of Fred R. Poor" could be read to describe the intertidal zone in front of the land formerly owned by Fred R. Poor.

### **1. The Right, Title and Interest Standard is a Low Bar**

The administrative standard for sufficient right, title, and interest differs dramatically from an actual determination of property rights. The mere possibility (such as the arguments created here by project opponents) that applicants do not have the actual rights to use the property as they seek, and that approval might later be revoked, does not deprive applicants of administrative standing or defeat a showing of sufficient right title and interest. *Southridge Corp.*

*v. Bd. of Env'tl. Prot.*, 655 A.2d 345, 348 (Me. 1995). This is in part because it “is an elementary principle of administrative law that an agency has only those powers expressly conferred by statute or such as arise therefrom by necessary implication to allow the agency to carry out the powers accorded them” and is “not the proper forum to determine existing property rights” in a contested strip of land. *Rockland Plaza Realty Corp. v. LaVerdiere's Enterprises, Inc.*, 531 A.2d 1272, 1273–74 (Me. 1987).

Indeed, when adjudicating disputes over claims resulting from the grant of a submerged lands lease, the Law Court declined to consider arguments that an upland owner is deprived of standing by prior deeds in a chain of title indicating that the upland owner’s property does not extend to the low-water mark. *Britton v. Dep't of Conservation*, 2009 ME 60, ¶ 6 & n.3, 974 A.2d 303, 306, as revised (July 9, 2009) (*Britton I*). In *Britton I*, the Court held that a 1999 deed into the Brittons which unambiguously bounded their property on “the York River” precluded an attack on their judicial standing to assert that a pier allowed pursuant to a submerged lands lease impaired their riparian right of access to their upland over the intertidal zone. Likewise here, the Eckrotes’ deed dated October 15, 2012 used Penobscot Bay as the seaward monument, with the call “Thence southwesterly along said Bay a distance of four hundred twenty-five (425) feet.” Thus, just as the Brittons’ 1999 deed was sufficient to establish standing in a dispute over a submerged lands lease, so too is the Eckrotes’ 2012 deed sufficient to establish administrative standing for a submerged lands lease application. It clearly follows that NAF’s option to purchase an easement from the Eckrotes is sufficient to establish administrative standing: both the Law Court and the Superior Court have recognized that an option to purchase an easement confers sufficient right title and interest for administrative review. *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983); *Nangle v Town of Windham*, No. CUMSC-AP-15-0040, 2016 WL 1706549, at \*5 (Me.Super. Feb. 23, 2016) (collecting cases). The *Nangle* Court contains a thorough discussion of administrative standing generally.

## **2. A Private Covenant Cannot Deprive an Applicant of RTI**

The Law Court has held that the existence of a private covenant cannot destroy administrative standing. *Our Way Enterprises, Inc. v. Town of Wells*, 535 A.2d 442, 444 (Me.1988). This same line of cases also observes that, because the Bureau is not a grantee of any private restrictive covenant, the Bureau cannot take private covenants into account when acting pursuant to its delegated authority under a statute enacted through the Legislature’s police-power. See *Lakes Environmental Association v. Town of Naples*, 486 A.2d 91, 96 n. 1 (Me.1984); *Whiting v. Seavey*, 159 Me. 61, 68, 188 A.2d 276, 280 (1963). This line of cases led the Law Court to observe that “it is settled law in Maine” that legislative enactments and private covenants are separate realms of land use control and that neither directly influences the interpretation of the other. *Bennett v. Tracy*, 1999 ME 165, ¶ 11, 740 A.2d 571, 574. Likewise, the Law Court has cautioned that it is reversible error to apply the Submerged and Intertidal Lands Act to disputes between abutters regarding riparian rights over the intertidal zone. *Britton v. Donnell*, 2011 ME 16, ¶ 4, 12 A.3d 39, 41 (*Britton II*). Under the reasoning in the above cases, the inverse is also true: it would be reversible error to apply an analysis of private covenants to the Bureau’s exercise of authority under the Submerged and Intertidal Lands Act.

### 3. Title to the Intertidal Zone in Front of the Eckrotes

Though, as discussed above, the Bureau lacks the statutory authority to adjudicate the meaning of the deed to Fred R. Poor dated January 25, 1946 and recorded in Book 452, Page 205 of the Waldo County Registry of Deeds, the opposition's premise that that deed unambiguously severs the flats from the upland is wrong. The deed is not unambiguous.

The seaward boundary of that deed is not described by reference to a single monument. Instead, the two side lot lines terminate in points where a river or gully arguably meet the ocean itself. The seaward boundary of the deed requires analysis of three operative calls as follows:

Thence Southeasterly following the bottom of the gully 275 ft. more or less to an iron bolt in the mouth of a brook; thence Easterly and Northeasterly along high water mark of Penobscot Bay 410 ft. more or less to a stake at the outlet of a gully; thence Northerly up the bottom of said gully 100 ft.

Unlike a deed that unambiguously runs side lot lines "to the high water mark of Penobscot Bay, thence along the high water mark of Penobscot Bay," which would plainly set the boundary monument as "the highwater mark of Penobscot Bay," the seaward bound in the Poor deed actually runs as a line between two monuments: "an iron bolt in the mouth of a brook" and "a stake at the outlet of a gully." Because the "mouth of a brook" and the "outlet of a gully" are both points where those watercourses arguable intersect with the ocean itself, it is not possible to conclude that the four corners of the deed unambiguously demonstrate an intent to sever the flats from the upland. Absent such unambiguous intent, the presumption under the Colonial Ordinance would convey the flats together with the upland. This principle was recognized by the Law Court with regard to streets. *Stetson v. City of Bangor*, 60 Me. 313, 317 (1872) (Although "strictly measured they do not extend beyond high-water mark on the plan" the Court held that "it was the intention to make a direct and unbroken connection between the street and the river at all times of the tide." This same reasoning would apply to the "mouth of a brook" and "outlet of a gully," which would presume that the brook at its mouth and the gully at its outlet make a connection to the Bay "at all times of the tide," and the Court often applies similar interpretative constructs to roads and watercourses. *Inhabitants of Warren v. Inhabitants of Thomaston*, 75 Me. 329, 332 (1883).

The measurement of 410 feet in the 1946 deed is plainly made "along high water mark of Penobscot Bay," but, as in *Stetson*, the high water mark does not unambiguously serve as a boundary monument. In other words, where the side lot lines terminate at the ocean (and are not limited to the highwater mark) then the measurement "along high water mark of Penobscot Bay 410 ft. more or less" is simply a convenient place to measure, and does not create an unambiguous severance of the flats from the upland. *Snow v. Mt. Desert Island Real Estate Co.*, 84 Me. 14, 24 A. 429, 430 (1891) (if even one side lot line extends to the water, the presumption is that the flats pass with the upland); *Snyder v. Haagen*, 679 A.2d 510, 515 (Me. 1996). The 2012 Good Deeds survey likewise supports the conclusion that the highwater mark was used for measurement, but not as a boundary. That survey depicts landward abutters of the Eckrotes, but does not identify the intertidal zone as separately owned. Instead it labels the Eckrotes' property as abutting "Penobscot Bay."

It is my understanding that neither the iron bolt nor the wooden stake referenced in the 1946 deed have been located on the face of the earth. Locating these monument on the face of the earth would provide evidence that could be used by a Court in the resolution of any latent ambiguity in the deed, but it is not an analysis that can be undertaken by the Bureau. Moreover, even if one or both monuments were located, the reference to the natural monuments of the “mouth of the brook” and the “outlet of the gully” could still control over the location of those artificial monuments. See *Baptist Youth Camp v. Robinson*, 1998 ME 175, ¶¶ 5-10, 714 A.2d 809, 811. *Baptist Youth Camp* presented a case regarding a deed reference to a stake in the “mouth of Ohio Stream.” There, the natural location of where the stream empties into Lake Pennamaquon was held to control over the artificial monument of a stake that could be easily moved or lost. Accordingly, it was proper for the trial court to recognize the unreliability of the monuments named in the original deed description, and place “more reliance on the geographic boundaries of the stream and the lake.” *Id.* ¶10.

The plain meaning of the word “mouth” is “that part of a stream where its waters are discharged.” See Webster’s Comprehensive Dictionary of the English Language (1998 Edition). Thus, by definition, the mouth of a stream joins the ocean where the stream’s waters are discharged. Several Court cases support the interpretation that the mouth of a brook is a natural monument where that brook meets the bay. See e.g. *Eaton v. Town of Wells*, 2000 ME 176, ¶ 8, 760 A.2d 232, 237 (Discussing “Wells Harbor” and “the mouth of the Webhannet River” as adjacent waterbodies marking the northerly bounds of an easement); *Baptist Youth Camp v. Robinson*, 1998 ME 175, ¶¶ 5-10, 714 A.2d 809, 811; *State v. Ruvido*, 137 Me. 102, 15 A.2d 293, 296 (1940) (discussing state jurisdiction and quoting a treatise that “mouths of rivers of any State where the tide ebbs” are “portions of the sea”); *Hamor v. Bar Harbor Water Co.*, 92 Me. 364, 42 A. 790 (1899) (the reporter of decisions describes a “mill situated at the mouth of Duck Brook” as located “below the high-tide mark of Frenchman’s Bay”); *Haight v. Hamor*, 83 Me. 453, 22 A. 369, 370 (1891) (a deed call that draws a line with “four rods of land” between the line and a brook, and then crosses a brook “at right angles to the brook, and following the same to its mouth” is shown on a plan to describe a locus parcel where the mouth of the river joins Frechman’s Bay); *Spring v. Russell*, 7 Me. 273, 293 (1831) (quoting legislative authorization to “open and cut a navigable canal” to “communicate with the sea, at the mouth of said river.”); *Winthrop v. Curtis*, 3 Me. 110, 111 (1824) (discussing a boundary line between the *Kennebec* and *Pejepscot* proprietors as beginning at “the mouth of Cathance river, which empties itself into Merry-meeting-bay.”

Even if a severance of the intertidal zone as a matter of record-title occurred in 1946, the uninterrupted possession of the intertidal zone by the owners of the upland property since that time would be sufficient to reunite that title in the upland owners (here the Eckrottes), and even the mere possibility that that may have occurred is sufficient to establish administrative standing. *Southridge Corp. v. Bd. of Envtl. Prot.*, 655 A.2d 345, 348 (Me. 1995); *accord Dunton v. Parker*, 97 Me. 461, 54 A. 1115, 1119 (1903) (similar holding for statutory standing under the Wharves and Weirs Act.)

Finally, even if a severance of the intertidal zone as a matter of record-title occurred in 1946, for the reasons explained in the letter of Surveyor James A. Dorsky, PLS, the result would be that that intertidal zone would have been retained by the heirs of Harriet Hartley, not

May 16, 2019  
Page 5

conveyed to the Butlers by an abutters description bounded on the north by the land of Fred Poor. Because Fred Poor's line to the north intersects with the high tide line, the Colonial Method would operate as a matter of law to extend that line from the highwater mark to the low water mark. *Emerson v. Taylor*, 9 Me. 42 (1832); *Portsmouth Harbor, Land & Hotel Co. v. Swift*, 109 Me. 17, 82 A. 542 (1912).

Sincerely,



David M. Kallin

**CERTIFICATION:**

THIS SURVEY CONFORMS TO STANDARDS SET FORTH BY THE STATE BOARD OF LICENSURE FOR PROFESSIONAL LAND SURVEYORS WITH THE FOLLOWING EXCEPTIONS:

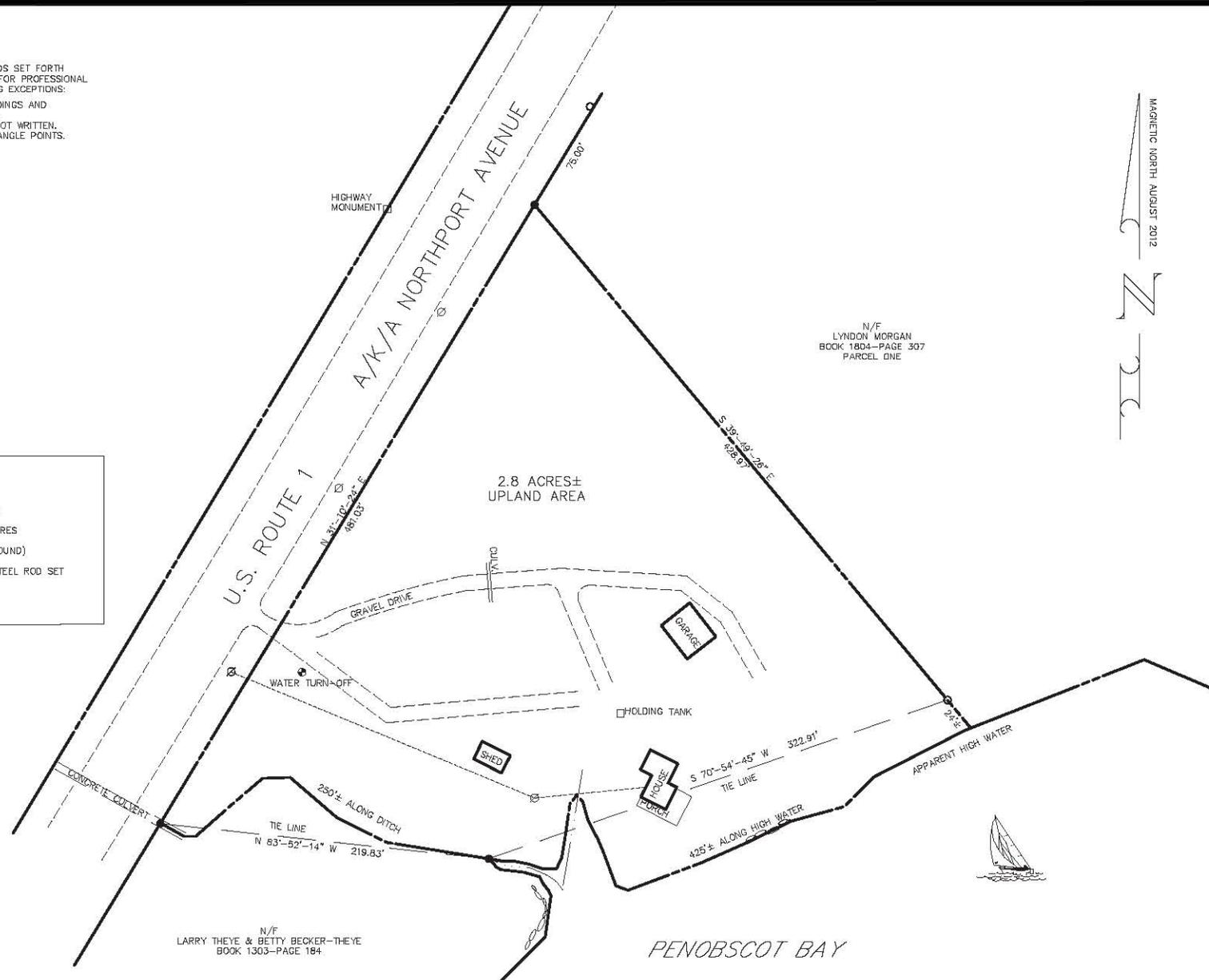
- a. A SURVEYOR'S REPORT OF FINDINGS AND OPINIONS WAS NOT PREPARED.
- b. A REVISED DESCRIPTION WAS NOT WRITTEN.
- c. MONUMENTS NOT SET AT ALL ANGLE POINTS.

MAGNETIC NORTH AUGUST 2012

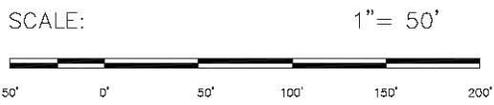
N/F  
LYNDON MORGAN  
BOOK 1804—PAGE 307  
PARCEL ONE

**LEGEND:**

- UTILITY POLE
- OVERHEAD WIRES
- IRON ROD (FOUND)
- 1/2" CAPPED STEEL ROD SET
- SEAWALL



GOOD DEEDS, INC.  
108 MAIN STREET  
P.O. BOX 557  
BELFAST, MAINE 04915  
TELE: (207) 338-5743  
JOB No. 12033  
DATE: AUGUST 31, 2012



BOUNDARY SURVEY  
of the property of  
**PHYLLIS J. POOR ESTATE**  
WALDO COUNTY REGISTRY OF DEEDS  
BOOK 1228 - PAGE 346  
ROUTE 1  
BELFAST, WALDO COUNTY, MAINE

MAILING ADDRESS: RICHARD & JANET ECKROTE  
42 GRANDVIEW AVENUE  
LINCOLN PARK, NJ 07035