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Admitted to Practice:
State of Maine
State of Florida
District of Columbia

United States Supreme Court
U.S. Circuit Court First Circuit
U.S. District Court Northern District of Florida
U.S. District Court Middle District of Florida
U.S. District Court District of Maine

May 6, 2019

Samantha Paradis, Mayor

Mary Mortier, Ward 1 Councilor

Neal Harkness, Ward 2 Councilor

Eric Sanders, Ward 3 Councilor

Michael Hurley, Ward 4 Councilor

Paul Dean, Ward 5 Councilor

Joseph Slocum, City Manager

RE: City Comment to Proposed Nordic Aquafarms Inc. Submerged Lands Lease Application

Dear Mayor Paradis, Members of the Belfast City Council and Manager Slocum:

As the Belfast City Council considers whether to file a comment with the Maine Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands (“DACF-BPL” or “the Bureau”), regarding the third proposed pipeline(s) route submitted by Nordic Aquafarms, Inc. (“NAF”), the Belfast and Northport citizens represented by Upstream Watch and the Maine Lobstering Union, are submitting their complete Second Comment and Motion to Dismiss, with attachments for your review and consideration.

The materials submitted with this letter detail a number of adverse environmental and economic harms that will result if these pipelines are approved, as proposed. No adequate consideration has been given by this Council, to date, to any of these potential, significant adverse impacts. Further, these materials demonstrate that NAF cannot put its pipelines where proposed – on this their third amended pipeline(s) route. Based on the materials provided, we request that the City of Belfast either oppose the application for a submerged lands lease, or send no comment at all.

First, no one can fully predict the scope of the adverse impacts that will result from allowing NAF to convert Penobscot Bay into its own giant chemistry experiment, based on the limited and ever-changing information that NAF has submitted at its public information meetings and in its State applications submitted to date. However, based on the limited information currently provided in applications submitted to the State, it is apparent that the impact on the health and reputation of all of Penobscot Bay’s fisheries – especially our currently thriving and lucrative lobster fishery – will be significant, long-term and likely devastating. The adverse impacts on the thousands of lobstermen who fish in Penobscot Bay, as well as on the many thousands of people in other industries (real estate, tourism, restaurants, boatyards, gear makers and sellers) whose jobs depend upon the health of this fishery, are incalculable. The loss of existing well-paying jobs cannot and will not be offset by the illusory promise by NAF of “up to” 100 jobs of unspecified salary ranges. Further, the potential for significant economic and social losses that will result if this project is

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approved as proposed include the diminution of the taxable value of waterfront properties in Belfast and Northport.

Second, NAF's first two pipeline(s) routes were ultimately rejected by the Bureau because both of these proposed route were located on the intertidal and/or littoral zone land of property owners who did not consent to this use of their property. The same fate must befall NAF's third attempt to find a legal path to the State's submerged lands. Like NAF's first two routes, this third route NAF proposes would trespass on the intertidal and littoral land of property owners who do not consent to this use of their land and who have place that land under a Conservation Easement.

SUMMARY OF NAF's TRI DEFECTS

Upstream and the IMLU are attaching the same evidentiary proof submitted last week to the Bureau, including relevant recorded deeds and other documents, recorded in the Waldo County Registry of Deeds, a review of which reveals that:

- (i) Janet and Richard Eckrote, the owners of the residential upland lot across and under which NAF proposes to place its three industrial accessory pipelines ("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.
- (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.
- (iii) The true owners of the intertidal land on which the Eckrotes' upland lot fronts, Jeffrey R. Mabee and Judith B. Grace,¹ do not consent to the placement of NAF's industrial pipelines on any portion of their land,² including their intertidal land. To ensure the protection and preservation of their intertidal land, Jeffrey R. Mabee and Judith B. Grace have placed the

¹ See Deed recorded in the Waldo County Registry of Deeds, at Book 1221, Page 347, attached as Exhibit G.

² Please see the 2-25-2019 letter of objection to placement of any portion of this project being on their intertidal land, previously filed by Jeffrey Mabee and Judith Grace with DAF-BPL, attached as Exhibit B.

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.³

As a matter of law, not subject to administrative discretion, NAF's deficiencies in TRI, in both "the upland property adjacent to the littoral zone in which the lease or easement is sought" and/or "all of the property that is proposed for development or use" for NAF's three proposed intake and outfall pipes, are both *fatal* and *incurable* for the reasons set out above, and discussed more fully below. NAF's second supplement to its submerged lands lease, and any still-pending DEP applications, must be dismissed accordingly.

It would be contrary to the public interest for the City Council of the City of Belfast to advocate in favor of the DACF-BPL granting a submerged lands lease that would violate the deeded private property rights of existing Belfast property owners and a lawful Conservation Easement.

SUMMARY OF SOME OF THE OTHER GROUNDS FOR DENYING THIS LEASE APPLICATION

The placement of these pipelines in Penobscot Bay, as proposed by NAF, would have potentially devastating impacts on the environment and economy of the Midcoast region – especially on our commercial fisheries and fishermen, including the iconic Maine lobster fishery in Penobscot Bay – which is the foundation of our economy in this region and the source of thousands of existing well-paying jobs. These adverse impacts include, but are not limited to the following:

- **Disturbing Buried HoltraChem Mercury:** The dredging required to bury a portion of NAF's pipelines in the Bay would disturb long-buried mercury from HoltraChem's discharges almost fifty (50) years ago. HoltraChem legacy mercury has previously been determined to be buried in this area of the Bay by the federal court's experts who conducted the Penobscot River Mercury Study ("PRMS"). In 2016, the Maine Department of Marine Resources shut down a 5.5 square mile area in the upper Penobscot Bay to all lobstering and crabbing, after finding a mean level of mercury in the tail meat of 40 adult lobsters of 292.7 ng/g, caused by exposure to HoltraChem mercury in the surface sediments south of Verona Island resulting in methyl mercury contamination. The DMR concluded that any mean levels of mercury in lobster meat, over 200 ng/g, justified its closure of both the lobster and crab fishery (even in the absence of such levels in the crabs in that area). The mercury levels the court's experts determined are found buried beneath the surface sediment in the area NAF proposes to dredge is 200 – 300 ng/g.⁴

³ The Mabee-Grace Conservation Easement, designating Upstream Watch as its Holder, was recorded in the Waldo County Registry of Deeds on April 29, 2019, Book 4367, Page 273, attached hereto and made a part hereof as Exhibit C.

⁴ The relevant DMR rule states:

25.65 Lobster and Crab Closure in Penobscot River

At the April 24, 2019 Belfast Harbor Committee Meeting, NAF's representative (Ed Cotter) revealed that NAF-commissioned sediment tests (which have not been made public), confirmed a level of 239 ng/g in one core sample that they took in this area and that NAF had failed to test most of the 10 core samples they had taken. During the December 17, 2018 NAF public information meeting, NAF's representative confirmed that the sediment testing method NAF's agents used to do their tests was not the more accurate PRMS sediment testing standard. Indicating that the level of mercury that is buried in this area may be even higher than previously determined, since NAF found 239 ng/g there even using a less accurate sediment testing protocol that was likely to understate the true level of mercury and its depth under the surface. A chart, prepared by the federal court's experts during Phase II of the PRMS, showing the location and estimated level of buried HoltraChem mercury in the Penobscot River and Bay (including in the area of NAF's third proposed route for placing its pipelines) is attached to the transmitting email for this letter.

- **A 5.5-Foot Underwater Wall:** According to NAF's latest schematic drawings for installation of their pipes in the intertidal land and under the Bay's waters, the portion of the pipelines that are not buried will form a wall on the surface of the Bay's bottom off Northport. The three pipes would be covered by gravel and a mesh cover. This configuration would form a wall along the bottom that is roughly 5.5 feet tall and roughly a half-mile long. Lobstermen who fish this area and who have had experience with disruptions to lobster movements caused by prior pipeline placements in Belfast Harbor, advised the Belfast Harbor Committee on April 24, 2019 that NAF's proposed underwater seawall will significantly disrupt the migration of lobsters in and around Penobscot Bay and radically change currents in this area and throughout at least the upper Bay. The effect on shorelines, erosion or navigation is unknown but likely also significant.
- **Contents and Characteristics of the Wastewater:** The impacts of the 7.7 million gallons of wastewater a day that NAF proposes to discharge into Penobscot Bay from these pipelines can also not be ignored when evaluating the impacts on riparian owners' rights and on commercial fishing and fisheries' health.⁵ According to the current, new Commissioner of DEP during his January 30, 2019 confirmation hearing, the impacts of this discharge on commercial fisheries is a subject in the jurisdiction of DACF-BPL not a consideration of the DEP during the MEPDES process. However, no information on the nature and predicted impacts of this wastewater discharge has been submitted by NAF, to date, to either agency.
 - **Wastewater Temperature:** The proposed warm temperature of this wastewater (59° to 64.4° Fahrenheit; revealed as 15° - 18° Celcius in the

It is unlawful to fish for or take lobsters or crabs by any means from the waters north of a line starting at the western most point of Perkins Point in the Town of Castine continuing in a northwesterly direction to the southern most point of Squaw Point on Cape Jellison in the Town of Stockton Springs. This section does not apply to equipment operated by the Department of Marine Resources.

⁵ To put this in perspective, the entire community of Bayside's wastewater treatment facility is limited to discharging 7 million gallons a year of treated wastewater into the Bay

MEPDES permit application) – discharged year round -- is between 5° and 33° Fahrenheit warmer than the Bay’s normal temperatures (depending on what time of year it is discharged). If a rise in temperature of the Gulf of Maine or the Bay of 0.5° Fahrenheit can devastate our ecosystems – what could the impact of discharging this volume of wastewater daily, in a relatively shallow embayment and estuary be?! In light of the loss of the lobster fishery in southern portions of New England, attributed to warming waters in those areas, the adverse impacts on the lobster fishery in Penobscot Bay would be catastrophic in the upper and western Bay, and potentially wide-ranging throughout the Bay as the water circulates.

- **Nitrogen:** The discharge will contain, according to NAF, 1484 pounds (673 kg) a day of nitrogen, which poses the risk of dangerous algae blooms, fish die-offs, and could put the Bayside Mussel Farm – an existing aquaculture leaseholder in the area of the discharges – out of business.
- **Currents and Circulation:** It will take fourteen days after discharge to leave the immediate area of the outfall pipe to circulate to every corner of Penobscot Bay and then out into the Gulf of Maine. This circulation estimate by NAF’s consultant means that in the immediate area of the outfall there will be a constant accumulation of approximately 108 million gallons of wastewater – destroying the viability of the existing mussel farm aquaculture business that thrives in the currently clean waters in this area and harm the use of these waters by all existing riparian owners in this corner of the upper Bay. This NAF current estimate was made without consideration of the impact of prevailing winds and we believe was done prior to the adoption of the re-configuration of the pipelines to an above-ground placement.
- **Salinity Changes:** According to NAF, 15% of the wastewater will be fresh water – permanently changing the salinity of the Bay through man-made alterations.

But before the above adverse environmental and economic impacts can be considered, the threshold issue of NAF’s lack of administrative standing to obtain any lease, license or permit in this area – when NAF has no legitimate title, right or interest in either “the upland property adjacent to the littoral zone in which the lease or easement is sought” or “all of the property that is proposed for development or use” for NAF’s three proposed intake and outfall pipelines -- must be addressed. This Council should not take a position in favor of NAF’s submerged lands lease application in the absence of both NAF’s and the Eckrotes’ TRI in the impacted intertidal land prior to NAF filing its response to the DACF-BPL directive to submit proof of TRI by May 16, 2019.

Respectfully submitted,



Kimberly J. Ervin Tucker
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