IN THE MATTER OF

NORDIC AQUAFARMS, INC. Belfast, Northport **and Searsport** Waldo County, Maine	) APPLICATIONS FOR AIR EMISSION,) SITE LOCATION OF DEVELOPMENT,) NATURAL RESOURCES PROTECTION ACT, and) MAINE POLLUTANT DISCHARGE ELIMINATION
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	) SYSTEM (MEPDES)/WASTE DISCHARGE) LICENSES)) **RENEWED MOTION FOR STAY OR DISMISS**) **PURSUANT TO NEW PRECEDENT**) **DECIDED ON JULY 7, 2020**) **SUBMITTED BY MGL INTERVENORS AND INTERESTED AND AGGRIEVED PARTY THE FRIENDS OF THE HARRIET L. HARTLEY CONSERVATION AREA**

Dated: July 13, 2020

Pursuant to new precedent issued by the Maine Supreme Judicial Court on July 7, 2020, in *Tomasino v. Town of Casco,* 2020 ME 96, Petitioners, by and through their counsel, Kimberly J. Ervin Tucker, Esq., hereby move for a stay or dismissal of all permit and license applications pending in the Board of Environmental Protection,[1] relating to Nordic Aquafarms, Inc. ("NAF"), until determination by the Waldo County Superior Court of the parameters of the easement option granted to NAF by the August 6, 2018 NAF-Eckrote Easement Purchase and Sale Agreement.[2] Such questions are before the Waldo County Superior Court in the pending Declaratory Judgment action to quiet title and resolve other property rights, captioned *Mabee and Grace, et al. v. Nordic Aquafarms, Inc., et al,* Docket No. RE-2019-18.

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[1] Hereinafter referred to as: "BEP" or "the Board".

[2] **Attached hereto and incorporated herein as Exhibit 3.**

The lease application proceedings Petitioners seek the Board to stay or dismiss include the following:

- 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

This motion to stay or dismiss NAF's permit and license applications in the Board is submitted on behalf of: **Jeffrey Mabee and Judith Grace** ("Mabee-Grace"), true owners[3] of a portion of the intertidal land that NAF fraudulently[4] asserts a right to use in these Board proceedings; the **Friends of the Harriet L. Hartley Conservation Area** ("Friends"), a Maine-registered nonprofit corporation[5] and 501c3 organization, and Holder of a portion of the intertidal land that NAF fraudulently asserts a right to use in these Board proceedings; the **Maine**

[3] Waldo County Registry of Deeds Book 1221, Page 347; Book 683, Page 283; Book 24, Page 34; Book 4425, Page 165.

[4] Pursuant to Maine Supreme Judicial Court precedents:

> A person is liable for fraud if the person (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

Sherbert v. Remmel, 2006 ME 116, §4, 908 A.2d 622, 623, citing, *Grover v. Minette-Mills, Inc.,* 638 A.2d 712, 716 (Me. 1994). Here, the Board and Department have relied on NAF's knowingly false representations about it easement rights, under the easement option granted by the Eckrotes and Petitioners (and Maine's taxpayers) have suffered significant damages as a consequence of NAF's fraudulent representations to the Board and Department.

[5] The Charter Number for the Friends of the Harriet L. Hartley Conservation Area is: 20200085ND. The Friends interest as Holder of the HLHCA is recorded at WCRD Book 4367, Page 273; Book 4435, Page 344; and Book 24, Page 54.

Lobstering Union[6] ("IMLU"), a cooperative corporation registered with the Maine Division of Corporations that has members who would be directly, adversely impacted by the Nordic Aquafarms, Inc. project as proposed; and Belfast Lobstermen **David Black** and **Wayne Canning** (who is also the Zone D Lobster Zone Council Representative for District 11 lobstermen) (collectively referred to herein with the IMLU as the "Lobstering Representatives"). Collectively the Interested Parties submitting this Motion to Stay or Dismiss are referred to herein as "Petitioners" or, where appropriate, by their specific name(s).

GRAVAMEN OF THE *TOMASINO* HOLDING

In the Law Court's July 7, 2020 decision in *Tomasino v. Town of Casco,* 2020 ME 96, ¶10-¶15 (decided July 7, 2020), the Maine Supreme Judicial Court clarified, for the first time, that a permit applicant cannot demonstrate the requisite administrative standing to proceed in an administrative permitting process, by relying solely on an easement, the parameters of which have not yet been decided by a court of competent jurisdiction. The Law Court also made clear that administrative permitting authorities lack the subject matter jurisdiction to make factual (or legal) determinations relating to the parameters of such easements.

Significantly, in making its ruling, the Law Court distinguished administrative standing disputes relating to whether an applicant for permits has "sufficient title, right or interest" that arise between private property owners when the applicant asserts that he/she/it has "title" to the disputed property (by deed, purchase option or adverse possession), [7] from administrative

[6] The Maine Lobstering Union is Local 207, in District 4 of the International Association of Machinists and Aerospace Workers ("IAMAW") and is referred to herein as "the IMLU" or "the Maine Lobstering Union." The Charter Number for this Cooperative Corporation in good standing is: 20140002CP.

[7] *See, e.g. Tomasino v. Town of Casco,* 2020 ME 96, ¶10-¶15 (decided July 7, 2020), citing, *Walsh v. City of Brewer,* 315 A.2d 200, 205 and 207 (Me. 1974) (the requisite right, title or interest in property to confer administrative standing is the "lawful power to use [the [property], or control its use" in the manner sought through the [permitting] action"); *Murray v. Inhabitants of Town of Lincolnville,* 462 A.2d

standing disputes between a private property owner and an applicant claiming "sufficient title, right or interest" based on a mere easement, the parameters of which have not been determined by a Court of competent jurisdiction.[8]

Specifically, the Law Court held in relevant part that:

> [N]one of these decisions [referenced in footnotes 5 and 6] supports the proposition that administrative standing may be conferred merely by possessing any kind of easement on the property at issue. Unlike title owners, easement owners are subject to a second layer of necessary authority – what the easement itself allows – in addition to what the applicable ordinances and statutes allow. . . ***Whatever minimum "right, title or interest" is required*** [to have administrative standing to obtain a permit]. . ., ***we conclude that, in the face of a dispute between private property owners, that requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so***.

Tomasino v. Town of Casco, 2020 ME 96, ¶15 (emphasis supplied).

In *Tomasino,* permit applicants challenged a Zoning Board's determination that they demonstrated ***insufficient*** title, right or interest ("TRI") in the property at issue to obtain a permit to remove trees from property owned by the abutting property owner (a land trust) over which the Tomasinos claim a deeded easement. The zoning board reasoned that, without a court's formal ruling on the parameters of the easement, it was not possible for the zoning board to determine where the easement was vis-a-vis the location of three trees that the applicant sought to remove. The Law Court agreed.

40, 43 (Me. 1983) ("an applicant for a license or permit to use property in certain ways must have 'the kind of relationship to the site,' that gives him a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the' . . . license he seeks." (internal citations omitted)); and *Southridge Corp. v. Bd. of Environmental Prot.,* 655 A.2d 345, 347-48 (Me. 1995) ("a pending action [in a parallel Superior Court quiet title case] claiming ownership by adverse possession was sufficient to confer standing to seek state regulatory permits for the property at issue").

[8] *Rancourt v. Town of Glenburn,* 635 A.2d 964, 965-966 (1993) (applicant did not establish that the scope of her right-of-way included the ability to construct a dock on the property; therefore the municipal board correctly determined that she had not satisfied the right, title or interest requirements to allow her permit application to proceed).

In *Tomasino*, the Law Court determined that the parameters of the easement on which the applicants relied in asserting "sufficient TRI" were unclear on two significant factual points: (i) whether the easement allowed the Tomasinos to cut trees from the land owned by the Trust without the express permission of the Trust; and (ii) whether all three of the trees that the Tomasinos sought to cut were within the boundaries of the easement that the Tomasinos had been granted. The Law Court stated that these factual determinations could only be resolved by a Court of competent jurisdiction, and resolution of such factual matters relating to the parameters of the easement were beyond the Zoning Board's subject matter jurisdiction to resolve.

As a result, the Court affirmed the judgment of the Casco Zoning Board that the Tomasino's easement was ***insufficient*** proof to demonstrate the requisite title, right or interest to establish the Tomasino's administrative standing to obtain a permit, in the absence of a factual determination ***by a Court of competent jurisdiction*** of the parameters of the easement.[9]

As will be shown below, this ruling is directly applicable to NAF's applications pending in the Board, as well as various other local and State permitting authorities, seeking permits, licenses and leases authorizing NAF to install three industrial pipelines across upland property owned by Richard and Janet Eckrote and into the intertidal land on which the Eckrotes' lot fronts. In all of these pending local and State permitting proceedings, including the Board, NAF has relied on its easement option from the Eckrotes (as well as the March 3, 2019 Letter Agreement, allegedly clarifying the meaning of the 8-6-2018 easement) as the basis on which NAF claims to have sufficient title, right or interest to obtain the necessary permits, licenses and

[9] Because the Superior Court acted in its intermediate appellate capacity, the Law Court reviewed the operative decision of the municipality directly. *Tomasino v. Town of Casco,* 2020 ME 96, ¶10-¶15 (decided July 7, 2020), citing, *Lakeside at Pleasant Mountain Condo. Ass'n v. Town of Bidgton*, 2009 ME 64, ¶ 11, 974 A.2d 893.

leases, required to construct its proposed land-based salmon farm – including the three pipelines a mile into Penobscot Bay.

The issues relating to the parameters and validity, *if any*, in the 2018 NAF-Eckrote easement are already being directly litigated in the Superior Court, in *Mabee and Grace, et al. v. Nordic Aquafarms, Inc., et al.,* Waldo County Superior Court civil action Docket No. RE-2019-18.

The Law Court's July 7, 2020 holding in *Tomasino,* mandates that all permitting proceedings stop, including those in the Board, until the Superior Court resolves the pending factual and legal issues relating to the parameters and validity, *if any*, of the easement on which NAF bases its claim of title, right or interest and, thus, its administrative standing. In the absence of a ***prior*** resolution by the Superior Court in the pending Declaratory Judgment action regarding the parameters of that easement, the administrative agencies, including the Board, lack the subject matter jurisdiction to proceed to consider or act on NAF's myriad, voluminous permit, license and lease applications.

MEMORANDUM OF LAW AND SUMMARY OF THE ARGUMENT FOR STAY

To date, the Board, Department, and other local and State regulatory entities from which NAF is seeking permits, licenses and leases, have cited the Law Court's prior decision in *Southridge Corp. v. Bd. of Environmental Prot.,* 655 A.2d 345, 347-48 (Me. 1995) to support the conclusion that lease, permit and license application proceedings may continue, despite Petitioners' pending Superior Court challenge relating to NAF's claims of title, right or interest in RE-2019-18. However, the Law Court expressly addressed, clarified and limited its prior holding in *Southridge,* in the *Tomasino* case. Pursuant to the clarifying holding in *Tomasino, supra,* the Board (and any similarly situated local and State permitting entities) must stay or

dismiss NAF's pending permit, license and lease applications as incomplete, due to insufficient title, right or interest, until the Waldo County Superior Court makes a determination of the parameters of the NAF-Eckrote easement.

The basis of Petitioners' challenges to the Board's subject matter jurisdiction to consider or process NAF's permit and license application(s) ***have nothing to do with the pending dispute in the Superior Court regarding who owns the intertidal land on which the Eckrote lot fronts and NAF proposes to place its industrial pipes into Penobscot Bay***. However, these challenges have everything to do with the parameters of the easement between NAF and the Eckrotes.

Resolution of the Petitioners' challenge to NAF's "sufficient TRI" claims in the Board, and previously in the Department, are based on the Petitioners' assertion that the easement granted to NAF by the Eckrotes, by its own terms, terminates at the high water mark of the Eckrotes' lot – granting no right to NAF to use the intertidal land on which the Eckrotes' lot fronts. This challenge requires a determination regarding the plain meaning and parameters of the easement option that NAF obtained from the Eckrotes. This challenge does not require the Board (or any other similarly situated local or State permitting authority) to resolve competing *ownership* claims by the relevant private property owners relating to this intertidal land.[10]

[10] Notably, the pending dispute over ownership of the intertidal land on which the Eckrotes' lot fronts does not involve NAF – NAF has no *legitimate* claim of ownership to this intertidal land. Fraudulent unrecorded instruments were submitted to DEP by NAF on June 10, 2019. Those faux "release deeds" were drafted by NAF's counsel and executed by unknown persons, whose identifying information (including the names, locations and alleged relationship to "Harriet A. [sic] Hartley" of the alleged Grantors) NAF has blacked out – making them un-recordable in Maine.

In these instruments the so-called Grantors claim to have conferred to NAF any interest the "Grantors" may have, *if any*, in the land referenced in the August 27, 1934 deed from Genevieve Hargrave to her sister Harriet L. Hartley and Arthur Hartley, as joint tenants. These unrecorded and un-recordable documents do not constitute a *legitimate* claim of ownership by title by NAF in the intertidal land on which the Eckrotes' lot fronts. Indeed, as drafted, these instrument do not convey title to any land pursuant to the controlling precedent of the Maine Supreme Judicial Court in *Sargent v. Coolidge,* 399 A.2d 1333 (Me. 1979) (a quitclaim deed merely of "a right, title and interest" in land is not a grant of the land itself nor of any particular estate in the land, and is not prima facie evidence of title), citing, *Hill v.*

Petitioners have asserted that the Board need only review the easement documents NAF has submitted – ***or not submitted*** – to see that NAF has failed to demonstrate that it has a legally cognizable expectation to use the intertidal land it proposes to use for placement of its pipes, in the manner that the Department's permits and licenses would authorize.[11]

However, pursuant to the *Tomasino* decision*,* the Law Court has clarified that it is *the Superior Court*, not any State agency, department, board, bureau or executive official, that *must* ***first*** make such a determination of the meaning and scope (i.e. "parameters") of this easement ***before*** NAF may rely on its easement option as proof of "sufficient" title, right or interest in the subject property to proceed in any permitting proceedings. And, pursuant to *Tomasino,* until and unless *the Court that has jurisdiction to do so* makes a ruling regarding the parameters of the NAF-Eckrote easement in the parallel pending Declaratory Judgment action (RE-2019-18), the easement must be determined by the Board to be ***insufficient*** proof of TRI (as the Bureau of Parks and Lands and the Department did in January of 2019). See e.g., Exhibits 1 and 2.

Further, pursuant to *Tomasino,* the Board now lacks subject matter jurisdiction to consider, process or make determinations on NAF's permit and license applications and/or the parameters of NAF's easement (including the effect of the March 3, 2019 Letter Agreement and December 23, 2019 Easement Amendment on the parameters of the 2018 easement boundaries in Exhibit A of the 2018 Easement Purchase and Sale Agreement), and must cease further consideration of NAF's permit and license applications. See, Exhibits 4 and 7.

In this case, the parameters of the easement on which NAF relies to demonstrate

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Coburn, 105 Me. 437, 452, 75 A. 67 (1909); *Butler v. Taylor,* 86 Me. 17, 23, 29 A. 923 (1893); *ash v. Bean,* 74 Me. 340 (1883); *Coe v. Person Unknown,* 43 Me. 432 (1857).

[11] Because, by its own terms, the easement's boundaries terminate at the Eckrotes' high water mark it should be apparent that NAF has failed to demonstrate sufficient TRI to proceed in the permit, lease and license proceedings.

sufficient TRI are even more in doubt, ambiguous and in need of factual (and legal) determinations by the Superior Court than the easement at issue in *Tomasino*. Indeed, in this case, the Superior Court has already determined in the parallel Declaratory Judgment action that there are significant factual issues regarding the parameters of NAF's easement that must be resolved. See, e.g. June 4, 2020 Order on Summary Judgment Motions, in RE-2019-18 (attached as Exhibit 10).

Here, there are even questions relating to the parameters of the easement that place in doubt whether NAF's Grantors, the Eckrotes, even have the ability to grant NAF an easement to use their upland lot ***or*** the intertidal flats on which their lot fronts – intertidal flats that Petitioners Mabee and Grace assert that they own in fee simple and to which Petitioner Friends is the Holder of a Conservation Easement.[12] In addition to the question of who *owns* the intertidal flats (and therefore who has the ability to grant an easement to use the flats), the factual issues relating to the parameters of NAF's easement already identified by the Superior Court include: (i) whether NAF's Grantors' (the Eckrotes') have the ability to grant NAF an easement over their upland property or if language in the 1946 deed from Hartley-to-Poor creates a restrictive covenant that limits the use of the Eckrotes' upland lot to residential purposes only;[13] and (ii) whether the

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[12] Even the surveyor who issued the April 2, 2018 survey, commissioned by NAF, cautioned NAF – in ALL CAPS on the face of that survey that the Eckrotes may not have the ability to grant NAF any easement below the Eckrotes' high water mark because of language indicating that the Eckrotes' waterside boundary terminates at the high water mark. See, e.g. April 2, 2018 Good Deeds survey by Clark Staples, P.L.S., attached hereto as Exhibit 8. See also, August 31, 2012 survey, commissioned by the Eckrotes and incorporated by reference in the Eckrotes deed from the Estate of Phyllis J. Poor (Schedule A), which states that the Eckrotes' waterside (eastern) boundary is "along high water". (attached hereto as Exhibit 9).

[13] As the Superior Court noted in its June 4, 2020 Order denying Plaintiffs Mabee and Grace's First amended Motion for Partial Summary Judgment regarding language Plaintiffs assert constitutes a "restrictive covenant," the Court concluded in relevant part that:

> "Because the deed as a whole is ambiguous regarding whether the residential use restriction was intended to burden all subsequent grantees of lot 36, or just Fred Poor, and because the scant extrinsic evidence present in the summary judgment record does not

Eckrotes' waterside (eastern) boundary ends at their high water mark, requiring further factual determinations relating to the location of the sideline termini referenced in the 1946, 1971 and 1991 deeds.[14]

Accordingly, because the Board lacks subject matter jurisdiction to consider, process or grant NAF any permits of licenses, until the pending factual and legal questions relating to the parameters of NAF's easement option from the Eckrotes are resolved by the Waldo County Superior Court, a stay or dismissal of all Board proceedings is mandated by the Law Court's holding in *Tomasino*. Because the Board and the Board's Presiding Officer has repeatedly denied Petitioners' requests for such a stay or dismissal, Petitioners renew their prior motions for imposition of this stay or dismissal now to the ***FULL BOARD***.

> provide any insight into Hartley's intent in 1946, Plaintiffs' amended first motion for summary judgment must be denied. . . . As the foregoing analysis impliedly details, however, nothing in the 1946 deed (nor the 1945 will) compels a judgment in Defendants' favor. The parties could assist the Court in this case at an eventual trial on the issue by locating and presenting any other evidence regarding the parties' intent at the time Hartley conveyed the parcel to Poor." (6-4-2020 Order Denying Summary Judgments, in RE-2019-18, pp. 9-10.

[14] As the Superior Court noted in its June 4, 2020 Order denying Plaintiffs Mabee and Grace's Second amended Motion for Partial Summary Judgment regarding whether the Eckrotes' waterside boundary is the high water mark of their lot, meaning that they have no ownership interest in the intertidal land on which their lot fronts and thus no ability to grant NAF an easement to use the intertidal land on which their lot fronts, the Court noted in relevant part that: "The second ambiguity relates to the location (or existence) of the artificial monuments described in the boundary description and how those monuments relate to the high-water mark. *Id.* at p. 22.

The Superior Court also noted in relevant part that:

> "[I]f the iron bolt and stake are both at or above the high-water mark, combined with the call along the high-water mark of Penobscot Bay, it would seem likely that the Court would have to apply 'the rule that where the two ends of a line by the shore are at high water mark, in the absence of other calls or circumstances showing a contrary intention, the boundary will be construed as excluding the shore.'" [citations omitted]; *Id.* at p. 21.

BACKGROUND

As the Board is well aware, Petitioners have consistently challenged the subject matter jurisdiction of the Board to proceed with its consideration of NAF's permit and license applications since January of 2019. The Board is also well aware that the Petitioners have a Declaratory Judgment action to quiet title, enforce property rights and enforce the Conservation Easement pending in the Waldo County Superior Court, *Mabee and Grace, et al v. NAF, et al.,* Docket No. RE-2019-18. In addition, Petitioners have participated as Intervenors or Interested Parties in multiple local and State (and federal) administrative proceedings in which NAF is seeking permits, licenses and leases that, if granted, would authorize NAF to take and use intertidal land that Petitioners Mabee and Grace assert that they own and Petitioner Friends of the Harriet L. Hartley Conservation Area (Friends) hold under a Conservation Easement created and record by Petitioners Mabee and Grace on April 29, 2019.[15] In all of these administrative forums, including the Board, Petitioners have continually opposed the sufficiency of NAF's claims of title, right or interest in the intertidal land on which the Eckrotes' lot fronts and to which Petitioners Mabee and Grace claim title.

In all of the local, State and federal administrative proceedings in which NAF has pursued permits, licenses and leases, including the Board, NAF has claimed that is has "sufficient" title, right or interest ("TRI") in the intertidal land on which it seeks permits and leases to place its three industrial pipes, based on the August 6, 2018 Easement Purchase and Sale Agreement, between NAF and Richard and Janet Eckrote.[16] That Agreement grants NAF an option to purchase a 25-foot wide permanent easement along the southern boundary of the Eckrotes' lot, Belfast Tax Map 29, Lot 36. However, by its own terms, the waterside (eastern)

[15] Waldo County Registry of Deeds ("WCRD") Book 4367, Page 273.

[16] Attached hereto and incorporated herein as Exhibit 3.

boundary of the easement option granted to NAF by the Eckrotes ***terminates at the Eckrotes' high water mark***.

Specifically, the easement NAF is granted an option to acquire in the August 6, 2018 Easement Purchase and Sale Agreement is not described by metes and bounds, but rather is depicted by a Google Earth image of the Eckrotes' lot with the boundaries of the easement highlighted by yellow lines. The yellow highlighting defining the easement shows that the easement goes along the southern boundary of the Eckrotes' lot, starting at U.S. Route 1 and terminating at the high water mark of the Eckrotes' lot.

That Google Earth image is attached to the Easement Purchase and Sale Agreement as Exhibit A. The image depicted in Exhibit A includes a 40-foot wide construction easement, within which the Eckrotes permit NAF to bury its three industrial pipes in a 25-foot wide permanent easement along the southern boundary of the Eckrotes' lot. The waterside (eastern boundary of the easement (the easement's end point) is shown to terminate at the Eckrotes' high water mark. Thus, the Eckrotes-to-NAF easement, as defined, includes no intertidal land and grants no easement to NAF to use the intertidal land on which the Eckrotes' lot fronts.

Because the easement, by its own terms, terminates at the Eckrotes' high water mark, Petitioners have repeatedly alleged in multiple forums, including the Board and Department, that the easement, even if executed, fails to give NAF administrative standing to seek any permits, leases or licenses because the easement is insufficient to give NAF a legally cognizable expectation to use the intertidal land on which the Eckrotes' lot fronts in the manner the permits, leases and licenses would authorize. This deficiency renders the easement insufficient to demonstrate that NAF has sufficient TRI to use this intertidal land – regardless of whether the Eckrotes own this intertidal land or not.

In January of 2019, both the Bureau of Parks and Lands and the Department of Environmental Protection agreed with Petitioners' challenge regarding the insufficiency of this easement to demonstrate sufficient RTI to proceed in the permitting, licensing and lease proceedings in these agencies. (See, e.g. Exhibits 1 and 2 attached hereto and incorporated herein). Specifically, in the January 18, 2019 letter from the Bureau of Parks and Lands, Submerged Lands Program, to NAF's counsel, the Bureau rejected the August 6, 2018 Easement Purchase and Sale Agreement as sufficient proof of TRI, stating in relevant part that:

> This letter serves as the Bureau of Parks and Lands, Submerged Land's Program's formal request that Nordic Aquafarms provide evidence that Nordic Aquafarms had established right, title or interest in the intertidal land where the pipelines are proposed. *As the Submerged Lands Program (the SLP) communicated during our conversation with David Kallin on January 16, 2019,* ***the Easement Purchase and Sale Agreement submitted by Nordic Aquafarms defines the easement area by reference to an Exhibit A that depicts the easement area as stopping at the high-water mark.***

Petitioners' Exhibit 1 (emphasis supplied).

As a result, NAF was requested to provide the Bureau with additional proof of TRI by April 18, 2019.

In response, in March 2019, NAF submitted a one-page letter, prepared by counsel for NAF and the Eckrotes, attached to a signed acknowledgement by the Eckrotes, dated February 28, 2019. That March 3, 2019 "Letter Agreement" purported to "clarify" NAF's rights under the 8-6-2018 Easement Purchase and Sale Agreement. The March 3, 2019 Letter Agreement states in relevant part as follows:

> . . . You intended a broad easement over your property, including any rights you have to US Route 1 and the intertidal zone such that Nordic Aquafarms can build and site its pipes anywhere in those areas where you have rights.
>
> * * *
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> . . .[T]his letter clarifies that the easement area delineated in the [8-6-2018 Easement] P&S includes the entirety of your [the Eckrotes'] rights in the intertidal zone and US Route 1 and amends the Closing Date.

Curiously, the March 3, 2019 Letter Agreement did not amend the boundaries of the Easement option as defined in Exhibit A of the 8-6-2019 Easement Purchase and Sale Agreement, which defined the waterside boundary of the easement option granted by the Eckrotes to NAF as terminating at the high water mark of the Eckrotes' property.

However, based on the March 3, 2019 Letter Agreement submitted by NAF to the Bureau of Parks and Lands, this determination was reversed by the Bureau in April 2019, and the Bureau found that the NAF applications were "complete" for processing.[17]

Similarly, on January 22, 2019, the Department determined that the boundary of the easement to be granted by the 2018 NAF-Eckrote option "terminated at the high water mark" of the Grantors' property and did not include an easement to use the intertidal land on which the Grantors' lot fronts. Exhibit 2. As a result, NAF was requested to provide the Department with additional proof of TRI by February 6, 2019,[18] but notably, NAF *never* submitted any documentation that amended the boundaries of the easement option to include the intertidal land on which the Eckrotes' lot fronts.

Despite the failure of NAF to provide any proof to the Department – through submission of an "***amendment, modification, or clarification of the agreement (or its attached Exhibit A) by the parties to that agreement"*** -- of a legally cognizable expectation to use this intertidal land in the

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[17] Exhibits 4, 5, and 6 to this Motion, incorporated herein.

[18] In relevant part, the Department expressly requested the following additional proof from NAF relating to TRI:

> 1) A clarification from the parties to the Eckrote purchase and sale agreement that the easement contained in the agreement expressly includes intertidal rights and applies to the adjoining intertidal zone. ***This Department request, which echoes a similar request made by BPL, may be satisfied through an amendment, modification, or clarification of the agreement (or its attached Exhibit A) by the parties to that agreement***.
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> 2) The survey providing the basis for the Eckrotes' intertidal boundaries.

Petition Exhibit 2, p. 2.

manner the permits sought would authorize, on June 13, 2019 the Department reversed this determination, stating in relevant part that:

> . . . 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 sufficient showing of TRI for the Department to process and take action on the pending application. 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.

Petition Exhibit 9, pp. 15 (emphasis supplied). When Petitioners' challenged this decision to the Board, the Board refused to rule on this jurisdictional challenge and proceeded with its own substantive review of NAF's permit applications in the absence of a resolution of Petitioners' challenge to the Board's and the Department's subject matter jurisdiction over NAF's permit applications. See, Exhibits 11 and 12.

Despite Petitioners' repeated attempts in the Board, to challenge the determination by the Board that NAF had demonstrated "sufficient TRI" to proceed, the Board and Board's Presiding Officer have denied all of the Petitioners' requests to stay the Board's consideration of the substance of the pending NAF permit and license application or dismiss the applications until the Waldo County Superior Court rules in the pending Declaratory Judgment action to quiet title and determine the parties' respective property rights. The Board refused Petitioners' challenges to the sufficiency of NAF's submissions in support of its claims of TRI, even after NAF submitted the December 23, 2019 Amendment to the NAF-Eckrote Easement Purchase and Sale Agreement, containing a WHEREAS clause that stated as follows:

> WHEREAS, as specified in the March 3, 2019 Letter Agreement, any easement rights Seller grants with respect to the intertidal zone and U S Route 1 adjacent to their real property are limited to whatever ownership rights we may have in and to

said areas, if any, and *no representation or warranty is made as to any such ownership rights*.

12-23-2020 Easement Amendment (attached hereto as Exhibit 7), p. 1.[19]

The Law Court's holding on July 7, 2020, in *Tomasino* now mandates that the Board stay or dismiss the NAF lease applications based on the ***insufficiency*** of NAF's title, right or interest -- because NAF relies only on an easement, the parameters of which have not been determined by a court of competent jurisdiction after factual inquiry by the Court, to establish its claim of "sufficient TRI." The clarification issued on July 7, 2020 by the Law Court, in *Tomasino,* requires all review of NAF's permit and license applications by the Board be stayed, and/or NAF's pending applications be dismissed, until the Waldo County Superior Court determines the parameters ad validity, *if any*, of the NAF-Eckrote easement, because NAF lacks administrative standing and the Board lacks subject matter jurisdiction to consider NAF's permit and license applications.

[19] The Board's Chair and Presiding Officer have denied Petitioners' multiple requests for stay of proceedings pending resolution of the TRI issues, from the outset of the Board assuming jurisdiction of NAF's permit and license applications as a project of statewide significance, pursuant to 38 M.R.S. § 341-D(2). In addition to the June 17, 2019 Letter from Board Chair Draper denying Petitioners Mabee and Grace's TRI challenge to NAF's TRI at the outset of the Board taking jurisdiction over NAF's various permit and license applications (Exhibit 11), the following Procedural Orders by the Presiding Officer deny Petitioners' TRI-related stay requests: the 2nd P.O. (dated 8-23-2019); the 3rd P.O. (dated 11-1-2019 denying Petitioners' request for TRI to be a hearing topic resolved before any other hearing topics proceed); the 4th P.O. (dated 11-8-2019); the 5th P.O. (dated 11-26-2019); the 9th P.O. (dated 1-31-2020); the 12th P.O. (dated 3-2-2020); the 13th P.O. (dated 3-16-2020); and the 14th P.O. (dated 4-3-2020).

The July 9, 2020 denial of stay by the Board's Presiding Officer was not related to TRI. On July 9, 2020, the Board's Presiding Officer denied Petitioners' request for a stay of substantive action by the Board on NAF's pending permit and license applications, pending NAF's completion of sediment testing along the proposed pipeline route for mercury and other contaminants, required by Section 404 of the Clean Water Act and ordered *on June 22, 2020* by the U.S. Army Corps of Engineers (USACE) with the approval of the U.S. Environmental Protection Agency (EPA) *and the Maine Department of Environmental Protection (DEP)*. The Board's Presiding Officer had previously denied Petitioners' requests that the Board require NAF to do such sediment testing pursuant to Section 404 of the Clean Water Act in the 13th, 14th, 15th, 16th, 17th and 19th Procedural Orders, and ordered that his denial of Petitioners' requested sediment testing was made in a Procedural Order without any opportunity for appeal by Intervenors/ Petitioners of this decision to the full Board for that denial.

The holding in *Tomasino* requires that he Board cease all review and action on the permit and license applications, including issuing any draft permits, until the Superior Court determines the parameters and validity, *if any*, of the NAF-Eckrote easement. Thus, it is concerning, *on many levels*, that NAF's counsel advised the Superior Court in a filing submitted today in *Mabee and Grace, et al. v. BEP and NAF*, Docket No. AP-2020-03, that ". . . draft orders will soon issue for public comment as required by the applicable environmental statutes. After comment, the Board will deliberate and vote on its final decision." NAF's July 13, 2020 Motion to Dismiss Reply, p. 1.

The Board's counsel joined in this filing by NAF -- that is premised on the novel notion that Petitioners have no ability or right to challenge the Board's review and action on permit and license applications over which the Board lacks subject matter jurisdiction, *according to the precedent just issued by the Maine Supreme Judicial Court*.

To be clear, Petitioners submit that any actions that the Board takes on NAF's pending permit and license applications prior to this Court's determination of the parameters of the NAF-Eckrote easement are a ***nullity***, because such determinations and action will have been undertaken by the Board in the absence of any subject matter jurisdiction in the Board to make such substantive decisions. Indeed, all substantive action on NAF's permit, license and lease applications, undertaken by the Board, and all other similarly situated local and State permitting authorities, after the clarification of the limits of subject matter jurisdiction by the Court in *Tomasino,* will be a ***nullity***.

As noted by the dissent in *Tomasino:* "administrative standing 'is intended to prevent an applicant from wasting an administrative agency's time by applying for a permit or license that he [or she] would have no legally protected right to use.'" *Tomasino v. Town of Casco,* 2020 ME 96, ¶ 20, citing, *Murray v. Inhabitants of the Town of Lincolnville,* 462 A.2d 40, 43 (Me. 1983); and *Walsh,* 315 A.2d at 207 n. 4 ("[G]overnment officials and agencies should not be

required to dissipate their time and energies in dealing with persons who are 'strangers' to the particular governmental regulations and control being undertaken."). Here, the Board has shown little or no concern regarding the potential for wasting limited taxpayer resources – or Petitioners' and other Intervenors' limited resources -- to consider NAF's applications prior to resolution of the considerable questions relating to the parameters and validity, *if any*, of the easement on which NAF relies to claim it has "sufficient TRI".

While the public purpose in preserving limited *public* resources enunciated by the Court in *Murray* and *Walsh* is important, equally important should be the recognition by public permitting agencies, like the Board, of the need in preserving the *private* resources of property owners whose property is threatened with regulatory taking, for the benefit of another private party (a permit applicant) whose legally cognizable interest in the property over which it seeks permits, licenses and/or leases from the government, has been credibly challenged and requires determination by a court of competent jurisdiction prior to permitting proceeding.

Private property owners defending their deeded property rights should not be expected to bankrupt themselves in a multi-front battle, waged simultaneously in multiple local and State administrative permitting proceedings, to prevent a corporation from seeking and obtaining permits to use land to which the corporation has only a dubious, disputed claim, grounded in an easement the parameters and validity of which have not been determined as a matter of law or fact, by a court vested with the subject matter jurisdiction to do so. The Law Court's holding in *Tomasino* is based on this principle.

At its core, Petitioners' challenges to the Board's subject matter jurisdiction are, and always has been, grounded in the constitutionally guaranteed right of all landowners to protect

their property from an unlawful regulatory taking. As the Law Court noted in *Brown v. Warchalowski,* 471 A.2d 1026, 1029, 1984 Me. LEXIS 600, •5-8:

> Article 1, section 21, of the Constitution of Maine provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." This constitutional guarantee surrounding the acknowledged right of ownership of private property necessarily implies from its mere declaration that private property cannot be taken through governmental action for private use, with or without compensation, except by the owner's consent. *Paine v. Savage*, 126 Me. 121, 123, 136 A. 664, 665 (1927); *Haley v. Davenport*, 132 Me. 148, 149, 168 A. 102, 103 (1933). The exigencies of particular individuals in the enjoyment of their own property will not in and of themselves suffice to permit state, county or municipal, action in appropriating the land of another for road purposes. . . . The constitution protects the owner of property to the extent of "churlish obstinacy", said Justice Kent in *Bangor & Piscataquis R.R. Co. v. McComb*, 60 Me. 290, 295 (1872):
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> > As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate.
> >
> > . . . ***In order to result in a constitutional "taking," it is not necessary that the owner of property actually be removed from his property or completely deprived of its possession, but merely that an interest in the property or in its use and enjoyment be seriously impaired***, such as when inroads are made upon an owner's title or an owner's use of the property to an extent that, as between private parties as in this case a servitude will attach to the land. *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 344 (Me. 1973); *United States v. Dickinson*, 331 U.S. 745, 748, 67 S. Ct. 1382, 1385, 91 L. Ed. 1789 (1947). *See also Cushman v. Smith*, 34 Me. 247, 260 (1852); *Estate of Waggoner v. Gleghorn*, 378 S.W.2d 47, 50 (Tex. 1964).

(emphasis supplied).

In *Tomasino,* the Court has struck a proper balance of public and private rights by requiring a permit applicant seeking permits, based on nothing more than a disputed easement, to first obtain a judicial determination of the parameters of that easement by a court of competent jurisdiction. It is imperative that the parameters of NAF's easement option be determined first by this Court in the parallel Declaratory Judgment action (RE-2019-18) prior to more costly, protracted permit proceedings being undertaken by a multitude of local and state entities.

While the Superior Court undertakes the legal and factual inquiries necessary to properly determine the parameters and validity, *if any*, of NAF's easement from the Eckrotes, and the Petitioners' and the Eckrotes' claims of ownership of the disputed intertidal land, neither the taxpayers nor Petitioners should be required to dissipate their respective limited resources in continued permit proceedings filed by an applicant that, as a matter of law under the circumstances of this case, lacks sufficient title, right or interest to have the requisite administrative standing to proceed in the permitting process. This is the holding of the Supreme Judicial Court in the July 7, 2020 *Tomasino* decision regarding what constitutes "sufficient title, right or interest" for an applicant, that is relying on an easement, the parameters of which have not been determined by a court of competent jurisdiction.

CONCLUSION

The Law Court's July 7, 2020 holding in *Tomasino v. Town of Casco, supra*, that: "***in the face of a dispute between private property owners, that requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so***", requires all further consideration by the Board on NAF's pending applications to cease, until the Waldo County Superior Court determines the parameters and validity, *if any*, of the NAF-Eckrote easement in the pending Declaratory Judgment action (RE-2019-18). Accordingly, Petitioners move for an immediate stay or dismissal of NAF's permit and license applications currently pending in the Board. Such a say would include the Board ceasing all review and proceedings on the above-referenced permit and license applications and ceasing efforts to issue draft permits in the absence of subject matter jurisdiction to do so.

Respectfully submitted this 13th day of July 2020.

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