

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
BOARD OF ENVIRONMENTAL PROTECTION
DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY

IN RE: APPLICATION OF NORDIC AQUAFARMS, INC.
MPDES PERMIT #ME0002771
APPLICATION FOR SUBMERGED LANDS LEASE
City of Belfast and Town of Northport, Waldo County

UPSTREAM WATCH AND MAINE
LOBSTERING UNION'S REPLY
IN SUPPORT OF THEIR MOTION
TO DISMISS FOR LACK OF TRI

This Reply in support of the December 18, 2018 Motion to Dismiss is submitted on behalf of Upstream Watch ("Upstream") and the Maine Lobstering Union ("IMLU"), both corporate entities registered with the Maine Division of Corporations. Upstream and IMLU respectfully submit that the MPDES permit application submitted by Nordic Aquafarms, Inc. ("Nordic") and the Application for submerged lands lease submitted to the DACF BPL are fatally flawed and must be dismissed for lack of title, right or Interest ("TRI"). Nordic's deficiencies in TRI are fatal and incurable for the reasons set out more fully below.

OVERVIEW

NAF proposes to construct a land-based salmon farm on land in Belfast, Maine off Perkins Road, serviced by three water pipelines that would be located within the municipal boundaries of both Belfast and Northport, Maine.

NAF has an option to buy a large tract of industrial-zoned land from the Belfast Water District on which NAF proposes to put its land-based salmon facility. This industrial zoned Belfast land is not located along the waterfront on Penobscot Bay. Yet the technical design NAF has chosen for its facility would require three water pipelines located in Penobscot Bay, that are both integral and essential to the operation of this industrial facility. These include two 30" saltwater intake pipes and one 36" outfall waste-water discharge pipe. NAF proposes to run these three industrial pipelines, from the salmon farm to a water treatment facility it would construct on the current Belfast Water District land, then go across (and under) U.S. Route 1, and finally go across a portion of a lot located on the waterside of Route 1 owned by the Eckrotes that is in the Residential II Zone in Belfast. Collectively, these pipes are each accessory structures to NAF's industrial principle use facility on the opposite side of Route 1.

Among the permits that NAF is required to obtain from the State of Maine for this project is a MEPDES discharge permit from the Maine Department of Environmental Protection ("DEP") and a Submerged Lands Lease from the Maine Department of Agriculture, Conservation and

Forestry (“DACF”), Bureau of Parks and Lands (“BPL”), for the portion of the pipelines that NAF proposes to locate in Penobscot Bay beyond the mean low water mark.¹

Pursuant to the controlling rules for the Maine DEP, “title, right or interest [“TRI”] in all of the property that is proposed for development or use,” must be demonstrated by an applicant “to the Department’s satisfaction” in order for an application to be substantively reviewed by DEP staff. Me. DEP 06 096 CMR 002-11(D). Further, “[w]hen the applicant has a lease or easement on the property, a copy of the lease or easement must be supplied. The lease or easement must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care, where required. If the project requires a submerged lands lease from the State, evidence must be supplied that the lease has been issued, or that an application is pending[.]” Me. DEP 06 096 CMR 002-11(D)(2).

As the Superior Court for Cumberland County noted in *Collins v. State*, 2004 Me. Super. LEXIS 251, at *6 - *7:

This [TRI] requirement is akin to the standing requirement for judicial action. The Law Court, in *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40 (Me. 1983), clarified the concept of administrative standing and its role as “an administrative and valid condition for applicant eligibility.” *Id.* at 43 (quoting *Walsh v. City of Brewer*, 315 A.2d200, 207 (Me. 1974)). In that case, the court stated that “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 the site in ways that would be authorized by the permit or license he seeks.” *Id.* (internal citations omitted).

Here, NAF must have TRI in all of the property that is proposed for development or use for the pipelines in order to have administrative standing.

NAF has sufficient TRI for the portion of the pipeline on the Belfast Water District property, but NAF has failed to provide proof of sufficient TRI to site any other portion of these accessory structures, for any of the several proposed pipeline routes that NAF has submitted to State regulators to date.

First, NAF admits that it has no permit from the Maine Department of Transportation or the City of Belfast to cross or dig-up Route 1, and NAF has not even filed any applications with either the

¹ In relevant part, publicly owned submerged lands in the coastal region of the Maine coast and the islands, includes: “All land from the mean low-water mark out to the three mile territorial limit. Where intertidal flats are extensive, the shoreward boundary begins 1,650 feet seaward from the mean high-water mark.” In contrast, in the coastal region of the Maine coast and islands, publicly owned submerged lands do **not** include: “Beaches or other shoreland that is covered by water only at high tide.”

https://www.maine.gov/dacf/parks/about/submerged_lands.shtml

See also, BPL’s website for an explanation on how to determine the mean low water mark.

https://www.maine.gov/dacf/parks/about/sublands_lowater.shtml

Maine Department of Transportation or the City of Belfast to cross and dig up this vital regional transportation artery.

Second, NAF only has an option for a 40-foot temporary construction easement and a 25-foot permanent easement for the three pipelines, over a defined and very limited portion on the southwestern-most edge of the Eckrotes' Residential II zoned lot in Belfast, Maine. Under the terms of that Easement Agreement, the three pipelines are required to be buried underground on a small portion of the Eckrotes' lot to the south of the existing "old barn" and access driveway off Route 1. The easement is not described by meet and bounds, rather the easement is illustrated in Exhibit A to the Easement Agreement and described in numbered ¶4 of the Easement Agreement. That illustration (attached hereto and incorporated herein as Exhibit A) and the text of the Easement Agreement, specify the location of the Easement Area as follows:

4. Location of Easement Area: A drawing of the proposed location of the permanent Easement Area and a temporary construction easement area is attached hereto as Exhibit A. Seller and Buyer acknowledge and agree that the final location of the Easement Area (and corresponding temporary construction easement area) may be subject to adjustment based on the result of Buyer's inspections and to Buyer's receipt of all applicable governmental and regulatory approvals necessary for Buyer's use of the Easement for its intended purposes, provided Buyer agrees that the Easement Area shall be located to the south of the old barn and existing driveway entrance. If Buyer determines that it is impractical or not feasible to locate the Easement south of the old barn and existing driveway entrance, and the parties are unable to agree on another, mutually acceptable location, this Agreement shall terminate and the Deposit shall be retained by Seller.

Neither the Eckrote Easement Area illustration in Exhibit A of that Easement Agreement, nor the descriptive text in numbered ¶4 of the Easement Agreement grant NAF title, right and interest to use, disturb, or place underground pipelines in, under, or on the Eckrotes' intertidal land or littoral zone. Rather, the illustration shows that the Easement Area to which the parties have agreed ***ends at the Eckrotes' lot's mean high water mark*** and *nothing* in the Easement Agreement references any right of NAF related to the Eckrotes' intertidal or littoral land rights and use.

In order for NAF to have the administrative standing to have DEP undertake a substantive review of its MEPDES permit application, or for NAF to obtain a submerged lands lease from BPL for its intake and outfall pipelines, NAF has the burden of demonstrating that it has title, right or interest in ***all of the property*** that is proposed for development or use for its three pipelines – especially for those portions of the pipelines that are proposed to be located on or under land owned by other parties. NAF must also have the kind of relationship to the site -- which must include all land along the route upon which the pipelines would be located on land and within the privately-owned intertidal or littoral areas in Penobscot Bay -- that gives it a legally cognizable expectation of having the power to use the site in ways that would be authorized by the MEPDES permit or submerged lands lease it seeks.

In other words, NAF must show that it has obtained a legally cognizable right to use all privately or publicly owned land over or under which its three pipelines are proposed to be located before

any action can legitimately be taken on its applications for permits by any State agency. In the absence of such proof from NAF, *NAF lacks the administrative standing to be eligible* for any permits or submerged lands lease and the State lacks the jurisdictional authority to review and/or take any action on NAF's permit applications.

To date, NAF has provided insufficient proof to date that it has either the requisite title, right or interest in *all of the property* that is proposed for development or use for its three pipelines, or the kind of relationship to the Eckrote site or other land along the proposed route(s) for the pipelines submitted to the State that give NAF a legally cognizable expectation of having the power to use the site in ways that would be authorized by the MEPDES permit or submerged lands lease it seeks.

Indeed, the "proof" submitted by NAF to date proves that NAF lacks the necessary TRI. Specifically, NAF's submissions to DEP and BPL are objectively deficient in establishing the requisite title, right or interest in the following ways:

- I. On its face, NAF's Eckrote Easement Area, as defined by the Easement Agreement NAF has submitted to DEP and BPL terminates at the mean high water mark of the Eckrotes' lot and fails to extend any use rights to NAF into the Eckrotes' intertidal or littoral zones (see Exhibit A). Consequently, NAF has no right, even under this Easement Agreement, to bury or place its pipelines in the intertidal zone of any Belfast or Northport property owner to get out to the State-controlled submerged land in Penobscot Bay, including the Eckrotes. Thus, NAF lacks the relation to the site proposed for its pipelines that gives it a legally cognizable expectation of having the power to use the site in ways that would be authorized by the MEPDES permit or submerged lands lease it seeks.
- II. The initial straight-line configuration of the pipelines into Penobscot Bay, submitted to both BPL and DEP and identified by NAF's agents as "Option 2A", illegally proposed crossing into and over the intertidal land and littoral zones of adjacent landowners (including Lynden Morgan), yet NAF has provided no proof that these landowners have given their consent to NAF to use this private land and the Eckrote Easement Agreement cannot and does not convey TRI to NAF to use or misappropriate this third-party, privately-owned land. Consequently, NAF has provided no proof that it has a right to bury or place its pipelines in the intertidal zone of any Belfast or Northport property owner to get out to the State-controlled submerged land to build the Option 2A pipeline configuration. Thus, NAF lacks the relation to the site proposed for constructing its Option 2A pipelines that could give NAF a legally cognizable expectation of having the power to use the site along which the Option 2A pipelines could be constructed and operated in ways that would be authorized by the MEPDES permit or the submerged lands lease it initially sought for Option 2A.
- III. The "supplemental" configuration of the pipelines into Penobscot Bay, submitted on November 20, 2018 by NAF's counsel Timothy Steigelman to Carol DiBello of BPL and identified as "Option 2" (also known as the "Twisted Sister"), also proposes to illegally cross into and over the intertidal land and littoral zones of different landowners in Northport and Belfast, yet NAF has provided no proof

that these landowners have given their consent to NAF to use this private land and the Eckrote Easement Agreement cannot and does not convey TRI to NAF to use or misappropriate this third-party, privately-owned land. Consequently, NAF has provided no proof that it has a right to bury or place its pipelines in the intertidal zone of any Belfast or Northport property owner to get out to the State-controlled submerged land to build the Option 2 pipeline configuration. Thus, NAF lacks the relation to the site proposed for constructing its Option 2 pipelines that could give NAF a legally cognizable expectation of having the power to use the site along which the Option 2 pipelines could be constructed and operated in ways that would be authorized by the MEPDES permit or the submerged lands lease it initially sought for Option 2.

- IV. NAF has failed to present any proof that it has a permit from either the Maine Department of Transportation or the City of Belfast, *or even a pending permit application with either of these entities*, to cross, excavate and/or bury three pipelines under Route 1, meaning that NAF lacks sufficient TRI in *all of the property* that is proposed for development or use for its three pipelines to currently have administrative standing to have their DEP or DPL applications substantively reviewed.
- V. Even a cursory review of the setback and accessory structure requirements in the current Belfast Zoning Ordinances and controlling Maine law demonstrate that NAF cannot legally place its three pipelines in the limited area authorized under the Eckrote Easement Agreement, whether these pipelines are configured as shown in NAF's Option 2 or Option 2A. The revised Belfast ordinances require a 50-foot setback for accessory structures – the proposed Option 2 and 2A pipeline configurations propose placing the pipeline on the property on the adjacent landowner to the south in violation of the Belfast setback requirements. Further there is inadequate land within the agreed-upon Eckrote Easement Area to meet the setback requirements in this recently revised ordinance and stay within the Easement Area. Additionally, the Belfast ordinance requires that accessory structures be placed “on the same lot” with the principle use and states that “[a]n easement is not a lot.” Finally, although the revised ordinance allows intake and outflow pipelines as accessory structures in the Residential II zone, it does not allow an industrial fish farm as an authorized *principle use* in this zone. As a result, it is a violation of Maine zoning law, as interpreted by the Law Court, for an accessory pipeline for an industrial facility to be sited in the Residential II zone, even under the revised Belfast Ordinances. The State is obligated to consider these legal impediments that prohibit NAF from placing these accessory structures where proposed and lacks the jurisdiction to proceed with any substantive review or action on the pending applications in the absence of NAF having any legally cognizable expectation of using the proposed pipeline site in the manner the permit would authorize.

Administrative standing is a jurisdictional prerequisite for both NAF to request permits and for the State to act on those permit or lease applications. The State is without legal authority to grant permits or even consider applications submitted by any applicant in the absence of TRI for “all of the property that is proposed for development or use.” While the rules and Maine law give

State agencies considerable discretion in determining whether an applicant has provided sufficient proof of its administrative standing through proof of TRI, willful blindness by State officials to the obvious defects in NAF's TRI (administrative standing) for the proposed pipelines would constitute an abuse of discretion that would have serious adverse impacts on the private property owners whose land NAF is proposing to damage and/or misappropriate.

No matter how biased in favor of this project some State officials may be, granting NAF second, third and fourth bites at the TRI "apple" to submit multiple ever-changing configurations for pipelines that NAF cannot legally construct where proposed would constitute an abuse of agency discretion and harm the property values and rights of impacted. Further, the State has no right to affect a regulatory taking of private property to benefit NAF without paying just compensation. For this reason, the State must stop further consideration of NAF's applications until and unless NAF can obtain and prove it has the requisite TRI and administrative standing.

BACKGROUND CHRONOLOGY

On September 26, 2018, NAF submitted an application for a Submerged Lands Lease to the DACF Bureau of Parks and Lands. The sole evidence of TRI provided to BPL from NAF was the Eckrote Easement Agreement. NAF made no effort to obtain or seek TRI to cross Route 1. NAF's submerged lands lease application included a relatively straight-line pipeline configuration that entered Penobscot Bay from the southwestern corner of the Eckrote lot. This configuration, identified by NAF as "Option 2A", placed the location of the three proposed pipelines within the town boundaries of both the City of Belfast and Northport. However, the Option 2A pipeline configuration improperly proposed locating the pipelines on the intertidal land and littoral zones of the Eckrotes and other private property owners without any evidence to support that these landowners have consented, or would ever consent, to NAF using their intertidal or littoral zone land for the placement of these industrial pipelines. See, Charts #1, #2, #3 and #4 attached. Indeed, NAF has provided no proof they have the right to place their pipelines even on or in the Eckrotes' intertidal or littoral land. (See Exhibit A).

On October 19, 2018, NAF submitted an application for MEPDES discharge permit to DEP. With that permit, NAF provided a copy of its DPL application and the Eckrote Easement Agreement as proof of TRI pursuant to Me. DEP 06 096 CMR 002-11(D)(2). The MEPDES application also included exhibits to the initial DPL submerged lands application that showed the Option 2A straight-line pipeline configuration.

On November 20, 2018, NAF submitted a radically amended pipeline configuration to DPL as a "supplement" to its pending application for a submerged lands lease. On information and belief, this radical revision was submitted after NAF's agents and counsel were advised that BPL staff had determined that the Option 2A configuration proposed putting the pipelines on land for which NAF had no TRI. Rather than reject the application, NAF was given a second bite at the TRI apple for the purpose of submitting a revised pipeline route for which NAF could demonstrate it had TRI. In a feeble effort to rectify this fatal TRI problem, NAF submitted the Option 2 configuration.

The revised Option 2 pipeline route (See Chart #1) has at least two significant bends in it – apparently in an effort to keep the pipeline within the Eckrotes’ presumed littoral zone until the pipeline reaches State submerged land it can lease. While described by NAF’s agents and attorneys as “supplemental” exhibits, the radically altered “Option 2” pipeline configuration and route bears little semblance to the original, essentially straight, configuration in Option 2A. Significantly, most of this revised pipeline route (also called the “Twisted Sister”) places the pipelines primarily in the municipal limits of Northport (with only about 1,000-feet of the nearly 7,000-foot pipelines located in Belfast and the remainder all in Northport) – meaning that the project is physically located in the municipal limits of two municipalities (Belfast and Northport), although neither the Town of Northport nor the landowners in Northport and Bayside were ever provided notice by NAF of the potential impacts and location of this proposed project prior to the initial comment period.

In December, notices for a second “voluntary” “supplemental” public information meeting, to be held on December 17, 2018 in Belfast, were hastily sent by certified mail to some landowners in Belfast and Northport (with NAF determining who would receive notice). On information and belief this second “voluntary” meeting was scheduled by NAF at the direction of State officials providing NAF another bite at the “notice” apple to keep this project proceeding in the permitting process despite the obvious and fatal TRI defects.

The “supplemental” public information meeting was held by NAF in Belfast during a snowstorm on December 17, with three senior DEP officials in attendance to observe.

During the December 17, 2018 NAF meeting the Option 2 (Twisted Sister) pipeline configuration was identified by NAF representatives as the proposed route for the pipeline, although it is unclear whether the DEP permit was “supplemented” with the radically revised pipeline configuration and route by any official submission by NAF. To date, no interested parties have been advised by the State of or given an opportunity to officially comment on this significant pipeline route revision. No reference was made to the Option 2A route during the “supplemental” public information meeting.

Several impacted residents in attendance at the meeting objected to the Option 2 route for the pipeline on the grounds that it proposed placement on their own intertidal and/or littoral zone land without their consent. At least three people asking questions during the December 17, 2018, NAF public information meeting (including the undersigned) challenged NAF’s administrative standing to proceed with the MEPDES permit and BPL submerged lands lease processes due to NAF’s lack of title, right and interest on the land on which they propose to place the pipeline.

NAF’s counsel and consultant attempted to deflect and avoid the TRI challenges raised at the December meeting. Initially, NAF’s counsel erroneously asserted that TRI was not relevant to DEP consideration of its MEPDES permit application, but ultimately NAF’s counsel conceded that TRI was required for DEP action on this permit as well as the application for a submerged lands lease.

On December 18, 2018, the undersigned filed a Motion to Dismiss the MEPDES permit application and the submerged lands lease application on the grounds that NAF lacks TRI.

On December 29, 2018, the undersigned received three letters in a single envelope, postmarked December 27, 2018 from DEP. The letters, all back-dated “December 21, 2018” and signed by the Acting Commissioner of DEP, denied the requests for hearing, intervention and BEP jurisdiction submitted on behalf of Upstream Watch and the Maine Lobstering Union during the comment period provided for the initial MEPDES and submerged lands lease applications. The denial of the request for BEP jurisdiction falsely asserted that this project only is physically located in one municipality – Belfast – even though both the Option 2A configuration (*that even NAF abandoned for lack of TRI on November 20*) and the Option 2 configuration are located in more than one municipality (Belfast and Northport).

This DEP denial of BEP jurisdiction determination was erroneous and based on demonstrably false claims regarding the physical location of the proposed project by DEP officials, including the Acting Commissioner. This project has always proposed that its accessory structures be in more than one municipality – located in both Northport and Belfast under both Options 2 and 2A. More importantly, in the absence of NAF having proven its administrative standing the three DEP denials were entered without DEP having jurisdiction to take *any action* related to the pending application from NAF – including requests for hearing, intervention or BEP jurisdiction.

On January 3, 2018, NAF filed a letter in opposition to the Motion to Dismiss filed by Upstream and the IMLU. In NAF’s letter response, NAF acknowledges that it has no permit and has filed no application for a permit to cross Route 1 – demonstrating its lack of TRI “in all of the property that is proposed for development or use.”

ALL EVIDENCE AVAILABLE TO THE STATE DEMONSTRATES THAT NAF LACKS TRI

Attached hereto and incorporated herein are four charts that provide additional visual support for the Motion to Dismiss filed by Upstream Watch and the Maine Lobstering Union. The Motion to Dismiss is based on NAF’s lack of TRI and thus lack of administrative standing. The attached charts illustrate the deficiencies detailed in that motion and this reply submission.

1. CHART 1: “Nordic Aquafarms Site Overview”:

This map shows in gross: (i) where the pipelines have been proposed to be located by NAF, both the straight-line (Option 2A) and the “twisted sister” (Option 2) configurations; (ii) where the town lines are; and (iii) the ocean bottom by depth soundings. It reveals that both proposed configurations of the pipelines cross town lines, either way, and that the proposed pipeline configurations crossed the town line from Belfast into Northport in every iteration submitted by NAF from the beginning of their permit application submissions. When DEP denied Upstream’s and the MLU’s requests for Board (BEP) Jurisdiction the Acting Commissioner asserted that the pipeline was only in one town and used that as a way to deny Upstream’s and the MLU’s requests. However, this chart makes clear that the Acting Commissioner was flat-out wrong in asserting that this project only is physically located in one municipality. Accordingly, the denial of BEP jurisdiction decision should be reversed.

The map also reveals that there is a shallow flat rocky shelf onto which the outfall discharge pipe will discharge. This is a significant difference from the claims that NAF has made in public meetings about where it will discharge waste-water. This Chart makes clear that the outfall discharge pipe will not discharge in deep water with fast currents as represented by the applicant.

2. **CHART 2: “Little River Cove Littoral Rights”**: This chart shows the 25-foot Eckrote easement in the small shaded area on the south side of the Eckrote lot and the zoning side yard setback. This chart illustrates that the pipeline easement crosses into the prohibited setback area. This shows that it is illegal for the applicant to use the easement as proposed as the zoning regulations, public laws and ordinances forbid it. These regulatory impediments to use the site as proposed should be acknowledged by State officials. Here, the applicant has no “right” to use the property as proposed. This chart also shows the littoral rights angle from the end of the easement to the southeast almost parallel to the Northport coastline, through the intertidal land of others who are not part of the easement. It shows the 25’ littoral zone of NAF’s agreed Easement Area (if NAF has any authority under its Easement to use any portion of the Eckrotes’ littoral zone and intertidal land). The 25-foot littoral zone is the most that NAF could claim a right to use within the Eckrotes’ littoral zone (and even that is doubtful as the Easement Agreement is currently written). NAF has improperly attempted to use the Eckrotes’ entire littoral zone to site the Twisted Sister pipeline configuration across the Eckrotes’ intertidal and littoral zone. This chart makes clear that NAF has placed the Twisted sister pipeline route outside the littoral zone of its 25-foot Easement Area – thus violating the scope of its easement and even the Eckrotes’ property rights in their littoral zone.
3. **CHART 3: “Little River Cove Pipeline Easement”**: This chart shows the pipeline, in either configuration, crossing the town lines of Belfast and Northport, again contrary to the assertion of the Acting Commissioner. It also shows the intertidal zone in both Belfast and Northport (the intertidal shelf doesn’t conveniently stop at the town line as shown on applicant’s maps) and it shows the properties in both Belfast and Northport adversely impacted by this proposed project’s pipeline configurations, both sets of which extend into the intertidal zone and beyond into the littoral zone. The owners of none of the impacted properties have given the applicant permission to be on their privately owned property.
4. **CHART 4: “Little River Cove Littoral Rights”**: This chart takes the previous Chart farther and, by shaded areas, shows the rights attached to each property and their complex overlaps and intersections. It reveals all of the landowners who would have to consent to the placement of the pipelines in either of the proposed configurations. None of those property owners have consented, save the very limited Eckrote easement. Those people and their properties do not cease to exist merely because the applicant “cleverly” omitted them from the maps it submitted to the State. It also shows high water, low water, general depths, and the pipe going through both intertidal and littoral land of people who have not consented to such intrusion.

For the foregoing reasons, NAF's applications for MEPDES and a submerged lands lease should be dismissed for lack of TRI. These applications 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,



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Copies of this filing are being jointly filed with appropriate staff of DEP and DAF BPL, as well as electronically served on counsel for NAF.