

STATE OF MAINE
WALDO COUNTY, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-2020-05

JEFFREY R. MABEE and
JUDITH B. GRACE, individually
and as joint tenants of certain real property
that is the subject of this action;
THE MAINE LOBSTERING UNION,
a Cooperative Corporation registered and doing
business in the State of Maine; **WAYNE
CANNING** and **DAVID BLACK**,
Commercial lobster and crab license holders
from Belfast, Maine (jointly designated by BEP
as “**the MGL Intervenors**”); and
**FRIENDS OF THE HARRIET L.
HARTLEY CONSERVATION AREA**,
a Non-Profit Corporation registered in
the State of Maine and an Interested and
Aggrieved Person denied Intervenor status
by BEP,

Petitioners,

v.

**BOARD OF ENVIRONMENTAL
PROTECTION;**

Respondents,

AND

NORDIC AQUAFARMS, INC., a
Foreign Corporation registered in the
State of Delaware,

Permit Applicant/Party-in-Interest,

**UPSTREAM WATCH;
THE FISH ARE OKAY;
ELEANOR DANIELS and DONNA
BRODERICK; NORTHPORT VILLAGE
CORPORATION; LAWRENCE
REICHARD; GULF OF MAINE
RESEARCH INSTITUTE; and
UNIVERSITY OF NEW ENGLAND,**

Parties-in-Interest.

**PETITION FOR REVIEW OF
11-19-2020 FINAL AGENCY
ACTION PURSUANT TO
Me.R.Civ.P. 80C
FILED BY THE MGL
INTERVENORS
AND INTERESTED AND
AGGREIVED PERSON
FRIENDS OF THE HARRIET
L. HARTLEY
CONSERVATION AREA
RE: APPLICANT NAF’s
APPLICATIONS FOR
MEPDES, AIR EMISSIONS,
SLODA AND NRPA**

INTRODUCTION

Petitioners, Jeffrey Mabee and Judith Grace, the Maine Lobstering Union, and Commercial lobster and crab license holders Wayne Canning and David Black (jointly designated by the Board of Environmental Protection (“the Board” or “BEP”) as: “the MGL Intervenors”) and Interested and Aggrieved Person¹ the Friends of the Harriet L. Hartley Conservation Area (“Friends”), by and through their counsel Kimberly J. Ervin Tucker, Esq., hereby file their “Petition for Review of Final Agency Action” by the Board, on applications for permits and licenses submitted by applicant Nordic Aquafarms, Inc. (“NAF”). Petitioners challenge Respondent's Final Agency Action pursuant to 5 M.R.S. §§ 11001-11008, et seq., and Rule 80C of the Maine Rules of Civil Procedure (“Rule 80C”) for the following permits and licenses:

- 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

¹ 06-096 C.M.R. ch. 2, §1(B) defines “Aggrieved Person” as follows:

- B. **Aggrieved Person.** "Aggrieved Person" means any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision. The Board will interpret and apply the term “aggrieved person”, whenever it appears in statute or rule, consistent with Maine state court decisions that address judicial standing requirements for appeals of final agency action.

06-096 C.M.R. ch. 2, § 1(J) defines “Interested Person” as follows:

- J. **Interested Person.** "Interested Person" means a person who submits written comments on an application or who requests, in writing, receipt of materials related to a particular application. The Department shall maintain a list of interested persons for each licensing proceeding.

06-096 C.M.R. ch. 2, § 1() defines “Intervenor” as follows:

- K. **Intervenor.** “Intervenor” means a person who, in accordance with the *Maine Administrative Procedure Act*, 5 M.R.S. §§ 9054(1 and 2), and the Department’s rules governing hearings, has been granted leave to participate as a party in a license application or appeal proceeding where a decision has been made to hold a hearing.

06-096 C.M.R. ch. 2, § 1(P) defines “Person” as follows:

- P. **Person.** "Person" means an individual, partnership, corporation, government entity, association, or public or private organization of any character; other than the Department.

- L-28319-TW-E-N
- W-009200-6F-A-N

The MGL Intervenors and Interested and Aggrieved Person Friends (“Petitioners”) adopt and incorporate the facts and legal claims contained in Upstream Watch’s Rule 80C Petition against the Board of Environmental Protection, for the same final agency actions, filed in the Kennebec County Superior Court, Docket No. AP-20-49 (attached hereto as Exhibit A), as though stated herein. In addition, Petitioners assert the following additional facts and claims for their Petition, pursuant to 5 M.R.S. § 11002(2) and state as follows:

This Petition challenges the Board’s final agency action in granting the above-referenced permits and licenses on both jurisdictional and substantive grounds. First, the Board improperly ignored the Supreme Judicial Court’s holding in *Tomasino v. Town of Casco*, 2020 ME 96, by determining that NAF had demonstrated sufficient title, right or interest (“TRI”) in the Eckrotes’ upland lot based on an easement, the factual parameters of which are in dispute and have not been determined by a court of competent jurisdiction.²

² Specifically, the factual parameters of the 8-6-2018 Easement option granted by Janet and Richard Eckrote to NAF are at issue in the pending declaratory judgment action pending in the Waldo County Superior Court action *Mabee and Grace, et al. v. NAF, et al.*, Docket No. RE-2019-18. This Court has previously determined that the factual parameters of the 8-6-2018 NAF-Eckrotes’ easement are in dispute in the June 4, 2020 Order, denying Plaintiffs Mabee and Grace’s Motions for Summary Judgment. The Board was provided that Order in support of Petitioners’ challenge to NAF’s claim of sufficient TRI in July of 2020. In their Amended First and Second Motions for Summary Judgment in RE-2019-18, Petitioners Mabee and Grace asserted that a restrictive covenant was imposed by the 1946 Hartley-to-Poor deed (WCRD Book 452, Page 205) limiting permissible uses of the Eckrotes’ upland lot to “residential purposes only” and prohibiting any for-profit business on this parcel without the approval of Grantor Harriet L. Hartley, her heirs and assigns), and that the waterside boundary of the parcel conveyed to the Eckrotes’ predecessor in interest (Fred R. Poor) by the same 1946 deed, severed the upland from the intertidal flats on which the Eckrotes’ lot fronts – with the Grantor (Petitioners Mabee and Grace’s predecessor in interest, Harriet L. Hartley) retaining the intertidal flats.

Petitioners Mabee and Grace claim ownership by deed and the judgment in *Ferris v. Hargrave*, Docket No. 11275 (WCRD Book 682, Page 283) and have filed a declaratory judgment action to quiet title to resolve this dispute. In addition, the 8-6-2018 Eckrotes-to-NAF easement option defines the waterside boundary of the easement option to be granted to NAF as terminating at the Eckrotes’ high-water mark – granting NAF no right to use the intertidal flats on which the Eckrotes’ lot fronts. In a 12-23-2019 Amendment to the 8-6-2018 Easement Purchase and Sale Agreement, NAF and the Eckrotes acknowledged that the Eckrotes made “no representation or warranty” of ownership of the intertidal land on which their lot fronts when they

In refusing to stay or dismiss NAF's applications pending resolution by this Court of the factual parameters of the 8-6-2018 Easement option, on which NAF bases its claim of title, right or interest and administrative standing, the Board, through its Presiding Officer, erroneously held that *Tomasino* did not apply to this case because "factually and procedurally distinguishable" from this case.³ Consequently, the Board proceeded to consider and grant NAF's permit and license applications that had been filed in the absence of NAF having administrative standing and thus, in the absence of any justiciable issue before the Board. Further, the Board violated its subject matter jurisdiction by the Presiding Officer continuing to rely on factual and legal determinations made by the Commissioner regarding the interpretation of the 8-6-2018 NAF-Eckrotes' Easement Agreement and the 3-3-2019 NAF-Eckrotes' Letter Agreement in June of 2019; and ignored the plain language in the 12-23-2019 NAF-Eckrotes' Amendment to the 8-6-2018 Easement Agreement.

acknowledged and signed the March 3, 2019 Letter Agreement with NAF. The Board erroneously ignored these factual disputes, identified by prior Court order, in determining that the Court's July 7, 2020 holding in *Tomasino v. Town of Casco*, 2020 ME 96 did not apply to the easement relied upon by NAF here.

³ Specifically, the Presiding Officer's Twentieth Procedural Order states in relevant part as follows:

Ruling. MGL's Amended Motion to Stay or Dismiss is denied. The Commissioner found that Nordic had demonstrated sufficient TRI to accept Nordic's applications as complete for processing. Over the course of this proceeding, the Board has considered and denied petitions by MGL to revisit the Commissioner's decision and stay the proceeding or return Nordic's applications based upon MGL's assertions that Nordic has not demonstrated sufficient TRI in the intertidal lands where Nordic's proposed pipelines would be located if permits were issued. As the Board has previously stated, the courts will ultimately decide the ownership of the intertidal area in question and any issues raised about the parameters of the Eckrote easement. **The Court's decision in *Tomasino* is factually and procedurally distinct from the Nordic matter and does not stand for the proposition that the Board's TRI determination may be reviewed by a court prior to final agency action. The decision in *Tomasino* does not change the Board's assessment.** The Board will complete its consideration of Nordic's applications and issue decisions.

Second, the substantive determinations made by the Board on the pending applications are in error because the Board granted NAF the permits and licenses referenced above based on incomplete and inaccurate applications. Indeed, the Board erred by:

- (i) Considering the above-referenced applications for this project prior to requiring NAF to complete sediment testing of the proposed sediment to be dredged and disposed of pursuant to a sediment plan approved by the Commissioner (or here the Board), in direct contravention of the mandate in 38 M.R.S. § 480-E(3);
- (ii) Refusing to suspend consideration of the pending NRPA and MEPDES applications until NAF completed sediment testing mandated on February 28, 2020 by the U.S. Army Corps of Engineers and U.S. EPA, pursuant to Section 404 of the Clean Water Act (“CWA”), using a federally mandated Sediment and Analysis Plan (“SAP”) issued in June 2020 to determine if the dredging, trenching, side-casting and blasting proposed by NAF for this project would disturb, resuspend and spread buried HoltraChem mercury previously found by neutral experts appointed by the federal court in the Mallinckrodt litigation or other dangerous hydrocarbons, PAHs, contaminants and toxins;
- (iii) Ignoring the conditions in the DMR evaluation of the proposed project on the lobster fishery, including DMR’s conclusion that sediment testing was required of the sediment proposed for dredging, trenching, side-casting, and blasting, in contravention to the spirit if not the letter of 38 M.R.S. § 480-D(9);
- (iv) Refusing to require NAF to amend the pending applications to reflect material changes to the project, regarding the amount and manner of disposal of dredge spoils, that NAF apparently knew about since June of 2019 but first revealed to the Intervenors and the public on March 2, 2020 -- after the Board’s administrative record had been prematurely closed on 2-14-2020 for hearing-related issues and 2-18-2020 for non-hearing related issues;
- (v) Failing to require NAF to file a separate MEPDES permit application for the change in dredge spoils disposal, announced on March 2, 2020 at a public meeting conducted by the Department of Marine Resources (“DMR”), although the proposed dewatering of 15,000-20,000 cy of dredge spoils from 110 to 130 barge-loads of material to Mack Point in Searsport would constitute a separate point source discharge of pollutants into the waters of the United States, in violation of Section 404 of the CWA, which would require NAF to file a separate MEPDES permit;
- (vi) Failing and refusing to give the municipality of Searsport notice of NAF’s newly proposed dewatering of 15,000-20,000 cy of dredge spoils at or near Mack Point within the municipal boundaries of Searsport, in contravention of 38 M.R.S. § 480-E(1) and 5 M.R.S. § 9051-A(1)(A)(2) and (2)(A)(2);
- (vii) Failing to require NAF to file a solid waste disposal application for its proposed dewatering of 15,000-20,000 cy of dredge spoils at or near Mack

- Point within the municipal boundaries of Searsport prior to granting NAF's pending Air Emissions, MEPDES, NRPA and SLODA applications;
- (viii) Failing to condition NAF's MEPDES, NRPA and SLODA applications on NAF filing and obtaining the necessary solid waste disposal permits and licenses needed to dewater dredge spoils at Mack Point, and the required local land use permits from Searsport and/or federal permits for such dewatering activities;
 - (ix) Using the same legal counsel from the Attorney General's Office to advise the Board, Presiding Officer and Department – defeating the independence of the Board from the Department and its staff in considering a project of statewide significance – the result of which was the denial of adequate due process to the Petitioners and all Intervenors;
 - (x) Granting the MEPDES permit to NAF and determining that the temperatures proposed for the wastewater to be discharged into Penobscot Bay will not have an adverse impact on water quality and lobsters and lobster fishing by using irrelevant temperature data from Belfast Harbor provided by DEP staff as the temperature of Penobscot Bay at the proposed point of discharge, rather than using actual temperature data in the area of the proposed discharge – available from the federal (NOAA) eMOLT study – to evaluate whether the proposed temperatures constitute the discharge of a pollutant into the waters of the United States, in contravention of Section 404 of the CWA;
 - (xi) Denying Petitioners (and all Intervenors opposing this project) the right to file relevant evidence discovered or created after the premature close of the Administrative Record – including information concealed by NAF or which did not exist in February 2020 – which denied the Petitioners and all Intervenors due process and violated the requirements for a fair adjudicatory hearing in 5 M.R.S. § 9056(2) and a thorough and accurate evaluation by the Board of the impacts of this proposed project;
 - (xii) Denying Petitioners and all Intervenors the right to question DEP staff and other State employees advising the Board during the hearing conducted in February or during deliberative sessions held before the full Board prior to the Board voting on whether to grant NAF the permits and licenses challenged herein, in contravention of 5 M.R.S. § 9054(5) and § 9056(2); and
 - (xiii) Denying Petitioner Friends the right to participate in the February hearing as an Intervenor, in contravention of 5 M.R.S. § 9054(1) and (2), even though Friends: (i) did not exist as a legal entity when the initial determination of who was an Intervenor was made; (ii) did not have a legal right as Holder of the Conservation Easement until November 4, 2019; and (iii) is represented by the same counsel at the MGL Intervenors.

All of the foregoing defects, as well as the defects enumerated in Upstream Watch's Rule 80C Petition (attached as Exhibit A and incorporated herein) constitute errors of law

and violations of due process committed by the Board, directly or through its Presiding Officer, and abuses of the Board's discretion. As a consequence of these identified defects in process, the findings made by the Board when it found NAF's applications to be complete and legally adequate, are unsupported by competent record evidence. Further, denying Petitioners and other Intervenors the due process required by law rendered the BEP process a sham – devoid of independence from DEP and contrary to the letter and spirit of the Board's statutory responsibilities to protect the environment and public health and safety.

Petitioners respectfully submit that the Court should bifurcate consideration of the issues raised in this Petition – addressing the jurisdictional and justiciability issues prior to requiring the State to prepare the voluminous Record required to address the substantive challenges to this litigation, and prior to subjecting the Court, the parties and the State taxpayers to the cost of resolving the substantive deficiencies referenced above.

PARTIES

A. Petitioners

1. **Jeffrey R. Mabee and Judith B. Grace** are natural persons, residents of the City of Belfast, Maine, and are the owners of a piece or parcel of land known as Little River Center, located at 290 Northport Avenue, Belfast, Waldo County, Maine, 04915, Belfast Tax Map Page 29, Lot 38, more particularly described in the Waldo County Registry of Deeds, at Book 1221, Page 347. Petitioners Mabee and Grace are husband and wife and own the subject property described in their deed in fee simple as joint tenants. Petitioners Mabee and Grace assert that their land includes the upland and structures on Belfast Tax Map 29, Lot 38 and the intertidal land on which Lots 38, 37, 36 and most of Lot 35 front, as shown on the recorded survey plan recorded in the WCRD at Book 24, Page 34 and described in the Surveyor's Report recorded at Book 4425, Page 165.

Petitioners Mabee and Grace respectfully assert that they are the true owners, in fee simple,

of the intertidal land on which applicant NAF improperly seeks to place three industrial pipelines, which are essential accessory structures of its proposed land-based salmon factory in Belfast, Maine. Petitioners do not consent to this proposed taking or use of their land. Petitioners Mabee and Grace are abutters of the proposed NAF project and the true owners of the environmentally fragile intertidal land on, through or under which NAF seeks to place its three industrial pipelines in Penobscot Bay.

Petitioners Mabee and Grace timely asserted their ownership interest in the intertidal land on which NAF seeks to place its water intake and discharge pipes in the Board proceedings beginning in May of 2019. Petitioners have tirelessly, consistently and at great personal expense been forced to file challenges to NAF's claims of "sufficient title, right or interest" in this intertidal land since April of 2019 – when Petitioners Mabee and Grace first learned that the intertidal land on which NAF sought to place its pipes was the Petitioners' intertidal land. To emphasize their intent to protect this intertidal land from the degradation and destruction that NAF has proposed, Petitioners Mabee and Grace put all of their intertidal land under the protection of a conservation easement, in perpetuity, pursuant to the statutory authority in 33 M.R.S.A. § 477-A, et seq., recorded on April 29, 2019, in the Waldo County Registry of Deeds at Book 4367, Page 273. This Conservation Easement is registered with the Maine Department of Agriculture, Conservation and Forestry ("DACF"). Petitioners Mabee and Grace have asserted their ownership interest in and Conservation Easement over the intertidal land in all of the local, State and federal administrative proceedings in which NAF seeks permits and licenses, including the DEP-BEP proceedings.

2. **The Friends of the Harriet L. Hartley Conservation Area** (“Friends”) is a non-profit corporation (T13-B) duly incorporated in the State of Maine on August 30, 2019, Charter No. 20200085ND, in Good Standing, with an office and principal place of business in the City of Belfast, Waldo County, Maine, with a mailing address of P.O. Box 465, Belfast, Maine 04915. Friends holds the Conservation Easement over a portion of the Plaintiffs’ property, including all of the intertidal land on which Tax Map 29, Lots 38, 37, 36 and most of 35 front, pursuant to the April 29, 2019 Conservation Easement (WCRD Book 4367, Page 273) and an Assignment from the original Holder, Upstream Watch, dated November 4, 2019, recorded in the WCRD at Book 4435, Page 344. The boundaries of the Harriet L. Hartley Conservation Area are described in Schedules A and B to the Conservation Easement (recorded in the WCRD at Book 4367, Page 273) and shown on the survey plan prepared by Donald R. Richards, P.L.S., L.F., recorded in the WCRD at Book 24, Page 54.

3. **The Maine Lobstering Union** (“IMLU”) is Local 207 of the International Association of Machinists and Aerospace Workers (IAMAW), within District Lodge 4 of the IAMAW. The IMLU was incorporated in the State of Maine as a nonprofit fish marketing association. The corporation was organized as a “cooperative corporation” by filing Articles of Incorporation under the Fish Marketing Act, 13 M.R.S.A. §§ 2001-2287, with the Maine Secretary of State, on September 10, 2013. The IMLU is in good standing as an entity according to the Maine Secretary of State. The IMLU’s charter number is 20140002CP. For federal tax purposes the IMLU is a “cooperative” under subchapter T of the Internal Revenue Code. The IMLU is an organization comprised of active, licensed lobstermen and sternmen and exists to represent the interests of *only* licensed lobstermen and sternmen (as opposed to other lobster industry participants). The IMLU is the first representative organization organized as a cooperative in Maine to represent lobstermen and sternmen exclusively.

The harvesters in the IMLU also have purchased and operate a wholesale and retail business that markets and sells Maine lobsters and crabs harvested by IMLU members and other holders of Maine commercial lobster and crab fishing licenses. The IMLU's business operates under the business name Lobster207. The IMLU represents lobstermen in all Maine Lobster Zones, from Kittery to Cutler, including in Zones C and D, the Zones covering Penobscot Bay, Maine, that would be most directly adversely impacted by this proposed project and the Board's Final Agency Action. The IMLU has members that fish in the area directly, adversely impacted by the pipelines, dredging, side-casting, dewatering, blasting and wastewater and effluent dumping proposed by NAF, and in all areas of Zones C and D that will suffer direct, indirect, cumulative, primary, secondary, acknowledged, foreseeable and unforeseeable impacts from this project in the short- and long-terms. The IMLU has participated in all stages of the Board's permit proceedings, and challenged the NAF permit and license applications based on NAF's lack of sufficient TRI, justiciability, and substantive and procedural defects that will adversely impact the fishing and fishing grounds in Penobscot Bay since at least October of 2018.

4. **Wayne Canning** is the Zone D Lobster Council representative for District 11 lobstermen and a lobsterman, holding a Maine commercial lobster and crab fishing license. Petitioner Canning fishes out of Belfast, Maine, in the area proposed by NAF for placement of its intake and discharge pipelines and the area where wastewater will be discharged. Petitioner Canning has participated in local and State proceedings and meetings in connection with this licensing and permitting process and has submitted and given testimony in opposition to the NAF project as proposed. Petitioner Canning has solicited input regarding the potential impacts of this proposed project from the Zone D District 11 lobstermen who he represents. Zone D District 11 includes the geographic area where NAF proposes to place its intake and discharge pipelines and discharge up to 7.7 million gallons per day of warm wastewater. The construction and placement of

these pipes and discharge of wastewater into Penobscot Bay will adversely impact Wayne Canning and all District 11 lobstermen, including increasing the risk to life and property. Petitioner Canning and similarly situated commercial lobster and crab license holders will suffer as a result of NAF's revised pipes installation proposal approved by the Board in its November 19, 2020 final agency action. Petitioner Wayne Canning has participated in all stages of the Board's permit and licensing proceedings, including by giving direct testimony, and challenged the NAF permits applications based on NAF's lack of sufficient TRI, justiciability, and substantive and procedural defects that will adversely impact the fishing and fishing grounds in Penobscot Bay since at least October of 2018.

5. **David Black** is a Belfast resident and a lobsterman, holding a Maine commercial lobster and crab fishing license. Petitioner Black has fished for more than 55 years in Belfast Bay and Penobscot Bay out of Belfast, Maine, and fishes in the area proposed by NAF for placement of its intake and discharge pipelines and the area where wastewater will be discharged. Petitioner Black has participated in local, State and federal administrative proceedings and meetings in connection with this permitting process and has submitted and given testimony in opposition to the NAF project as proposed in the BEP hearings conducted in February 2020 and the DMR solicitation of public comments in March 2020. Petitioner Black confirmed, based on his personal experience, the uncompensated, multi-year adverse impacts suffered by the lobstermen in District 11, including him, due to past dredging projects (including the 2003 Belfast Harbor dredging project) and past placement of pipelines that obstruct the movement of lobsters in and around the Bay. Petitioner Black will suffer an increased risk to life and property as a result of NAF's amended pipes installation plan proposal, submitted by NAF and approved by the Board in its 11-19-2020 final agency action.

B. Respondent

6. **The Board of Environmental Protection**, as described by the relevant State websites,⁴ is a seven-member citizen board whose members are appointed by the Governor and confirmed by the Legislature. The purpose of the Board is to provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws related to environmental protection and to provide for credible, fair and responsible public participation in department decisions. While the Board is part of the Department of Environmental Protection, it has independent decision-making authority in the areas of its responsibility. The Board fulfills its purpose through rulemaking, decisions on selected permit applications, decisions on appeals of the Commissioner's licensing actions, review of the Commissioner's enforcement actions, and recommending changes in the law to the Legislature [see 38 M.R.S. § 341-B]. The Board is statutorily directed to exercise independent judgment on the matters before it. The Board is not bound by the views of others or, in the case of an appeal, by the Commissioner's decision. Most license applications are processed at the Department staff level and decided by the Commissioner or the Commissioner's designee; however, State law requires that certain license applications be decided by the Board. The statutory criteria for Board jurisdiction over an application are set forth in 38 M.R.S. § 341-D(2):

"The Board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance. A project of statewide significance is a project that meets at least 3 of the following 4 criteria:

- Will have an environmental or economic impact in more than one municipality, territory or county;
- Involves an activity not previously permitted or licensed in the State;
- Is likely to come under significant public scrutiny; and

⁴ <https://www.maine.gov/dep/bep/index.html>
<https://www.maine.gov/dep/bep/info/BEP%20Overview%20-%20Purpose%20Sept%202019.pdf>

- Is located in more than one municipality, territory or county.”

C. Permit Applicant/Party-in-Interest

7. **NORDIC AQUAFARMS, INC.**, (hereinafter “Defendant NAF”) is a Delaware corporation with offices in Belfast, Waldo County, Maine, Portland, Cumberland County, Maine and Fredrikstad, Norway. Permit Applicant and Party-in-Interest NAF is a foreign Business Corporation, Charter No. 20180521 F which desires to construct and operate a land-based salmon aquaculture factory which, as currently proposed by NAF, would require the placement of three industrial pipelines into Penobscot Bay, across an upland lot owned by Janet and Richard Eckrote (Belfast Tax Map 29, Lot 36) and on, over and under the intertidal property on which the Eckrotes’ lot fronts and to which Petitioners Mabee and Grace claim an ownership interest and on which Petitioners Mabee and Grace placed a Conservation Easement that is now held by Petitioner Friends.

D. Parties-in-Interest

8. **Upstream Watch** is a non-profit, 501(c)(3) corporation (T 13-B) duly incorporated in the State of Maine on September 6, 2018, Charter No. 20190094ND, in Good Standing, with an office and principal place of business at 67 Perkins Road in the City of Belfast, Waldo County, Maine. Upstream Watch held the Conservation Easement over a portion of the Plaintiffs’ intertidal land on which Tax Map 29, Lots 38, 37, 36 and most of 35 front), described in Schedules A and B to the recorded conservation easement (WCRD Book 4367, Page 273). Upstream Watch intervened as a party in the administrative process in the Board and has filed a Petition challenging the Board’s final agency action entered on 11-19-2020 in the Kennebec County Superior Court, Docket No. AP-20-49.

9. **The Fish Are Okay** is a not-for-profit corporation with a place of business in the City of Belfast, County of Waldo, State of Maine.

10. **The Northport Village Corporation** is a municipal corporation situated in the Town of Northport, County of Waldo, State of Maine.

11. **Eleanor Daniels and Donna Broderick** are a married couple who lived in Belfast, Maine and were abutters to the upland property on which NAF proposes to place its industrial fish factory at the time this project was first proposed by NAF. Eleanor Daniels is currently the Treasurer of Friends. Parties-in-Interest Daniels and Broderick have participated in opposing NAF's project as proposed since 2018. Parties-in-Interest Daniels and Broderick are now residents of Searsmont, County of Waldo, State of Maine.

12. **Lawrence Reichard** is a natural person, who is a journalist by profession, and he is a resident of and/or doing business in the City of Belfast, County of Waldo, State of Maine.

13. **The Gulf of Maine Research Institute** is a non-profit corporation, organized under the laws of the State of Maine with its principal place of business at 350 Commercial Street, Portland, County of Cumberland, State of Maine.

14. **The University of New England** is a private higher education university organized under the laws of the State of Maine with its principal place of business at 11 Hills Beach Road, Biddeford, County of York, State of Maine.

15. All of the Parties-in-Interest listed above were granted Intervenor status by the Board and participated in the hearings conducted by the Board on NAF's applications, as submitted initially, in February of 2020.

JURISDICTION AND VENUE

16. The location of the project for which NAF sought and seeks permits and licenses from the Board is situated in Waldo County, State of Maine.

17. Final Agency Action by the Respondent Maine Board of Environmental Protection is subject to review under 5 M.R.S. § 11001(1).

18. Under 06-096 C.M.R. Chapter 3, Section 2(J) of the Maine Department of Environmental Protection Rules, the MGL Intervenors are Intervenors in the license application process of NAF and has standing to seek review by this Court.

19. As one or more of the Petitioners (and Parties-in-Interest) reside in Waldo County and/or have their principal place of business in Waldo County, and the activity or property which is the subject of the proceeding is located in Waldo County, venue is proper in the Waldo County Superior Court, pursuant 5 M.R.S. § 11002(1)(A) and (C). However, because the principal place of business of the Board is in Kennebec County, venue is also proper in Kennebec County, where Upstream Watch has filed its Rule 80C Petition, pursuant to 5 M.R.S. § 11002(1)(B).

PROCEDURAL HISTORY AND BACKGROUND

20. In the spring of 2018, Nordic publicly announced its desire to construct a land-based salmon farm and processing factory in Belfast, County of Waldo, Maine, primarily on land owned by the Belfast Water District on the west side of U.S. Route 1, in the south part of the City of Belfast almost on the Northport Town Line. Adjacent land would be leased and/or acquired by Nordic from neighboring property owners.

21. The proposed industrial salmon factory and fish slaughterhouse would require access to the ocean, in particular to Penobscot Bay, on the east side of U.S. Route 1, in order to install two 30" saltwater intake pipes and one 36" wastewater discharge pipe into Penobscot Bay.

22. On August 6, 2018, NAF entered an agreement with Richard and Janet Eckrote, who own the upland parcel located at Belfast Tax Map 29, Lot 36, for an option to acquire a 25-foot wide “permanent” easement on the southern end of the Eckrotes’ upland lot to bury NAF’s three pipes.

23. The boundaries of the easement option granted in the 8-6-2018 NAF-Eckrotes' Agreement are expressly defined by and delineated in Exhibit A to the Agreement, using an "Google earth-type" image with yellow highlighted lines showing the boundaries of the easement. However, by its own terms, the easement that would be granted by the Eckrotes to NAF in this 8-6-2018 Easement Purchase and Sale Agreement terminates at the Eckrotes' high water mark and does not include any right for NAF to use the intertidal flats on which the Eckrotes' lot fronts.

24. According to the plans submitted by NAF to the various local and State agencies, the waterside portion of the intake and discharge pipes would be located in the municipal boundaries of both Belfast and Northport, Maine, in Waldo County, but would impact the water quality and fishing rights (especially lobstering and crabbing) of commercial lobster and crab license holders in virtually every community in and around Penobscot Bay, affecting Knox, Waldo and Hancock Counties.

25. Likewise, Petitioners Mabee and Grace's and Friends' respective property rights in the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and most of 35 front are within the municipal boundaries of both Belfast and Northport, Maine. (See, e.g. WCRD Book 24, Pages 34 and 54.

26. Pursuant to 06-096 C.M.R. ch. 2, §11-D, NAF is required to "maintain sufficient TRI in all property proposed for development and use throughout the entire application processing period," and further states that *the Department, which includes the Board*, "may return an application, after it has already been accepted as complete for processing, if the Department determines that *the applicant did not have, or no longer has, sufficient title, right or interest.*" (Emphasis supplied).

27. NAF had initially submitted its application for a discharge permit ("MEPDES") to the Department of Environmental Protection ("DEP" or "The Department") in September, 2018,

and its application for a submerged lands lease, from the Maine Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands, Submerged Lands Division (“the Bureau”) on September 26, 2018.

28. In both agencies, NAF based its claim of “sufficient title, right or interest” in the upland and intertidal property required for placing its pipelines in Penobscot Bay, on the 8-6-2018 unrecorded option to purchase a 25-foot permanent easement across the southern boundary of property owned by Janet and Richard Eckrote (Belfast Tax Map 29, Lot 36; 282 Northport Avenue, Belfast, Maine 04915) (“Easement Agreement”).

29. On or about November 21, 2018, NAF through its agents submitted a second proposed route for its pipelines that originated from the Eckrotes’ upland lot, but took a radically different route from the original proposal that impacted more property owners in Northport than the original route.

30. This Second pipelines route was first revealed to the public during a public hearing required by the Maine DEP in connection with NAF’s MEPDES discharge permit, conducted by NAF, in Belfast, Maine on December 17, 2018, at the Hutchinson Center.

31. On or about January 7, 2019, Petitioners Mabee and Grace, as members of Upstream Watch, Upstream Watch, and the Maine Lobstering Union (“MLU”), filed a written objection through counsel, jointly submitted to the Bureau, the Department and the Board. This objection was directed to NAF’s second proposed pipelines route. The objection focused on NAF’s lack of “sufficient title, right or interest” (administrative standing),⁵ stating that the easement on

⁵ The Lobstering Petitioners and Upstream Watch also challenged a determination by the Department that the NAF project failed to meet the statutory criteria as a project of statewide significance, requiring mandatory review by the Board of Environmental Protection, in 38 M.R.S. § 341-D(2), which states in relevant part:

"The Board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance. A project of statewide significance is a project that meets at least 3 of the following 4 criteria:

- Will have an environmental or economic impact in more than one

which NAF relied to establish a claim of “sufficient title, right or interest”, in the land proposed for leasing and permitting (i.e. use and development) actually, *by its own express terms as illustrated in Exhibit A of the Easement Agreement*, terminated at the high water mark of the easement grantors’ (the Eckrotes’) upland property. See, e.g. Exhibit A of the August 6, 2018 Easement Agreement Between NAF and Janet and Richard Eckrote.

32. On January 18, 2019, the Bureau issued a letter to NAF giving NAF until April 18, 2019 to submit additional proof of title, right or interest in all land, including the intertidal land between the high-water mark of the Eckrotes’ lot and the State’s submerged lands beyond the low water mark. Petitioners and other interested parties were not served with this notice; rather, this letter had to be obtained through a Maine Freedom of Access Act (FOAA) request to the Bureau – despite the fact that this letter expressly addresses a challenge by the Petitioners on a matter of the jurisdiction and justiciability relating to Applicant NAF’s administrative standing.

33. On January 22, 2019, the Department issued a similar letter to NAF directing NAF to provide additional proof of its title, right or interest. This letter too had to be obtained from DEP through a FOAA request.

34. On January 28, 2019 the Board advised Petitioners’ counsel that the Department “is re-evaluating the issue of title, right or interest (and potentially the question of Board jurisdiction) and has requested Nordic provide additional information regarding TRI by February 6, 2019.”

35. On information and belief, based on information obtained by FOAA, a meeting was held between NAF’s representatives and the “incoming commissioners” of DEP and DACF on

municipality, territory or county;

- Involves an activity not previously permitted or licensed in the State;
- Is likely to come under significant public scrutiny; and
- Is located in more than one municipality, territory or county.”

or about January 28, 2019 and, at that meeting NAF agreed to consolidate review of all permit applications under the jurisdiction of the Board.

36. On January 30, 2019 Acting DEP Commissioner Loyzim advised Petitioners' counsel in relevant part that:

. . . I have reconsidered my December 21, 2018 recommendation and will be recommending that the Board of Environmental Protection assume jurisdiction over the above referenced [MEPDES] permit application, consolidated with forthcoming Natural Resources Protection Act (NRPA) and Site Location of Development Act (Site Law) permit applications. In light of this consolidation, the Department will be placing review of NAF's MEPDES application on hold until it can be consolidated and reviewed in concert with NAF's Site Law and NRPA applications. Accordingly, the Department will be taking no further action on TRI, nor other elements of the MEPDES application until that time.

The department will make a completeness determination when it receives NRPA and Site Law permit applications along with any application to amend the MEPDES application submitted by NAF. The Department will resume review of and would welcome comments concerning TRI at that time.

37. In March 2019, NAF submitted a *third* proposed route for its pipelines and two letters allegedly relating to TRI, with the Bureau, ostensibly in response to the Bureau's January 18, 2019 letter seeking additional TRI support from NAF.

38. The letters were drafted by NAF's and the Eckrotes' counsel, but signed ultimately by the President of NAF and the Eckrotes. The 3-3-2019 Letter Agreement was characterized by NAF as an amendment to the boundaries of the easement, granting NAF the right to use the intertidal area on which the Eckrotes' lot fronts.

39. However, by its plain language and meaning, the March 3, 2019 Letter Agreement fails, *by its own terms*, to amend the easement boundaries in Exhibit A of the August 6, 2018 NAF-Eckrotes' easement option, and fails to even claim (let alone demonstrate) that either the Eckrotes or NAF have any title, right or interest in the intertidal land on which the Eckrotes' lot fronts. *Id.*

40. Despite these deficiencies, on or about April 9, 2019, the Bureau accepted these letters as "sufficient" proof of NAF's title, right or interest in the intertidal land on which the

Eckrotes' lot fronts, and determined that the NAF application was "complete" – now proposing a third route and new configuration for its pipelines into Penobscot Bay.

41. After reviewing the bizarre March 3, 2019 letter counsel for Upstream Watch, including Petitioners' counsel, retained experts to evaluate if the Eckrotes actually had any ownership interest in the intertidal land on which their lot fronts. The mental and legal gymnastics undertaken to obfuscate whether or not the Eckrotes owned this intertidal land suggested that NAF was attempting to misrepresent the extent of its rights to use this intertidal land. Simply, if the Eckrotes owned this intertidal land, NAF and the Eckrotes would have simply amended Exhibit A of the 8-6-2018 Easement Agreement. The fact that they did not do so spoke volumes and sent up a warning flare that something was seriously amiss with NAF's TRI claim.

42. The evaluation by the experts commissioned by Petitioners Mabee and Grace and Upstream Watch confirmed that: (i) the January 25, 1946 deed to the Eckrotes' predecessors-in-interest Fred R. Poor (WCRD Book 452, Page 205) had severed the intertidal flats from the upland lot, with the Grantor, Harriet L. Hartley, retaining ownership of the intertidal land on which Belfast Tax Map 29, Lots 36 and most of 35 front (as well as Lots 37 and 38 on which the retained dominant upland estate fronted); (ii) the Eckrotes' waterside boundary ended at the high water mark pursuant to the deeds issued since 1946; and (iii) Petitioners Mabee and Grace own the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and most of 35 front.

43. Once Petitioners Mabee and Grace learned that they owned this intertidal land, on April 29, 2019, they placed all of their intertidal land under the protection of a Conservation Easement, lasting in perpetuity, to preserve this fragile estuary land in its natural condition, pursuant to 33 M.R.S. § 477-A. Petitioners Mabee and Grace recorded the Conservation Easement in the Waldo County Registry of Deeds on April 29, 2019, naming Upstream Watch as the Holder. [WCRD Book 4367, Page 273].

44. Petitioners Mabee and Grace and the lobstering representatives and Upstream Watch thereafter, on or about May 1, 2019, advised the Bureau that the intertidal land upon which all three proposed routes for these pipelines would transit belongs to Petitioners Mabee and Grace in fee simple and was under the protection of a recorded Conservation Easement that prohibits any of the uses and/or placement of the commercial and industrial infrastructure on this land, that NAF proposes to engage through the requested permits. Thus, NAF and the State agencies were placed on notice that NAF has no cognizable expectation of putting this land to the uses that the permits sought would authorize.

45. Petitioners Mabee and Grace, through Upstream Watch – a nonprofit corporation registered in the State of Maine in which Petitioners Mabee and Grace were members at that time - - provided the Bureau with: (a) deeds proving Petitioners Mabee and Grace’s ownership of this intertidal land; (b) deeds demonstrating that the Eckrotes deeded title ended at the high water mark of their property since 1946, and (c) the Conservation Easement, dated April 29, 2019, recorded in the Waldo County Registry of Deeds at Book 4367, Page 273, that protects all of Petitioners Mabee and Grace’s intertidal land, from the mouth of the Little River to a point North of the Eckrotes’ northern most upland boundary, in its natural condition, in perpetuity, pursuant to 33 M.R.S.A. § 477-A, et seq.

46. On May 16, 2019, NAF filed additional documents with the Bureau, including an unrecorded survey, dated August 31, 2012, by Good Deeds, that states that the eastern (waterside) boundary of the Eckrotes’ lot is “along high water.” This is the same unrecorded survey that is incorporated by reference as the basis of the deed description in the deed from the Estate of Phyllis J. Poor to Janet and Richard Eckrote, dated October 15, 2012, and recorded in the Waldo County Registry of Deeds at Book 3697, Pages 5-7. Thus, as clarified by the incorporated survey plan, even the October 15, 2012 Deed (containing the erroneous description of the Eckrotes’ waterside

boundary as “along said bay”) also establishes that the Eckrotes’ waterside boundary is at the high-water mark of Penobscot Bay – not the low water mark.

47. On May 17, 2019, NAF filed its NRPA and SLODA applications with the DEP-BEP, for review by the Board. Petitioners’ counsel received confirmation of this filing from DEP staff on May 22, 2019.

48. Thereafter, Petitioners’ counsel forwarded all filings challenging the sufficiency of NAF’s TRI submissions to the Department that had previously been submitted to the Bureau.

49. On May 29, 2019, the Department sent NAF a letter requesting additional information in support of NAF’s TRI claim.

50. On June 10, 2019 NAF filed the 144-page pdf of allegedly all information on which NAF relies in asserting TRI with the Department, and DEP acknowledged receipt of this information.

51. On June 12, 2019 the Department received additional proof from Petitioners Mabee and Grace and Upstream Watch that NAF lacked TRI in this intertidal property, including the recorded final quiet title judgment and complete case file from State Archives of *Ferris v. Hargrave*, Docket No. 11275, in which this Court entered a quiet title judgment in favor of Petitioners Mabee and Grace’s predecessor-in-interest, Winston C. Ferris, based on the identical property description in Petitioner Mabee and Grace’s recorded deed (WCRD Book 1221, Page 346). This final judgment is recorded in the chain of title for this property in the Waldo County Registry of Deeds Book 683, Page 283.

52. However, despite this overwhelming and irrefutable evidence that neither NAF nor the Eckrotes had title, right or interest in this intertidal property – including a prior Court judgment by this Court -- the Department found the NAF application “complete” on June 13, 2019.

53. In making its June 13, 2019 “completeness” determination, the Department erred in

finding “sufficient” title, right or interest (“TRI”) and in placing the burden of proof on Petitioners to prove that NAF failed to demonstrate sufficient TRI – rather than, as DEP’s rules require, placing the burden of proof regarding TRI on the *applicant* NAF. *See*, 06-096 C.M.R. ch. 2, § 11(D).

54. The Department’s TRI determination was made in the absence of any credible evidence submitted by the applicant in support of its claim of TRI, and despite the Department receiving, voluminous, uncontroverted evidence – *including a final judgment in a 1970 quiet title action* regarding this property and multiple deeds recorded in the Waldo County Registry of Deeds -- that definitively establish that:

- (i) Richard and Janet Eckrote do not own the intertidal land on which their lot fronts;
- (ii) The Eckrotes’ waterside boundary terminates at the high-water mark, according to reports and opinions prepared by three surveyors commissioned by the Eckrotes and/or NAF (e.g. the 8-31-2012 Good Deeds survey, the 4-2-2019 Good Deeds Survey, the 5-16-2012 Jim Dorsky Surveyors Opinion to NAF President Erik Heim, and the 6-4-2019 Dorsky survey revision);
- (iii) The easement option granted by the 8-6-2018 NAF-Eckrotes’ Easement Purchase and Sale Agreement terminates by its own terms in Exhibit A to that document at the Eckrotes’ high-water mark and is not sufficient proof of NAF’s TRI (a conclusion reached by DEP on 1-22-2019);
- (iv) The true owners of this intertidal land, determined by deeds and a prior quiet title action, are Jeffrey Mabee and Judith Grace, who do not consent to this use of their property; and
- (v) The intertidal land that NAF seeks to use and develop is under the protection of a recorded Conservation Easement, imposed by the true, fee simple owners, Jeffrey Mabee and Judith Grace, with Upstream Watch named as the initial Holder of this Conservation Easement.

55. The June 13, 2019 TRI determination by DEP states in relevant part that:

. . . With respect to the intertidal portion of the property proposed for use, the Department finds that the deeds and submissions, including NAF’s option to purchase an easement over the Eckrote property and 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 applications. This determination is not an adjudication of property rights and may be reconsidered by the Department at any time during processing as applicants must have adequate and sufficient

TRI throughout the application process. Accordingly, *should a court adjudicate any property disputes or rights in a way that affects NAF's interest in the proposed project lands while the applications are being processed, the Department may revisit the issue of TRI and return the applications if appropriate.*

(emphasis supplied).

56. However, the Department seemingly ignored that a Court – *this Court* – had already determined ownership of this land in a quiet title judgment, entered on June 26, 1970, in *Ferris v. Hargrave*, Docket No. 11275. (WCRD Book 683, Page 283), regarding the property described with the identical property description in Petitioners Mabee and Grace's deed.

57. Beginning on June 13, 2019, the Board stated that it would continue to process NAF's pending NRPA, SLODA and MEPDES applications – seemingly accepting the “TRI” determination made by the Department that found that NAF had filed “sufficient” proof of title, right or interest to proceed in the permitting process and holding that “only a Court” can make a determination regarding ownership of this intertidal land but not making an independent TRI determination by the Board pursuant to its assumption of jurisdiction over this project.

58. In July 2019, Petitioners Mabee and Grace filed a suit for Declaratory and Injunctive Relief to Quiet Title to determine and declare their ownership of the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and most of 35 front and to resolve their rights under a restrictive covenant (“residential purposes only”) that is in the 1946 deed from their predecessor in interest Harriet L. Hartley to the Eckrotes' predecessor in interest, Fred R. Poor. *Mabee and Grace, et al. v. NAF, et al.*, Docket No. RE-2019-18 (filed on July 15, 2019).⁶

59. The Board refused to include NAF's TRI claims as a matter for hearing in the adjudicatory hearing in this matter.

⁶ A pretrial conference on the boundary issues in that litigation is scheduled for December 23, 2020.

60. In February 2020, the Board proceeded to hold costly and burdensome adjudicatory hearings on the substantive issues relating to NAF's applications for MEPDES, Air Emissions, NRPA and SLODA, that Petitioners Mabee and Grace were required to expend significant resources to participate in in order to preserve their property rights and right to challenge the Board's consideration of the pending applications in the absence of NAF's administrative standing and thus the Board's lack of a justiciable issue before it relating to the pending applications.

61. The Board denied Friends' request to participate in the February 2020 adjudicatory hearing, claiming that Friends' request was untimely – although Friends: (i) did not exist as a legal entity at the time the Board determined who could be an Intervenor; (ii) did not have a legal right in the Conservation Easement as Holder until November 4, 2019 when Upstream Watch assigned its interests and responsibility as Holder to Friends; and (iii) had the same counsel as the MGL Intervenors so there would be little or no disruption of the hearing by granting Friends Intervenor status.

62. On February 14, 2020, at the conclusion of the adjudicatory hearing on limited subjects, the Board immediately closed the Administrative Record for all matters covered during the hearing and announced that the Record would close on February 18, 2020 for all non-hearing topics.

63. On February 14, 2020, just prior to the conclusion of the hearing and at the same time the Board closed the Record – prohibiting submission of additional evidence by Intervenors – the Board's Executive Director also advised that DMR would conduct a "public hearing" regarding the potential impacts on fisheries and fishing of the proposed project. This addition to the process was in response to the MGL Intervenors' objection to the Board's violation of 38 M.R. S. § 480-D(9) – by considering NAF's applications without DMR conducting the public hearing required by

the NRPA statute prior to providing an evaluation of the fisheries and fishing industry impacts of a proposed project that includes dredging.

64. On March 2, 2020, DMR conducted a severely limited solicitation of public comments – *not a public hearing* -- on only impacts to fishing in the area of the dredging (not impacts to the fisheries and fishing from the dredging and resuspension of potentially contaminated sediment and disturbance of HoltraChem mercury). Indeed, the Commissioner of DMR expressly denied Petitioners' request for an adjudicatory hearing in accordance with the requirements of 38 M.R.S. § 480-D(9).

65. At that 3-2-2020 DMR public meeting NAF and its agent CIANBRO revealed for the first time that NAF was materially changing the amount of dredge spoils to be removed from the Bay for "upland disposal" (increasing the amount from 4,000-8,000 cy to 15,000-20,000 cy); and changing the method for transport to 110-130 barge-loads of dredge spoils taken across the upper Penobscot Bay to Mack Point in Searsport.

66. NAF claimed that the need for this material change was just discovered "two weeks ago" (i.e. February 17, 2020 -- after the close of the hearing Record but prior to close of the non-hearing Record). However, records obtained from DEP in December 2020 through FOAA requests reveal that NAF was making inquiries and obtaining commitment letters from upland waste disposal facilities for disposal of 15,000 cys+ of "Bay sediment" in May of 2019 – a fact concealed from the Board, Intervenors and the public by DEP staff and NAF and never stated in the applications for permits and licenses submitted by NAF and its agents.

67. On March 3, 2020, Petitioners advised the Board (and other local, State and federal permitting authorities) and other Intervenors, of NAF's material amendment of the proposed project and requested NAF be required to amend its applications. To reflect these material changes and allow the Intervenors to submit additional evidence of the impacts of this proposed change.

68. In response, the Presiding Officer denied Petitioners' requests, denied Petitioners the right to file additional evidence regarding the impacts of this material change (including the potential impacts of these proposed changes on the fisheries and fishing), and held that no appeal of these decisions by the Presiding Officer could be filed with the full Board.

69. It was not until April of 2020 that the Board finally ruled on Petitioners' TRI-related challenges to NAF's administrative standing. A 4-member contingent from the Board denied Petitioners' challenge and ruled that NAF had demonstrated "sufficient proof of TRI".

70. In May 2020, Petitioners filed a Rule 80B challenge to the Board's continued consideration of NAF's applications and refusal to enter a stay of proceedings until resolution by the Court in the pending Declaratory Judgment action regarding ownership of the disputed intertidal land NAF seeks permits and licenses to use (AP-2020-03).

71. The Board and NAF moved to dismiss Petitioners' Rule 80B challenge asserting that Petitioners only recourse was to file a Rule 80C challenge to the Board's TRI determination after the Board issued its final agency action.

72. On July 13, 2020, Petitioners Mabee and Grace and Friends filed a Motion to Stay or dismiss the NAF applications pending in the Board based on the Supreme Judicial Court's July 7, 2020 holding in *Tomasino v. Town of Casco*, 2020 ME 96.

73. On July 14, 2020, the Superior Court dismissed the Petitioners' Rule 80B Petition (AP-2020-03) holding that Petitioners only recourse was to seek a stay or dismissal from the agency and to file a Rule 80C appeal after final agency action if the agency denied the stay or dismissal.

74. On July 17, 2020 Petitioners filed a Renewed Motion to Stay or Dismiss based on the Court's holding in *Tomasino* in the Board, and on July 20, 2020, Petitioners filed an amendment of that motion that incorporated and addressed issues contained in the Court's July 14,

2020 Order in AP-2020-03.

75. The Presiding Officer denied Petitioners' Motion to Stay or Dismiss, erroneously asserting that the holding in *Tomasino* was not applicable because that decision was factually and legally distinguishable – meaning that there was no need for resolution of the factual parameters of the easement by a Court of competent jurisdiction prior to the Board proceeding to consider and rule on NAF's applications. The holding ignored this Court's June 4, 2020 Order in RE-2019-18, in which this Court described several outstanding factual issues that required resolution regarding the meaning of the restrictive covenant and the boundaries of the Eckrotes' parcel – all of which are relevant to whether the Eckrotes have the legal capacity to grant an easement to use the intertidal land on which their lot fronts.

76. The Presiding Officer held that Petitioners had no right to appeal this decision to the full Board.

77. Repeatedly, after February 14, 2020, Intervenors (including Petitioners) were denied the ability to file relevant evidence regarding the nature of the proposed project and the impacts of the proposed project, with the Board by the Presiding Officer – even where it could be demonstrated that the evidence did not exist on February 14, 2020, and/or had been concealed by NAF prior to February 14, 2020.

78. In contrast, DEP staff continued to amend their recommendations based on *ex parte* communications with NAF and its agents and NAF was repeatedly allowed to submit new information to DEP staff – contradictory of evidence submitted during the hearing – after February 14, 2020.

79. The Presiding Officer repeatedly denied Intervenors' requests to submit evidence in opposition to NAF's argument and information submitted to DEP staff after February 14, 2020. In other words, *the Record was only closed to new or newly discovered evidence submitted by*

opponents – NAF had unlimited rights to submit additional and materially different evidence with impunity to DEP staff and DEP staff would alter its conclusions provided to the Board based on that new, and unchallengeable, evidence NAF submitted.

80. In post-hearing deliberations, conducted by Zoom, Intervenors were also denied the ability to speak or to file any written evidence or argument to the Board to counter and challenge recommendations made by DEP staff. This constituted a blatant violation of Petitioners' due process rights and the statutory requirements in Maine's Administrative Procedures Act.

81. The Board's 11-19-2020 final agency action adversely affects the Petitioners' property rights and Conservation Easement, establishing a right in Petitioners Mabee and Grace and Friends to file this challenge to the Board's action, pursuant to 33 M.R.S. § 478(1)(A) and (B).

**MANNER IN WHICH THE PETITIONERS'
HAVE BEEN AND ARE BEING AGGREIVED:**

A. Petitioners Mabee and Grace and Friends

82. If the Board's determinations to grant NAF the requested permits and licenses and to avoid filing the amended and additional applications required by federal and state law, including the CWA, are allowed to stand, the Petitioners will suffer significant adverse damages to the value and merchantability of their real property, as well as its use and enjoyment. Indeed, merely having to participate in these permitting proceedings, where the applicant, and the Grantor of the easement on which the applicant relies to establish "sufficient" TRI, has no actual title, right or interest in the property for which it seeks these permits and licenses, has already cost Petitioners Mabee and Grace and Friends tens of thousands of dollars in attorneys' fees, expert witness fees, surveying costs, and other litigation and administrative forum filing costs. All of these costs constitute special damages borne by Petitioners Mabee and Grace and Friends that were caused by NAF's request for permits in the absence of administrative standing and TRI and the Board refusal or failure to apply the Supreme Court's holding in *Tomasino v. Town of Casco*, 2020 ME 96, to this applicant.

83. NAF's claims of "sufficient TRI" in the Mabee-Grace intertidal land are slandering Petitioners Mabee and Grace's title and adversely impacting the value and marketability of their real estate and is hindering Petitioner Friends' ability to obtain leases and seek funding for grants needed to protect the Conservation Area in its natural condition and to restore the Conservation Area's eel grass beds and access to the Little River by anadromous species, including wild Atlantic salmon.

84. Allowing the Board to grant NAF permits and licenses, that would authorize NAF and its agents to take, use, damage and destroy Petitioners Mabee and Grace's intertidal land, on which Petitioner Friends holds a Conservation Easement and has a duty to protect in its natural condition, in the absence of NAF (or the Eckrotes) having any actual title, right or interest in that intertidal land, violates Petitioners' rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Art. I, § 21 of the Maine Constitution; and diminishes or destroys the value and marketability of Petitioners' real property and Petitioners Mabee, Grace and Friends' use and enjoyment of this intertidal land in its natural condition.

85. Further, in granting this lease to NAF, the Bureau is violating the conservation easement, which protects this intertidal land in its natural condition, in perpetuity, free of any commercial or industrial use or structures, in violation of the State's obligations to enforce conservation easements in 33 M.R.S.A. § 478.

86. Petitioners Mabee and Grace and Friends have, and will continue to suffer special damages, spending tens of thousands of dollars to defend and protect their land from theft and degradation in local, State and federal lease, licensing and permitting proceedings (including the appeal of the Board's license and permit determinations here), as well as the Declaratory Judgment action pending in this Court in RE-2019-18.

B. Lobstering Petitioners

87. The impacts that the Lobstering Petitioners will suffer from this project as proposed include direct impacts on the abundance, distribution, health, access to and commercial value of lobsters in and from Belfast Bay and Penobscot Bay, as well as the potential adverse economic impacts from possible contamination of lobsters caused by disturbing long-buried HoltraChem mercury or discharge of contaminants in the NAF wastewater, which could irreparably damage the reputation for wholesomeness of *all lobsters* marketed and sold under the “Maine Lobster” brand – including but not limited to lobsters that are caught or landed specifically in or from Waldo County in Belfast and Penobscot Bays.

88. Among those impacts is the deposition of process waste into Penobscot Bay, polluting the Bay and impairing the farming of mussels and harvesting of lobsters and crabs, and fouling beaches where IMLU members and Petitioners, and their families swim and fish.

89. In addition, these impacts include permanent physical loss of use and access to traditional fishing grounds by lobstermen, crabbers, urchin fishermen and scallopers in the area of the proposed pipelines and wastewater and effluent dumping, and potential loss of use of a far more expansive area of the Penobscot Bay if the proposed pipeline and wastewater and effluent dumping cause new contamination and/or the re-suspension and spread of long-dormant and buried mercury contamination from Mallinckrodt and HoltraChem, as well as warming the waters of Penobscot Bay (since the proposed effluent is 5° to 33° Fahrenheit warmer than the ambient water temperatures in the Bay).

90. IMLU members and other licensed lobstermen and crabbers, including Petitioners Canning and Black, have already lost the use of approximately 13 square miles of lobstering and crabbing grounds near this area due to the presence of mercury contamination. This project poses a threat of disturbing similar contamination from the same original sources (Mallinckrodt and

HoltraChem), as well as new and as yet not fully revealed additional contamination that will damage the marketability and/or abundance of lobster and crab, as well as other commercially fished species in this area.

91. NAF's third proposed pipelines route and configuration proposes that a large portion of the intake pipelines and most of the outfall/discharge pipeline would be buried in the intertidal zone originating from the Eckrotes' lot and extending into Belfast and Penobscot Bay. NAF proposes that these pipes will be buried by use of destructive mechanical trenching, side-casting of dredge spoils and dredging in this fragile and sensitive intertidal estuary. NAF also proposes to use *blasting* to destroy ledge in this area so that it can bury these pipelines – again disturbing and spreading buried HoltraChem mercury that the federal court's experts, as well as the USACE and USEPA, have determined is buried in this area.

92. NAF then proposes to place the remaining length of the outfall and intake pipelines along the surface of the Bay beginning at a depth of approximately 35-feet, on brackets located every 15 feet. This construction process would form dangerous underwater obstructions that can entangle lobster and crab fishing gear for approximately a half mile that neither NAF, DEP nor the Board studied in any meaningful way.

93. Although the applications NAF filed state that NAF will remove 4,000-8,000 cy of dredge spoils from the subtidal zone covered by the Bureau's lease and the Board's permits, the March 2, 2020 oral representations by NAF and its agent CIANBRO, made at the DMR meeting, revealed NAF intends to remove up to 15,000 to 20,000 cy of dredge spoils for upland disposal – the contamination or suitability of which has never been required by the Board in contravention to its legal duties under federal and State law.

94. NAF has filed no written amendment relating to this additional material change and the 11-16-2020 Board Findings and Decision do not include an assessment of the impacts of this

material change – instead expressly limiting the Board’s decision to the after-the-fact materials or oral representations submitted to DEP and DMR staff by NAF and DEP staff recommendations to the Board that ignore the DEP’s own statutory duties and rules. The DEP staff recommendation relating to the materially changed dredge spoils disposal proposal by NAF appear to conceal relevant information from the Board known to staff (according to recently obtained materials acquired by FOAA requests).

95. NAF’s infrastructure, proposed for placement in, on and above the State’s subtidal land, will inevitably alter currents in the area, trap wastewater, disrupt and obstruct the movement of lobsters and other sea life, damage or destroy valuable scalloping, lobstering and crabbing grounds where 100 to 200 lobstermen currently fish from Districts 10 and 11, and pose a hazard to navigation by all mariners and increase the risk to life and property to commercial fishermen (including Petitioners) posed by entanglement in the proposed pipes, concrete anchors and guide piles.

96. The Board, and DEP and DMR staff, have done no adequate evaluation of the impacts of this proposed project on lobster and crab fishing in this area – relying on the conclusory statements of NAF and agency staff of DEP and DMR – that were based on no scientific study by NAF, DMR or DEP.

97. The up to 7.7 million gallons of wastewater that NAF proposes to dump daily into the fertile lobstering grounds of Penobscot Bay will be 5° to 33° Fahrenheit warmer than the natural temperatures of Penobscot Bay – depending on the time of year of the discharge. Dumping wastewater that is significantly warmer than the ambient temperatures of the Bay will adversely impact lobsters and crabs at all stages of development and permanently harm the Penobscot Bay lobster fishery. To understate such adverse impacts, NAF has filed “expert” reports falsely claiming that there is no significant lobster presence in this area – news to the almost 200

lobstermen who make a living fishing this area each year. Further, DEP staff have referenced irrelevant data on the temperatures of the water in Belfast Harbor – a shallow and distant body of water -- to justify staff's erroneous recommendations and conclusions to the Board regarding the potential impacts of the proposed project on water quality, seawater temperatures and benthic organisms including lobsters and crabs.

98. The Department of Marine Resources, inexplicably simply ignored these risks in issuing its "evaluation" letters to the Bureau and Board, asserting that there would be no significant impacts to the lobster fishery from this project without any objective, empirical or scientific basis for this bald assertion.

99. But/for the Board granting NAF permits and licenses none of the above-referenced adverse impacts would be suffered by the Lobstering Petitioners.

100. The Lobstering Petitioners provided the Board with county-by-county lobster landings data from the Maine Department of Marine Resources dating from 1964 to 2018. This data flatly contradicts the specious claims made by DMR, NAF and its agents that there are few lobsters in the area where NAF proposes to place its pipelines and that NAF acknowledges will be directly impacted by its wastewater discharges. This data is incorporated by reference into this Petition as though stated herein.⁷

101. This data demonstrates the exponential increase in lobsters and lobster landings in Waldo County as the Bay has begun to recover from past industrial degradation and pollution of this area of the Bay. From 1964 to 1999, the Waldo County lobster catch was not significant enough for DMR to even be separately mentioned in its report. From 2000 to 2003, Waldo County's catch was included with the Knox County data. However, beginning in 2004, the Waldo County catch had rebounded enough to be separately reported by DMR.

⁷ This data can be found online at:
<https://www.maine.gov/dmr/commercial-fishing/landings/documents/lobster.county.pdf>

102. In 2004, the Waldo County catch was 401,706 pounds, worth \$1,762,878 at the dock.

103. However, this data also confirms that the Waldo County catch drastically declined as a result of the effects of the 2003 Belfast Harbor dredge on the upper Bay fishery. In 2005, the catch declined by over 29% to 284,661 pounds. The catch remained under the 400,000- pound range until 2011.

104. In 2011, the catch was 456,016 pounds with a value of \$1,449,663. Since 2014, the Waldo County Catch ranged between 746,704 pounds and 864,528 pounds, with a value in excess of \$3 million each year.

105. The value of the Waldo County lobster catch has a value in the local and Maine economy of three to five times the value of the catch at the dock – meaning the Waldo County lobster catch has an economic worth to the Maine and Midcoast economies of in excess of \$9 million and \$15 million *annually*.

106. The value of this catch far exceeds the potential annual economic benefits to the Maine and local economy of the proposed NAF project. This significant economic value would be lost if this project is approved. The Board erred in ignoring the data submitted by the Lobstering Petitioners that demonstrated that the NAF project, as proposed, will have direct, immediate, significant adverse impacts on lobsters' health and quantities, access to traditional lobster and crab fishing grounds currently used by 100 to 200 lobstermen, the reputation and sustainability of the lobster fishery in the upper Penobscot Bay, and the reputation for wholesomeness of Penobscot Bay lobster and the "Maine Lobster" brand.

107. Further, the Board erred in relying upon the superficial and conclusory statements submitted by Denis-Marc Nault of the Department of Marine Resources, that limited DMR's assessment of impacts from this proposed project on Pen-Bay fisheries to only the winter of

construction on the lobster fishery – ignoring the impact on the winter crab fishery during this construction period, and ignoring all permanent impacts post-construction from dredging, blasting, trenching, disturbing buried HoltraChem mercury, warming water temperatures, changes in salinity because the discharge effluent will contain 15% freshwater, increases in nitrogen, changes in currents, obstructions and disruptions in lobster habitat and movement, and physical loss of traditional fishing areas.

108. The Board also erred in ignoring the mercury distribution chart prepared by the federal court’s experts during Phase II of the PRMS and submitted to the Board by the Lobstering Petitioners, in favor of a one-page conclusory statement by the Maine Department of Marine Resources that they were “unaware” of any mercury.

109. This PRMS mercury distribution chart shows that the level of contamination from buried HoltraChem mercury in the area NAF proposes to dredge, blast and place its pipelines is 200-300 ng/gm.

110. The Board erred in failing to consider the potential for dangerous entanglements of fishing gear and anchors from this above-ground placement of the pipes.

111. The Board appears to have simply ignored the change in impacts created by the change in NAF’s proposed installation method.

112. Indeed, the Board utterly failed to consider the greater risks to the lives and property of commercial lobster and crab fishermen and recreational and commercial boaters posed by NAF’s change in the proposed pipelines installation method.

113. While this change in the method for pipeline installation changes the amount of seafloor that the USACE, DEP and the Board calculate will be permanently altered by this proposed project and, thus, *reduces the amount that NAF is being charged for leases and permits*

– this change increases the risk to life and property and adverse impacts to navigation of this proposed project – a reality ignored by DMR, DEP and the Board.

114. The Board also erred in failing to consider the temporary and permanent impacts on the lobster and crab fishery in Penobscot Bay caused by NAF and CIANBRO disturbing mercury and other contaminants in the sediment during construction and by the force of the discharge of 7.7 million gallons of wastewater during operation of the NAF facility.

115. In prior 2019 filings, NAF confirmed a level of 239 ng/gm in one of the 3 core samples they took last year. NAF's employee Ed Cotter has told the Belfast Harbor Committee that NAF did not test 7 of the 10 core samples NAF took along the second pipelines route (the route abandoned in March of 2019 by NAF), 2 samples were "inconclusive" for mercury, and one of the 3 tested cores showed 239 ng/gm (just as the Court's experts stated was present. It is significant that NAF found this level of mercury, since NAF confirmed that it did not use the more accurate PRMS core sampling and testing protocol to do its limited testing. The Board erred in failing and/or refusing to consider the results of sediment testing by NAF, mandated in February of 2020 by the USACE and USEPA, for various contaminants including mercury until those tests are accepted by the USACE and USEPA, pursuant to the June 2020 SAP.

116. It is impossible for the Board to make conclusions regarding the temporary or permanent impacts of this proposed project on the existing access of fishermen to this area as a productive commercial fishing resource, without considering the amount and nature of sediment that this project, as proposed, will disturb and re-suspend (including the temporary and permanent impact of construction and operation of the pipes in Penobscot Bay on the lobster and crab fisheries of the upper Penobscot Bay).

117. It is error for the Board to attempt to defer its responsibility for such decisions to other State or federal agencies. That other agencies have overlapping jurisdiction does not obviate

the Board's independent responsibility to make these judgments based on sound science and expert analysis.

C. All Petitioners

118. All of the Petitioners have had to incur an unreasonable cost burden to challenge NAF's administrative standing. Where, as here, the lease applicant (NAF) is relying on an easement to demonstrate TRI – an easement the factual parameters and legal validity of which have not been determined by a Court of competent jurisdiction (i.e. *this Court*) – the applicant is devoid of the requisite right, title or interest “in the upland property adjacent to the littoral zone in which the lease or easement is sought,” to have administrative standing.

119. The Board's decision to proceed in the permitting and licensing process was and is contrary to the Law Court's recent holding in *Tomasino v. Town of Case, supra* at ¶ 15, and the requirements in 01-670 C.M.R. ch. 53, § 1.6.B.1. It is unreasonable and error for the Board to grant any permit or license to NAF – shifting the burden on the property owners and this Court to enforce property rights that are guaranteed by law in this State and nation.

120. In the absence of TRI, NAF lacks administrative standing to proceed in the lease process and the Board lacks a justiciable issue before it to proceed upon.

121. It was a violation of the Board's subject matter jurisdiction to make legal determinations regarding the meaning and interpretation of the March 3, 2019 Letter Agreement or the boundaries of the August 6, 2018 Easement Agreement. These are all matters relating to the factual parameters of the 8-6-2018 Easement Agreement that are solely within the subject matter jurisdiction of this Court – not the Bureau – to make.

122. Until those determinations are made by this Court, in the pending separate declaratory judgment action to quiet title (RE-2019-18), the Board was required to dismiss or stay consideration of NAF's pending applications. It was error for the Board to grant any permits or licenses to NAF in the absence of NAF's administrative standing or a justiciable issue before the

Bureau.

WHEREFORE, pursuant to 5 M.R.S. § 11007(4) Petitioners respectfully request that the Court find that each of the referenced decisions of the Board of Environmental Protection, including findings, inferences, conclusions contained therein are:

- (i) In violation of constitutional or statutory provisions;
- (ii) In excess of the statutory authority of the Board and Department;
- (iii) Made upon unlawful procedure;
- (iv) Affected by bias or error of law;
- (v) Unsupported by substantial evidence on the whole record; and/or
- (vi) Arbitrary or capricious or characterized by abuse of discretion,

and revoke the approvals granted to NAF, and declare each of them null and void, granting such other relief as is just and proper, and award Petitioners their costs.

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 this Court rules on the parameters of the NAF-Eckrote easement in the pending Declaratory Judgment action (RE-2019-18). Accordingly, the Board of Environmental Protection erred in proceeding with the above-referenced permit and license applications. pursuant to the Law Court's holding in *Tomasino* and Rule 80B(b). Petitioners respectfully submit that the Board's error in determining the threshold jurisdictional question, regarding NAF's alleged demonstration of "sufficient right, title or interest," so fundamentally infects every other decision that the Board has made, this question requires resolution by the Court before the Petitioners should have to address the other substantive errors made by the Board.

Respectfully submitted this 18th day of December 2020.

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