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DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
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SUBMERGED LANDS LEASE – PRELIMINARY FINDINGS AND DECISION

APPLICANT: Nordic Aquafarms, Inc.

PROJECT LOCATION: City of Belfast and Town of Northport

APPLICATION: Bureau of Parks and Lands Submerged Lands Lease Application No. SL2352, dated September 26, 2018, as amended on November 20 and December 5, 2018 (one modification sent in two sections), and as amended on March 22, 2019 (the application).

PROJECT DESCRIPTION: As further described in the application, the Applicant proposes to install three pipes and associated riprap (collectively, the Pipes) on submerged lands in Penobscot Bay as part of a commercial, land-based aquaculture operation (the Project). The proposed location of the Pipes is depicted on the attached “Exhibit A. To reach the submerged lands, the Pipes would cross property, including the intertidal lands, located at 282 Northport Avenue, Belfast.¹ The Pipes would originate in Belfast and, as they extend seaward, cross the town line into Northport.

The three Pipes the Applicant proposes to site on submerged lands include one 36-inch-diameter water discharge pipe extending approximately 2,800 feet seaward of the mean low-water mark and two 30-inch-diameter water intake pipes extending approximately 5,510 feet seaward of the mean low-water mark as depicted on the attached site plan labeled “Exhibit A.” The Pipes would be set approximately one foot apart. The Pipes would be buried to a depth of five feet in the intertidal zone (between the mean high-water mark and the mean low-water mark). The subtidal portion of the Pipes would be covered with five feet of riprap material seaward to an approximate depth of 30 feet at low tide. After reaching that depth, the Pipes would then rest on the bottom substrate with protective cover, as depicted on Exhibit A. The last 100 feet of the water discharge pipe would incorporate three diffusers that project vertically approximately 34 inches above the pipe. The seaward end of each intake pipe includes an intake structure that would extend vertically approximately 8 feet from the bottom of each pipe, which would be in approximately 40 feet of water at low tide.

The Applicant proposes to lease a 40-foot-wide corridor of submerged lands for the Pipes. An estimated 4,000-8,000 cubic yards of back-fill material from the buried portion of the subtidal Pipes would be disposed of at an upland receiving site.

¹ The Applicant altered the proposed location of the pipes from its original submission and November amendment in response to comments submitted by shorefront property owners and other interested parties regarding the crossing of intertidal land and littoral zones.

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REVIEW COMMENTS: The Bureau of Parks and Lands (the Bureau) sent the first notice requesting public comment on the original application on October 9, 2018. A notice for public comment was not distributed for the November-December amendment because the Bureau was awaiting additional information from the Applicant. The Applicant submitted the requested information with the final amendment in March 2019. The Bureau accepted the application as complete on April 4, 2019. On April 8, 2019, the Bureau sent notice of the application to the City of Belfast, the Town of Northport, Northport Village Corporation, immediate shorefront abutters and additional shorefront owners in Belfast and Northport, other interested parties, and the Department of Marine Resources (the DMR). The Bureau requested that comments be submitted to the Bureau by May 8, 2019.

The Bureau received comments from the City of Belfast, Upstream Watch and the Maine Lobstering Union (collectively, Upstream Watch), the southwesterly abutter, and 17 members of the public during the comment period. The Bureau received six additional comments from the public during the month and a half prior to the comment period and nine comments after the comment period. The Bureau obtained additional information from the DMR and the U.S. Army Corps of Engineers (the USACE). Comments addressed possible environmental impacts of the Project; compliance with municipal regulations; and whether the application was complete for processing, including whether the applicant has sufficient right, title, and interest (RTI) in the adjacent upland.

Environmental impacts and compliance with municipal regulations are not within the Bureau's purview when considering a request for a submerged lands conveyance. However, pursuant to subsection 1.6(B)(10) of the Bureau's Chapter 53 rules (01-670 C.M.R. ch. 53), the terms of a submerged lands lease require that the lessee obtain all permits or other approvals required by federal, state, and local law and remain in compliance with all such permits and approvals for the duration of the lease term.

Several comments asserted that the application was not complete for processing because the site plan submitted with the application, see Exhibit A, does not bear a registered surveyor's seal. Subsection 1.7(A)(3) of the Bureau's Chapter 53 rules requires the Applicant to submit a detailed site plan; subsection 1.7(A)(3) does not, as a matter of course, require that an applicant submit a plan bearing a registered surveyor's seal. As such, and because the site plan submitted in the application, and attached hereto as Exhibit A, was sufficiently detailed for the Bureau to determine the proposed location and nature of the Project, the Bureau did not request that the Applicant submit a site plan stamped by a registered surveyor.

Many comments, including those of Upstream Watch, addressed the Applicant's legal interest in the intertidal property where the proposed Pipes would be located. The Bureau requested that the Applicant submit by June 16, 2019, additional information supporting its RTI in the adjacent upland. The Applicant timely submitted additional information related to its RTI in the adjacent upland. Upstream Watch requested and was allowed one week, until June 28, 2019, to respond to the Applicant's RTI submission. Subsequently, the Applicant submitted to the Department of Environmental Protection (the DEP), with a copy to the Bureau additional documentation related to RTI. RTI is discussed below.

FINDINGS: Based upon its review of the administrative record, the Bureau makes the following findings in accordance with 12 M.R.S. § 1862 and the Bureau's Chapter 53 rules.

RIGHT, TITLE AND INTEREST:

Pursuant to subsection 1.6(B)(1) of the Bureau's Chapter 53 rules, an applicant for a submerged lands conveyance must demonstrate that it has sufficient RTI in the upland property adjacent to the littoral zone in which the submerged lands lease is sought. To demonstrate RTI, the Applicant submitted an Easement Purchase and Sale Agreement between the Applicant and Richard Eckrote and Janet Eckrote (the Eckrotes). The Eckrotes own property located at 282 Northport Avenue in Belfast. Per the Easement Purchase and Sale Agreement, the Eckrotes have agreed to convey to the Applicant an easement over the property depicted in Exhibit A to the Easement Purchase and Sale Agreement for the Pipes associated with the Project. Exhibit A to the Easement Purchase and Sale Agreement shows the prospective easement ending at the mean high-water mark. Upon the Bureau's request, the Applicant submitted to the Bureau a letter dated March 3, 2019, from Nordic to the Eckrotes, which is countersigned by the Eckrotes on February 28, 2019, and pursuant to which the Eckrotes confirm their understanding that the area subject to the Easement Purchase and Sale Agreement "includes the entirety of [the Eckrotes'] rights in the intertidal zone."

Upstream Watch commented that the Applicant lacks sufficient RTI in the intertidal land adjacent to the Eckrotes' property because a different shorefront owner owns the intertidal land in front of the Eckrotes' property and has encumbered that intertidal land with a conservation easement deed that would prohibit the Pipes.² Additionally, Upstream Watch contends that the Applicant lacks sufficient RTI because a 1946 deed, which may be in the Eckrotes' chain of title, purports to limit the use of the Eckrotes' property to residential purposes only.

The Bureau obtained a copy of the Eckrotes' deed, which is recorded in the Waldo County Registry of Deeds, Book 3697, Page 5. The metes and bounds description in the Eckrotes' deed includes the following calls: "to the high water mark of Penobscot Bay; thence generally southwesterly along said Bay." The Applicant and Upstream Watch each submitted a legal opinion and an opinion from a surveyor opining on the extent of the Eckrotes' ownership. Based on the Eckrotes' deed, which includes a call to the water, the Colonial Ordinance presumption of ownership to the low water mark, the Easement Purchase and Sale Agreement, and the March 3, 2019, letter amending the Easement Purchase and Sale Agreement, the Bureau finds that the Applicant has demonstrated sufficient RTI in the upland property adjacent to the proposed submerged lands lease area for the Bureau to process the lease application. The Bureau will not issue a submerged lands lease to the Applicant until the Applicant provides the Bureau with a copy of a recorded easement from the Eckrotes to cross the upland property, including the intertidal lands, adjacent to the submerged lands for which the lease is sought.

The Bureau acknowledges that there are competing claims of title to the intertidal land in front of the Eckrotes' property. The Bureau, however, lacks the authority to resolve competing title claims; resolution of such claims is a function of the courts. Except when the Bureau owns intertidal land, the Bureau's submerged lands leasing program does not grant rights to intertidal land; rather, the Bureau determines whether a less than fee conveyance should be issued for the publicly-owned submerged lands. As such, the decision to issue a submerged lands conveyance does not constitute an adjudication of any title disputes among private parties regarding ownership of intertidal lands, which only a court can adjudicate. If the outcome of a title action effectively terminates a lessee's RTI for its submerged

² The conservation easement deed, dated April 29, 2019, was granted by Jeffrey R. Mabee and Judith Grace to Upstream Watch and is recorded in the Waldo County Registry of Deeds, Book 4367, Page 273.

lands lease, that lease, pursuant to subsection 1.6(B)(1)(b) of the Bureau's Chapter 53 rules, "shall be invalid and all leasehold . . . interest in the Submerged Lands shall be extinguished."

LITTORAL ZONES AND SETBACK DISTANCES:

Littoral zones and setbacks lines are determined by applying subsection 1.6(B)(11) of the Bureau's Chapter 53 rules. Littoral zones and setback standards delineate the area of submerged land adjacent to the Applicant's upland property and establish adequate separation between structures for navigation and access for both the public and riparian owners. Littoral zones do not delineate areas of public submerged lands for the exclusive use of the applicant or other riparian owners.

Littoral zone boundaries are established by right angle projections from a baseline established along the shoreline at the intersection of the high-water line and the side boundary of each property. Setback standards are established from other existing structures and an applicant's littoral zone boundary. When littoral zones overlap, subsection 1.6(B)(11)(b)(2) requires that structures be set back twenty-five feet from an applicant's littoral sidelines.

For the purposes of discussing this application, the Bureau refers to the Eckrottes' littoral zone as the Applicant's littoral zone. The Applicant's littoral zone is delineated by the Applicant on Exhibit A in accordance with subsection 1.6(B)(11) of the Bureau's Chapter 53 rules. A number of abutters' littoral zones overlap with the Applicant's littoral zone. Because of the overlapping littoral zones and distance the Pipes would extend offshore, the Pipes are unable to avoid crossing other riparian owners' littoral zones where those littoral zones overlap with the Applicant's littoral zones. The proposed location of the Pipes, however, is within the Applicant's littoral zone and setback twenty-five feet from the Applicant's littoral zone boundary lines at all points. Thus, the Bureau finds that the location of the proposed Pipes complies with subsection 1.6(B)(11) of the Bureau's Chapter 53 rules.

Several shorefront property owners in the immediate area, including the adjacent abutters, have objected to the placement of the Applicant's Pipes within their littoral zones. When two or more littoral zones overlap, the Bureau has the discretion to require a letter of no objection from those shoreland owner(s) whose littoral zones are affected. Because the proposed Pipes would be buried for approximately 800 feet in the intertidal zone, then covered with five feet of riprap seaward approximately 1,800 feet to an approximate depth of 30 feet at low tide before resting on the ocean floor an additional approximate 3,710 feet, the Bureau finds that the Project would not unreasonably impair other property owners' ability to construct docking structures within their littoral zones or access their properties from the water. Therefore, the Bureau is not requiring a letter of no objection from other property owners whose littoral zones the Pipes would cross.

PUBLIC ACCESS WAYS:

Per subsection 1.7(C)(2) of the Bureau's Chapter 53 rules, a proposed use of submerged lands must not unreasonably interfere with customary or traditional public access ways to submerged lands. The portion of the Project landward of the mean low-water mark is not proposed to be sited within, abutting, or near a deeded public access point to the shore. With respect to any public access points that are not deeded, the proposed Pipes will not interfere with access because the Pipes would be buried to a depth of five feet for approximately 800 feet in the intertidal zone, covered with five feet of riprap material seaward approximately 1,800 feet to an approximate depth of 30 feet at low tide and rest on the bottom

substrate an additional approximately 3,710 feet. As such, the Bureau finds that the proposed Pipes will not unreasonably interfere with public access ways to submerged lands.

PUBLIC TRUST RIGHTS:

Per 12 M.R.S. § 1862(6)(a) and (b) and subsection 1.7(C)(2) of the Bureau's Chapter 53 rules, a proposed use of submerged lands must not unreasonably interfere with public trust rights. Subsection 1.4(Q) of the Bureau's Chapter 53 rules defines public trust rights as "transitory fishing, fowling, recreation, navigation and other customary or traditional uses whereby the public may use or enjoy the waters, Submerged Lands, and associated natural resources of the State of Maine."

Area fisheries include lobster, crab, and shellfish. The proposed lease area is closed by the DMR to shellfish harvesting. To limit any potential impacts to lobster and crab fisheries in the area, and, therefore, to fishing, the DMR commented that construction should take place during the USACE's winter work window of November 6 to April 8. The DMR stated that "it is unlikely that any lobsters or crabs would be present during this time and therefore fishing activity/effort will be low to not present." Because the Project requires a permit from the USACE, the work window for laying the Pipes, should the Project be approved, will be determined through the USACE permitting process.

Regarding navigation, the City of Belfast recommends that marker buoys be installed to locate the Pipes, including at the end points, to prevent fouling of fishing gear or anchors. Bureau staff conferred with the USACE regarding these recommendations and, although the Bureau is supportive, it understands that the U.S. Coast Guard (the USCG) Aids to Navigation System would determine any marker requirements. Additionally, if the USACE approves the Project, the USACE will require notification of the as-built project location to the National Oceanographic and Atmospheric Administration for inclusion in its navigation charts.

No other concerns were raised relative to potential interference with the ability to fish, fowl (waterfowl hunt), navigate or recreate in the area. Most of the proposed Pipes' subtidal depth would be in excess of 10 feet, allowing these uses to take place over and around the Pipes and riprap.

To the extent that construction activities due to the proposed dredging and pipe installation may affect temporarily public trust rights on or over submerged lands, these activities do not require a submerged lands conveyance because they do not involve the placement of permanent structures or fill on submerged lands.

Because the Pipes would be buried to a depth of five feet for approximately 800 feet in the intertidal zone, be covered with five feet of riprap material seaward approximately 1,800 feet to an approximate depth of 30 feet at low tide, and rest on the bottom substrate with protective cover for an additional approximately 3,710 feet, the Bureau finds that the proposed Pipes will not unreasonably interfere with fishing, fowling, navigation, or other existing marine uses of the area. In addition, any potential effects on these uses would be minimized provided the Applicant obtains the necessary approvals from the USACE and USCG.

INGRESS AND EGRESS OF RIPARIAN OWNERS:

Per 12 M.R.S. § 1862(6)(d) and subsection 1.7(C)(3) of the Bureau's Chapter 53 rules, a proposed use of submerged lands must not unreasonably interfere with ingress and egress of riparian owners. The three

Pipes would be buried approximately 800 feet in the intertidal area, the first approximately 1,800 feet of the subtidal area to a depth of 30 feet, then would rest on the ocean substrate for approximately 3,710 feet. The Pipes would be located within a 40-foot-wide corridor on submerged lands. The subtidal pipe location would be several hundred feet from other riparian property owners' shorefronts. Because the Pipes would be buried and the proposed lease area is limited to a 40-foot-wide corridor, the Bureau finds that the proposed Pipes will not unreasonably interfere with ingress and egress of riparian owners.

SERVICES AND FACILITIES NECESSARY FOR COMMERCIAL MARINE ACTIVITIES:

Regarding 12 M.R.S. § 1862(6)(c) and subsection 1.7(C)(4) of the Bureau's Chapter 53 rules, the Bureau observed that there are no commercial marine services or facilities in the proposed submerged lands lease area. As such, the Bureau finds that the proposed Pipes will not unreasonably diminish the availability of services and facilities necessary for commercial marine activities.

RISK TO LIFE OR PROPERTY:

Regarding subsection 1.7(C)(5) of the Bureau's Chapter 53 rules,³ the proposed Pipes present minimal safety risks to life or property because they would be buried under submerged lands or rest on the bottom of submerged lands. Additionally, as discussed under Public Trust Rights above, risks to life and property would be further reduced by marking and mapping the Pipes, should the USCG determine that marking and mapping are warranted. Accordingly, the Bureau finds that the proposed Pipes will not result in significantly increased risk to life or property in the vicinity of the proposal under conditions of weather and vessel traffic that are likely to be encountered.

REQUIREMENTS OF OTHER AGENCIES:

Regarding subsection 1.7(C)(6) of the Bureau's Chapter 53 rules, the Bureau understands that the Applicant is in the process of obtaining all required federal, state, and municipal approvals. Standard language in the submerged lands lease requires that the lessee acquire all federal, state, and local approvals within a limited time frame after the lease is issued, and that the lessee comply with the terms of all such approvals throughout the lease period. Failure to obtain all necessary federal, state, and local approvals invalidates the lease for the portion of the Project that does not receive a required permit.

The Bureau finds that the proposed Project complies with subsection 1.7(C)(6) because the lease is conditional upon receiving all necessary approvals.

SPECIAL PROTECTION AREAS OF SUBMERGED LANDS:

Regarding subsection 1.7(C)(7) of the Bureau's Chapter 53 rules, there is no evidence in the record that any portion of the proposed submerged lands lease area has been designated for special protection by an agency authorized to make such designations. Therefore, the Bureau finds that the proposed Pipes will not conflict with established management guidelines designed to protect such designated areas.

COASTAL POLICIES:

Because the Bureau has determined that the proposed Pipes otherwise meet the standards described in subsection 1.7(C) of the Bureau's Chapter 53 rules, the Bureau finds, per subsection 1.7(C)(8), that the

³ The Bureau's Chapter 53 rules contain two subsections numbered 1.7(C)(5), the first of which is applicable only to the installation of underground cables. Because the Applicant is proposing to install water intake and discharge pipes, and not underground cables, the first of the two subsections numbered 1.7(C)(5) is not applicable.

use does not conflict with those aspects of the Coastal Policies or the Coastal Policy guidelines in 38 M.R.S. § 1801 that relate to the criteria considered by the Bureau.

PUBLIC INTEREST and CONSISTENCY WITH RULES

Based on all the findings above, and because the lease terms require the Applicant to obtain all necessary federal, state, and local approvals, the Bureau finds, regarding subsections 1.7(C)(1) and (9) of the Bureau's Chapter 53 rules, that the proposed Pipes are not inconsistent with the Bureau's rules and are not otherwise contrary to the public interest, provided the Applicant obtains the necessary federal, state, and municipal approvals.

OUTSTANDING FEES:

The Applicant has paid the fee required for processing the application. A pro-rated rental fee will be due when the submerged lands lease is executed, however because the lease is not being issued at this time there are no fees that are due. Regarding subsection 1.7(C)(10) of the Bureau's Chapter 53 rules, the Bureau finds that there are no outstanding fees relative to the application.

CONCLUSIONS: Based upon its review of the administrative record and the findings set forth above, the Bureau concludes that the Project meets the requirements set forth in 12 M.R.S. § 1862 and in the Bureau's Chapter 53 Rules.

DECISION: In accordance with 12 M.R.S. § 1862, the Director of the Bureau has determined that Submerged Lands Lease No. 2141-L-48 and Submerged Lands Dredging Lease No. 05-21DL will be granted to Nordic Aquafarms, Inc. after the Bureau receives a recorded easement instrument conveying rights to the upland, including the intertidal land, that the Applicant proposes to utilize for the proposed Pipes. The Applicant must provide the recorded easement to the Bureau within 30 days of the Applicant's receipt of all necessary permits and approvals.

Signed: 
Andrew R. Cutko, Director

Date: July 16, 2019