CITY OF BELFAST

WALDO COUNTY, MAINE

BELFAST PLANNING BOARD

IN RE: APPLICATION OF NORDIC AQUAFARMS, INC.

**RENEWED MOTION FOR STAY OR DISMISSAL
PURSUANT TO NEW PRECEDENT
DECIDED ON JULY 7, 2020 AND
NAF'S CHANGES TO ITS PROPOSED PROJECT
NOT INCLUDED IN
THE FILED APPLICATION SUBMITTED TO BELFAST**

SUBMITTED BY INTERVENORS-PETITIONERS:
Jeffrey Mabee And Judith Grace;
Lobstering Representatives
The Maine Lobstering Union,
Wayne Marshall And David Black; and

INTERESTED AND AGGRIEVED PARTY-PETITIONER:
The Friends of the Harriet L. Hartley Conservation Area

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

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

In addition, as a second ground for a stay, Petitioners assert that the application filed with the City of Belfast is no longer an accurate description of the NAF project. Petitioners request a stay to get the results of the required sediment testing by NAF and amendments of the filed application to conform to the current project proposal and, additional hearings relating to the new information provided by NAF once the test results and necessary amendments are provided.

PARTIES REQUESTING STAY OR DISMISSAL

This motion to stay or dismiss NAF's permit applications pending in the Belfast Planning Board ("the Board") is submitted on behalf of: **Jeffrey Mabee and Judith Grace** ("Mabee-Grace"), true owners[2] of a portion of the intertidal land that NAF fraudulently[3] asserts a right to use in these Board proceedings; the **Friends of the Harriet L. Hartley Conservation Area** ("Friends"), a Maine-registered nonprofit corporation[4] and 501c3 organization, and Holder of a recorded conservation easement[5] that includes a portion of the intertidal land that NAF

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

[3] Pursuant to Maine Supreme Judicial Court precedents:

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

Sherbert v. Remmel, 2006 ME 116, §4, 908 A.2d 622, 623, citing, *Grover v. Minette-Mills, Inc.,* 638 A.2d 712, 716 (Me. 1994). Here, Petitioners assert that the Board has relied on NAF's knowingly false representations about its easement rights, under the easement option granted by the Eckrotes and Petitioners (and Belfast's taxpayers) have suffered significant damages as a consequence of NAF's fraudulent representations to the Board. See footnote 11 for additional details of NAF's fraudulent filings in this Board relating to claims of title, right or interest in the intertidal land on which the Eckrotes' lot fronts informing Petitioner use of the word "fraudulent" here and in the pending Superior Court lawsuit.

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

[5] WCRD Book 4367, Page 273; Book 4435, Page 344; Book 24, Page 54.

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

GRAVAMEN OF THE *TOMASINO* HOLDING

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

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

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

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

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

Specifically, the Law Court held in relevant part that:

> [N]one of these decisions [referenced in footnotes 7 and 8] supports the proposition that administrative standing may be conferred merely by possessing any kind of easement on the property at issue. Unlike title owners, easement owners are subject to a second layer of necessary authority – what the easement itself allows – in addition to what the applicable ordinances and statutes allow. . . ***Whatever minimum "right, title or interest" is required*** [to have administrative standing to obtain a permit]. . ., ***we conclude that, in the face of a dispute between private property owners, that requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so***.

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

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

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through the [permitting] action"); *Murray v. Inhabitants of Town of Lincolnville,* 462 A.2d 40, 43 (Me. 1983) ("an applicant for a license or permit to use property in certain ways must have 'the kind of relationship to the site,' that gives him a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the' . . . license he seeks." (internal citations omitted)); and *Southridge Corp. v. Bd. of Environmental Prot.,* 655 A.2d 345, 347-48 (Me. 1995) ("a pending action [in a parallel Superior Court quiet title case] claiming ownership by adverse possession was sufficient to confer standing to seek state regulatory permits for the property at issue").

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

In *Tomasino*, the Law Court determined that the parameters of the easement on which the applicants relied in asserting "sufficient TRI" were unclear on two significant factual points: (i) whether the easement allowed the Tomasinos to cut trees from the land owned by the Trust without the express permission of the Trust; and (ii) whether all three of the trees that the Tomasinos sought to cut were within the boundaries of the easement that the Tomasinos had been granted. The Law Court stated that these factual determinations could only be resolved by a Court of competent jurisdiction, and resolution of such factual matters relating to the parameters of the easement were beyond the municipal Zoning Board's subject matter jurisdiction to resolve. The Law Court also stated that, in the absence of a prior factual determination of the parameters of an easement by a court with jurisdiction to do so, the easement was ***insufficient*** proof of title, right or interest to demonstrate the required administrative standing to obtain a permit.

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

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

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

Agreement, allegedly clarifying the meaning of the 8-6-2018 easement) as the basis on which NAF claims to have "sufficient title, right or interest" to obtain the necessary permits, licenses and leases, required to construct its proposed land-based salmon farm – including placing three pipelines a mile into Penobscot Bay.

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

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

MEMORANDUM OF LAW AND SUMMARY OF THE ARGUMENT FOR STAY

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

Pursuant to the clarifying holding in *Tomasino, supra,* the Board (and any similarly situated State permitting entities) must stay or dismiss NAF's pending permit, license and lease applications as ***incomplete***, due to ***insufficient*** title, right or interest, until the Waldo County Superior Court makes a determination of the parameters of the NAF-Eckrote easement.

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

Resolution of the Petitioners' challenge to NAF's "sufficient TRI" claims in the Board, are based on the Petitioners' assertion that the easement granted to NAF by the Eckrotes, by its own terms, terminates at the high water mark of the Eckrotes' lot – granting no right to NAF to use the intertidal land on which the Eckrotes' lot fronts.[10] This challenge requires a determination regarding the plain meaning and parameters of the easement option that NAF obtained from the Eckrotes. This challenge does not require the Board (or any other similarly situated State permitting authority) to resolve competing *ownership* claims by the relevant private property owners relating to this intertidal land.[11] Petitioners have asserted that the Board need only review

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

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

the easement documents NAF has submitted – ***or not submitted*** – to see that NAF has failed to

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In these instruments the so-called "Grantors" claim to have conferred to NAF any interest the "Grantors" may have, *if any*, in the land referenced in the August 27, 1934 deed from Genevieve Hargrave to her sister Harriet L. Hartley and Arthur Hartley, as joint tenants. These unrecorded and *un-recordable* documents do not constitute a *legitimate* claim of ownership by title by NAF in the intertidal land on which the Eckrotes' lot fronts. Indeed, as drafted, these instruments do not convey title to any land pursuant to the controlling precedent of the Maine Supreme Judicial Court in *Sargent v. Coolidge,* 399 A.2d 1333 (Me. 1979) (a quitclaim deed merely of "a right, title and interest" in land is not a grant of the land itself nor of any particular estate in the land, and is not prima facie evidence of title), citing, *Hill v. Coburn,* 105 Me. 437, 452, 75 A. 67 (1909); *Butler v. Taylor,* 86 Me. 17, 23, 29 A. 923 (1893); *ash v. Bean,* 74 Me. 340 (1883); *Coe v. Person Unknown,* 43 Me. 432 (1857).

In August of 2019, at the Planning Board hearing on Petitioners Mabee and Grace's TRI challenge, Mr. Kelly advised the Board that he had reviewed these documents and a "genealogical report" by NAF's "expert" and Mr. Kelly had confirmed that the persons executing these instruments were "heirs-at-law" of Harriet L. Hartley. Those representations were false.

First, Mr. Kelly later advised in response to a FOAA request filed by Petitioners' undersigned counsel that he had never seen the un-redacted version of these deeds and did not know the identities of the persons who signed these documents (Exhibit 13). Second, the so-called genealogical expert who wrote the one-paragraph conclusory statement that the "Grantors" were "heirs-at-law" of Harriet ***L.*** Hartley is a title searcher from South Portland, Maine whose phone number on the letterhead for the so-called genealogical report is a disconnected number (and had been disconnected at the time NAF filed the report with the Board) and who is not on the State of Maine's registry of certified genealogical researchers in this State (Exhibit 14). Third, the "Release Deeds" all state that the persons signing them are "heirs-at-law" of "Harriet ***A.*** Hartley" not Harriet L. Hartley (the woman who owned land in Belfast, Maine from August 27, 1934 to September 21, 1950). Fifth, whoever the people are who allegedly signed these documents they are not "heirs-at law" of Harriet L. Hartley, because Harriet's "heirs-at-law" at the time of her death, according to the Register of Wills for the County of Philadelphia, PA, were her sisters: Genevieve Hargrave Bailey and Esther Hargrave Woods – and both of them died in the 1950s so they certainly did not sign any deeds in 2019 granting NAF anything (Exhibit 15, Schedule D). Finally, the Philadelphia Register of Wills determined in December of 1951 that, at the time of her death, Harriet L. Hartley owned no real property – having sold all of her land in Maine more than twelve months prior to her death on October 18, 1951. As a result here heirs-a-law (her two surviving sisters) inherited her remaining assets (less than $12,000 in cash) and inherited no real property from Harriet's estate (Exhibit 15, Schedule D). Consequently, whatever distant relatives of Harriet's that may exist (descendants of Harriet's sister Esther's only son (Samuel Nelson Woods, Jr.), since Harriet and Genevieve never had children), no relatives of Harriet L. Hartley inherited any land in Maine from her, or her actual heirs-at law, and therefore none of Harriet's distant relatives have any title, right or interest in any land in Belfast, Maine to convey to NAF, because one cannot convey land that they never received. *Almeder v. Town of Kennebunkport,* 2019 ME 151, ¶¶ 28-38.

Accordingly, NAF's "release deeds" are fraudulent – conveying no title or interest in any land in Belfast, Maine – offered by NAF as evidence to this Board to drag these proceedings out by making a false claim of title, right or interest in the intertidal land on which the Eckrotes' lot fronts – land to which Petitioners Mabee and Grace have a claim of title based on recorded deeds and in which title was quieted by a prior judgment entered in favor of Petitioners Mabee and Grace's predecessor-in-interest (Winston Ferris) by the Waldo County Superior Court on June 26, 1970, in *Ferris v. Hargrave*. (WCRD Book 683, Page 283). That judgment was based on the identical property description in Petitioners Mabee and Grace's deed and barred any claim of title, right, interest or estate by anyone claiming by, through or under Genevieve Hargrave – the very person the people signing the faux "Release Deeds" claim their interest is through. (WCRD Book 1221, Page 347). All of these deficiencies should have been revealed to the Board in August, 2019 – why they were not is a matter of grave concern to the Petitioners.

demonstrate that it has a legally cognizable expectation to use the intertidal land it proposes to use for placement of its pipes, in the manner that the Board's permits would authorize.

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

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

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

Here, there are even questions relating to the parameters of the easement that place in doubt whether NAF's Grantors, the Eckrotes, even have the ability to grant NAF an easement to use their upland lot ***or*** the intertidal flats on which their lot fronts – intertidal flats that Petitioners Mabee and Grace assert that they own in fee simple and to which Petitioner Friends is the Holder of a Conservation Easement.[12]

In addition to the question of who *owns* the intertidal flats (and therefore who has the ability to grant an easement to use the flats), specific factual issues relating to the parameters of NAF's easement already identified by the Superior Court include: (i) whether NAF's Grantors' (the Eckrotes') have the ability to grant NAF an easement over their upland property or if language in the 1946 deed from Hartley-to-Poor creates a restrictive covenant that limits the use of the Eckrotes' upland lot to residential purposes only;[13] and (ii) whether the Eckrotes' waterside (eastern) boundary ends at their high water mark, requiring further factual determinations relating

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

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

> "Because the deed as a whole is ambiguous regarding whether the residential use restriction was intended to burden all subsequent grantees of lot 36, or just Fred Poor, and because the scant extrinsic evidence present in the summary judgment record does not provide any insight into Hartley's intent in 1946, Plaintiffs' amended first motion for summary judgment must be denied. . . . As the foregoing analysis impliedly details, however, nothing in the 1946 deed (nor the 1945 will) compels a judgment in Defendants' favor. The parties could assist the Court in this case at an eventual trial on the issue by locating and presenting any other evidence regarding the parties' intent at the time Hartley conveyed the parcel to Poor." (6-4-2020 Order Denying Summary Judgments, in RE-2019-18, pp. 9-10.

to the location of the sideline termini referenced in the 1946, 1971 and 1991 deeds.[14]

Accordingly, because the Board lacks subject matter jurisdiction to consider, process or grant NAF any permits, until the pending factual (and legal) questions relating to the parameters of NAF's easement option from the Eckrotes are resolved by the Waldo County Superior Court, a stay or dismissal of all Board proceedings is mandated by the Law Court's holding in *Tomasino*.

BACKGROUND

As the Board is well aware, Petitioners have consistently challenged the subject matter jurisdiction of the Board to proceed with its consideration of NAF's permit applications since June of 2019 – beginning at the first Board meeting on NAF's applications. The Board is also well aware that the Petitioners have a Declaratory Judgment action to quiet title, enforce property rights and enforce the Conservation Easement pending in the Waldo County Superior Court, *Mabee and Grace, et al v. NAF, et al.,* Docket No. RE-2019-18. In addition, Petitioners have participated as Intervenors or Interested Parties in multiple local and State (and federal) administrative proceedings in which NAF is seeking permits, licenses and leases that, if granted, would authorize NAF to take and use intertidal land that Petitioners Mabee and Grace assert that they own and that Petitioner Friends of the Harriet L. Hartley Conservation Area (Friends) hold under a

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

The Superior Court also noted in relevant part that:

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

Conservation Easement created and record by Petitioners Mabee and Grace on April 29, 2019.[15] In all of these administrative forums, including the Board, Petitioners have continually opposed the sufficiency of NAF's claims of title, right or interest in the intertidal land on which the Eckrotes' lot fronts and to which Petitioners Mabee and Grace claim title – expressly challenging the parameters of the NAF-Eckrote easement from the outset.

In all of the local, State and federal administrative proceedings in which NAF has pursued permits, licenses and leases, including this Board, NAF has claimed that is has "sufficient" title, right or interest ("TRI") in the intertidal land on which it seeks permits, licenses and leases to place its three industrial pipes into Penobscot Bay, based on the August 6, 2018 Easement Purchase and Sale Agreement, between NAF and Richard and Janet Eckrote.[16] That Easement Agreement grants NAF an option to purchase a 25-foot wide permanent easement along the southern boundary of the Eckrotes' lot, Belfast Tax Map 29, Lot 36. However, by its own terms, the waterside (eastern) boundary of the easement option granted to NAF by the Eckrotes ***terminates at the Eckrotes' high water mark***. See, Exhibit 3.

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

That Google Earth image is attached to the Easement Purchase and Sale Agreement as Exhibit A. The image depicted in Exhibit A includes a 40-foot wide construction easement,

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

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

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

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

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

> This letter serves as the Bureau of Parks and Lands, Submerged Land's Program's formal request that Nordic Aquafarms provide evidence that Nordic Aquafarms had established right, title or interest in the intertidal land where the pipelines are proposed. *As the Submerged Lands Program (the SLP) communicated during our conversation with David Kallin on January 16, 2019,* ***the Easement Purchase and***

> ***Sale Agreement submitted by Nordic Aquafarms defines the easement area by reference to an <u>Exhibit A</u> that <u>depicts the easement area as stopping at the high-water mark</u>.***

Petitioners' Exhibit 1 (emphasis supplied).

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

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

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

(emphasis supplied).

Curiously, the March 3, 2019 Letter Agreement ***did not amend the boundaries of the Easement option as defined in Exhibit A*** of the 8-6-2019 Easement Purchase and Sale Agreement, which defined the waterside boundary of the easement option granted by the Eckrotes to NAF as terminating at the high water mark of the Eckrotes' property. However, based on the March 3, 2019 Letter Agreement submitted by NAF to the Bureau of Parks and Lands, the Bureau's prior January 2019 determination that the easement was insufficient proof and "TRI" was reversed by the Bureau in April 2019, and the Bureau found that the NAF applications were "complete" for processing.[17]

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

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

Despite the failure of NAF to provide any proof to the Department – through submission of an "***amendment, modification, or clarification of the agreement (or its attached Exhibit A) by the parties to that agreement"*** -- of a legally cognizable expectation to use this intertidal land in the manner the permits sought would authorize, on June 13, 2019 the Department reversed its January 22, 2019 determination that the easement was insufficient to demonstrate TRI, stating in relevant part that:

> . . . With respect to the intertidal portion of the property proposed for use, the Department finds that the deeds and other submissions, ***including NAF's option to purchase an easement over the Eckrote property and the succession of deeds in the Eckrote chain of title***, when considered in the context of the common law presumption of conveyance of the intertidal area along with an upland conveyance, constitute sufficient showing of TRI for the Department to process and take action on the pending application. This determination is not an adjudication of property rights and may be reconsidered by the Department at any time during processing as applicants must have adequate and sufficient TRI throughout the application process. Accordingly should a court adjudicate any property disputes or rights in a way that affects NAF's interest in the proposed project lands while the applications are being processed, the Department may revisit the issue of TRI and return the applications if appropriate.

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

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

Petition Exhibit 2, p. 2.

Petition Exhibit 9, p. 15 (emphasis supplied). When Petitioners' challenged the DEP's June 13, 2019 decision to the Board of Environmental Protection, the BEP refused to rule on this jurisdictional challenge and proceeded with its own substantive review of NAF's permit applications in the absence of a resolution of Petitioners' challenge to the BEP's and the DEP's subject matter jurisdiction over NAF's permit applications. See, Exhibits 11 and 12.

Despite Petitioners' repeated attempts to challenge the determinations that NAF had demonstrated "sufficient TRI" to proceed, all of the local and State permitting entities have denied all of the Petitioners' requests to stay consideration of the substance of the pending NAF permit, license and lease applications or dismiss the applications until the Waldo County Superior Court rules in the pending Declaratory Judgment action to quiet title and determine the parties' respective property rights.

This Board took no action on Petitioners' renewed challenges to the sufficiency of NAF's submissions in support of its claims of TRI, submitted to the Panning Board in January of 2020, even after Petitioners submitted the December 23, 2019 Amendment to the NAF-Eckrote Easement Purchase and Sale Agreement, containing a WHEREAS clause that stated as follows:

> WHEREAS, as specified in the March 3, 2019 Letter Agreement, any easement rights Seller grants with respect to the intertidal zone and U S Route 1 adjacent to their real property are limited to whatever ownership rights we may have in and to said areas, if any, and *no representation or warranty is made as to any such ownership rights*.

12-23-2020 Easement Amendment (attached hereto as Exhibit 7), p. 1. This amendment should have made clear that the March 3, 2019 NAF-Eckrote Letter Agreement did not amend the boundaries in Exhibit A of the 2018 easement, as defined in the 8-6-2018 Easement Purchase and Sale Agreement; and did not contain any claim by the Eckrotes that they own the intertidal land on which their lot fronts.

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

The holding in *Tomasino* requires that the Board cease all review and action on the permit applications, including issuing any draft findings or permits, until the Superior Court determines the parameters and validity, *if any*, of the NAF-Eckrote easement.

To be clear, Petitioners submit that any actions that the Board takes on NAF's pending permit and license applications prior to this Court's determination of the parameters of the NAF-Eckrote easement are a ***nullity***, because such determinations and action will have been undertaken by the Board in the absence of any subject matter jurisdiction in the Board to make such substantive decisions. Indeed, all substantive action on NAF's permit, license and lease applications, undertaken by the Board and all other similarly situated local and State permitting authorities, after the clarification of the limits of subject matter jurisdiction by the Court in *Tomasino,* will be a ***nullity***.[19]

[19] On July 13, 2020, Petitioners filed motions to stay, based on the Law Court's decision in *Tomasino,* in the Bureau of Parks and Lands, Board of Environmental Protection and a pending Rule 80B proceeding relating to the BEP's subject matter jurisdiction.

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

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

Private property owners defending their deeded property rights – like Petitioners Mabee and Grace who are 40-year residents and taxpayers in Belfast -- should not be expected to bankrupt themselves in a multi-front battle, waged simultaneously in multiple local and State administrative permitting proceedings, to prevent a corporation from seeking and obtaining permits to use land to which the corporation has only a dubious, disputed claim, grounded in an easement the parameters and validity of which have not been determined as a matter of law or fact, by a court vested with the subject matter jurisdiction to do so. The Law Court's holding in *Tomasino* is based on this principle.

At its core, Petitioners Mabee and Grace's challenges to the Board's subject matter jurisdiction are, and always has been, grounded in the constitutionally guaranteed right of all landowners to protect their property from an unlawful regulatory taking. As the Law Court noted in *Brown v. Warchalowski,* 471 A.2d 1026, 1029, 1984 Me. LEXIS 600, •5-8:

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

(emphasis supplied).

In *Tomasino,* the Court has struck a proper balance of public and private rights by requiring a permit applicant seeking permits, based on nothing more than a disputed easement, to first obtain a judicial determination of the parameters of that easement by a court of competent jurisdiction. Pursuant to this well-reasoned approach to balancing competing rights and claims, it

is imperative that the parameters of NAF's easement option be determined first by this Court in the pending Declaratory Judgment action (RE-2019-18) prior to more costly, protracted permit proceedings being undertaken by a multitude of local and state entities.

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

SECOND GROUND FOR STAY: NAF'S CHANGES TO ITS PROPOSED PROJECT NOT INCLUDED IN THE FILED APPLICATION SUBMITTED TO BELFAST

As a second ground for a stay, Petitioners assert that the application filed with the City of Belfast is no longer an accurate description of the NAF project. Material changes have been made to the project by NAF, without the applicant submitting amendments to its Belfast application to reveal the proper description of the project as currently proposed, and additional requirements that have been imposed on NAF by federal authorities. Those changes include: (i) on June 22, 2020, the U.S. Army Corps of Engineers ("USACE") required NAF to do sediment testing for contaminants, including mercury, in the area that NAF proposes to place its pipes in Belfast Bay and Penobscot Bay; and (ii) significant changes in the amount of dredging, the amount of dredge

spoils NAF proposes to dispose of at an unspecified and unidentified upland disposal site, and the method and location of de-watering and transport of the dredge spoils.

Petitioners request a stay to get the results of the required sediment testing by NAF and amendments of the filed application to conform to the current project proposal. ***If*** the Court ultimately decides that NAF easement's parameters include a right for NAF to use the intertidal land on which it seeks permits from the Board, additional hearings relating to the sediment test results and necessary application amendments could and should proceed at that time.

A. June 22, 2020 USACE "SAP"

Petitioners cite the Sediment and Analysis Plan ("SAP") that the USACE, with approval of the U.S. EPA and Maine DEP, issued to NAF on June 22, 2020 as an additional ground for a stay. The results of the SAP testing -- particularly findings relating to the level of buried HoltraChem mercury in the area NAF proposes to disturb with dredging, excavating, trenching, side-casting of dredge spoils, de-watering, and blasting to bury and place its pipes in the intertidal and subtidal areas of Belfast and Penobscot Bay -- should be completed and provided to the Board before any permit decisions area made by the Board. It is imperative that the risks posed by the NAF project, as proposed, be properly understood by the Board before the Board attempts to assess if the requirements in the Ordinances have been met.

For more than a year Petitioners have advised NAF and every local, State and federal regulatory entity considering NAF's permit, lease and license applications that this project poses a significant threat to the environment and economy of the Midcoast region because of NAF's proposal to dredge in an area where there are significant amounts of buried HoltraChem mercury. To date, *State* agencies, including the Bureau of Parks and Lands (BPL), DMR, DEP and BEP have feigned ignorance regarding the existence of HoltraChem mercury in this area of Penobscot Bay – as though pretending the mercury is not there will stop the catastrophic environmental and

economic consequences that would occur if and when NAF's "excavating", "trenching", "side-casting," "de-watering" and blasting re-suspended and spread this toxic threat.

Petitioners have referenced the extensive data compiled by neutral experts appointed by the federal court in Maine, who have conducted the Penobscot River Mercury Study ("PRMS"). This study, spanning more than a decade, has determined that there are significant mercury deposits in the Penobscot Bay, north of the southern tip of Islesboro, attributable to tons of mercury being dumped in the Penobscot River in Orrington, Maine, by HoltraChem beginning in 1967.[20] On March 3, 2020 Petitioners submitted a March 2, 2020, comment by one of those experts, Dr. Dianne Kopec relating to this threat to this Board.

That mercury has caused, and continues to cause, significant environmental and economic harm – including requiring the closure by DMR of at least 13 square miles of bottom at the mouth of the Penobscot River and upper estuary of the Bay. This closure applies to all to lobster and crab fishing in this area.[21]

Where buried by natural attenuation, this HoltraChem mercury causes no public health threat to fisheries and/or disruption to commercial fishing. However, if buried mercury is disturbed through dredging and re-suspended – exposing it to the methylating bacteria in the Bay

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[20] Petitioners reference and incorporate all documents and reports publicly available from the PRMS here, which can be found at the following website:
https://www.nrdc.org/resources/mallinckrodt-case-documents

Chapter 5 of the Phase II PRMS Report is particularly relevant to the adverse impacts of the proposed NAF project and is expressly incorporated by reference in this Objection, as is the 3-2-2020 Comment submitted by Dr. Dianne Kopec, an expert who has participated in the PRMS, previously provided by the Petitioners to the Bureau on March 3 and June 27.
https://www.nrdc.org/sites/default/files/chapter5-penobscot-mercury-study-report-mallin-201304.pdf

[21] **25.65 Lobster and Crab Closure in Penobscot River.** It is unlawful to fish for or take lobsters or crabs by any means from the waters north of a line starting at the western most point of Perkins Point in the Town of Castine continuing in a northwesterly direction to the southern most point of Squaw Point on Cape Jellison in the Town of Stockton Springs. This section does not apply to equipment operated by the Department of Marine Resources.
https://www.maine.gov/dmr/laws-regulations/regulations/documents/dmrchapter25-07172019.pdf

and River – the result will be spreading methyl mercury contamination to the water, biota and benthic organisms – including lobsters and crabs. Any contamination of the lobster and crab in the Bay, causing levels of mercury over 200 ng/g, will cause DMR to close the effected area to all commercial fishing, as DMR has done in the past. The immediate impact of disturbing buried mercury by NAF would be closure or the entire upper Bay lobster and crab fishery that sustains more than 100 commercial fishermen in the upper Penobscot Bay. However, the long-term and broader impacts would likely be damage to the entire lobster and crab fishing industry in Penobscot Bay (which accounts for 25% to 49% of all lobsters landed in the State of Maine); and irreparable damage to the reputation for wholesomeness of all lobsters sold under the Maine Lobster brand.

There is nothing that will unreasonably interfere with fishing or other existing marine uses of the area NAF proposes to impact with its project more than spreading pollution – whether that pollution is from re-suspended HoltraChem mercury or from introducing high levels of nitrogen, warm water, noise, turbidity, or other contaminants from the excessive wastewater discharges that this applicant proposes.

Petitioners respectfully assert that treating Penobscot Bay like a toilet for the private profit of a foreign corporation is unconscionable and unreasonable interference with fishing and other existing marine uses of this area of Penobscot Bay – and that is inevitable if the NAF project is approved, as proposed, and granted permits by the Board. The willful blindness exhibited by State regulators to the inevitable and existential threats posed by this applicant's project, as proposed, are inexcusable and inexplicable. This Board need not follow this improvident path.

Petitioners' repeated requests for sediment testing to determine the location and amount of HoltraChem mercury this project would disturb were denied by various State agencies – in fact in the initial response from DMR, prepared by Denis-Marc Nault, DMR denied any knowledge of

the existence of mercury in this area. Such gross abdication of the duty of State regulatory agencies to protect our environment, by acknowledging such well-documented threats as the buried HoltraChem mercury in the Bay, is disappointing and dangerous to our health and the health of the Bay and our economy.

The buried HoltraChem mercury is not going to magically disappear by denying its existence any more than will the COVID-19 virus. Magical thinking about a miraculous disappearance of the buried HoltraChem mercury, if we just pretend it isn't there, is not going to prevent a calamity from re-suspension of this mercury by NAF and Cianbro. However, in violation of 38 M.R.S. §480-E(3) DEP and BEP have proceeded with processing NAF's applications without first requiring NAF to conduct and complete necessary sediment testing along the proposed pipeline route with a testing plan approved by the DEP Commissioner.

Finally, on June 22, 2020, the USACE issued a sediment and analysis plan ("SAP"), requiring NAF to do a minimum of eleven core samples to test the sediment along the pipeline route proposed for contaminants, including HoltraChem mercury. While this SAP has several glaring omissions – including no core sampling along the last 3,300 feet in the submerged lands held in trust by the State – it is a start.

The requirement for the core samples and tests, now mandated by the US-EPA and the USACE, and the resulting information from those tests, is essential for this Board to review *prior to making a determination to grant any leases to NAF*. For this reason, Petitioners respectfully assert that getting these SAP testing results is a second basis imposing a stay on this Board's consideration of NAF's permit applications. If the Court determines that NAF has sufficient TRI, this Board can hold further proceedings for consideration of the impacts of the sediment NAF proposes to disturb on the Belfast and surrounding environment and economy. The Board cannot

make a reasoned and informed decision on whether to grant NAF permits without this information. Therefore, Petitioners request the stay on that basis here.

B. NAF Has Amended the Amount and Location of Dewatering, Dredging and Upland Dredge Spoils Disposal Without Amending Its Belfast Application to Reveal These Changes

Long after NAF's submission of its permit application in the City of Belfast and after completion of the Planning Board's hearings on NAF's application, NAF made significant and material changes in the amount of dredge spoils NAF proposes to remove for upland disposal and changed the location and method for dewatering and transport of the dredge spoils proposed for upland disposal. Both of these changes were announced orally on March 2, 2020 by NAF and its agent Cianbro. This announcement was made at a public meeting held in Belfast by DMR.

The radically altered proposal relating the amount and location of dredging and dredge spoils disposal now includes transporting 20,000 cy of dredge spoils (2 to 4 times prior NAF estimates), in 110 to 130 barge loads, across Belfast Bay to Mack Point in Searsport. However, NAF has filed no amendments to its local, State or federal permit, license and lease applications, including its Belfast Application, explaining these material changes. NAF has failed to reveal where these additional 15,000 cy of dredge spoils are being taken from. Are these 15,000 cy of additional dredge spoils or are 15,000 cy less dredge spoils being replaced in the pipe trench? If additional dredge spoils, is this material being generated by the "grading and filling" needed to place pipe brackets every 15 feet along the land 3,300 feet on the pipelines? Where will dewatering of dredge spoils – that potentially contain significant amounts of contaminants including HoltraChem mercury -- be conducted – within the water in the municipal boundaries of Belfast or Searsport – or on land in Searsport? No filing has been submitted by NAF in any regulatory agency to reveal these details despite Petitioners' objections.

No notice has been provided to Belfast or Searsport of NAF's proposal to transport these dredge spoils to Searsport, and dewater these potentially contaminated dredge spoils in the municipal boundaries of Belfast or Searsport (or whether that dewatering will occur on land or at sea).

The amount of dredge spoils that NAF allegedly would remove from the State's submerged lands is materially incorrect after the March 2, 2020 DMR meeting revelations of NAF's true intentions. Petitioners' sent notice to the Belfast Planning Board, through Mr. Marshall, Mr. Kelly and City Manager Herbig, on March 3, 2020 regarding NAF's announcement of these material changes in it project proposal. Petitioners sent a copy of the new proposed haul route to Searsport with that notice. Petitioners incorporate by reference the evidence and argument they submitted on March 3, 2020 here.

Petitioners are unaware of any action the Belfast Planning Board has taken in response to that Notice to require NAF to amend its pending application to correct the material errors in the description of the proposed project.

Petitioners again respectfully assert that NAF should be required to amend its Belfast permit application to correct the errors in the project description and the Board should open its record to take additional evidence regarding the potential impacts of these changes in the project, as proposed, if the Superior Court determines that NAF has administrative standing after the Court's determination of the factual (and legal) parameters of the NAF-Eckrot easement. A stay of further action on the filed application is appropriate until the application is amended and this additional evidence obtained.

CONCLUSION

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

Additionally, a stay should be issued until NAF provides the Board with: (i) the results of the SAP testing, required by the June 22, 2020 USACE SAP; (ii) amendments to its application to correct errors in the project description relating to the amount, location and method of dredging, dewatering, and dredge spoils disposal NAF now proposes; and (iii) evidence is taken by the Board on these test results and changes in the project proposal.

Respectfully submitted this 15th day of July 2020.

Kimberly J. Ervin Tucker
Counsel for Petitioners Jeffrey Mabee and Judith Grace
and the Friends of the Harriet L. Hartley Conservation Area
Maine Bar No. 6969
48 Harbour Pointe Drive
Lincolnville, Maine 04849
P: 202-841-5439
k.ervintucker@gmail.com

CC: David Kallin, Esq.
Joanna Tourangeau, Esq.
David Perkins, Esq.
Kristin Racine, Esq.
Sara Gilbert, Esq.
Peter Tischbein, USACE
Dana Strout, Esq.