STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY

IN RE: APPLICATION OF NORDIC AQUAFARMS, INC.

COUNTY OF WALDO,
CITY OF BELFAST AND
TOWN OF NORTHPORT

UPSTREAM WATCH AND
MAINE LOBSTERING UNION'S
SECOND COMMENT REGARDING
APPLICANT NAF'S ALLEGED
TITLE, RIGHT OR INTEREST AND
MOTION TO DISMISS

APPLICATION OF NORDIC
AQUAFARMS, INC.
DATE: May 1, 2019

This *Second Comment Regarding Applicant NAF's Alleged Title Right or Interest and Motion to Dismiss* is submitted on behalf of Upstream Watch ("Upstream") and the Maine Lobstering Union[1] ("IMLU"), both corporate entities registered with the Maine Division of Corporations that have members who would be directly, adversely impacted by the Nordic Aquafarms, Inc. project as proposed.

At issue is the second supplement to Nordic Aquafarms, Inc.'s ("NAF") Application for submerged lands lease, submitted to the Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands ("DACF-BPL" or "the Bureau") in March, 2019. This second supplement contains: (i) the third revision of NAF's proposed pipeline(s) route; and (ii) significantly modified schematics for installation of NAF's pipelines. In addition, on or about March 27, 2019, NAF filed two versions of the same letter that purport to supplement NAF's claims that it has sufficient title, right or interest in the upland property adjacent to the littoral zone in which the lease or easement is sought for NAF's three proposed intake and outfall pipelines.

Upstream and the IMLU respectfully submit that, as a matter of law, NAF's amended Application must be dismissed for lack of Title, Right or Interest ("TRI"). As revealed by the evidence submitted with this Motion and Comment, NAF lacks TRI in both "the upland property adjacent to the littoral zone in which the lease or easement is sought" and/or "all of the property that is proposed for development or use" for NAF's three proposed intake and outfall pipelines.

In the absence of such TRI, NAF lacks the administrative standing required to file an application for a submerged lands lease or any of the required DEP permits required for its proposed land-based salmon farm in Belfast and Northport, Maine. And, in the absence of NAF's TRI and administrative standing, the State's agencies lack the jurisdiction to consider NAF's lease or permit applications.

I. SUMMARY OF OTHER GROUNDS FOR DENYING THIS LEASE APPLICATION

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[1] 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 placement of these pipelines in Penobscot Bay, as proposed by NAF, would have potentially devastating impacts on the environment and economy of the Midcoast region – especially on our commercial fisheries and fishermen, including the iconic Maine lobster fishery in Penobscot Bay – which is the foundation of our economy in this region and the source of thousands of existing well-paying jobs. These adverse impacts include, but are not limited to the following:

- **Disturbing Buried HoltraChem Mercury:** The dredging required to bury a portion of NAF's pipelines in the Bay would disturb long-buried mercury from HoltraChem's discharges almost fifty (50) years ago. HoltraChem legacy mercury has previously been determined to be buried in this area of the Bay by the federal court's experts who conducted the Penobscot River Mercury Study ("PRMS"). In 2016, the Maine Department of Marine Resources shut down a 5.5 square mile area in the upper Penobscot Bay to all lobstering and crabbing, after finding a mean level of mercury in the tail meat of 40 adult lobsters of 292.7 ng/g, caused by exposure to HoltraChem mercury in the surface sediments south of Verona Island resulting in methyl mercury contamination. The DMR concluded that any mean levels of mercury in lobster meat, over 200 ng/g, justified its closure of both the lobster and crab fishery (even in the absence of such levels in the crabs in that area). The mercury levels the court's experts determined are found buried beneath the surface sediment in the area NAF proposes to dredge is 200 – 300 ng/g.[2] At the April 24, 2019 Belfast Harbor Committee Meeting, NAF's representative (Ed Cotter) revealed that NAF-commissioned sediment tests (which have not been made public), confirmed a level of 239 ng/g in one core sample that they took in this area and that NAF had failed to test most of the 10 core samples they had taken. During the December 17, 2018 NAF public information meeting, NAF's representative confirmed that the sediment testing method NAF's agents used to do their tests was not the more accurate PRMS sediment testing standard. Indicating that the level of mercury that is buried in this area may be even higher than previously determined, since NAF found 239 ng/g there even using a less accurate sediment testing protocol that was likely to understate the true level of mercury and its depth under the surface.
- **A 5.5-Foot Underwater Wall:** According to NAF's latest schematic drawings for installation of their pipes in the intertidal land and under the Bay's waters, the portion of the pipelines that are not buried will form a wall on the surface of the Bay's bottom off Northport. The three pipes would be covered by gravel and a mesh cover. This

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[2] The relevant DMR rule states:

> **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.

configuration would form a wall along the bottom that is roughly 5.5 feet tall and roughly a half-mile long. Lobstermen who fish this area and who have had experience with disruptions to lobster movements caused by prior pipeline placements in Belfast Harbor, advised the Belfast Harbor Committee on April 24, 2019 that NAF's proposed underwater seawall will significantly disrupt the migration of lobsters in and around Penobscot Bay and radically change currents in this area and throughout at least the upper Bay. The effect on shorelines, erosion or navigation is unknown but likely also significant.

- **Contents and Characteristics of the Wastewater:** The impacts of the 7.7 million gallons of wastewater ***a day*** that NAF proposes to discharge into Penobscot Bay from these pipelines can also not be ignored when evaluating the impacts on riparian owners' rights and on commercial fishing and fisheries' health.[3] According to the current, new Commissioner of DEP during his January 30, 2019 confirmation hearing, the impacts of this discharge on commercial fisheries is a subject in the jurisdiction of DACF-BPL not a consideration of the DEP during the MEPDES process. However, no information on the nature and predicted impacts of this wastewater discharge has been submitted by NAF, to date, to either agency.
    - **Wastewater Temperature:** The proposed warm temperature of this wastewater (59° to 64.4° Fahrenheit; revealed as 15° - 18° Celcius in the MEPDES permit application) – discharged year round -- is between 5° and 33° Fahrenheit warmer than the Bay's normal temperatures (depending on what time of year it is discharged). If a rise in temperature of the Gulf of Maine or the Bay of 0.5° Fahrenheit can devastate our ecosystems – what could the impact of discharging this volume of wastewater daily, in a relatively shallow embayment and estuary be?! In light of the loss of the lobster fishery in southern portions of New England, attributed to warming waters in those areas, the adverse impacts on the lobster fishery in Penobscot Bay would be catastrophic in the upper and western Bay, and potentially wide-ranging throughout the Bay as the water circulates.
    - **Nitrogen:** The discharge will contain, according to NAF, 1484 pounds (673 kg) a day of nitrogen, which poses the risk of dangerous algae blooms, fish die-offs, and could put the Bayside Mussel Farm – an existing aquaculture leaseholder in the area of the discharges – out of business.
    - **Currents and Circulation:** It will take fourteen days after discharge to leave the immediate area of the outfall pipe to circulate to every corner of Penobscot Bay and then out into the Gulf of Maine. This circulation estimate by NAF's consultant means that in the immediate area of the outfall there will be a

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[3] To put this in perspective, the entire community of Bayside's wastewater treatment facility is limited to discharging 7 million gallons ***a year*** of treated wastewater into the Bay

constant accumulation of approximately 108 million gallons of wastewater – destroying the viability of the existing mussel farm aquaculture business that thrives in the currently clean waters in this area and harm the use of these waters by all existing riparian owners in this corner of the upper Bay. This NAF current estimate was made without consideration of the impact of prevailing winds and we believe was done prior to the adoption of the re-configuration of the pipelines to an above-ground placement.

- **Salinity Changes:** According to NAF, 15% of the wastewater will be fresh water – permanently changing the salinity of the Bay through man-made alterations.

No one can predict the scope of the adverse impacts that will result from allowing NAF to convert Penobscot Bay into its own giant chemistry experiment, but the impact on the health and reputation of all of Penobscot Bay's fisheries – especially our currently thriving and lucrative lobster fishery – will be significant, long-term and likely devastating. The adverse impacts on the thousands of lobstermen who fish in Penobscot Bay are incalculable, but certainly not off-set by the illusory promise by NAF of "up to" 100 jobs of unspecified salary ranges.

But before the above impacts can be considered, the threshold issue of NAF's lack of administrative standing to obtain any lease, license or permit in this area – when NAF has no legitimate title, right or interest in either "the upland property adjacent to the littoral zone in which the lease or easement is sought" or "all of the property that is proposed for development or use" for NAF's three proposed intake and outfall pipelines -- must be addressed.

II. REASONS THAT NAF LACKS REQUIRED TRI

Upstream and the IMLU are attaching evidentiary proof, including relevant recorded deeds and other documents, recorded in the Waldo County Registry of Deeds, a review of which reveals that:

(i) Janet and Richard Eckrote, the owners of the residential upland lot across and under which NAF proposes to place its three industrial accessory pipelines ("the Eckrotes' upland lot" or "the Eckrote lot") do not, and never did, own the intertidal land on which their lot fronts and therefore cannot, and never could, grant NAF an Easement to place its pipelines on, over or under this intertidal land.

(ii) The Eckrotes' upland lot is encumbered by a covenant that states this lot or parcel "is to be used for ***residential purposes only***" and "***no business for profit*** is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns." (emphasis supplied). This covenant was imposed by a deed executed in 1946 between Harriet L. Hartley and Fred R. Poor (a predecessor in interest to the Eckrotes and Janet Eckrote's grandfather). See Waldo County Registry of Deeds at Vol. 452, Page 205, attached in

Composite Exhibit A. This covenant runs with the land *in perpetuity*. As a result, the Eckrotes cannot, and never could, grant NAF an Easement to place its industrial accessory structure pipelines – which are essential accessory structures to their for-profit business -- on, over or under any portion of the Eckrotes' upland lot without prior approval from Harriet Hartley's heirs and/or assigns, which approval has not been sought or granted.

(iii) The true owners of the intertidal land on which the Eckrotes' upland lot fronts, Jeffrey R. Mabee and Judith B. Grace,[4] do not consent to the placement of NAF's industrial pipelines on any portion of their land,[5] including their intertidal land. To ensure the protection and preservation of their intertidal land, Jeffrey R. Mabee and Judith B. Grace have placed the portion of their intertidal land from the Little River to the North side of the Eckrote upland lot under a Conservation Easement to protect and preserve this land in its current natural condition, free of any commercial or industrial, accessory or principal structures, *in perpetuity*. The Holder of that Conservation Easement is Upstream Watch.[6]

As a matter of law, not subject to administrative discretion, NAF's deficiencies in TRI, in both "the upland property adjacent to the littoral zone in which the lease or easement is sought" and/or "all of the property that is proposed for development or use" for NAF's three proposed intake and outfall pipes, are both ***fatal*** and ***incurable*** for the reasons set out above, and discussed more fully below. NAF's second supplement to its submerged lands lease, and any still-pending DEP applications, must be dismissed accordingly.

III. OVERVIEW OF NAF's "TRI" BURDEN OF PROOF

NAF proposes to construct a land-based salmon farm on land in Belfast, Maine off U.S. Route 1 and Perkins Road. By choice (not necessity), NAF has designed this facility to be serviced by three water pipelines that would be located within the municipal boundaries of both Belfast and Northport, Maine, and which would extend over 5,500-feet into Penobscot Bay.

NAF has an option to buy a large tract of industrial-zoned land from the Belfast Water District on which NAF proposes to locate its land-based salmon facility. This industrial-zoned

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[4] See Deed recorded in the Waldo County Registry of Deeds, at Book 1221, Page 347, attached as Exhibit G.

[5] Please see the 2-25-2019 letter of objection to placement of any portion of this project being on their intertidal land, previously filed by Jeffrey Mabee and Judith Grace with DACF-BPL, attached as Exhibit B.

[6] The Mabee-Grace Conservation Easement, designating Upstream Watch as its Holder, was recorded in the Waldo County Registry of Deeds on April 29, 2019, Book 4367, Page 273, attached hereto and made a part hereof as Exhibit C.

Belfast land is not located along the waterfront on Penobscot Bay. Although technologies exist that are known to the applicant and are entirely self-contained, requiring no polluting discharge into the Bay and Gulf of Maine, the technical design NAF has chosen for its facility would require three water pipelines located in Penobscot Bay, that are both integral and essential to the operation of the less expensive, but more environmentally damaging, technology of this proposed industrial facility.

NAF's three pipelines include two 30" saltwater intake pipes and one 36" outfall wastewater discharge pipe. NAF proposes to run these three industrial pipelines, side-by-side from the salmon farm on the land-side of Route 1 to a water treatment facility it would construct on the current Belfast Water District land, also on the land-side of Route 1. Thereafter, the pipelines would go across (and under) Route 1, across (and under) a portion of a lot located on the waterside of Route 1 owned by Richard and Janet Eckrote, and finally go across (and under) the intertidal land on which the Eckrotes' upland lot fronts, to the State's submerged lands located outside the mean low water mark. Outside the mean low water mark, the three pipelines would continue into the State-controlled submerged lands in Penobscot Bay. The pipelines are proposed to be placed both below and on the surface of the sediment within the State's submerged lands outside the low water mark. The total length of the intake pipelines exceeds 5,500 feet into the Bay and the outfall wastewater pipeline terminates about 3,600-feet into the Bay (although NAF's representations about the exact lengths of these pipelines have changed repeatedly and remain a matter of some confusion and dispute).[7]

The Eckrotes' lot is in the Residential II Zone in Belfast. These pipes are accessory structures to NAF's industrial principal use facility on the opposite side of Route 1.

As a threshold requirement for this project, NAF is required to apply for (and ultimately obtain) from the State of Maine a Submerged Lands Lease from the Maine Department of Agriculture, Conservation and Forestry ("DACF"), Bureau of Parks and Lands ("BPL"), on which to locate that portion of the pipelines that NAF proposes to put in Penobscot Bay beyond the mean low water mark.[8]

In order to obtain a submerged lands lease, NAF must first demonstrate that it has the administrative standing to obtain a lease by demonstrating that it has title, right or interest

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[7] At least 1,200 feet of the three pipelines would be buried in the intertidal zone and a portion of the State's submerged lands – in an area previous determined by the federal Court's experts conducting the Penobscot River Mercury Study ("PRMS") to have buried mercury attributable to HoltraChem.

[8] In relevant part, publicly owned submerged lands in the coastal region of the Maine coast and the islands, includes:

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

https://www.maine.gov/dacf/parks/about/submerged_lands.shtml
See also, BPL's website for an explanation on how to determine the mean low water mark.
https://www.maine.gov/dacf/parks/about/sublands_lowater.shtml

("TRI") ". . . in the upland property adjacent to the littoral zone in which the lease or easement is sought. . . "[9] See, 01-670 C.M.R. ch. 53, § 1.6.B.1. This requirement is not a suggestion or a matter of administrative discretion. It is the law to which all are subject, regulated entities and regulators alike. The applicant's administrative standing is a jurisdictional threshold issue and maintaining TRI is a requirement throughout the permitting process and operation or term of the lease, easement and/or permitted activity.

The complete DACF-BPL TRI requirements are contained in Chapter 53: SUBMERGED LANDS RULES promulgated by the Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands ("DACF-BPL" or "the Bureau"). This rule states in relevant part as follows:

> **B. General Terms and Conditions**
>
> **1. Right, Title and Interest in Adjacent Upland**
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> a. An **<u>applicant</u>** for a lease or easement **<u>must</u>** demonstrate sufficient right, title or interest in the upland property adjacent to the littoral zone in which the lease or easement is sought as follows: (emphasis supplied)
>
> (1) When the applicant owns the property, a copy of the deed(s) to the property shall be supplied;
>
> (2) When an applicant has a lease on the property, a copy of the lease shall be supplied. The lease shall be of sufficient duration and other terms, as determined by the Bureau, to permit construction and reasonable use of the facility;
>
> (3) When the applicant has an option to buy or lease the property, a copy of the option agreement shall be supplied. Option agreements shall contain terms deemed sufficient by the Bureau to establish future title or a leasehold of sufficient duration. . . .
>
> b. The interest conveyed by a lease or easement in Submerged Lands may not be severed from the right, title or interest in the adjacent upland. If the holder of a lease or easement for Submerged Lands conveys the right, title or interest in the upland property to another party and does not transfer the Submerged Lands lease or easement to the new upland

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[9] Similarly, NAF must demonstrate that it has TRI to obtain the multiple permits that it needs from the Maine Department of Environmental Protection ("DEP"), including: a MEPDES wastewater discharge permit, a Natural Resources Protection Act (NRPA) permit, a Site Location of Development Act (SLODA) permit, and a clean Air permit. DEP General Rule 06-096 C.M.R. ch. 2.11.D. For the same reasons stated in this Second Comment, NAF lacks sufficient TRI "in all of the property that is proposed for development or use" to have any DEP permits accepted as complete and/or processed by DEP. *Id.*

> owner, subject to the approval of the Bureau, or ***if the holder's right, title or interest in the upland terminates, then the lease or easement <u>shall be invalid</u> and all leasehold or easement interest in the Submerged Lands <u>shall be extinguished</u>.***

See, 01-670 C.M.R. ch. 53, § 1.6.B.1 (emphasis supplied).

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

> This [TRI] requirement is akin to the standing requirement for judicial action. The Law Court, in *Murray v. Inhabitants of the Town of Lincolnville,* 462 A.2d 40 (Me. 1983), clarified the concept of administrative standing and its role as "an administrative and valid condition for applicant eligibility." *Id.* at 43 (quoting *Walsh v. City of Brewer,* 315 A.2d 200, 207 (Me. 1974). In that case, the court stated that "an applicant for a license or permit to use property in certain ways must have the kind of relationship to the site that gives him a legally cognizable expectation of having the power to use the site in ways that would be authorized by the permit or license he seeks." *Id.* (internal citations omitted).

The requirement that the applicant provide evidence of TRI is not discretionary; it is jurisdictional and mandated by law.

As the Law Court noted in *Walsh v. City of Brewer,* 315 A.2d at 211: **"**standing is 'conceptually antecedent to the consideration of whether a Court has a jurisdiction of the subject-matter.' . . ." Standing is uniquely interwoven with subject-matter jurisdiction and can be raised for the first time even at the appellate level. *See*, *Nichols v. Rockland,* 324 A.2d 285, 296, 1974 Me. LEXIS 315, *3. Standing and jurisdiction are inextricably intertwined.

> Unless, however, it is alleged, and made to appear, that plaintiff has a relationship to the land qualifying him as a proper "applicant" under the regulatory ordinances -- on the basis of which it becomes at least arguable that plaintiff (upon appropriate findings that he has fulfilled all other regulatory requirements) has legal entitlement to a license and permit which could constitute the "*property*" rights cognizable in a Court of equity, -- there is absent a necessary condition of *equity* subject-matter jurisdiction.

Walsh v. City of Brewer, 315 A.2d at 210, 1974 LEXIS 355, *26.

In order to have the administrative standing to obtain a submerged lands lease or any of the necessary DEP permits, NAF must be able to demonstrate that it has ***<u>actual</u>*** (not just apparent) TRI in both "the upland property adjacent to the littoral zone in which the lease or easement is sought" and "all of the property that is proposed for development or use" for the pipelines in order to have administrative standing to seek a submerged lands lease from DACF-BPL or permits from DEP. Having TRI is an objectively provable or *disprovable* fact – not a matter of mere bureaucratic fiat or discretion. Only actual TRI can create "a legally cognizable

expectation of having the power to use the site in ways that would be authorized by the permit or license" sought. *Collins v. State, supra.*

> A justiciable controversy involves a claim of present and fixed rights based upon an existing state of facts. "'Accordingly, rights must be declared upon the existing state of facts and not upon a state of facts that may or may not arise in the future.'" *Campaign for Sensible Transp. v. Maine Turnpike Auth.*, 658 A.2d 213, 215 (Me. 1995) (quoting *Connors v. International Harvester Credit Corp.*, 447 A.2d 822, 824 (Me. 1982)).

Madore v. Maine Land Use Regulation Comm'n, 1998 ME 178, 715 A.2d 157, 160, 1998 Me. LEXIS 175, *6.

Here, a tentative agency determination that NAF has submitted "sufficient" proof that it has TRI to continue to process and consider its application for a submerged lands lease does not mean that the applicant has actual TRI or sufficient administrative standing to confer jurisdiction on the agency to proceed. State agencies may have the discretion not to require an applicant to submit additional evidence of TRI when requested to do so by interested parties asserting the applicant lacks TRI. However, state agencies cannot ignore proof, established by public record deeds, that an applicant and/or the property owner on which the applicant's TRI is based (through option, lease or easement) lack the requisite TRI in the subject property to create a cognizable expectation of being able to use the property in the ways authorized by the lease or permits sought. ***In other words, the State can't ignore proof that someone else owns the property that the applicant wants to use.***

In contrast to the DEP Rules, the DACF-BPL Submerged Lands Rules fail to list an "easement" as a valid basis for establishing an applicant's TRI. Compare 01-670 C.M.R. ch. 53, § 1.6.B.1 with 06-096 C.M.R. ch. 2.11.D. We presume that the legislature, or the rule-promulgating agency, intended the words it wrote, and intended to omit the words it did not write. In violation of the Rule, NAF attempts to rely on an ***<u>option</u>*** for an **<u>Easement</u>** for a limited portion of the upland property owned by Richard and Janet Eckrote to demonstrate that it has sufficient TRI in the upland property adjacent to the littoral zone in which the lease or easement is sought from DACF-BPL for its three pipelines.

This Easement option is legally insufficient to establish TRI under the BPL rule, which (in contrast to DEP's rule) does not list an "easement," let alone an *<u>option</u>* for an easement, as one of the mechanisms by which TRI can be demonstrated. If we are "a Nation of laws and not of men." BPL does not have discretion to violate its own Rules by allowing an Easement option to be the basis of demonstrating "sufficient" TRI exists here.

More importantly, the Easement option NAF has is substantively and objectively insufficient to establish TRI as a matter of fact, because the upland property owners (Richard and Janet Eckrote): (i) do not own the intertidal lands NAF needs to place its pipelines (See, Exhibits A, E and G); and (ii) have a restrictive covenant on their land that prohibits any "for profit business" being conducted on this parcel without permission from the covenant beneficiaries (which they don't have) and restricts the use of all of this parcel to "residential use only." BPL

does not have the discretion to violate its jurisdictional limits by acting on a lease application in the absence of NAF having a relationship to the land qualifying it as a proper "applicant" for a lease or permit. (See, Exhibits A and E).

If the BPL rule mandates that a submerged lands lease or easement "***shall be invalid***" and all leasehold or easement interest in the Submerged Lands "***shall be extinguished***" if the lease holders' TRI or interest in the upland property terminates, at any time during the term of the lease, than it cannot be lawful for BPL to *issue* a lease or easement in any submerged lands in the face of proof that the applicant for a lease, and the owner of the uplands, both lack TRI or any ownership interest in the intertidal land on which that lease would apply and cross. This assessment of the proper interpretation and application of BPL's rule must certainly be the correct one, where – as here – the true owners of this intertidal land (Jeffrey Mabee and Judith Grace) have previously filed a letter to BPL providing the agency with express notice that they do not consent to placement of the proposed NAF pipelines on or under their intertidal land (Exhibit B) and, subsequently, executed and recorded a Conservation Easement on their intertidal land, from the Little River to the Northside of the Eckrote lot, to preserve this land in its natural condition and prevent placement of such industrial structures on it *in perpetuity.* (Exhibit C).

IV. LIMITS OF THE ECKROTE EASEMENT OPTION

Here, pursuant to the Easement Option Agreement from the Eckrotes to NAF, NAF would have only an option for a 40-foot temporary construction easement and a 25-foot permanent easement for the three pipelines, over a defined and very limited portion on the southwestern-most edge of the Eckrotes' Residential II zoned lot in Belfast, Maine. Under the terms of the NAF-Eckrote Easement Agreement, the three pipelines are required to be buried underground on a small portion of the Eckrotes' lot to the south of the existing "old barn" and access driveway off Route 1. The parties chose not to describe the proposed easement by meets and bounds. Rather the easement is illustrated in Exhibit A to the Easement Agreement and described in numbered ¶4 of the Easement Agreement.

That illustration (attached hereto and incorporated herein as Exhibit D) and the text of the Easement Agreement, specify the location of the Easement Area as follows:

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

location, this Agreement shall terminate and the Deposit shall be retained by Seller.

The lawyer (presumably Lee Woodward, Esq.) who drafted the Easement Option Agreement and the sketch appended to it as Exhibit A drew the easement lines only to the mean high-water line. Lee Woodward is also the lawyer who drafted the deed from the Estate of Phyllis Poor to Richard and Janet Eckrote in 2012. See e.g. Waldo County Registry of Deeds, Book 3697, Page 5, attached in Composite Exhibit A. It is reasonable to assume and believe that Attorney Woodward knew that his clients, the Eckrotes, did not own any of the intertidal land between their lot and the Bay, and, prudently, Attorney Woodward declined to draw easement lines that trespassed on land of another.

Despite Mr. Woodward's probably inadvertent alteration of language relating to the waterside boundaries of this lot (discussed in greater detail in the expert report of Donald R. Richards, P.L.S., L.F., attached hereto and incorporated by reference herein as Exhibit E, p. 2), that 2012 deed conveys "the same premises described in a deed from William O. Poor to Phyllis J. Poor, dated July 1, 1991, recorded in the Waldo County Registry of Deeds in Book 1228, Page 346 . . ." The referenced predecessor deed, as well as other deeds in this chain of title going back to 1946, define the property boundaries of the Eckrote (Poor) lot as terminating at the high water mark of the property. See also, deeds recorded in the Waldo County Registry of Deeds, at Book 691, Page 44 and Vol. 452, Page 205 (See Deeds attached in Composite Exhibit A). Thus, Mr. Woodward (if not the Eckrotes), knew or should have known, that neither the Eckrotes nor their predecessors in interest going back to the 1946 deed to Fred R. Poor (Janet Eckrote's grandfather), have ever had an ownership interest in the interetidal land on which this lot fronts.

Ownership of the intertidal land between the high water mark on the Eckrotes' lot and the low water mark in the Bay was retained by Harriet L. Hartley when she conveyed a portion of the land she owner to Fred R. Poor, on January 25, 1946, recorded in the Waldo County Registry of Deeds in Vol. 452, Page 205 (attached as Exhibit A). When Ms. Hartley conveyed this parcel to Janet Eckrote's grandfather, she placed two restrictions on the property intended to protect its nature as residential and the intertidal lands in their natural condition.

First, Harriet Hartley retained the intertidal land for herself, since she continued to retain adjacent land on which she was building her own homestead. Retention of the intertidal land was accomplished by the intentional insertion of language of exclusion in the deed, stating that the property boundary of the conveyed parcel is "along high water mark of Penobscot Bay" rather than "along Penobscot Bay". See, Waldo County Registry of Deeds, Vol. 405 at Page 206 (See, Composite Exhibit A). The former description means that no intertidal ownership is conveyed; the latter would suggest an intention to convey the intertidal land or "flats". See, Donald R. Richards Opinion Letter, pp. 1-2 (Shore Rights) (Exhibit E, p. 1-3); and Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water Bodies*, 47 Me. L. Rev. 35 (2018), pp. 52-54. (A copy of which was provided as an attachment to the First Comment to this application by Upstream Watch and IMLU. See Exhibit B to the First Comment).

Thus, it is understandable that Attorney Woodward would be reluctant to suggest the Eckrote Easement Agreement authorized NAF to commit a trespass on the intertidal land of the true owners (See, Exhibits C and G) by extending the boundaries of the Easement depicted in Easement Exhibit A (attached here as Exhibit D) beyond the deeded limits of the upland property into the intertidal zone because Attorney Woodward knew, or should have known, the confines of the Eckrotes' land.

Indeed, it is inconceivable that NAF and their counsel did not know, when they filed the first application for a submerged lands lease with BPL in 2018, that the Eckrotes did not own the intertidal land between the mean high water mark on their property and the mean low water mark, because (on information and belief) NAF's counsel commissioned a title search to be completed on the Eckrote property and the adjacent properties which was completed in 2018 by title searcher Virginia Hodge. Similarly, NAF and/or their agents commissioned at least three survey projects (Good Deeds, Inc. 2018, Dorsky, November 14, 2018, and Dorsky amendment, February 2019),[10] and Mr. Woodward had Good Deeds do a survey, dated August 31, 2012, that is incorporated by reference in the Eckrotes' deed he drafted for the Estate of Phyllis Poor (but never recorded in the public records). One or more of these doubtless shows the confines of the Eckrote property end at the high water mark.[11]

Second, Harriet Hartley included a covenant in the 1946 deed to Fred R. Poor – a covenant that was to run with the land and impose limits on the use of the parcel acquired by Fred R. Poor, in perpetuity. See, Waldo County Registry of Deeds, Vol 405. At Page 206 (Exhibit A); and Donald R. Richards' Opinion Letter, pp. 3-4 (Exhibit E). Specifically, the covenant states as follows:

> The lot or parcel of land herein described is conveyed to Fred R. Poor with the understanding it is to be used for residential purposes only, that no business for profit is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns. . . .

See p. 206 of the Deed recorded in the Waldo County Registry of Deeds, Vol. 452, Page 205 (Exhibit A).

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[10] DEP has requested one of the surveys (Dorsky 2018). At NAF's December 17, 2018 public information meeting, members of the public asked NAF to make public these surveys and NAF refused to produce them. In their "First Comment" Upstream and the IMLU asked for an order from DACF-BPL requiring NAF – whose CEO constantly trumpets his company's commitment to transparency – to disclose the four surveys and the Hodge 2018 title search. However, BPL refused this request, even though the law is clear that disclosure is mandated by due process when a survey has been incorporated by reference into a deed or other document. *LaFleur v. International Paper Co.,* 1987 Me. Super. LEXIS 95, •7, citing *Booker v. Everhart,* 294 N.C. 146, 240 S.E.2d 360, 363 (N.C. 1978).

[11] Upstream and the IMLU requested that BPL require NAF to produce all of these documents in their First Comment – asserting that these provide the best evidence of whether TRI and provide a far more reliable and credible source for determining whether NAF has TRI in anything based on the Eckrote Easement. However, BPL declined this request, choosing instead to rely on the peculiar, error-ridden letter submitted on NAF letterhead, dated March 3, 2019, signed by Eric Heim, but attached to an acknowledgement of a letter allegedly sent by NAF employee Ed Cotter on an unspecified date, bearing un-notarized signatures purporting to be from Richard and Janet Eckrote, dated February 28, 2019, three days before creation of the Heim letter, and purports to acknowledge agreement with the contents of a letter from Ed Cotter (although no such letter exists) . (See, Exhibit, F).

Harriet Hartley's wisdom of imposing, by covenant in the 1946 Deed, the conditions of her understanding with Fred R. Poor when she agreed to sell her land to him, is all the more clear today. While Harriet Hartley and Fred R. Poor had an understanding about how this parcel could be used, which was honored during Fred Poor's lifetime, only inclusion of a covenant that runs with the land, conferring benefits on the Grantor's heirs and assigns, can protect this land in perpetuity, as Harriet Hartley intended when she sold this parcel to Janet Eckrote's grandfather, Fred R. Poor.

In sum, not only do the Eckrotes not have any ownership or interest of any kind in the intertidal land between the high water mark on their land and the Bay, but the Eckrotes do not have a right to grant an Easement for the placement of NAF's pipes (a non-residential use related to conducting a for profit business) across, over or under this parcel pursuant to the covenant. Unless and until the Eckrotes obtain the permission of Hariett Hartley's heirs and assigns to place these pipelines on this lot, the Eckrotes have no lawful right to grant NAF an Easement to do so. The Eckrotes are unable to confer any interests greater than their own to NAF. As a consequence of the limits of the Eckrotes' ownership interests and right to use this land for residential purposes only absent permission from Harriet Hartley's heirs and assigns, the Eckrotes cannot convey or grant an easement to that which they do not own (i.e. the intertidal land belonging to Jeffrey Mabee and Judith Grace). (See, Donald R. Richards' Opinion Letter, at Page 3, footnote 3). Further, the Eckrotes have no right, absent permission from the heirs and assigns of Harriet Hartley, to use their parcel for non-residential purposes or place accessory structures for a for profit business. *Id.*

The Eckrotes, NAF and their respective counsel have known, or should have known, about the limits of the Eckrotes' ownership and these restrictions on only residential uses of this parcel for over a year. However, it appears all of these parties and their counsel have deliberately concealed relevant information concerning the extent and timing of their knowledge regarding these issues, impacting NAF's ability to have TRI for its pipelines, from everyone – the public, the relevant State agencies, and the adversely impacted abutters and Hartley assigns -- in the hopes of inducing BPL and DEP to act illegally, in the absence of NAF's standing and the agencies' jurisdiction, on their various lease and permit applications. It is time the State dismisses these applications for lack of TRI.[12]

V. FOR THE THIRD TIME NAF HAS FAILED TO DEMONSTRATE THAT IT HAS TRI. AS A RESULT, BPL HAS NO JURISDICTION TO HEAR NAF'S SUBMERGED LANDS LEASE APPLICATION

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[12] In addition, the State should require NAF to produce all of the materials referenced in the First Comment filed by Upstream and the IMLU and make a determination if this applicant and/or their counsel or agents have filed applications based on knowingly false information regarding TRI – information that the applicant and their counsel knew, or should have known, was false when the applications were filed. To do less can only be characterized as willful blindness or complicity to NAF's concealment of the facts relating to its lack of TRI that was intended to take rights and ownership interests in land that belongs to others, including Jeffrey Mabee and Judith Grace.

To date, two proposed pipeline(s) routes submitted by NAF, both originating from the Eckrotes' upland lot, have ultimately been rejected by BPL because the proposed routes violated the property rights in the intertidal and littoral zones of other private property owners in both Belfast and Northport.

The original pipeline(s) route (identified by NAF as "Option 2A"), like the current third route, was initially found by BPL,to be based on "sufficient" demonstration of TRI by NAF to warrant initiation of the permitting process and issuance of a Notice to Interested Parties for Comments. However, after objections were filed during the Comment Period for this original pipeline(s) route – asserting that the route placed the pipelines in the intertidal and/or littoral zones of property owners who objected to this placement – NAF was required to submit a new pipeline(s) route to BPL. Instead of dismissing the application or returning it to the applicant as required by its Rules, BPL allowed NAF the special privilege of submitting a modified pipeline(s) route as a "supplement" to its application for a submerged lands lease.

The "supplemental" second configuration of the pipelines into Penobscot Bay, submitted on November 20, 2018 by NAF's counsel Timothy Steigelman to Carol DiBello of BPL and identified as "Option 2", like the original option 2A route, proposed to illegally cross into and over the intertidal land and littoral zones of different landowners in Northport and Belfast. NAF provided no proof or even any suggestion that these landowners had given their consent to NAF to use this private land. The Eckrote Easement Option Agreement cannot and did not convey TRI to NAF to use or misappropriate this third-party, privately-owned land.

After NAF's submission of the "supplemental" Option 2 route in November, BPL did not issue a new Notice to interested parties informing them of NAF's "supplemental" submission of a radically altered pipeline(s) configuration, nor did BPL provide any formal opportunity to interested or aggrieved parties to submit additional comments regarding this route alteration. Rather, the Option 2 route was first unveiled by NAF to the public at a public information meeting for NAF's DEP MEPDES permit application, conducted in Belfast, on December 17, 2018.

On December 18, 2018, Upstream and the IMLU moved to dismiss NAF's submerged lands lease application with BPL for the second pipeline(s) route and NAF's MEPDES permit application, in part, because neither the Eckrote Easement Area illustration in Exhibit A of that Easement Agreement, nor the descriptive text in numbered ¶4 of the Easement Agreement grant NAF title, right or interest to use, disturb, or place underground pipelines in, under, or on the intertidal land on which the Eckrote lot fronts. Rather, the Easement's Exhibit A illustration expressly shows that the Easement Area to which the parties have agreed ***<u>ends at the Eckrotes' lot's mean high water mark</u>*** and *nothing* in the Easement Agreement references any right of NAF to use the intertidal land on which the Eckrotes' lot fronts.[13] See attached Exhibit D).

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[13] Upstream and the IMLU also objected that the Option 2 configuration, like the Option 2A configuration, was illegally placed on the intertidal and/or littoral zone land of other lad owners who did not consent to the use of their land.

Based on this objection, BPL issued a letter on January 18, 2019 permitting NAF to submit additional proof of its TRI for the Option 2 pipeline(s) route by April 18, 2019; and DEP issued a letter on January 22, 2019 requiring NAF to file additional proof of TRI by February 7, 2019, including a requirement that NAF file the November 14, 2018, Dorsky survey of littoral and intertidal zone land.[14] Note, this is one of the surveys requested in Upstream and the IMLU's First Comment Number, information required by law because it was incorporated by reference as a source document in NAF's applications, including the maps submitted to BPL, which BPL has, to date, inexplicably refused to request.

In response to BPL's January 18, 2019, demand for additional proof of TRI, NAF has submitted a ***third*** route for its pipelines, rather than attempting to provide additional proof of TRI for the second "Option 2" pipeline(s) route. Like the first two pipeline(s) routes, the third route originates from and crosses over and under the Eckrote upland lot and enters the intertidal zone on which the Eckrote lot fronts. The third route NAF has submitted, which is the subject of this Second Comment and Motion to Dismiss, must suffer the same fate as NAF's first two routes – as would any pipeline(s) route submitted by NAF that relies on the Eckrote Easement option for TRI.

Astonishingly, the ***only*** additional proof of TRI that NAF has filed with the Bureau in support of its third pipeline(s) route are two unrecorded, un-notarized letters. These writings appear to relate, somehow, to the Eckrotes' alleged intent in executing the option Easement Agreement with NAF. These letters, and the thread of emails from the Eckrotes' (Lee Woodward) and NAF's counsel (Joanna Tourangeau) transmitting them to Carol DiBello of DACF-BPL, are attached to this filing as Exhibit F.

The first version of this letter (Exhibit F, pp. 3-4) has no actual letterhead or date on the first page – only a typed notation to insert the NAF letterhead and a date. This first letter also has no signature from any NAF representative, only a blank space where the signature of an NAF representative was apparently to be inserted. The second page of this first version of the letter has the name of "Ed Cotter" at the top and the designation "Nordic Aquafarms Inc." below his name (perhaps a carried over signature block for the first page with the name of the person originally planned to sign this letter?). The second page then has a place for the Eckrotes to sign "acknowledgements". The acknowledgement text states: "I have read the letter from Ed Cotter of Nordic Aquafarms, Inc. dated [Insert] and agree." Two un-notarized signatures, that purport to be the signatures of Richard and Janet Eckrote, appear under this "acknowledgement" with the handwritten dates "February 28, 2019" on this second page of the first version of the letter.

This first letter was understandably and appropriately rejected by the Bureau as legally insufficient to establish NAF's TRI.

The second version of the Easement "acknowledgement" letter (Exhibit F, pp. 5-6 has NAF's letterhead at the top and a date of March 3, 2019. This second letter was signed by Eric Heim of NAF. Attached to this letter is the same, signed second page "acknowledgement"

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[14] A later DEP decision to consolidate the MEPDES permit application with all required DEP permits for processing nullified this February 7, 2019 deadline.

bearing the un-verified, un-notarized signatures that purport to be the Eckrotes' signatures and still is dated February 28, 2019. However, the Eckrotes' acknowledgement text still states: "I have read the letter from Ed Cotter [not Eric Heim] of Nordic Aquafarms, Inc. dated [Insert] and agree." Thus, the signatures acknowledge the contents of a letter from Ed Cotter that does not exist and is dated three days before the March 3, 2019 letter from Eric Heim to which this page is now attached! Thus, the Eckrotes were induced to sign an "acknowledgement " of a letter that did not exist when they acknowledged it and is attached to a letter prepared at least three days after the acknowledgement pages were executed by the Eckrotes.

The substantive defects in both of these letters, allegedly drafted by NAF's counsel and attorney Lee Woodward representing the Eckrotes 9see transmitting email thread at Exhibit F, pp. 1-2), are even more pronounced than the typographical anomalies they contain. Specifically, the letters curiously acknowledge nothing of actual substance relating to establishing NAF's TRI in the intertidal zone. Eric Heim directs the letter to the Eckrotes, stating in relevant part that:

> " . . .You [the Eckrotes] intended a broad easement over your property, including any rights you have to Route 1 and in the intertidal zone such that Nordic Aquafarms can build and site its pipes anywhere in those areas *where you have rights*.
>
> * * *
>
> By signing the acknowledgment on the accompanying page, this letter clarifies that the easement area delineated in the P&S includes *the entirety of your rights in the intertidal zone and US Route 1* and amends the Closing Date.

(emphasis supplied). However, the Eckrotes have no special or ownership rights in the intertidal to agree to give to NAF by Easement. The Eckrotes cannot give what they do not have.

Significantly, this letter is cleverly worded so that the Eckrotes do not actually suggest they have any rights in the intertidal zone or to U.S. Route 1, other than those enjoyed by all members of the public. The Eckrotes only say that they intended to give NAF all the rights that they did or do have in the intertidal and to U.S. Route 1. All the letter acknowledges is that: "Nordic Aquafarms can build and site its pipes anywhere in those areas [U.S. Route 1 and the intertidal zone] where [the Eckrotes] have rights." Which is no where.

Inexplicably, the Bureau concluded that the NAF application is complete and that NAF has met its burden of demonstrating "sufficient" TRI based on these unrecorded and grossly flawed, error-ridden letters. Had BPL required the relevant deeds, or the surveys or the title report NAF has had prepared on the relevant properties, BPL would have seen the emptiness of the rights conveyed in the Eckrote Easement and/or the sham intent letters filed in March of 2019. Simply put, the Eckrotes were implying that they had an interest in U.S. Route 1 and the intertidal lands to convey, when they didn't, all to "fool" BPL into approving NAF's non-existent TRI and ability to proceed in the lease process.

In *Southridge Corp. v. Board of Envtl. Protection,* 1994 Me. Super. LEXIS 111, ***7 - ***12, the Kennebec County Superior Court reversed a determination by DEP, later upheld by the BEP,

that an applicant had demonstrated "sufficient" TRI to obtain an after-the-fact permit by submitting letters from the applicant's lawyer and the applicant's company's lawyer. The Superior Court noted that:

> . . . Such evidence [i.e. letters from the applicant's lawyers] neither falls within the categories enumerated in the regulation nor demonstrates a legally enforceable interest which is not revocable at the will of the owners. *See Murray* [*v. Inhabitants of Town of Lincolville,*] 462 A.2d [40] at 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)].
>
> Similarly, it is contrary to the purpose of "standing" regulations which are designed "to prevent an applicant from wasting an administrative agency's time by applying for a . . . license that he could have no legally protected right to use." *Id.* In this case the respondent has not proven that he is the owner of the parcel. *See, McMullen v. Dowley,* 483 A.2d 698, 700 (Me. 1984).

Southridge Corp. v. Board of Envtl. Protection, 1994 Me. Super. LEXIS 111 at *10.

On appeal, the Law Court reversed this decision, finding that the applicant's "legally cognizable expectation " arose from the fact that a septic system had long existed on the property in controversy, with the knowledge of and without objection by, the owner. See, e.g. *Southridge Corp. v. Board of Envtl. Protection,* 655 A.2d 345 (Me. 1995).

Here, NAF has no such facts that establish a legally cognizable expectation that it can use Route 1, the Eckrotes' upland lot (without permission from Harriet Hartley's heirs an assigns), or the intertidal land on which the Eckrotes' lot fronts. Here, NAF in the first instance attempted to demonstrate TRI by submitting an Easement Agreement that gives it an option for a portion of an upland lot owned by the Eckrotes. This Easement option is not the type of evidence of TRI that is within any of the categories of sufficient evidence enumerated in the BPL rule. As such, BPL should never have accepted this Easement option as evidence from NAF that demonstrates "sufficient" TRI for the sought submerged lands lease.

In addition to the Easement falling outside the enumerated evidence in the rule, on its face, the Easement option terminates at the mean high water mark – a clue that NAF had no rights under the Easement in the intertidal land on which the Eckrotes' upland lot fronts. In response to objections about this obvious defect in TRI, BPL required NAF to submit additional proof of TRI. The error-ridden letters described above were what NAF submitted to BPL. In accepting these legally defective letters as proof of "sufficient" TRI, BPL violated its own rule again.

Significantly, these letters fail to demonstrate that the Eckrotes had an ownership interest in the intertidal zone that they could convey to NAF by easement – let alone establish that NAF has TRI in the intertidal zone. Further, the Eckrotes have no right "to US Route 1" that could be

conveyed to NAF. Simply, you cannot grant an easement to land in which you have no personal interest and/or fee title.

Obviously, the letter(s) are legally meaningless in demonstrating TRI in the intertidal land on which the Eckrotes' lot fronts. Indeed, the letter(s) provide no evidence of a cognizable interest in the intertidal land, or U.S. Route 1, even in the Eckrotes and certainly do not demonstrate any interest, let alone "sufficient" TRI, in applicant NAF in the intertidal zone (or U.S. Route1).

As to whether these letters also constitute a crime under Title 17-A, Section 451 – Perjury, or Section 453 – Unsworn Falsification, that should be referred to the Office of the District Attorney or the Attorney General, we will, for now, leave to the Bureau to decide. Just as an acknowledgement by the Eckrotes purporting to grant an Easement to NAF of all of their interest in the Brooklyn Bridge would not grant NAF the TRI to build and site its pipelines on the Brooklyn Bridge, an unrecorded Easement or a letter clarifying the meaning of an unrecorded Easement does not create TRI in the intertidal zone (or U.S. Route 1) in the absence of the Eckrotes having such ownership rights to convey.

VI. OBJECTIVE PROOF DEMONSTRATING THAT NAF DOES NOT HAVE, AND CANNOT OBTAIN, TRI TO SITE ITS PIPELINES IN THE INTERTIDAL ZONE

As already discussed at length in Sections IV and V, herein, because State regulators have failed to require NAF to carry the burden that all applicants bear – to demonstrate sufficient TRI by submitting the best available evidence in support of their claim to TRI for their ever-changing pipeline(s) routes -- Upstream and the IMLU have been forced to assume the burden of proving that NAF does not have, and cannot obtain, the necessary TRI to site its pipelines as proposed.

The expert opinion letter from Donald R. Richards, P.L.S., L.F, attached hereto and incorporated herein as Exhibit E, evaluates the relevant deeds in the chain of title for the Eckrotes' upland lot and concludes that: (i) the Eckrotes, and their predecessors in interest dating back to 1946 never had an ownership interest in the intertidal land on which the Eckrotes' upland lot fronts; and (ii) a Covenant in this same 1946 deed limits use of the Eckrotes' lot to "only residential purposes" and permits "no for profit business to be conducted" on the parcel without the approval of the Grantor, her heirs or assigns. (See relevant deeds in Composite Exhibit A).

In other words, the Eckrote Easement cannot support a claim of TRI by NAF in the intertidal land on which the Eckrote lot fronts, because the Eckrotes only own he land down to their high-water line and they do not own the intertidal land between their deeded upland parcel and the mean low water mark in Penobscot Bay. And, the Eckrote Easement cannot support a claim of TRI by NAF to place their pipelines across or under any portion of the Eckrotes' parcel because NAF's pipelines are an accessory structure to a for profit business and a non-residential, industrial principal use. See Deed from Harriet L. Hartley to Fred R. Poor, dated June 19.1946, recorded in the Waldo County Registry of Deeds at Vol. 452, Page 205, and appended hereto and made a part hereof as Composite Exhibit A.

For these reasons, the Eckrotes cannot grant to NAF, or to anyone else, access to Penobscot Bay through the intertidal land between the upland Eckrote parcel and Penobscot Bay – by Easement or conveyance of fee title in their upland lot. Additionally, the Eckrotes cannot grant NAF a right to place the pipelines for their for profit business across, over or under the Eckrotes' lot in the absence of permission being granted for such a non-residential use of this property by Harriet Hartley's heirs and assigns, which permission has not been and will not be granted.

While NAF has attempted to satisfy its TRI burden by submitting three separate and significantly different pipeline(s) routes to DACF-BPL, all originating from the Eckrotes' lot and based on the Eckrote Easement, NAF still cannot satisfy their burden of demonstrating "sufficient" TRI under the requirements of either the BPL or DEP rules.

NAF can demonstrate that it has sufficient TRI for the portion of the pipeline on the Belfast Water District property, based on its Option Agreement to purchase that land from the Belfast Water District. However, NAF cannot provide proof of sufficient TRI to site any other portion of these essential accessory structures, along any of the several proposed pipeline(s) routes that NAF has submitted to State regulators to date. All NAF can legally demonstrate to BPL is the right to approach U.S. Route 1 from the land-side. NAF lacks TRI to cross over or under U.S. Route 1, the Eckrotes' lot or the intertidal zone land on which the Eckrotes' upland lot fronts.

Although BPL made an initial determination that NAF has submitted "sufficient" proof of TRI to support NAF's third proposed pipeline(s) route, attached to the undated Notice sent to abutters on April 9, 2019, calling for COMMENTS on or before May 8, 2019, and reiterated this conclusion on April 24, 2019 in response to the First Comment filed by Upstream and the IMLU, such a determination cannot create administrative standing or jurisdiction where objective facts and evidence demonstrate that NAF has no TRI in either "the upland property adjacent to the littoral zone in which the lease or easement is sought" or "all of the property that is proposed for development or use" for NAF's three proposed intake and outfall.

While the BPL and DEP rules initially vest these agencies with the discretion of determining whether an applicant has demonstrated that it has "sufficient" TRI to proceed in the permitting process, such agency discretion does not trump the law or objective facts proving no TRI does or can exist. A lack of TRI means that the applicant lacks administrative standing and/or the kind of relationship to the site that gives it a legally cognizable expectation of having the power to use the site in ways that would be authorized by the permit or license it seeks. *Collins v. State, supra.* In turn, in the absence of the applicant's administrative standing or a legally cognizable expectation to use the site in the ways a permit would authorize, the State agencies lack the jurisdiction and therefore the legal authority to process or grant a lease or permit application. Any attempt to do so by BPL would be illegal and would constitute a regulatory taking of private property without just compensation in violation of Article I, Section 21 of the Maine Constitution and the Fifth Amendment to the U.S. Constitution.

As stated in the DEP rule: "The Department 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." 06-096 C.M.R. ch. 2.11.D.

Indeed, pursuant to the BPL rule, a loss of TRI in the upland property, suffered at any time after a Submerged Lands lease or easement from BPL is granted, will ***extinguish*** the submerged lands lease entirely. Specifically, the BPL rule states in relevant part that: "[I]f the holder's right, title or interest in the upland terminates, then the lease or easement shall be invalid and all leasehold or easement interest in the Submerged Lands shall be extinguished." 01-670 C.M.R. ch. 53, § 1.6.B.1(b). The language is not discretionary.

Here, NAF's third pipeline(s) route is as lacking in TRI as their first two proposed routes and their application for a Submerged Lands lease and any filed DEP applications is contrary to law and must be rejected accordingly.

VII. SUMMARY OF NAF'S ADDITIONAL "TRI" DEFICIENCIES COMMON TO ALL THREE PROPOSED PIPELINE(S) ROUTES

For at least the following reasons, NAF does not have, and cannot acquire, access to Penobscot Bay through the intertidal lands located between the upland property owned by the Eckrotes and Penobscot Bay:

a. A review of the relevant deeds from the Waldo County Registry of Deeds reveals that the intertidal land between the high water mark along the Eckrotes' upland lot and Penobscot Bay is not owned by Janet and Richard Eckrote, meaning that neither the Eckrotes' Easement to NAF or its subsequent letters and/or the alleged acknowledgement from the Eckrotes relating to the intended scope of the Easement option give NAF sufficient TRI in the upland property adjacent to the littoral zone in which the submerged lands lease is sought by NAF.

b. NAF has no right to cross U.S. Route 1, a federal highway, with its pipelines and, to date, has failed to submit proof that it even has sought a permit from any regulatory agency with the authority to grant the necessary permits.

c. Use of NAF's purported 25-foot permanent easement across a limited portion of the upland property owned by the Eckrotes to install its proposed pipes is illegal because it violates the City's 50-foot side-yard setback zoning requirements for accessory structures in the revised Belfast Ordinances.

d. Use of NAF's purported easement across upland property owned by the Eckrotes to install its proposed pipes is illegal because the intake and outfall pipelines are not accessory structures of a permitted principal residential use in the Res II Zone, but rather an illegal extension of an accessory structure that is an essential and integral accessory structure of an industrial use that is not permitted within the Res II Zone and is

proposed to extend off the lot on which the principal use of the accessory structure is attached -- in violation of the Belfast zoning ordinances controlling land use.

e. Use of NAF's purported easement across upland property owned by the Eckrotes to install its proposed pipes is illegal because the Eckrotes' property is encumbered by a covenant that runs with the land in perpetuity, imposed by a deed from Harriet L. Hartley to Fred R. Poor (Janet Eckrote's grandfather), located at Vol. 452, Page 205 (See Composite Exhibit A), restricting the use of this land to residential use only and prohibiting any for profit business to be conducted on this parcel, in perpetuity, without prior permission of Harriet Hartley's heirs and assigns, including the current owners of two adjacent properties. This covenant cannot be altered by changes in any local zoning ordinances.

Note: Subparagraphs b, c, and d above were discussed in Comment Number 1 by Upstream Watch and the Maine Lobstering Union, incorporated herein as if fully set forth. Said Comment Number 1 was dismissed by BPL clearly contrary to law. Upstream Watch and the Maine Lobstering Union reserve their rights to contest the dismissal of Comment Number 1 by BPL in this proceeding, any ancillary proceeding, or in an independent proceeding of their choosing.

CONCLUSION

For the foregoing reasons, NAF's application for a submerged lands lease should be dismissed for lack of TRI. This application can be resubmitted if NAF obtains TRI in properly zoned land at a future time. However, in the absence of administrative standing now, no further substantive review is appropriate by any State agency at this time.

Respectfully submitted,

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Copies of this filing are being jointly filed with appropriate staff of DACF