

## IN THE MATTER OF

NORDIC AQUAFARMS, INC.	) APPLICATIONS FOR AIR EMISSION,
Belfast and Northport	) SITE LOCATION OF DEVELOPMENT,
Waldo County, Maine	) NATURAL RESOURCES PROTECTION ACT, and
	) MAINE POLLUTANT DISCHARGE ELIMINATION
A-1146-71-A-N	) SYSTEM (MEPDES)/WASTE DISCHARGE LICENSES
L-28319-26-A-N	)
L-28319-TG-B-N	)
L-28319-4E-C-N	) RESPONSE IN OPPOSITION TO
L-28319-L6-D-N	) PROFFERED NORDIC EXHIBIT 41
L-28319-TW-E-N	) AND RENEWED MOTION TO DISMISS
W-009200-6F-A-N	) PURSUANT TO 06-096 C.M.R. ch. 2, §11.D

Dated: February 14, 2020

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In response to proffered Nordic Exhibit 41, admitted into the Administrative (but not hearing) record on February 12, 2020, Intervenor Mabee and Grace and the Lobstering Representatives are submitting evidence to the Board that refutes the claims made by James Dorsky and William B. Gartley, in sworn statements (both dated February 4, 2020), submitted by Nordic Aquafarms, Inc. (“NAF”).

The issue of NAF’s lack of title, right or interest (“TRI”) in the intertidal land on which NAF proposes to bury its pipelines was not included as a hearing topic (despite the requests and appeals of these same Intervenor). As a result, statements in Mr. Bernacki’s Rebuttal Testimony deemed TRI-related were stricken from Mr. Bernacki’s Rebuttal Testimony prior to the hearing commencing.

The alleged intent of NAF filing the Dorsky-Gartley “sworn statements” was to impugn the veracity of Mr. Bernacki by challenging portions of the Rebuttal Testimony filed under oath by Paul Bernacki on January 17, 2020 – the same “TRI-related” portions of Mr. Bernacki’s testimony that had already been stricken by the Presiding Officer, *at NAF’s request*.

However, as discussed in more detail below, NAF’s counsel’s attempt at a “Perry Mason moment” during the February 12, 2020 BEP hearing, is refuted by evidence in the DEP record, ***submitted by NAF’s counsel***, on June 10, 2019 and other evidence proffered with this response in opposition.

The evidence submitted with this response in opposition and renewed motion to dismiss pursuant to 06-096 C.M.R. ch. 2, § 11.D is submitted on behalf of all of my clients listed in the signature block, including the above-referenced Intervenor and the Friends of the Harriet L. Hartley Conservation Area (which was denied Intervenor status on the eve of the hearing). This evidence, in addition to refuting the Dorsky-Gartley sworn statements also demonstrates – as we have consistently asserted to the Department and Board since January 2019 -- that Nordic Aquafarms Inc. (“NAF”) lacks title, right or interest in all land proposed for development and therefore lacks the administrative standing to obtain any permits or leases from local, State or federal agencies, including the Board, for this proposed project. Neither NAF nor the Eckrotes have an ownership interest in the intertidal lands on which the Eckrotes’ lot fronts. That reality is inescapable and irrefutable, based on the determinations of four different surveyors, including Mr. Dorsky.

### Dorsky-Gartley Claims in NAF's Proffered Exhibit 41

Mr. Dorsky and Mr. Gartley each state in relevant part that:

4. I reviewed Mr. Bernacki's Rebuttal Testimony (attached), and hereby affirm that I did not have any conversation with Mr. Bernacki in which I "emphatically stated that the Eckrotes['] property rights end at the High Water Mark, and do not include any intertidal property."

Mr. Bernacki disagreed – under oath and subject to cross examination -- with this assertion by Msrs. Dorsky and Gartley during the February 12, 2020 hearing. However, there is no purpose served by asking the Board to resolve this "they said – he said" dispute – which was improperly injected into these proceedings by Nordic's counsel over a topic ("TRI") that this Board excluded as a hearing topic months ago (over the emphatic objections and appeal of Interveners Mabee and Grace, et al.).

Instead, the Board need only review the contradictory evidence in the Record -- *submitted by NAF from Mr. Dorsky* – that reveals that Mr. Dorsky has unequivocally stated on several occasions that the Eckrotes' property rights end at the High Water Mark, and do not include any intertidal property. Such conclusions by Mr. Dorsky were in filings submitted by NAF to DEP and other entities. Thus, whether or not Dorsky or Gartley said this to Mr. Bernacki is irrelevant.

Specifically, Mr. Dorsky opined in a letter dated May 16, 2019 to Erik Heim (NAF's President)<sup>1</sup> that Harriet L. Hartley: (i) severed the upland now owned by the Eckrotes from the intertidal flats when she conveyed a portion of her vast property to Fred R. Poor (Janet Eckrote's grandfather) on January 25, 1946; and (ii) retained ownership in that intertidal property (on which current Belfast Tax Map 29, Lots 36 and most of 35 front). (This May 16, 2019 Dorsky opinion letter is located at pages 87-88 of the 144-page pdf filed by NAF with DEP on June 10, 2019 resubmitted with the electronic copy of this filing attached hereto and incorporated herein).

In addition, on June 10, 2019, NAF filed (with DEP) an image of a revised version of the November 2018 "Littoral Zone & Intertidal Zone" survey by James Dorsky (the date for which is obscured by an exhibit tag) that also indicates the waterside boundary of the Eckrotes' lot is the **high water mark** (indicated with a solid and hashed blue line). (This revised Dorsky survey is located at page 3 of the 144-page pdf filed by NAF with DEP on June 10, 2019 resubmitted with the electronic copy of this filing and is incorporated herein). Curiously, this Dorsky survey document also has language added on its face indicating that *NAF – not the Eckrotes* -- has some "partial interest" in 7.2 acres of intertidal land on which the Eckrotes' lot fronts based on "unrecorded deeds from Hartley Heirs". While this claim that NAF has some "partial interest" (of an undisclosed legal nature) in the intertidal land on which the Eckrotes' lot fronts is simply false, as discussed in more detail below, what is relevant about this assertion by Mr. Dorsky on the revised survey document is that it acknowledges that ***the Eckrotes do not have any ownership interest in the intertidal land on which their lot fronts.***

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<sup>1</sup> This letter was submitted to the Bureau of Parks and Lands on May 16, 2019 and to the DEP on June 10,

### Meaning of Dorsky's May 16, 2019 Opinion Letter

While the wording of Mr. Dorsky's May 16, 2019 opinion letter to Erik Heim is rather convoluted, its meaning is clear – James Dorsky – like three other surveyors (including one hired by the Eckrotes in 2012 (Gusta Ronson of Good Deeds) and one hired by NAF in 2018 (Clark Staples of Good Deeds)) -- has determined that *the Eckrotes do not own the intertidal land on which their lot fronts and their waterside property boundary is the high water mark.*

As explained by Donald R. Richards, P.L.S., L.F., in his Surveyor's Report recorded in the Waldo County Registry of Deeds at Book 4425, Page 165 (attached hereto and incorporated herein):

It is also worth mentioning that James Dorsky in a May 16, 2019 letter attached as Appendix B. explaining his interpretation of the deeds pertaining to this area states that the conveyance to Sam M. Cassida, "created a boundary line across the flats between the flats northerly of this line that were conveyed to Cassida and the flats southerly of this line that Hartley would have still owned in front of Poor (now Eckrote and Morgan) and southerly to the Little River". This statement confirms that three different surveyors have concluded that Harriet L. Hartley retained the shore and the flats in front of the Fred R. Poor property at the time of that conveyance to Cassida in 1946. Additionally a fourth surveyor, Clark Staples of Good Deeds in Belfast, Maine, prepare a Topographic Survey of the lands of Richard & Janet Eckrote dated [August 31], 2018 for use by Nordic Aquafarms in which he notes the discrepancy between the description in the deed to Richard and Janet Eckrote (WRKL Bk. 3697, Pg. 5) and the previous deeds in the chain of title and suggests that a legal opinion should be provided to evaluate whether the Phyllis J. Poor estate had the right to grant an easement below the high water line.

See, Richards' Report at WCRD at Book 4425, Pages 170-171 (footnotes omitted) and 182-183.

In sum, James Dorsky (in his capacity as a licensed professional land surveyor in Maine) has concluded that neither Fred R. Poor nor his successors-in-interest the Eckrotes ever owned the intertidal land on which the Poor-Eckrote lot fronts and he has advised NAF's President Erik Heim of that fact no later than May 16, 2019. Further, NAF has put Mr. Dorsky's letter containing this unequivocal conclusion in the DEP record on June 10, 2019.

Accordingly, while Mssrs. Dorsky and Gartley assert that they did not: "emphatically state[ to Mr. Bernacki] that the Eckrotes['] property rights end at the High Water Mark, and do not include any intertidal property", Mr. Dorsky – like Good Deeds -- unequivocally advised Mr. Heim of those facts on or before May 16, 2019 and NAF filed those statements for all the world to read, through filings submitted by their counsel to DEP on June 10, 2019.

Additionally, Mr. Dorsky's conclusions that the Eckrotes' property boundary is the high water mark and does not include any intertidal lands are shared by three other Maine licensed surveyors:

- **Gusta Ronson, P.L.S. #1289**, who completed the August 31, 2012 survey plan, commissioned by the Eckrotes and incorporated by reference in the October 15, 2012 Deed from the Estate of Phyllis J. Poor to the Eckrotes, that states on its face that the waterside property boundary of the land owned by the Estate of Phyllis J. Poor was "**along high water**" (See also, explanatory letter from Gusta Ronson to Donald R. Richards, both attached hereto and incorporated herein);

- **Clark G. Staples, P.L.S. #2332**, who completed the unrecorded April 2, 2018 topographic survey plan commissioned by NAF delineates the Eckrotes' waterside property boundary at the high water mark (included in NAF's June 10, 2019 DEP filing at page 4 attached hereto and incorporated herein); and
- **Donald R. Richards, P.L.S., L.F. #1209**, who completed the recorded October 8, 2019 "Map of Property" and Survey Report for the Mabee-Grace property, including the Colonial Method<sup>2</sup> survey of all of the Mabee-Grace intertidal land (attached hereto and incorporated herein and recorded in the WCRD at Book 24, Page 34 and Book 4425, Page 165, respectively).

All of the four surveyors who have been retained to establish the boundaries of the relevant lots (Belfast Tax Map 29, Lots 38, 37, 36 and 35) and the extent of intertidal ownership for each of these lots, has concluded that the Eckrotes' waterside property boundary is the high water mark of Penobscot Bay (not low water mark).

***No surveyor has concluded to the contrary, whether commissioned by the Eckrotes, NAF or the true intertidal landowners.***

It is unclear why Messrs. Dorsky and Gartley are denying, under oath, telling Mr. Bernacki a conclusion by Mr. Dorsky, that Mr. Dorsky has, in fact, shared with NAF's President in May 2019, and NAF's counsel has shared with the world – including the Bureau and DEP -- in May and June 10, 2019.

Undersigned counsel can attest to the fact – *if needed* – that, in the late Fall of 2012 and mid Summer of 2019 (after the Dorsky opinion letter was filed with the Bureau on May 16 and about the time that the 144-page pdf was filed with DEP in June 2019), Mr. Bernacki told me about his conversations with both Mr. Gartley and Mr. Dorsky. Mr. Bernacki reported their statements to him contemporaneously with those conversations taking place. Mr. Bernacki told me at that time that, consistent with Mr. Bernacki's stricken Rebuttal testimony, Mr. Gartley and Mr. Dorsky had told him that Mr. Dorsky had concluded that: (i) the Eckrotes' boundary was the high water mark; (ii) the Eckrotes and their predecessors-in-interest had no ownership interest in the intertidal land on which the Eckrotes' lot fronts; and (iii) Gartley and Dorsky had repeatedly conveyed that conclusion to their client NAF. I had no reason to question that Mr. Dorsky and Mr. Gartley made statements like this to Mr. Bernacki, since NAF had submitted the letter from Mr. Dorsky to Erik Heim, dated May 16, 2019, *containing these same conclusions*.

Thus, NAF's purpose in filing Nordic Exhibit 41 -- to impugn Mr. Bernacki's integrity over a matter outside the scope of the hearing – makes no sense when Mr. Dorsky's other statements and conclusions in the Record are considered. The Dorsky-Gartley sworn statements do not impeach Mr. Bernacki's veracity and are inconsistent with Mr. Dorsky's other conclusions in the DEP-BEP Record.

Intervenors move that Nordic Exhibit 41 not be considered by the Board for any purpose.

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<sup>2</sup> *Emerson v. Taylor*, 9 Me. 42, 1832 Me. LEXIS 64.

**Dorsky Survey Attached to the June 10, 2019 NAF Filing**

Notably, the Dorsky-attributed document at page 3 of the 144-page NAF pdf, filed with DEP by NAF on June 10, 2019, states in relevant part as follows:

Heirs of  
HARRIET L. HARTLEY  
7.2 ACRES ±  
PARTIAL INTEREST  
REMAINDER OF BOOK 386 PAGE 451  
(SEE NOTES 6 & 7),  
NORDIC AQUAFARMS INC.  
7.2 ACRES ±  
PARTIAL INTEREST  
UNRECORDED DEEDS FROM HARTLEY HEIRS  
(SEE NOTES 6 & 7)

Notes 6 and 7 of the Dorsky document state as follow:

6. THE LINES SHOWN ON THIS PLAN THAT ARE IDENTIFIED IN THE LEGEND AS “INTERTIDAL PROPERTY LINE IF FLATS WERE CONVEYED” REPRESENT WHERE ADDITIONAL INTERTIDAL ZONE PROPERTY LINES WOULD DIVIDE THE INTERTIDAL ZONE (AKA THE FLATS) AMONG ALL OF THE ADJACENT UPLAND OWNERS IF ALL OF THE DEEDS IN THEIR CHAINS OF TITLE WERE INTERPRETED TO HAVE CONVEYED THE FLATS ALONG WITH THE UPLAND. SOME OF THE DEEDS APPEAR TO HAVE NOT CONVEYED THE FLATS. THE DESCRIPTION IN THE CURRENT ECKROTE DEED (BK 3697, PG 5) DOES INCLUDE THE FLATS.
  
7. AN ATTORNEY SHOULD BE CONSULTED TO HELP DETERMINE WHAT RIGHTS MAY HAVE BEEN CONFERRED TO THE ECKROTES IN THE INTERTIDAL ZONE BY THE APPARENT HISTORIC USE OF THE SHORE AS EVIDENCED BY THE TWO SETS OF STEPS LEADING TO THE SHORE.

At pages 135-144 of the 144-page NAF pdf, filed with DEP by NAF on June 10, 2019, NAF filed documents titled “release deeds” with all identifying information relating to the identities and physical locations of Grantors and the Notaries obscured by NAF. These are apparently the unrecorded and *unrecordable* documents referenced in the Dorsky survey document at page 3 of the 144-page pdf. Under Maine law, these documents, as drafted, convey no title to any land.<sup>3</sup>

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<sup>3</sup> As the Law Court stated in *Sargent v. Coolidge*, 399 A.2d 1333, 1343, 1979 Me. LEXIS 589, \*21: “. . . [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. *Hill v. Coburn*, 105 Me. 437, 452, 75 A. 67 (1909); *Butler v. Taylor*, 86 Me. 17, 23, 29 A. 923 (1893); *Nash v. Bean*, 74 Me. 340 (1883); *Coe v. Persons Unknown*, 43 Me. 432 (1857).”

In addition, these documents are from persons claiming to be the “heirs” of Harriet A. [sic] Hartley (a person who has never owned this or any Belfast property). These undisclosed persons do not claim to be heirs of Harriet L. Hartley -- an actual prior owner of this intertidal land.

However, these instruments, whoever they are from, are not from “heirs” of Harriet L. Hartley, pursuant to the controlling law in Pennsylvania and prior holdings of the appropriate authorities from the Philadelphia Register of Wills. Significantly, the Philadelphia Register of Wills determined in December of 1951 that Harriet L. Hartley ***owned no real property*** at the time of her death on October 18, 1951. These materials from the Philadelphia Register of Wills were previously filed with the Board and are incorporated herein.

As a result of this determination, Harriet L. Hartley’s testamentary intent in her 1945 Will (previously submitted to the boars) to bequeath her Belfast property to her sister-in-law (Ruth Hartley Weaver) and her sister Esther’s son (Samuel Nelson Woods, Jr.) was determined to be “ineffective” and distribution of her estate (which consisted of about \$12,000 in cash) was determined by the Pennsylvania intestacy succession law. Under that controlling Pennsylvania law, Harriet’s “heirs-at law” were her sisters, Genevieve Hargrave Bailey and Esther Hargrave Woods, who split the assets in Harriet’s estate, consisting of less than \$12,000, equally. (WCRD at Book 4425, Page 185).

Distant blood relatives of Harriet L. Hartley (who had no children) cannot have any interest in land to convey to NAF, because ***Harriet owned no real property at the time of her death*** to bequeath or transfer to her “heirs” or “heirs-at-law”. Pursuant to the controlling case law in the State of Maine (and every other State), one cannot convey an interest in land that one does not own. *See, e.g. Almeder v. City of Kennebunkport*, 2019 Me. 151.

Thus, Mr. Dorsky’s survey filing prepared for NAF claiming that NAF has some unspecified “partial interest” in 7.2 acres of the intertidal land from the “heirs of Hartley” is a slanderous statement disparaging Intervenor Mabee and Grace’s title<sup>4</sup> – but it is also an example of a statement made by Mr. Dorsky evidencing his conclusion that the Eckrotes’ waterside boundary is the High Water Mark and that the Eckrotes own no intertidal land. When the firm of Gartley and Dorsky has made multiple statements, published in the public record relating to the NAF project *by NAF*, confirming that the firm of Gartley and Dorsky and James Dorsky, PLS, have concluded that “the Eckrotes’ property rights end at the High Water Mark, and do not include any intertidal property,” it is mystifying why Mssrs. Dorsky and Gartley would file sworn statements disavowing that they had made these same statements to Mr. Bernacki directly.

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<sup>4</sup> Intervenor Mabee and Grace own all of the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and most of 35 front, in fee simple, by Warranty Deed and by a 1970 quiet title judgment entered in favor of their predecessor-in-interest Winston Ferris, in *Ferris v. Hargrave*, Docket No. 11275 (Waldo County Superior Court, June 26, 1970, recorded in the WCRD at Book 683, Page 273),

**CONCLUSION AND REQUEST FOR DISMISSAL**

Based on the prior Record statements and conclusions of surveyor James Dorsky, PLS, and three other surveyors, the Record before the Board demonstrates that NAF lacks the requisite title, right or interest in the intertidal land for which permits are sought to place NAF's pipelines into Penobscot Bay. Accordingly, Intervenors Mabee and Grace and the Lobstering Representatives, and Non-Intervenors the Friends of Harriet L. Hartley Conservation Area (Holder of the conservation easement on the intertidal land on which NAF seeks permits from this Board), jointly move to dismiss the above-referenced applications as incomplete for lack of sufficient title, right or interest, pursuant to 06-096 C.M.R. ch. 2, § 11.D ("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.")

Respectfully submitted,



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 Intervenors Jeffrey Mabee  
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 Intervenors Lobstering  
 Representatives;  
 And the Holder of the  
 Conservation Easement  
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