

VOL. 1 ISSUE 1 • NOV 2023

# THE CURRENT

An Upstream Watch Newsletter

## Dear Friends of Upstream Watch,

As the year draws to a close, Upstream Watch is taking a moment to reflect on all that we've accomplished this year, while preparing for all that still lies ahead in our efforts to stop Nordic Aquafarms. We have seen significant progress, with the decisions from the Maine Supreme Court and the lease rescission by the Maine Bureau of Parks and Lands. We also continue to face obstacles, most recently with BEP and the DEP Commissioner's refusal to revoke Nordic's permits, resulting in another round of appeals to Superior Court. By early next year, we anticipate being before the Belfast Zoning Board of Appeals, and we are keeping tabs on the eminent domain proceedings, which were recently remanded back to the Belfast City Council. It still may be a long road in the courts, but we remain hopeful and are incredibly grateful for the continued support from all of you. Without you, our work to protect the the Little River, Penobscot Bay, and our community would not be possible.

The biggest takeaway from our efforts opposing Nordic is a deeper understanding that the Penobscot Bay watershed faces mounting threats, with climate change and industrialization of the coast at the top of the list. Unfortunately, state and local agencies are not sufficiently protecting the environment or our communities. While Nordic remains our number one priority, Upstream Watch is also planning for the organization's future, and our role in protecting the Bay. To that end, we're working to build a Penobscot Bay Waterkeeper program, and we're excited to introduce this to everyone.

For the Rivers and the Bay,

Jillian Howell  
Executive Director



## In this issue:

Letter of Reflection from  
the Executive Director  
PAGE 01

An Update on Nordic  
Aquafarms  
PAGE 02

Penobscot Bay Waterkeeper  
PAGE 05

Sears Island and Offshore  
Wind Development  
PAGE 06

Support the Bay on  
Giving Tuesday  
PAGE 07

## Upstream Watch's Opposition to Nordic Aquafarms: A Year in Review

Much has happened this year in the court system and at the agency level, with both wins to celebrate as well as additional obstacles presented. Below is a summary of major milestones from this past year, as well as what we expect in the coming months.

### From the Maine Supreme Court: Nordic never had TRI, Upstream has right to appeal Belfast Zoning Board Permits



In February 2023, the Maine Supreme Court issued its decision in the *Mabee I* quiet title action holding that:

- Jeffrey Mabee and Judith Grace are the owners of a disputed parcel of intertidal land Nordic needs to run their discharge and intake pipes through.
- Mabee and Grace hold an enforceable “residential purposes only” deed restriction on the related upland property.
- A conservation easement created by Mabee and Grace in 2019 over the intertidal land is enforceable. Mabee and Grace assigned that conservation easement to Upstream Watch, who later assigned it to the Friends of Harriet L. Hartley Conservation Area.

This decision affirmed what we already knew – Nordic never had, and still does not have Title, Right, or Interest (TRI) to all of the land necessary to build their facility. Without access to the intertidal land, Nordic has no access to the Bay for their discharge and intake pipes. As a result of this decision, in May 2023, Upstream’s appeal of the BEP awarded state environmental permits was remanded back to BEP, and they were ordered by the Court to determine the impact, if any, of *Mabee I* and the fact that Nordic does not have TRI to the intertidal land, on the challenged permit approvals.

“This decision affirmed what we already knew – Nordic never had, and still does not have, Title, Right, or Interest to all of the land necessary to build their facility.”



View of the Little River, Penobscot Bay, and the land proposed for development by Nordic. Photo captured during Lighthawk flight.





In August 2023, the Maine Supreme Court ruled the lower court erred when it upheld the Belfast Zoning Board of Appeal's (ZBA) decision that Upstream Watch lacked standing to appeal permits issued by the Belfast Planning Board. The Court remanded the case back to the ZBA, stating Upstream has standing to appeal the substance of the permits.



## State Agency Actions and Proceedings

### Board of Environmental Protection: License Suspensions and Remand Proceedings

Following the Supreme Court's *Mabee I* decision, Upstream Watch filed a petition to the Commissioner of the Maine Department of Environmental Protection (DEP) to revoke Nordic's permits; without TRI, Nordic should never have been able to apply for these permits in the first place.

In response to this petition, as well as similar petitions filed by Friends of Harriet Hartley and Mabee and Grace, in June of 2023 the Commissioner issued a Suspension Order suspending Nordic's Air License and Natural Resources Protection Act/Site Law Permit.

In response to the Court's remand from *Mabee I*, BEP outlined proceedings for all parties to file briefs and present oral arguments. In October 2023, after hearing presentations from Upstream Watch's attorney, as well as those representing Friends of Harriet Hartley, Judith Grace and Jeffrey Mabee, the Northport Village Corporation, and Nordic Aquafarms, BEP unanimously found its approval of Nordic Aquafarms' permits issued in November 2020 is not impacted by the Maine Supreme Court's February 2023

decision in the *Mabee I* quiet title action case. BEP further found the original decision by Maine DEP and concurrence by BEP, that evidence of sufficient TRI to warrant processing of the permit applications, was demonstrated at that time and remains in place. BEP also stated that only the Commissioner, not BEP, has the authority to rescind or amend permits once issued. Finally, BEP restated their belief that TRI is a threshold to overcome for the processing of permit applications, not a permit requirement.

BEP is correct in that only the Commissioner has the authority to rescind the permits; on October 31, 2023, the Commissioner, though, dismissed petitions by Upstream and others to revoke Nordic's permits. While these decisions are not at all surprising, it is frustrating considering the sheer quantity of resources - notably time and money - that this jumble of litigation has cost Upstream Watch and other intervenors, the City of Belfast, and state agencies all for a project that never had, and still does not have, access to all of the land necessary to build its facility.

In response to BEP's decision, and the Commissioner's refusal to revoke Nordic's permits, Upstream Watch filed an appeal of both Nordic's permits, and BEP's remand decision in Kennebec County Superior Court this November. We look forward to making our case before the Court on these matters.

## The Maine Bureau of Parks and Lands Suspension of Leases

In contrast to the BEP and DEP Commissioner, in September 2023, the Maine Bureau of Parks and Lands rescinded its September 2020 decision to grant Nordic a submerged lands and dredging lease as a result of the *Mabee I* decision.

## What's Next with Nordic

### BEP Appeal

Zoning Board of Appeals: With the Maine Supreme Court's decision affirming Upstream Watch's standing to appeal the permits issued by the Belfast Planning Board, Upstream will have an opportunity to present our case challenging the substance of these permits. Hearings are currently being scheduled and we anticipate being before the Zoning Board of Appeals by early next year.

### Eminent Domain

In October, the Superior Court judge remanded the eminent domain case back to the Belfast City Council. We are awaiting further details from Belfast City Council on these proceedings.

We remain extremely concerned about the City of Belfast's taking of private property for the benefit of an industry, not only for what it may mean for Nordic's proposed operation, but the precedent it sets for a municipality's power of eminent domain. If this taking is allowed to happen, all private land, even that which is protected by conservation easements, would be at risk of condemnation or seizure for the benefit of industrial development.

The City of Belfast "took" the intertidal land owned by Jeffrey Mabee and Judith Grace using its power of eminent domain so that Nordic could have access to Penobscot Bay for their intake and discharge pipes. Upstream Watch filed a lawsuit in Court challenging Belfast's "taking" as illegal under state law and under both the state and federal constitution. The power of eminent domain is intended to be used for the public good, not for the benefit of a private business. In that litigation, Upstream's lawyers are joined by Wesley Horton, a Connecticut lawyer who is one of very few experts on eminent domain in the United States. He successfully argued the *Kelo v. New London* eminent domain case before the United States Supreme Court.

## Summary of Concerns with Nordic Aquafarm's Proposed Operation

### Operation at full capacity will result in:

- Discharge of 7.7 million gallons per day of wastewater into Belfast Bay
  - The discharge will be laden with nutrients, unknown quantities of pharmaceuticals, detergents and other chemicals, and would be warmer than the temperature of the Bay itself
- Running of 7 of 8 industrial diesel generators daily
- Significant truck traffic on Route 1
- Air emissions from eight 67-foot tall smoke stacks
- An energy demand that requires an upgrade to Central Maine Power's Line 80
- Pumping of fresh water from municipal supplies at a rate of 650 gallons per minute
- Potential salt water intrusion from water withdrawal at the Little River well sites

### The project includes development of 37.9 acres of land that will impact:

- 35 acres of mature forest
- 19 wetlands
- 9 streams
- 2 types of Natural Resources Protection Act designated Significant Wildlife Habitat for waterfowl and wading birds
- Open meadowland
- Hiking trails
- Swimming holes
- One of the last undeveloped habitat connections from the Bay to the uplands, critical for migrating birds, larger mammals, and overwintering species
- Construction would require:
  - Removal of soils unsuited for development beneath the building footprint of depths of up to 50 feet.
  - Intake and discharge pipe construction in Penobscot Bay that will disturb mercury-laden sediment.
  - Eminent domain taking of private land

For more details on these impacts, check out the research on our website [here](#).





## Who are the Waterkeepers?

A Waterkeeper serves as the local, on-the-ground advocate for a specific watershed pursuing the vision of “fishable, swimmable, drinkable waters.” Waterkeepers work towards this vision by conducting pollution investigations, collecting water quality data, organizing and educating the public, and bringing litigation to hold polluters and regulatory agencies accountable. This model was started back in the 1960s on the Hudson River in New York.

Waterkeeper Alliance was formed as a separate non-profit to license new Waterkeeper programs and hold them accountable to their mission. Waterkeeper Alliance also provides resources to the individual Waterkeepers through their environmental attorneys, communication staff, trainings, and facilitation of connection to other Waterkeepers.

Today there are 300+ Waterkeepers covering 2.5 million square miles of rivers, lakes, and coastal waterways on six continents.

We want to join these ranks and bring this model here to Penobscot Bay.

## The Future of Upstream Watch: Penobscot Bay Waterkeeper

Through our work to understand the true impacts of Nordic Aquafarm’s proposal, our efforts to engage in the permitting processes, and ultimately our litigation, Upstream Watch has come to better understand the threats facing the environment, and the failure of our regulatory system and state agencies to protect us from these threats. Maine’s local, state, and federal environmental agencies and permitting processes are inadequate to ensure protection of the health of our waters and communities, and we cannot solely rely on these agencies or processes to protect our rivers or the Bay from proposals like Nordic in the future.

To that end, Upstream Watch has been thinking about our future role in protecting our waterways. Our vision for the organization’s future includes the establishment of the Penobscot Bay Waterkeeper program to protect and advocate for the waters of this region, and push for better enforcement of laws, regulations and permit conditions. Upstream Watch’s Penobscot Bay Waterkeeper program will be guided by science, and informed by current and legacy pollution impacting the Bay, as well as concerns and needs identified by fishing people, tribal members, local governments, community and environmental organizations, scientists, and members of the public.



We are currently working with Waterkeeper Alliance to secure licensing for this program, and reaching out to those around the Bay to inform our advocacy, priorities, and strategy as we get started.

To help facilitate this build out of this program and vision for Upstream Watch’s future, Upstream Watch hired Jillian Howell as the organization’s first Executive Director in July 2023. Jill comes with experience as a Waterkeeper, having most recently served as the Pamlico-Tar Riverkeeper in eastern North Carolina.

There will be much more to come on this in the coming months, but we wanted to let all of you know about our plans!



## Sears Island

**“We support Maine’s pursuit of renewable energy alternatives, however, we cannot support the destruction of green space in the name of green energy.” - Upstream Watch President Amy Grant in Upstream Watch’s letter of support to Islesboro Islands Trust**

For decades, Sears Island has been a target for major industrial development proposals, from nuclear and coal-fired power plants to cargo ports. The latest proposal is one that pits renewable energy against conservation, with Sears Island in the running for development as an offshore wind port.

In March 2020, Governor Mills announced that the Maine Department of Transportation would begin assessment of locations for a port necessary to facilitate floating offshore wind power development in Maine. Mack Point and Sears Island are both being considered as potential locations for this port. Mack Point is already an industrialized port, and would be a redevelopment effort. Sears Island is currently undeveloped, forested conservation land with walking trails accessible to the public.

In August, after evaluating the proposals at each location and what each would mean for Sears Island and the health of Penobscot Bay, Upstream Watch wrote a letter of support to the Islesboro Islands Trust in their opposition to the development of Sears Islands, and joined the Alliance for Sears Island. If a wind port is to be built in Penobscot Bay, Mack Point, an already industrialized port, should be redeveloped. Sears Island is a place of significant ecological and recreational importance in the region, and remains one of the largest undeveloped islands on the Eastern Seaboard of the United States. Construction of this terminal on Sears Island will result in destruction of critical marine habitat, and impacts to fisheries, and its operation will disrupt migratory birds nesting on the island, and take away from the recreational opportunities afforded by such a unique place.

Recently, Sprague Energy, the owner and operator of the Mack Point port, released a redesign of the proposed Offshore Wind port. The new plan offers substantial operational, environmental, and financial advantages when compared to the first Mack Point plans designed by the Maine Department of Transportation’s engineering firm.



**View of Sears Island (background) and Mack Point (foreground). Photo captured during Lighthawk flight.**

**The Alliance for Sears Island is a gathering of people and organizations, an unincorporated association having a particular interest in Penobscot Bay and committed to protecting the environmental benefits of Sears Island. The Alliance includes Friends of Sears Island, Friends of Maine Coastal Islands National Wildlife Refuge, Friends of the Harriett Hartley Conservation Area, Islesboro Islands Trust, Public Employees for Environmental Responsibility, Sierra Club Maine Chapter, Upstream Watch and a growing number of citizens, all eager to maintain the ecological integrity of Penobscot Bay while combatting the climate emergency.**

**If you’d like to comment on the proposal, you have until November 22, 2023 to provide written comment [here](#).**





# SUPPORT THE BAY ON GIVING TUESDAY




## Thank You for Your Continued Support!

It has been a long road in our ongoing efforts to protect the Little River and Penobscot Bay from a project that would have lasting environmental impacts. We are so incredibly grateful to all those who have supported us over the years. Your generous contributions make our work possible as legal costs keep mounting. As we approach Giving Tuesday, we hope you'll consider making a gift to Upstream Watch.

From,

Amy Grant  
Board President  
Upstream Watch



If you'd like to contribute to Upstream Watch, donations can be made [here](http://www.upstreamwatch.org), through our website at [www.upstreamwatch.org](http://www.upstreamwatch.org), or by mailing a check to Upstream Watch at PO Box 113 Belfast, Maine 04915. Whether you can give \$5, \$30 or even \$100, it makes a real difference.