STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NOS. SAG-07-711, SAG-07-712, KEN-08-36
(consolidated)

ED FRIEDMAN,
Appellant
v.
MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Appellee

FRIENDS OF MERRYMEETING BAY,
Appellant
v.
MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Appellee

DOUGLAS HAROLD WATTS,
Appellant
v.
MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Appellee

On appeal from Sagadahoc and Kennebec County Superior Courts

APPELLANTS' JOINT REPLY BRIEF

David A. Nicholas
Bar No. 010049
20 Whitney Road
Newton, Massachusetts 02460
(617) 964-1548

Bruce M. Merrill
Bar No. 7623
225 Commercial Street Suite 501
Portland, Maine 04101
(207) 775-3333

Attorneys for Ed Friedman and
Friends of Merrymeeting Bay

Douglas H. Watts
131 Cony Street
Augusta, Maine 04330
(207) 622-1003

Pro Se

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

AGENCY DECISIONS

FEDERAL STATUTES

STATE STATUTES

FEDERAL REGULATIONS

STATE REGULATIONS

OTHER AUTHORITY

ARGUMENT

I. THE BOARD DOES NOT HAVE UNREVIEWABLE DISCRETION TO ACT ON THE PETITIONS.

A. The Board Has A Mandatory Duty To Fix Defective Water Quality Certifications.

In arguing the Board under 38 M.R.S.A. § 341-D(3) (2001) has unfettered discretion to act on petitions to modify water quality certifications, the Appellees ignore the Clean Water Act ("CWA"), Maine's water quality laws, and this Court's decisions regarding water quality certifications.

As stated by the Supreme Court: "Congress passed the Clean Water Act to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), ... the 'national goal' being to achieve 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.' 33 U.S.C. § 1251(a)(2)." S.D. Warren Co. v. Maine Board of Environmental Protection. 547 U.S. 370, 385 (2006). In furtherance of these objectives, States are required to adopt water quality standards. 33 U.S.C. § 1313(a) (2001). State water quality standards must be consistent with the CWA and are subject to the approval of the United States Environmental Protection Agency ("EPA"). 33 U.S.C. § 1313(a) and (c); see FPL Energy Maine Hydro LLC v. Department of Environmental Protection, 2007 ME 97, ¶ 35, 926 A.2d 1197 (2007) (EPA disapproved a new Maine water quality standard regarding dam

impoundments). Maine's EPA-approved water quality standards require the waters at issue in the instant cases, among other things, to support all indigenous species and maintain the structure and function of the resident biological community. 38 M.R.S.A. §§ 465(4)(C) (2001 & Supp. 2007); see Appellants Br. 9-10, 31-32 for a fuller discussion of the applicable water quality standards.

Congress considered achievement of state water quality standards so important that in the CWA it enacted a provision (§ 401) requiring an applicant for a federal license that involves any activity that may result in a discharge to navigable waters - including a Federal Energy Regulatory Commission (FERC") license for operation of a hydroelectric dam - to obtain a certification from the state that the activity "will comply" with state water quality standards, unless the State waives certification. 33 U.S.C. § 1341(a)(1) (2001); 116 Cong. Rec. 8,984 (1970) (Sen Muskie stating section that became 401 "may be the most important action of this legislation"). Under § 401 of the Act, a state cannot, in its discretion, issue a certification when the activity will cause a violation of state water quality standards. Further, if limits or conditions on the activity are necessary for that activity to satisfy water quality standards, those limits or conditions must be set forth in the certification; again, under the CWA a state has no discretion to leave them out. 33 U.S.C. § 1341(d).

This Court in S.D. Warren Co. v. Board of Environmental Protection, 2005 ME 27, 868 A.2d 210, 219 recognized it is *critical to*

modify a water quality certification when it turns out the certification in fact does not assure compliance with water quality standards. The Court held when conditions in a water quality certification "are not as effective as planned," it is "essential" for the Board to have the authority to reopen the certification because otherwise "the water quality standards will not be met and the BEP's goal to 'restore and maintain the chemical, physical and biological integrity of the States waters...' will not be achieved during the forty-year term of the FERC license." Id. at ¶ 28. A state has no discretion to continue a certification that fails to assure compliance with water quality standards just as it has no discretion to issue a certification that fails to assure compliance with water quality standards in the first place. If a state could choose to allow a defective certification to remain in effect, it would subvert the goals of the CWA and render § 401 of the Act useless. See Northern Plains Resource Council v. Fidelity Exploration and Development Company, 325 F.3d 1155, 1164 (9th Cir. 2003) (state has no authority to create exemption from CWA requirements).

Maine's water quality laws also mandate the Board modify a certification when the certification does not assure satisfaction of water quality standards. The Legislature sets water quality standards for the State's water bodies. 38 M.R.S.A. § 464(1). By law, water bodies must be managed to achieve those standards. § 38 M.R.S.A. § 464(1). The Board is responsible for administering these water quality standards, 38

M.R.S.A. § 341-B (2001), but it cannot change them. The Board is prohibited from allowing a water quality certification to authorize an activity that degrades a water body below its water quality standard because that would be tantamount to changing the water quality standard for the water body, which only the Legislature can do (and then only with EPA approval). Thus, contrary to Appellees' claim, the Board has no discretion to deny (or as Appellees cast it, "choose not to act" on) a petition to modify a water quality certification when the certification no longer assures water quality standards are attained.

The Board wants to have its cake and eat it too. It wants the authority to issue a certification without the duty to comply with the CWA and State water quality laws. The Board wants to be able to say "no" to a modification petition for any reason, even if it results in every living thing in a river being killed. But the power to issue certifications derives from the Clean Water Act and concomitant State water quality laws, and that power is constrained. The State could have waived certification of the dams, but chose not to. Once it took on the responsibility to certify, it took on the obligation to fix defective certifications when necessary to safeguard water quality.

The dam owners suggest meeting the goals of the CWA are outweighed by a licensee's entitlement to rely on the "finality" of licenses. Dam Owners Br. 36-38. The ship has sailed on that argument. If finality were king, this Court would not have found an implied authority

to place re-opener clauses in certifications. Moreover, the very existence of the modification provisions in § 341-D(3) and Me. Dept. of Env't Prot. 01 096 2-27 (Rule 27) shows the Legislature and the Board do not consider finality more important than the need to fix defective licenses.[1]

Appellees perform an analytical contortion act attempting to make other arguments why the Board's decision on a modification petition is discretionary (though they do not deny "may" can have a mandatory effect in a statue). Mainly, they argue modification is enforcement, which, according to Appellees, is always a matter of unreviewable discretion. They point to the statutory section in which the modification provision was originally located to support their argument. But this defies common sense. Appellants are asking the Board to rewrite a license. They are not asking the Board to compel compliance with a license's terms. If Appellants wanted to enforce the terms of a certification, they could have done so by bringing a citizen suit in federal

[1] The dam owners argue an appeal of a denial of a modification petition is inconsistent with the Maine Administrative Procedure Act's ("APA") requirement that judicial review of a license issuance be filed within 30 days. It is not. Issuance of a license and a decision on a petition to modify are two separate agency actions, and they each start their own 30-day clock. In addition, Appellants note the cases cited by the dam owners regarding finality at pp. 37-38 of their brief are challenges to municipal licenses that arise in the context of enforcement actions; they in no way construe a statute or regulation that, as is the case here, creates a procedure to modify a license. Similarly, Sold, Inc. v. Town of Gorham, 2005 ME 24, 868 A.2d 172, cited by the Board, did not involve modification of a license, but rather an untimely challenge to the validity of a municipal ordinance.

District Court directly against the dam owners under the CWA. 33 U.S.C. § 1365(a)(1)(ii)(A) and (f)(5).[2]

Further, the modification provisions of § 341-D(3) cannot merely be enforcement-related because, as pointed out in Appellants' opening brief and not denied by the Board, § 341-D(3) can be used to relax the terms of a license.[3] Moreover, as the Board itself points out, true enforcement action (revocation or suspension) that comes out of a § 341-D(3) proceeding is referred to the Attorney General for an action in District Court, while under § 341-D(3) the Board itself modifies the terms of a license without going to court. Board Br. 5. Appellants note cases the Board characterizes as finding judicially unreviewable "[a]gency decisions declining to exercise similar discretionary authority to modify, suspend

---

[2] The statutory restructuring cited by Appellees resulted in a separate subsection in § 341-D that does deal only with enforcement: §341-D(6) is entitled "Enforcement" and provides the Board shall advise the Commissioner of the Department of Environmental Protection ("DEP") on enforcement priorities and the adequacy of penalties and enforcement activities, approve administrative consent agreements with violators, and hear appeals of emergency orders issued to violators. The Legislature thus segregated pure enforcement related provisions.

Appellants also note the Board states Rule 27 establishes a procedure to ask the Board to "investigate" a license. The word "investigate," presumably intended to have enforcement overtones, is not used in Rule 27.

[3] The dam owners at page 32 of their brief claim a request by a licensee "is subject to a license amendment application process that does not involve" § 341-D(3) or Rule 27, but they do not support that with a reference to a statute or rule, and they do not claim that this unspecified process is exclusive or that they are prohibited from using § 341-D(3) to relax a permit term should they so choose.

or revoke licenses" (Board Br. 20) are actually cases where citizens requested enforcement, so those cases are inapt.[4]

The dam owners suggest prosecutorial discretion is implicated because modification "involves the exercise of the agency's coercive power over the licensee." Dam Owners Br. 29. "Coercive power" is exercised all the time by agencies in ways that are not enforcement actions: regulations are enacted, permits are issued, fees are charged, etc. E.g., Jackson, Pharmaceutical Product Liability May Be Hazardous To Your Health, 42 Am. U. L. Rev. 199, 216 (1992) ("[r]egulation of an industry is the coercive power to dictate corporate behavior"); Duffy, The Marginal Cost Controversy In Intellectual Property, 71 U. Chi. L. Rev. 37, 46 (2004) ("government has the coercive power to tax"); Teece and Sherry, Standards Setting and Antitrust, 87 Minn. L. Rev. 1913, 1919 (2003) (noting difference between "coercive power of regulations" and voluntary industry standards). All enforcement actions may be exercises of coercive power, but not all exercises of coercive power are enforcement actions.

The dam owners also state "[d]eciding whether to modify...a license involves a balancing of a number of factors that are within the technical

---

[4] Riverkeeper v. Collins, 359 F.3d 156, 166 (2d Cir. 2004) (Nuclear Regulatory Commission denial of citizen petition seeking enforcement action); Massachusetts Public Research Group, Inc. v. United States Nuclear Regulatory Commission, 852 F.2d 9, 10 (1st Cir. 1988) (NRC denial of "specific enforcement request"); Missouri Coalition for Environment v. Corps of Engineers, 866 F.2d 1025 (8th Cir. 1989) (Army Corps of Engineers denial of request to enforce CWA dredge and fill permit); City of Olmstead Falls v. U.S. Environmental Protection Agency, 233 F. Supp. 2d 890, 900-901, 904 (N.D. Ohio 2002) (same).

expertise of the Board" and involve ordering of priorities. Dam Owners Br. 29-30. Again, this is not different from deciding what regulations to enact, or what conditions to include in permits, or what fees to charge, and no one claims these types of activities are enforcement related.

The Board argues the criteria in § 341-D(3) serve to limit its authority to act, not its discretion. Board Br. 19. It argues once the criteria are applied and the Board decides it has authority to act, then there are no meaningful standards to apply in deciding whether it will in fact act. Board Br. 19. This is ludicrous. The criteria in § 341-D(3) are the very criteria the Board must apply in deciding whether to modify. For the FOMB Petition the Board did not hold a two-day adjudicatory hearing on four of the § 341-D(3) criteria just to determine whether it had authority to modify the certifications. Under the Board's view of § 341-D(3), after the hearing the Board could have concluded it did have authority to modify the certifications, and then decide not to modify them for reasons wholly unrelated to the subject of the hearing or the § 341-D(3) criteria. Thus, according to the Board, even if the Board found the certifications omit a standard required by law, the Board could have decided not to modify them because the Red Sox had lost that day. The Legislature did not intend to provide the Board with unfettered discretion "not to act" when petitioned to modify an illegal license, or a license that is threatening public health or the environment.

Lastly, the dam owners parse the wording of § 341-D and argue the Board has no mandatory duty to modify because § 341-D(3) uses the word "may" while other subsections of § 341-D use the word "shall." This argument flouts a basic principle of statutory construction:

> 'In interpreting a statute courts must presume that the Legislature did not intend . . . results inimical to the public interest.' Schwanda v. Bonney, 418 A.2d 163, 166 (Me. 1980). Moreover, the terms of the statute 'must be given a meaning consistent with the overall statutory context, and be construed in the light of the subject matter, the purpose of the statute, the occasion and necessity for the law, and the consequences of a particular interpretation.' Finks v. Maine State Highway Com'n, 328 A.2d 791, 798 (Me. 1974).

Director of the Bureau of Labor Standards v. Cormier, 527 A.2d 1297, 1301 (Me. 1987); Blair v. Halperin, 1981 Me. Super. LEXIS 53, at * 3 (March 18, 1981) (interpretation of statute not to be "in opposition of the public interest"). As discussed above and in Appellants' opening brief, § 341-D(3) and Rule 27 cannot be interpreted to allow the Board to continue defective water quality certifications. As this Court stated long ago in a divorce case, "To place any other construction on the statute would be subversive of its real purpose and might well result in infinite difficulty and evil." McIntire v. McIntire, 130 Me. 326, 330, 155 A. 731, 733 (1931).[5]

---

[5] The Board does not respond to Appellants' argument that even if modification is considered enforcement here, this Court should permit review of enforcement decisions that are tainted by errors of law. Appellants Br. 40-43. More specifically, the Board does not address Richert v. City of South Portland, 1999 ME 179, 740 A.2d 1000 or Touissant v. Harpswell, 1997 ME 18, 698 A.2d 1063) (both of which reviewed a decision not to enforce) and does not attempt to harmonize these cases with Herrle v. Town of Waterboro, 2001 ME 1, (con't)

B. Discretionary Decisions Are Reviewable.

Although the Board argues enforcement decisions are not reviewable, it does not argue all discretionary decisions are unreviewable. The Board does not respond to the cases cited in Appellants' opening brief at 25-26 in which courts reviewed non-enforcement discretionary decisions made under statutes using the word "may."

The dam owners contend the cases cited by Appellants involve statutes that in fact impose a mandatory duty on an agency to act. This is incorrect. For example, in USPIRG v. Board of Environmental Protection, 2004 Me. Super. LEXIS 189 (August 26, 2004), the court reviewed a DEP decision to issue a general wastewater discharge permit to salmon farms, even though in making that decision DEP had authority "to subjectively determine the most appropriate manner for controlling" the discharge. Id. at *10. Nor, for another example, is a municipality

---

763 A.2d 1159, as Appellants did. The dam owners' discussion of these cases (Dam Owners' Br. 34-35) is hard to understand, but it seems to distinguish Richert and Touissant on the ground that the Court did not discuss the jurisdictional issue of whether non-enforcement decisions are reviewable. This asserted distinction is unavailing. This Court has stated even when neither party raises the question of jurisdiction before the Law Court,

> it is our duty to assure ourselves of, and examine, our own jurisdiction before deciding the merits of an appeal. The Law Court on its own initiative must take note of matters raising questions as to its own jurisdiction. [Cites omitted].

Olsen v. French, 456 A.2d 869, 871 (Me. 1983). Thus, if there were a question as to the reviewability of the agency actions in Richert and Touissant, the Court would have raised it and addressed it.

ever required to grant a variance, though a denial of a variance is reviewable. E.g., Phaiah v. Town of Fayette, 2005 ME 20, 866 A.2d 863.

Any other result would lead to absurd situations. If an agency decided to deny all requests for discretionary action submitted on a Monday, and grant all requests for discretionary action submitted on a Friday, it could do so and these decisions could not be challenged in court.

II. THE BOARD'S DISMISSALS OF THE PETITIONS ARE FINAL AGENCY ACTION.

The Superior Court ruled the Board's dismissals are not final agency action because Petitioners can always file another petition. The Board repudiates, and the dam owners do not defend, the Superior Court's reasoning. Board Br. 23-24 ("The Board acknowledges that its dismissals of the petitions were final in the sense that there was no further recourse before the Board on those petitions. The fact that a citizen may re-petition the Board in the future does not render the Board's dismissal of a petition a nonfinal decision.").[6] Instead, Appellees argue the Board dismissals are nonfinal for a different reason (one not adopted by the Superior Court): the Board's decisions do not affect Petitioners legal rights, duties or privileges, as required by the definition

[6] Real-party-in-interest FPL Energy Maine Hydro LLC certainly is in no position to argue otherwise. In FPL Energy Hydro LLC v. Department of Environmental Protection, 2007 ME 97, ¶ 6, 926 A.2d 1197, FPL appealed a Board decision denying its application for a water quality certification even though the denial was without prejudice to apply again.

of "final agency action" in 5 M.R.S.A. § 8002(4). They argue only the dam owners' legal rights, duties or privileges can be affected. Appellees are wrong.

Appellants, users of the publicly owned rivers at issue, are the intended beneficiaries of the water quality certifications. The purpose of the certifications is to safeguard water quality standards for members of the public like Appellants. Appellants have the right to object to certifications. See e.g., Save Our Sebasticook v. Board of Environmental Protection, 2007 ME 102, 928 A.2d 736, 744-746; FPL v. DEP, 2007 ME 97, 926 A.2d 1197, 1200. The Legislature and the Board provided Appellants with the right to petition the Board to modify certifications. § 341-D(3); Rule 27.

But that is not all. Appellants have the right to enforce water quality certifications directly against the dam owners. The Clean Water Act authorizes citizens to bring suit in federal District Court against any person who violates a certification. 33 U.S.C. § 1365(a)(1)(ii)(A) and (f)(5) (not cited by Appellees).

Appellees make two points that are unavailing. First, they contend since the Board has unfettered discretion to do what it wants with the Petitions, Petitioners have no right to any particular outcome. Board Br. 25; Dam Owners Br. 18-19. As discussed above and in Appellants' opening brief, the Board in fact does not enjoy unfettered discretion.

Second, Appellees contend one's legal rights, duties or privileges cannot be affected by a decision that preserves the status quo. Board Br. 24; Dam Owners Br. 18. This is obviously untrue. Every time a zoning board of appeals denies a variance the status quo is preserved, and courts regularly review those decisions. E.g., Phaiah v. Town of Fayette, 2005 ME 20, 866 A.2d 863; Perrin v. Town of Kittery, 591 A.2d 861 (Me. 1991). Similarly, an unsuccessful bidder for a State contract, whose status quo is also preserved, can challenge the bidding process. Brown v. State Dept. of Manpower Affairs, 426 A.2d 880, 883-884 (Me. 1981). Any other result would cut off the appeal rights of those who have been denied a license.

Of course the Board's decisions here do not preserve the status quo. In the case of the Messalonskee Petition, Mr. Watts sought to prevent construction of a dam without fish passage. The Board denied Mr. Watts' Petition, and the dam was built without passage, thereby blocking a formerly free-flowing stretch of the river and destroying fish habitat. As for the other rivers, the status of eel and other fish populations is not static; it is constantly worsening due to the lack of passage.[7]

[7] The dam owners argue the "no adequate remedy" exception to the final agency action rule would not apply if the Board dismissals would be considered nonfinal because Appellants can file a complaint with FERC under 18 C.F.R. § 385.206. Dam Owners Br. 21. That regulation establishes a procedure to file a complaint with FERC about compliance with FERC laws and permits, it has nothing to do with changing the terms of a water quality certification or even amending a FERC license.

III. THERE IS NO SEPARATION OF POWERS ISSUE.

The Board's argument that judicial review of its dismissals would violate the separation of powers principle is based on the premise that the dismissals were decisions not to take enforcement action. As set forth above, the Board's decisions were licensing decisions, not enforcement decisions.

The real separation of powers problem arises from Appellees' arguments. Appellees do not like the regulatory scheme the Legislature and (ironically) the Board itself created when it established a procedure for citizens to seek modification of licenses. But that is a policy dispute. If the Court were to ignore the scheme both the Legislature and the Executive branches designed, that would violate separation of powers.

IV. APPELLANTS HAVE STANDING.

The dam owners argue Appellants do not have standing because they are not "aggrieved" by the Board's decisions. This argument is makeweight.

This Court held "a 'person aggrieved' has standing to seek review of an administrative action and simultaneously vindicate public rights where such person has suffered 'particularized' injury. In the Matter of Elizabeth Lappie, Me., 377 A.2d 441 (1977)." Heald v. School Administrative Dist. No. 14, 387 A.2d 1, 3 (Me. 1978). It is established that harm to aesthetic interests "establishes a direct and personal injury." Fitzgerald v. Baxter State Authority, 385 A.2d 189, 197 (Me.

1978). Courts regularly hear citizen appeals of licensing matters. E.g., USPIRG v. BEP, 2004 Me. Super. LEXIS 189 (appeal of salmon farm wastewater discharge permit); Natural Resources Council of Maine v. Maine Land Use Commission, 2001 Me. Super. LEXIS 148 (August 10, 2001) (appeal of approval to build boat launch); Maine People Organized to Win Environmental Rights v Department of Environmental Protection, 1991 Me. Super. LEXIS 10 (January 4, 1991) (appeal of approval to expand landfill). DEP takes the position "'aggrieved person' is broadly defined..." FPL v. DEP, 2006 Me. Super. LEXIS 130,* 20 (May 25, 2006), aff'd FPL Energy Hydro LLC v. Department of Environmental Protection, 2007 ME 97, ¶ 6, 926 A.2d 1197 (citizens appealed issuance of water quality certification to the Board).

At least for purposes of this appeal, the dam owners do not dispute the contention that dam operations cause aesthetic and economic harm to Appellants.[8] Rather, the dam owners argue the Board's decisions to

---

[8] Nor could they. Footnote 7 in Appellants' opening brief, pp. 7-8 provides record cites supporting this contention. Appellants will not belabor this, but to provide an example of the evidence on this point, Appellant Ed Friedman testified in an affidavit:

> I regularly paddle and motor on Merrymeeting Bay, on the Kennebec and on the Androscoggin and intend to continue so doing. I also am a Maine Guide and take people on kayak tours of the Bay and offer paddle instruction. I observe many of the various diadromous fish including those subject to the Petition. My paddling experience is greatly diminished knowing there are less of these fish than there would otherwise be due to the effect of dams, including the four on the Kennebec at issue here.

Docket Entry 9/26/07, App. at 19 (Friedman Affidavit ¶ 12, attached as Exhibit B to the Nicholas Affidavit submitted in opposition to the motion to (con't)

deny the Petitions were not themselves the cause of any injury because the status quo was preserved. Dam Owners Br. 39. This is illogical. The Board was faced with a choice it had to make by virtue of Rule 27: modify the certifications and prevent the slaughter of indigenous fish, or continue the certifications as is and allow the fish to be killed. As a direct consequence of the Board's decision not to modify, fish are being killed, Appellants aesthetic, recreational and economic interests are being harmed, and Appellants are "aggrieved" and have standing to bring this case.

Cases cited by Appellees do not require any other result. In Storer v. Department of Environmental Protection, 656 A.2d 1191, 1192 (Me. 1995), the court ruled that an applicant for a permit did not have standing because he received the permit he appealed and thus was not harmed by, but rather benefited from, agency action (he wanted to dispute the Board's jurisdiction). Other cases involved challenges to an enforcement decision, which is not at issue here. Linda R.S. v. Richard D., 410 U.S. 614 (1973) (challenge to prosecutor's enforcement policy);

---

dismiss the Friends of Merrymeeting Bay 80C Appeal). For another example, Mr. Friedman testified at the adjudicatory hearing on the Kennebec Petition:

> The wholesale slaughter of eels and other migratory fish by dams adversely affects my livelihood [a kayak tour and instruction business] which is based in large part on a healthy population of native fish present in this unique system. At times my clients and I may fish in the Bay, and again, an absent or impaired fish population deprives or diminishes this right.

Direct testimony of Ed Friedman, ¶ 37 (attached as Ex. A to the Nicholas Declaration in opposition to the motion to dismiss the FOMB 80C appeal, docket sheet entry September 26, 2007.

Smith v. Shook, 237 F.3d 1322 (11th Cir. 2001) (challenge to decision not to proceed with attorney disciplinary action); Great Hill Fill & Gravel v. Board of Environmental Protection, 641 A.2d 184 (Me. 1994), (challenge to weak enforcement order).

V. THE BOARD HAS THE POWER TO MODIFY CERTIFICATIONS.

The dam owners argue these cases should be dismissed because the Board does not have the power to modify water quality certifications and thus Appellants fail to state a claim. The Board does not take this position before the Court. In fact, the Board stated in a previous water quality certification proceeding that it need not rely on a re-opener clause to modify a certification because it can always modify under § 341-D(3). FPL Energy Maine Hydro LLC Water Quality Certification of Gulf Island-Deer Rips Hydro Project, #L-17100-33-o-N, § 11.n. (attached as Ex. D to the Nicholas Affidavit submitted in opposition to the motions to dismiss the FOMB 80C Appeal, Docket Entry 9/26/07 [App. 19]); see also Board Dismissal of Watts Petition, App. 80 ("ability of Board to 'reopen and modify an existing license is a powerful tool'"). We urge the Court to reach this question.

EPA regulations expressly allow certifying state agencies to modify water quality certifications. 40 C.F.R. § 121.2(b). While the dam owners suggest this regulation does not apply to certifications for federal licenses that have already been issued, by its plain language the regulation is not so limited. Moreover, the dam owners do not cite, and Appellants are

unaware of, any authority suggesting that the regulation is limited in its applicability.

State law also expressly allows modification of water quality certifications. 38 M.R.S.A. § 341-D(3); Rule 27; Board Rule Ch. 2, I.J. (App. 128) (definition of "license" includes DEP-issued certifications).

Moreover, as discussed above and in Appellants' opening brief, this Court has ruled the State has the implied authority to include re-opener clauses in certifications, which "is essential because if the conditions [in a certification] are not as effective as planned, the water quality standards will not be met and the BEP's goal to 'restore and maintain the chemical, physical and biological integrity of the State's waters...' will not be achieved during the forty-year term of the FERC license." S. D. Warren, 2005 ME 27, ¶ 28, 868 A.2d at 219-220. The State could not have less authority to modify a certification via the express provisions of § 341-D(3) and Rule 27 than it does via the implied authority to include re-opener clauses. Indeed, when petitioned to do so, the Board has the mandatory duty to modify certifications when necessary to protect water quality standards. In short, the State clearly has the power to modify a certification when it turns out the certification is a "license to ill."

The dam owners twist this Court's statement in S.D. Warren that re-openers are "essential" to suggest this Court ruled certifications can be modified only with re-opener clauses. The Court made no such ruling. What this Court found "essential" was the ability to modify

certifications to safeguard water quality, not a restriction on the method to accomplish a modification. Even the dam owners cite a FERC decision that incorporated a modified water quality certification into a license absent a re-opener. Public Utility District No. 1 of Pend Oreille County, 112 FERC ¶ 61,055 (July 11, 2005), at 61,412, n.50.

The dam owners' suggestion that the Board cannot modify a certification because only FERC can modify a FERC license makes no sense: (1) there is no law prohibiting a FERC license from being amended to incorporate a modified certification, and the dam owners do not contend otherwise; (2) EPA regulations expressly contemplate implementation of a modified certification, 40 C.F.R. § 121.2(b); and (3) FERC does in fact incorporate a modified certification in a license, PUD No. 1 v. Pend Oreille Cty., 112 FERC ¶ 61,055.

Lastly, it should be noted water quality certifications impose ongoing independent obligations. DEP and the Board have the power to enforce their own certifications, even if they do not have the power to enforce the terms of a FERC license. The terms of a certification are also enforceable by citizens under the citizen suit provision of the CWA. The independent nature of certifications is a further indication that the Board has the ability to modify them.[9]

---

[9] In a series of confusing footnotes, the dam owners argue all three appeals are barred by res judicata. They seem to contend that each Appellant should have also appealed all the other cases and the first Androscoggin Petition, and *since* they did not res judicata applies. This game of "gotcha" should be rejected. Each Petition was ruled on separately by the Board; there is no (con't)

CONCLUSION

For the reasons set forth above and in Appellants' opening brief, the dismissals of the 80C actions should be reversed, and the cases should be remanded to the Superior Court for determinations on the merits.

Dated: May 3, 2008

David A. Nicholas
Bar No. 010049
20 Whitney Road
Newton, Massachusetts 02460
(617) 964-1548

Douglas H. Watts
131 Cony Street
Augusta, Maine 04330
(207) 622-1003

Pro Se

Bruce M. Merrill
Bar No. 7623
225 Commercial Street Suite 501
Portland, Maine 04101
(207) 775-3333

Attorneys for Ed Friedman and
Friends of Merrymeeting Bay

---

obligation for, say, Mr. Watts to have appealed the FOMB Petition regarding dams on the Kennebec, even if he was a co-petitioner, in order to preserve his right to appeal his later-filed Petition regarding the dam on the Messalonskee. Nor is Mr. Friedman barred because he filed two Petitions regarding the Androscoggin, the second of which (on appeal here) was dismissed by the Board on the ground that it contained no new evidence. The finding of no new evidence is disputed and itself is reviewable. Even apart from that, it would be fundamentally unfair to bar Mr. Friedman from appealing a second Androscoggin petition when Judge Marden had ruled in Watts v. BEP that a new petition could be filed. "[R]es judicata is a judge-made doctrine resting on considerations of policy, and doubtless there is room for equitable adjustments.' Diversified Foods, Inc. v. First Nat'l Bank of Boston, 985 F.2d 27, 31 (1st Cir. 1993), cert. denied, 509 U.S. 907, 113 S.Ct. 3001, 125 L.Ed. 2d 694." Scott Dugas Trucking and Excavating, Inc. v. Homeplace Building and Remodeling, Inc., 1994 Me. Super. LEXIS 175, *17 (April 28, 1994).

CERTIFICATE OF SERVICE

I certify that on May 3, 2007 I caused Appellants' Joint Reply Brief to be served on the following counsel of record by first class mail at the following addresses:

Janet M. McClintock, Esq.
Assistant Attorney General
6 State House Station
Augusta, Maine 04333-0006

Matthew Manahan, Esq.
Pierce Atwood
One Monument Square
Portland, Maine 04101

Jeffrey Thaler, Esq.
Bernstein, Shur, Sawyer & Nelson
P.O. Box 9729
Portland, Maine 04101-9729

David Swetnam-Burland, Esq.
Brann & Isaacson
184 Maine Street
Box 3070
Lewiston, Maine 04243

Kelly Boden, Esq.
Verrill Dana LLP
One Portland Square
Portland, Maine 04112-0586

Dated: May 3, 2008

David A. Nicholas