

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-07-10

FRIENDS OF MERRYMEETING BAY,)	
)	
Petitioner)	RESPONDENT MAINE BOARD
)	OF ENVIRONMENTAL
v.)	PROTECTION'S MOTION TO
)	DISMISS RULE 80C APPEAL
MAINE BOARD OF)	AND INCORPORATED
ENVIRONMENTAL PROTECTION,)	MEMORANDUM OF LAW
)	
Respondent)	

INTRODUCTION

Respondent Maine Environmental Protection ("Board") hereby moves, pursuant to M.R. Civ. P. 12(b)(1), to dismiss the Rule 80C appeal filed in the above matter. The Board requests that the Court dismiss the appeal on the grounds that the Court lacks jurisdiction to hear the appeal of the legally discretionary decision of the Board of Environmental Protection not to modify, suspend or revoke currently valid water quality certifications issued by the Department of Environmental Protection ("Department"), and that the Petitioner Friends of Merrymeeting Bay ("FOMB") lacks standing to bring the appeal.

This matter involves a decision by the Board not to modify water quality certifications. The Board's examination of the existing certifications was prompted by a petition filed by FOMB.¹ The petition was filed pursuant to 38 M.R.S.A. § 341-D(3) (2001) and the Board's regulations, 06-096 CMR Chapter 2, § 27, resting in the Board the sole authority to take action to

¹ A second petition seeking modification of the same water quality certifications was filed by Douglas H. Watts. Mr. Watts has filed a Rule 80C appeal challenging this same Board decision in Kennebec County Superior Court. *Douglas Harold Watts v. Maine Board of Environmental Protection*, AP-07-50 (Me. Super. Ct. Kenn. Cty.). A motion to change venue to the Sagadahoc County Superior Court is pending in that action.

modify, suspend or revoke water quality certifications issued by the Department in connection with the Federal Energy Regulatory Commission's ("FERC") licensing of four hydroelectric projects on the Kennebec River. The petition was filed with the Board on September 29, 2005. After holding a public hearing on the matter, the Board exercised its discretion by deciding not to modify the certifications in issue.

The decision whether to reopen and modify a permit or certification is one the Legislature has left to the sole discretion of the Board. This appeal should be dismissed, as was the recent appeal of the Board's decision not to modify water quality certifications issued to hydroelectric projects on the Androscoggin River, because the Court "is without power to review what is statutorily a discretionary decision entrusted to the Board." *Douglas Watts v. Maine Board of Environmental Protection*, AP-06-19 (Me. Super. Ct. Kenn. Cty., December 6, 2006) (decision attached as Exhibit A). In addition, for all the reasons stated below, FOMB lacks the standing necessary to bring this appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For purposes of this motion, the facts are undisputed.

A. Relevant Statutes and Regulations.

Pursuant to section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, any applicant for a federal license that involves any activity that may result in any discharge into navigable waters, including a FERC license for the construction or operation of a hydropower project, must obtain a certification from the state (in this case the Board) that the activity will comply with that state's water quality standards. *Id.* Where a water quality certification is issued, it must contain conditions to provide reasonable assurance that the project will comply with water quality standards. *Id.* The conditions of the state certification become a condition of the federal permit

for which it was issued. *Id.* The hydroelectric projects in issue each currently have valid water quality certifications issued by the Department.² FERC licenses, and the water quality certifications issued in connection with them, are valid for between 30 and 50 years. 16 U.S.C. § 808(e).

Pursuant to the Department's enabling statute, and after notice and opportunity for hearing, the Board "may modify ... any license, or may issue an order prescribing necessary corrective action, or may act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license," where it finds that certain grounds exist.³ 38 M.R.S.A. § 341-D(3)(A)–(G); 06-096 CMR Chapter 2, § 27(A)–(H). By the clear terms of the statute, the Board's decision whether to take such action is wholly discretionary ("the *Board may* modify ... any license"). "License" is defined to include any order, approval or certification. *Id.* See also 06-096 CMR Chapter 2, § 1(J). The statute does not provide a right to appeal the discretionary decision of the Board.

The Board's rules provide that "*any person, including the Commissioner of the Department, may petition the Board to revoke, modify or suspend a license.*" 06-096 CMR

² The projects in issue are Lockwood Hydro Project, owned by Merimil Limited partnership; Hydro-Kennebec Project, owned by Hydro Kennebec Limited Partnership; and the Shawmut Hydro Project and Weston Hydro Project, owned by FPL Energy Maine Hydro LLC.

³ Pursuant to 38 M.R.S.A. § 341-D(3), a license may be modified, revoked or suspended where:

- A. The licensee has violated any condition of the license;
- B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
- C. The licensed discharge or activity poses a threat to human health or the environment;
- D. The license fails to include any standard or limitation legally required on the date of issuance;
- E. There has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license;
- F. The licensee has violated any law administered by the department; or
- G. The license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990.

Chapter 2, § 27 (emphasis added). The petition must describe the factual basis for the petition, including what evidence will be offered to support the petition if the Board decided to proceed to hearing. *Id.* Following the receipt of such a petition, the Board “shall dismiss the petition or schedule a hearing on the petition.” *Id.* Following any hearing scheduled by the Board, the Board “may modify in whole or in part any license” when it finds that at least one of the statutory grounds for such action exists. *Id.*

B. Procedural History.

FOMB filed a petition with the Board on September 29, 2005 requesting that the Board modify the water quality certifications issued for four projects on the Kennebec River to provide immediate upstream and downstream passage for Atlantic salmon, alewife, American shad, blueback herring, and American eel. The certifications and FERC licenses issued for the dams require the phased installation of upstream and downstream passage facilities for these same species. Board Decision, dated July 5, 2007, at 2 – 3 (attached as Exhibit B).⁴

At its regularly scheduled meeting on January 19, 2006, the Board heard from FOMB, the owners of the dams, and Department staff, who also act as staff to the Board, and voted in its discretion to schedule a public hearing on the petition. Exhibit B, App. At 2. A public hearing to receive testimony from the parties and the general public was held on March 15 and 16, 2007 in Augusta. *Id.* at 5. Following that hearing, and after considering the testimony and written briefs of parties, the Board exercised the discretion rested in it by 38 M.R.S.A. § 341-D(3) and decided not to modify the certifications in issue. Exhibit B. Specifically, the Board decided, in its discretion, that the record developed at the hearing did not provide sufficient factual basis that

⁴ Appended to the 10 page Board Decision is a Summary of Petitions, Petition Proceedings, Public Hearing Testimony, and Post-Hearing Briefs, prepared by Dana Murch, Department of Environmental Protection, dated June 21, 2007, which is incorporated by reference into the Decision at n. 1.

would support modification of the certifications with reference to the standards listed in the statute and rules. Exhibit B at 4 -9.

C. Douglas Watts v. Maine Board of Environmental Protection.

In a similar case, on December 6, 2006, the Superior Court (Marden, J.) granted the Board's motion to dismiss a Rule 80C appeal challenging the Board's discretionary decision not to modify water quality certifications issued to hydroelectric projects on the Androscoggin River. Exhibit A. While the Board made a number of arguments in support of its motion, including that the petitioner lacked standing and that any appeal would violate the Separation of Powers clause of the Maine Constitution, the court found it need not reach these issues because it agreed that the court lacked jurisdiction to hear the appeal. Specifically, the court relied on the fact that the statute specifically provides that the Board "may modify in whole or in part any license," 38 M.R.S.A. § 341-D(3) (emphasis added). Exhibit A at 3. The Court likened the Board's discretionary decision to reopen and modify a certification to a decision to bring an enforcement action. Exhibit A at 3. The court found that the Board's decision not to grant a hearing and instead to dismiss the petition

amounts to a screening function, analogous to the discretion granted to prosecutors on whether or not to pursue civil or criminal charges. This function exists so that the Board (as does a prosecutor) can weigh the evidence in favor of proceeding further against the costs of proceeding and likelihood of petitioner's success in the complained of matter.

Id. The court stated that the Board acts as a "gatekeeper to ensure that thoroughly investigated final licenses are only disturbed under certain circumstances," and that in this case, after considering the information proffered by petitioners, the Board "declined to take further steps to pursue the petitioner's allegations." *Id.* "This decision," the court said, "was prosecutorial in nature and a legitimate exercise of the Board's enforcement discretion." *Id.* at 4. The court

found that while the Board is charged with evaluating the merits of each petition, it will necessarily deny most petitions, reserving public hearings only for those select petitions which raise enough evidence as to call into question the reasoning for granting the license.” *Id.* The court noted that under the Board’s rules *any* person may petition the Board to modify a license, making it more important for the Board to exercise its discretion in screening and evaluating petitions. *Id.* citing 06-096 CMR Chapter 2 § 27. Finally the court held that the Board’s decision was not “final agency action,” that could be appealed under 38 M.R.S.A. § 346 (2001 & Supp. 2006) and 5 M.R.S.A. § 11001(1) (2002), any more than could an enforcement decision by a state agency. Exhibit A at 6. Instead, the court found that the decision was a “wholly discretionary screening decision entrusted to the Board.” *Id.* The court found therefore, that it “is without power to review what is statutorily a discretionary decision entrusted to the Board.” Exhibit A at 7.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO HEAR THIS APPEAL.

A. The Superior Court Lacks Jurisdiction Because There is No Statutory Right of Appeal of the Decision of the Board Not to Take Further Action to Modify the Certifications, Which Decision Is Wholly Within the Discretion of the Board.

The right to review executive action is statutory. *Sears, Roebuck and Company v. City of Portland*, 144 Me. 250, 255, 68 A.2d 12, 14 (1949). Where there is no statutory right to a judicial appeal of executive action, the appeal should properly be dismissed. *Dumont v. Speers*, 245 A.2d 151, 155 (Me. 1968) (motion to dismiss granted where decision of Commissioner of Inland Fisheries and Wildlife not to order the construction of a fishway upon petition of citizen group was discretionary and no right of appeal from the decision was provided by statute).

There is no statutory right to review the decision of the Board whether to take action to modify, revoke or suspend a certification. *Watts v. Board of Environmental Protection*, AP-06-19 (Me. Super. Ct. Kenn. Cty., December 6, 2006) (Marden, J.). By the terms of the statute, the Board's decision in this case – declining to modify water quality certifications – was wholly within the discretion of the Board. *Id.* at 6. Section 341-D(3) provides that the Board, upon notice and opportunity for hearing “may” modify, or act to revoke or suspend a license whenever it finds that certain criteria are met. 38 M.R.S.A. § 341-D(3). Section 341-D(3) does not provide a right of appeal where the Board determines not to modify, suspend or revoke.

The fact that the Board scheduled a public hearing in this matter does not make its ultimate decision less discretionary. The purpose of the hearing is to develop a record that might support a finding that the statutory grounds for reopening a license exist. The required grounds listed in statute serve to limit the Board's discretion, not to compel action if they exist. “After a hearing, the Board *may* modify in whole or in part any license.” 06-096 CMR Chapter 2, § 27 (emphasis added). In this case, the Board determined that none of the four grounds invoked by FOMB were supported by the record. Exhibit B at 4 - 9. Even if the Board had found that the statutory grounds for modifying the certifications was supported by the factual record developed at the hearing, there is no requirement in 38 M.R.S.A. §341-D(3) that the Board in fact modify the certifications. The Board could determine for other reasons that it is not appropriate to modify the certifications at this time. Compare this to the statutory provision regarding Board assumption of jurisdiction of a license application filed with the Commissioner. 38 M.R.S.A. §341-D(2). Any interested party may request that the Board assume jurisdiction of an application and, if the Board finds that the application meets one of the four statutory criteria listed, it “shall” assume jurisdiction over and decide the license application. If the Legislature

had wanted to compel the reopening of a long-settled license if certain findings are made, it could have done so. 38 M.R.S.A. §341-D(3) contains no such mandate but leaves the reopening of a license completely within the discretion of the Board.

Likewise the discretionary decision of the Board is not appealable as a “final agency action” under 38 M.R.S.A. § 346 and 5 M.R.S.A. §§ 8002(4) and 11001(1) (2002 & Supp. 2006). *Watts v. Board of Environmental Protection*, AP-06-19 (Me. Super. Ct. Kenn. Cty., December 6, 2006) (Marden, J.), Exhibit A at 5 – 6. “Final agency action” is defined as a decision which “affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency.” 5 M.R.S.A. 8002(4). Section 1101(1) of the Administrative Procedure Act provides that “any person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court.” 5 M.R.S.A. § 11001(1); M.R. Civ. P. 80C.⁵ In this case, none but the dam owners/certification holders themselves had any “legal rights, duties or privileges” implicated by the Board’s action, and the Board’s decision not to modify the certifications did not affect these. The Board neither granted nor took away any licenses or certifications, nor promulgated any regulation.

Nor was the Board’s determination “final” in that it did not preclude some action in the future if the law or conditions change. Exhibit B at 1; *Watts v. Board of Environmental Protection*, AP-06-19 (Me. Super. Ct. Kenn. Cty., December 6, 2006) (Marden, J.) at 6. The Board simply declined to exercise its discretion to take further steps at this time towards

⁵ Section 11001(2) provides a similar right of review where an agency fails or refuses to act. 38 M.R.S.A. § 11001(2) (2002). A decision not to take a requested action, such as the decision of the Board here, is not the same as a “failure or refusal to act,” as that phrase is used in section 11001(2). See *Lingley v. Maine Workers’ Compensation Board*, 2003 ME 32, ¶ 9, 819 A.2d 327, 330 – 331 (2003) (there was no failure or refusal to act, pursuant to 38 M.R.S.A. § 11001(2), where motion before administrative board to adopt rule failed to pass).

modifying, revoking or suspending the certifications because it lacked sufficient basis to do so, an action akin to an unappealable exercise of prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion); *see also State v. Pickering*, 462 A.2d 1151, 1161 (Me. 1983) (where the Law Court observed that the State by necessity has tremendous discretion in its decision regarding prosecution for both civil and criminal violation, and that such prosecutorial discretion plays a critical role within our system of law in maintaining flexibility and sensitivity).

The fact that the Board's rules permit persons to petition the Board to exercise its discretion to initiate modification proceedings does not make the decision to do so any less discretionary or any more subject to appeal. In an analogous area, the Administrative Procedure Act permits any person to petition an agency for the adoption or modification of a rule. 5 M.R.S.A. § 8055 (2002). As distinguished from this case, that statute itself specifically provides that if 150 or more registered voters sign a petition to adopt or modify a rule, the agency *must* initiate appropriate rulemaking proceedings. 5 M.R.S.A. § 8055(3). Even in that case, however, an agency's decision whether to adopt a rule is wholly discretionary, unless specifically required by statute, and thus not appealable. *See* 5 M.R.S.A. § 8058 (2002); *Lingley*, 2003 ME 32, ¶¶ 6, 7; 819 A.2d at 330. Given that there is no statutory right of appeal from the discretionary decision of the Board in this matter, the Superior Court lacks jurisdiction to hear an appeal of that decision. The appeal filed in this matter should therefore be dismissed.

B. Even if the Decision of the Board Was a “Final Agency Action” Under the APA, Any Appeal Would Violate the Separation of Powers Clause of the Maine Constitution, Me. Const. art III, § 2, and Therefore Should be Dismissed.

Even if the Board’s decision in this case could be considered “final agency action,” pursuant to 5 M.R.S.A. § 8002(4), “it does not follow that the action is subject to judicial review.” *New England Outdoor Center v. Commissioner of Inland Fisheries and Wildlife*, 2000 ME 66, ¶ 10, 748 A.2d 1009, 1013 (2000). Article III, section 2 of the Maine Constitution provides that “no person or persons, belonging to one of [the legislative, executive, or judicial] departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.” Me. Const. art III, § 2. In addressing questions that implicate the separation of powers clause, the courts ask “whether ‘the power in issue [has] been explicitly granted to one branch of state government, and to no other branch?’” *Id.* ¶ 9, 748 A.2d at 1013 (quoting *State v. Hunter*, 447 A.2d 797, 800 (Me. 1982)). Thus, while the language of 5 M.R.S.A. § 8002(4), defining final agency action, and 5 M.R.S.A. § 11001(1), granting the right to appeal such actions in Superior Court, is broad, it “must be read in light of the constitutional doctrine of separation of powers.” *Id.* ¶ 10, 748 A.2d at 1013 (quoting *Hunter*, 447 A.2d at 800). “Some executive action is by its very nature not subject to review by an exercise of judicial power.” *Id.*

In *New England Outdoor Center*, the Law Court held that a decision by the Commissioner of the Department of Inland Fisheries and Wildlife closing an investigation of certain whitewater outfitters that was initiated by a third party complaint and deciding not to pursue a license revocation was within the discretion of the executive branch. *Id.* ¶ 12, 748 A.2d at 1014. The Court further held that if a court were to order the Commissioner to continue its investigation or initiate license revocation, it would “improperly interfere[e] with the agency’s

discretionary power,” and violate separation of powers. *Id.* The Court thus upheld the Superior Court’s judgment of dismissal on the ground that it was within the discretion of Commissioner not to pursue license revocation actions. *Id.* ¶ 1, 748 A.2d at 1011.

The authority to modify or take action to suspend or revoke a water quality certification, pursuant to 38 M.R.S.A. § 341-D(3), is similarly explicitly provided to the executive branch, in this case the Board, to exercise in its discretion. Any appeal of the Board’s decision not to modify, suspend or revoke a license would be “inconsistent with settled principles of the separation of powers,” *id.*, and should therefore be dismissed. *See also Bar Harbor Banking and Trust Company v. Alexander*, 411 A.2d 74, 76 (Me. 1980) (Law Court dissolved a Superior Court order restraining the Superintendent of Consumer Credit from ordering an investigatory hearing on the grounds that it violated separation of powers).

The correctness of the Board’s position here becomes apparent when one considers the remedy petitioner seeks in this case. The Court is being asked to review the legal and factual sufficiency of the Board’s decision not to reopen a certification. If the Court were to decide in the petitioner’s favor, the remedy would be to order the Board to exercise its discretion in favor of reopening when the Board has concluded that there is no basis to do so. The Law Court has held that the courts may neither enjoin an agency investigatory hearing, *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 75 (Me. 1980), nor order an executive agency to conduct one when it is within its discretion whether to do so, *New England Outdoor Center*, 2000 ME 66, 748 A.2d 1009. Any remedy the Court could grant in the current appeal would similarly violate the principle of separation of powers.

II. EVEN IF THE BOARD'S DECISION TO TAKE NO FURTHER ACTION TO MODIFY THE CERTIFICATION WAS FINAL AGENCY ACTION, PETITIONER HAS NOT DEMONSTRATED STANDING SUFFICIENT TO APPEAL THAT DECISION.

Only persons "aggrieved" by a final agency action are entitled to judicial review, pursuant to 5 M.R.S.A. §11001(1). One is "aggrieved" if one can demonstrate a direct and particularized injury. *Heald v. SAD No. 74*, 387 A.2d 1, 3 (Me 1978). In contrast, "any person" may petition the Board to modify, suspend or revoke a license. 06-096 CMR Chapter 2, § 27. FOMB, therefore, was never required to show, and the Board did not find, that it was an "aggrieved party" as a basis for filing the petition. Without such a finding by the Board, or competent evidence of FOMB's standing before this Court, the appeal must be dismissed for lack of standing.

FOMB has not shown, and cannot show, as a matter of law, the legal interest necessary to establish standing to appeal a decision of the Board not to reopen a license or certification belonging to another party. The decision to disturb a license or certification that has become final and been in effect for almost 10 years is an extraordinary action that can only be undertaken under limited circumstances. The reasons for so acting are generally punitive in nature, but include mistakes of law at the time of issuance, changes in circumstances, and the presence of some threat to human health or the environment. The decision whether to take this extraordinary action is within the Board's investigatory and enforcement authorities as opposed to its licensing or permitting authorities. The Board's decision not to modify the water quality certifications in this case was akin to an exercise of prosecutorial discretion and is in effect an exercise of its enforcement discretion.

It is axiomatic that only one who is threatened with prosecution or enforcement has sufficient interest to support standing to appeal a decision of an agency that acts in an

enforcement or prosecutorial capacity. Thus the United States Supreme Court has held that “a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.” *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973). Similarly, one filing a grievance with state bar counsel involving alleged wrongdoing of a lawyer has no standing to appeal bar counsel’s decision not to proceed with disciplinary action. *Smith v. Shook*, 237 F.3d 1322, 1324 (11th Cir. 2001); *Cotton v. Steele*, 587 N.W.2d 693, 698 – 699 (Neb. 1999); *Starr v. Mandanici*, 152 F.3d 741, 748 (8th Cir. 1998); *Doyle v. The Oklahoma Bar Association*, 998 F.2d 1559, 1566 – 1567 (10th Cir. 1993).

This principle extends to enforcement actions taken by the Board. In *Great Hill and Gravel, Inc. v. Board of Environmental Protection*, 641 A.2d 184 (Me. 1994), the petitioner claimed that it was adversely affected by the Board’s approval of consent agreements entered between the DEP and landowners who operated a sand and gravel pit next to the petitioner’s property. The Law Court held that petitioner did not have standing to review this exercise of prosecutorial discretion by the Board because its “legal rights and responsibilities were unchanged by the Board’s decision,” notwithstanding that petitioner was an abutter and that petitioner alleged that the consent orders indirectly affected its business. *Id.*

A third party does not have the kind of legal interest necessary to justify a lawsuit based on enforcement or non-enforcement with respect to the license of another when that decision is given to an agency to be made in its sole discretion. As the Tenth Circuit stated in the analogous case of disciplinary decisions by state bar counsel, “[s]uch a right is not recognized in the law and, indeed, it would be contrary to public policy to allow every private citizen to force the prosecutor to proceed with a case in pursuit of a private objective.” *Doyle*, 998 F.2d at 1567.

The petition filed by FOMB that initiated the Board's consideration of the issue of modification may have been the occasion for that consideration but it created no right of appeal in the petitioner, who did not even need to show that he was aggrieved to bring such a petition. *See* Chapter 2, § 27 (“any person, including the Commissioner, may petition the Board to revoke, modify or suspend a license”). Like the decision of a disciplinary board or a prosecuting attorney, the decision of the Board here is made by the Board on the Department's behalf for the benefit of the public, not specific individuals. *Cf.*, *Doyle*, 998 F.2d at 1567–1568 (“[t]he district attorney is sworn to uphold the law generally and does not have a duty to enforce the law for the purpose of providing satisfaction to a third person who has no direct legal interest”). The Board's decision with regard to the reopening of a license or a certification involves no other persons than the certification holders against whom the action may be taken. As bringing a complaint gives a complainant no right to appeal a decision by the Department not to pursue enforcement action or a prosecutor's decision not to bring a criminal prosecution, so no right to an appeal arises from petitioner having filed a petition with the Board here. FOMB, therefore, like a third party in an attorney disciplinary proceeding “has no more standing to insert [itself] substantively into a license-based discipline system than [it] has to compel the issuance of a license.” *Id.*

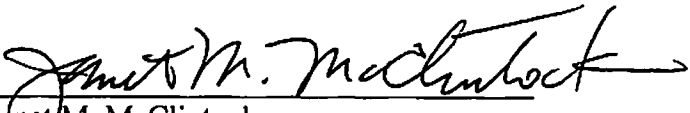
CONCLUSION

For all the reasons set forth above, Respondent Board of Environmental Protection respectfully requests that the Court grant its motion to dismiss the within appeal.

Dated: August 31, 2007

Respectfully submitted,

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NOTICE

Pursuant to M.R. Civ. P. 7(c), matter in opposition to this motion must be filed not later than 21 days after the filing of the motion, unless another time is provided by the Maine Rules of Civil Procedure or set by the court. Failure to file timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.