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Delivery by Hand-West Bath Courthouse

August 6, 2007

Anita Alexander, Clerk
Sagadahoc County Superior Court
147 New Meadows Rd.
Bath, ME 04530

RE: AP-07-6; Ed Friedman v. Maine Board of Environmental Protection

Ms. Alexander,

Please find attached for filing: Petitioner's Memorandum of Law in Opposition to Respondent's Motion to Dismiss my appeal. Also attached is a photocopy of Limited Notice of Appearance for attorney David A. Nicholas on my behalf. Original copy is in the mail to you from MA.

Thank you.

Sincerely,

Ed Friedman

C.C.
Dave Nicholas
David Swetnam-Burland
Kelly Boden
Jeff Thaler
Matt Manahan
City of Lewiston-David Jones
Dana Murch
Carol Blasi
Cindy Bertocci

STATE OF MAINE
SAGADAHOC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-07-6

ED FRIEDMAN,)
)
Petitioner,)
)
v.)
)
MAINE BOARD OF ENVIRONMENTAL)
PROTECTION,)
)
Respondent.)

PETITIONER ED FRIEDMAN'S MEMORANDUM OF LAW
IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Petitioner Ed Friedman submits this memorandum of law in opposition to the Board of Environmental Protection's ("Board") motion to dismiss.

In addition, Mr. Friedman objects to the filing of the dam owners' memorandum. The dam owners raise "two additional reasons the Court should dismiss this appeal." Dam owners' memorandum, p. 4. This was served on Mr. Friedman late in the day on Friday August 3, 2007 – Mr. Friedman's response to the Board's motion was due on Monday, August 6, 2007. Mr. Friedman respectfully requests that this Court strike the brief as it relates to the two additional arguments, res judicata and the power of the Board to modify water quality certifications. The Board did not raise these issues in its motion to dismiss. The dam owners essentially filed a motion to dismiss on three days' notice (two of which fall on a weekend). The dam owners could have filed their own motion to dismiss, but chose not to. Mr. Friedman objects to this "sandbagging" technique. Mr. Friedman cannot adequately respond to the dam owners' arguments in the time provided. At this point, the dam owners should make their arguments when merits briefing occurs.

I. THE COURT HAS JURISDICTION TO DECIDE THIS APPEAL.

A. There Is A Statutory Right To Appeal.

The Board suggests that there is no statutory authorization to file an appeal of a petition to modify a water quality certification. However, 38 MRSA §346(1) provides in relevant part:

> …any person aggrieved by any order or decision of the board or commissioner may appeal to Superior Court. These appeals to the Superior Court shall be taken in accordance with Title, 5, Chapter 375, subchapter VII.

B. Mr. Friedman Is Not Appealing An Exercise Of Enforcement Discretion.

The linchpin to the Board of Environmental Protection's ("Board") argument is that an agency's decision whether to take enforcement action is not reviewable by a court. The Board cites many cases to support that proposition.[1] The Board also cites Watts v. Board of Environmental Protection, AP-06-19 (Me. Super. Ct. Kenn. Cty., Dec. 6, 2006) (Marden, J.), which dismissed a similar appeal to this one on that ground. Citing Herrle v. Town of Waterboro, 2001 ME 1, 763 A.2d 1159 (2001), Judge Marden in Watts analogized a petition to modify a water quality certification to a request to a zoning board of appeals to take enforcement action against an alleged zoning law violator. Watts, AP-06-19, slip op. at 2-4. Judge Marden held that a decision not to modify water quality certifications "was prosecutorial in nature and a legitimate exercise of the Board's enforcement discretion." Id. at p. 4.

[1] Heckler v. Chaney, 470 U.S. 821 (1985); Linda R.S. v. Richard D., 410 U.S. 614 (1973) (no standing to seek review of decision by district attorney not to enforce child support law); Smith v. Shook, 237 F.3d 1322 (11th Cir. 2001) (no standing to appeal bar counsel's decision not to proceed with disciplinary action); Cotton v. Steele, 587 N.W.2d 693 (Neb. 1999) (same); Starr v. Mandanici, 152 F.3d 741 (8th Cir. 1998) (same); Doyle v. The Oklahoma Bar Association, 998 F.2d 1559 (10th Cir. 1993) (same); New England Outdoor Center v. Commissioner of Inland Fisheries and Wildlife, 2000 ME 66, 748 A.2d 1009 (2000) (no review of IF&W decision not to enforce whitewater rafting law); State v. Pickering, 462 A.2d 1151, 1161 (Me. 1983) (general statements about prosecutorial discretion); Bar Harbor Banking and Trust Co. v. Alexander, 411 A.2d 74 (Me. 1980) (court cannot restrain Superintendent of Consumer Credit investigation); Great Hill and Gravel v. Board of Environmental Protection, 641 A.2d 184 (Me. 1994) (third party appeal of enforcement order).

However, Mr. Friedman's petition to the Board to modify the water quality certifications for multiple dams on the Androscoggin River was not a request to the Board to take enforcement action, and thus the Board's argument should not prevail. Mr. Friedman respectfully submits that Judge Marden's decision in Watts was in error.

In his petition to the Board, Mr. Friedman did not ask the Board to revoke or suspend the water quality certifications – two options that by law can be the subject of a Board petition. He did not ask the Board to impose a fine on the dam owners for violating the certifications. Nor did Mr. Friedman ask the Board to take civil enforcement action against the dam owners for violating water quality standards, or to launch an investigation into whether the dam owners broke the law.

Rather, Mr. Friedman petitioned the Board to change the terms of the water quality certifications. Water quality certifications are considered to be a license, Department of Environmental Protection ("DEP") Rules Ch. 2, § 1(J), so in other words Mr. Friedman asked that the terms of the various licenses be amended or modified to comply with the statutory standards. Such a petition is not seeking an enforcement action. See Connecticut Fund for the Environment v. Acme Elect-Plating, 822 F Supp. 57 (D. Conn. 1993) (appeal of a Clean Water Act discharge permit application is not an enforcement proceeding). In fact, it is the opposite of asking for enforcement, because Mr. Friedman's position is that the certifications are too lax and enforcing lax certifications would serve no purpose.

That modification is not enforcement is reinforced by the fact that the dam owners themselves can seek modification of their certifications if they thought the terms of the certifications were too stringent. Clearly, such a petition is not an enforcement action either, and it unlikely either the Board or the dam owners will take the position that such a petition is unappealable.

With respect to the zoning enforcement analogy made in Watts, a more apt analogy would be denial of a zoning variance. Under 30 MRSA § 4343(4), a municipal zoning board of appeals "may grant" a variance. If a variance is denied, that decision can be appealed for abuse of discretion, errors of law, or findings not supported by the substantial evidence in the record.. E.g., Phaiah v. Fayette, 2005 ME 20, ¶8,, 866 A.2d 863, 866 (Me. 2005).[2]

C. Even If The Board's Decision Was A Decision Not To Take Enforcement Action, This Court Would Still Have Jurisdiction.

Even assuming that this appeal does involve review of an agency decision not to undertake an enforcement action, which Mr. Friedman strenuously argues is not the case, this Court would still have jurisdiction to decide this appeal. 38 MRSA §346(1) expressly provides that "any person aggrieved by any order or decision of the board or commissioner may appeal to Superior Court." An appeal would then be governed by the procedures set forth in the Maine Administrative Procedures Act.

38 MRSA § 346(1) would have no purpose if it merely repeated what the Maine APA already provided – a right to appeal final agency action. Maine v. White, 2001 ME 65 ¶ 4 (2001) (statutes are to be interpreted as being free from unnecessary and superfluous language). By using the term "any" to modify "order or decision," 38 MRSA § 346(1) expanded the types of agency actions that could be appealed to include review of decisions by the Board not to take enforcement action.

D. Mr. Friedman Is An Aggrieved Party.

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[2] The separation of powers argument the Board makes is dependent on its argument that this is an appeal of a decision to not take enforcement action. Board memorandum at pp. 12-14. Since this is not such an appeal, the separation of powers argument is wholly unfounded.

The Board's reference to the appealability of rulemaking (Board memorandum at p. 11) hurts its argument. The statute governing appeals of rulemaking decisions expressly restricts appeals of decisions not to adopt a rule to those instances where a rule is required by law. There is no such restriction with respect to appeals of Board actions.

The Board makes the following argument as to why Mr. Friedman is not an aggrieved party: (1) an aggrieved party is one who is aggrieved by final agency action; (2) "final agency action" is defined as a decision which "affects the legal rights, duties or privilege of specific persons…, " and (3) Mr. Friedman, and the approximately 60 other signers of the petition to the Board, including State legislators, have no legal rights, duties or privileges implicated by the Board's decision. According to the Board, in this case "none but the dam owners/certification holders themselves had any 'legal rights, duties or privileges.'" Board memorandum at p. 10.

Under the Board's reasoning, only a permit holder can appeal a decision about its permit. Citizens who oppose a permit have no ability to appeal because they have no legal rights. This of, course is not the case. Members of the public appeal permit decisions all the time. E.g., United States Public Interest Research Group v. Board of Environmental Protection, 2004 Me. Super. LEXIS 189 (Kenn. Cty. 2004) (environmental groups' appeal of salmon farm industry wastewater discharge permit); Natural Resources Council of Maine v. Maine Land Use Commission, 2001 Me. Super. LEXIS 148 (Kennebec Cty. 2001) (environmental groups' appeal of approval to build boat launch in the Allagash Wilderness Waterway); Maine People Organized to Win Environmental Rights v. Department of Environmental Protection, 1991 Maine Super. LEXIS 10 (Kennebec Cty. 1991) (environmental groups' appeal of approval to expand landfill).

The fact is, Mr. Friedman has a right – both by statute and by Board rules – to petition for modification of a water quality certification. Moreover, Mr. Friedman has a right to be free from the economic and aesthetic harm caused by the dam owners operating under their current water quality certifications. Cf. Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 197 (Me. 1978) (harm to aesthetic interests "establishes a

direct and personal injury suffered by the plaintiffs"). The Board is arguing for a radically new, unwarranted restriction on the ability of citizens to appeal final agency action.[3]

III. MR. FRIEDMAN HAS STANDING TO BRING THIS APPEAL.

The Board argues that Mr. Friedman does not have standing because the Board never determined he was an aggrieved party. Board memorandum at p. 14. This argument is alarming, as it urges a sea change in access to the courthouse to challenge agency action. Agencies could insulate themselves from appeal simply by avoiding a determination that a party is "aggrieved" or otherwise has standing. The Board cites no case to support such an absurd result, and it should be rejected.

The Board also argues that in any event, Mr. Friedman cannot demonstrate standing because only the target of an enforcement action can have standing to appeal an enforcement decision; a non-enforcement decision cannot be appealed. However, as set forth above, this case is not an appeal of an exercise of enforcement discretion. Again, members of the public are regularly found to have standing to appeal permitting decisions. E.g., Conservation Law Foundation v. Lincolnville, 2001 Me. Super. LEXIS 26, at **24-25 (Waldo Cty. 2001) (environmental group had standing to appeal subdivision approval where group's member regularly passes by the property which has unique features "'critical' to her spiritual and emotional fulfillment"). This case is not different.

[3] The Board also suggests that the Board's decision not to modify the water quality certifications is not "final" because "it did not preclude some action in the future if the law or conditions change." Board memorandum at p. 10. Judge Marden made a similar ruling in Watts.. However, this argument, and Judge Marden's ruling, was premised on the determination that Mr. Friedman's appeal is akin to an appeal of prosecutorial discretion, which is not the case. See Lingley v. Maine Workers' Compensation Board, 2003 ME 32, ¶ 7, 819 A.2d 327 (Me. 2003) ("When an applicant applies to an agency for a permit or other approval, and the agency refused to grant the permit or approval, that refusal is an action.").

Even if this case is considered an appeal of enforcement discretion, Maine law expressly allows appeals of such decisions, and thus Mr. Friedman would be precisely the type of person to have standing to file such an appeal since he is adversely affected, aesthetically and economically, by the Board's decision to allow the dams to continue ruining the Androscoggin.

IV. THE WATER QUALITY CERTIFICATIONS CAN BE MODIFIED.

The dam owners claim that the water quality certifications can no longer be modified, thus this appeal should be dismissed. As noted above, the dam owners essentially filed a motion to dismiss on three days' notice (one business days' notice) and Mr. Friedman requests that the dam owners' argument be struck. In the event the arguments are not struck, Mr. Friedman submits the following argument as to why the dam owners are wrong. He is able to do this on such short notice only because a similar argument was addressed in proceedings relating to modification of water quality certifications on the Kennebec River and Mr. Friedman can adapt a filing made in the proceeding. Mr. Friedman reiterates that he believes the 11th hour filing of the dam owners' is unfair.

The dam owners argue that once the Federal Energy Regulatory Commission ("FERC") issues a license for a dam, a water quality certification cannot be modified. However, federal regulations on water quality certifications allow modification. 40 C.F.R. § 121.2(b) provides:

> The certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator.

Here, the certifying agency is the Board, the licensing agency is FERC, and the Regional Administrator is the EPA Region I (New England) administrator. 40 C.F.R. § 121.1(e), (b), and (d) (definition of terms). Thus, once this Board decides to modify the water

quality certification, it can work with FERC and EPA to get the modification implemented.

Of course, even apart from this regulation, there is nothing to prevent the Board from submitting the modified certifications to FERC and asking that FERC enter into negotiations to amend the licenses.

Moreover, State law is clear that modification of water quality certifications is allowed. The plain meaning of 38 MRSA 341-D(3) and Ch. 2, § 27 is that certifications can be modified. Merrill v. Sugarloaf Mountain Corp., 2000 Me 16, p. 11, 745 A.2d 378, 384 (2000) ("The most fundamental rule of statutory construction is the plain meaning rule. When statutory language is plain and unambiguous, there is no need to resort to any other rules of statutory construction."); Christensen v. Harris County, 529 U.S. 576, 588 (2000) (same for construction of a regulation); see Kittery Retail Ventures, LLC v. Town of Kittery, 2004 ME 65, p. 10 (2004) (first look to plain meaning of law to determine legislative intent).

Moreover, State law is clear that modification of water quality certifications is allowed. The plain meaning of 38 MRSA 341-D(3) and Ch. 2, § 27 is that certifications can be modified. Merrill v. Sugarloaf Mountain Corp., 2000 Me 16, p. 11, 745 A.2d 378, 384 (2000) ("The most fundamental rule of statutory construction is the plain meaning rule. When statutory language is plain and unambiguous, there is no need to resort to any other rules of statutory construction."); Christensen v. Harris County, 529 U.S. 576, 588 (2000) (same for construction of a regulation); see Kittery Retail Ventures, LLC v. Town of Kittery, 2004 ME 65, p. 10 (2004) (first look to plain meaning of law to determine legislative intent).

Consistent with the plain meaning of the modification statute and rule, DEP in its response to comments on another hydroelectric project, Gulf Island-Deer Rips Hydro,

stated that the Board always has the authority under 38 M.R.S.A. § 341-D(3) to modify a water quality certification. FPL Energy Maine Hydro LLC Water Quality Certification of Gulf Island-Deer Rips Hydro Project, #L-17100-33-O-N, § 11.n. Similarly, a water quality certification need not contain specific "reopener" language to be modified, as the Gulf Island-Deer Rips water quality certification makes clear. Id. (DEP specifically rejected the idea that a reopener clause is required to modify water quality certifications). To Petitioners' knowledge, the Attorney General's office has not stated that the DEP in the Gulf Island matter was wrong, and has not gone on record to state that the Board has no power to modify the water quality certifications. Were the DEP to now change its position and claim that modification is not allowed, the Board should not give DEP's position deference because the agency would be flip-flopping. Cf., e.g., Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1457 (9th Cir. 1992) (no deference to agency's "expertise" when agency has fluctuated in position).

Any other result would gut the statutory and regulatory provisions regarding modification. 38 MRSA 341-D (3) and DEP Rules at Ch. 2, § 1.J. define "license" to include any "certification issued by the Department." There are no exceptions. To rule that water quality certifications cannot be modified would impermissibly read "certification" out of § 341-D(3) and Ch. 2, § 1.J and render that term superfluous in the statute and regulation. State of Maine v. White, 2001 ME 65, ¶ 4 (2001) (statutes are to be interpreted as being free from unnecessary and superfluous language).

The dam owners' argument that a water quality certification can never be changed (with or without a water quality certification reopener) during the life of a FERC permit is an argument that leads to an absurd result. Saucier v. Portland, 1980 Me. Super. Leixs 1, *7 (Cumberland Co. 1980) ("There is a well accepted principle of interpretation that statutes, and here governmental guidelines, will not be given an interpretation which will

produce an absurd result."). The term of a FERC license is 30-50 years. According to the dam owners, even if it turns out their operations kill every living thing in the river, nothing can be done about it until the license is renewed in 30-50 years.

The absurdity of such a situation was recognized by the Maine Supreme Judicial Court in the S.D. Warren case. In S.D. Warren, the company argued that the Board had no power to include a "reopener" clause in a 401 certification. The court, in rejecting that argument, articulated a rationale equally applicable here:

> The BEP is expressly granted the authority to issue section 401(a)(1), 33 U.S.C.A. § 1341(a)(1), certifications pursuant to 38 M.R.S.A. § 464(4)(F)(1-A). Considering the purpose of Maine's water quality standards, stated at 38 M.R.S.A. § 464(1), the authority to include "reopeners" is "essential to the full exercise of powers specifically granted" to the BEP. See Hallissey, 2000 ME 143, P11, 755 A.2d at 1072. *This authority is essential because if the conditions 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.* The Board's interpretation of 38 M.R.S.A. § 464 as implicitly authorizing the inclusion of "reopeners" is reasonable and the statute does not plainly compel a contrary result.

S.D. Warren v. Board of Environmental Protection, 2005 ME 27, ¶ 28 (2005) (footnotes omitted) (emphasis added).[4] In this case, the biological integrity of the Androscoggin will not be met if the Board cannot exercise its statutory powers to modify a water quality certification.[5]

Further, contrary to the dam owners' suggestion, water quality certifications *do* impose ongoing independent obligations. DEP and the Board have the power to enforce their own water quality certifications, even if they cannot enforce the terms of FERC licenses. The Board and the Attorney General's Office have never claimed otherwise. In

[4] This part of the S.D. Warren case was not the subject of the appeal heard by the U.S. Supreme Court.

[5] To be consistent with the position it took in S.D. Warren, the Attorney General's office cannot argue otherwise in this case.

addition, the terms of a water quality certification are enforceable by private parties or a state in federal court under the "citizen suit" provision of the federal Clean Water Act.[6]

V. RES JUDICATA DOES NOT BAR THIS SUIT.

In the extremely brief time available, Mr. Friedman simply does not have time to respond to the dam owners' argument that res judicata bars this suit. Suffice to say:

a. Justice Marden, in Watts, stated that the petitioner was free to re-petition;

b. the Board petition at issue here is the first stand-alone petition dedicated to Androscoggin dams, other that submitted only by Mr. Watts (an earlier petition was inclusive of both Kennebec River dams and Androscoggin dams and was different in scope);

c. the petition at issue here introduced substantial new evidence (listed in Mr. Friedman's appeal) that could not have been discussed or litigated in the earlier petition regarding the Androscoggin dams;

d. that Mr. Friedman happens to be Chair of a large and vibrant organization in now way should bar him or any other of the 60 or so individual petitioners from taking further individual actions that a non-profit organization may choose not to pursue; and

e. it is ironic that the dam owners complain about a mutual relationship and privity between Mr. Friedman, Mr. Watts and FOMB when the same can be said about the multiple dam owner themselves, and their cooperation with the Departments of Environmental Protection, Marine Resources, and Inland Fisheries and Wildlife, and the Maine Atlantic Salmon Commission.

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[6] Section 505(a)(1)(A), 33 U.S.C. § 1365(a)(1)(A), of the CWA provides that private parties and states may commence a civil action against any person "who is alleged to be in violation of an effluent standard or limitation under this chapter…" The definition of "effluent standard or limitation" includes "certification under section 1341 [401] of this title." 33 U.S.C. § 1365(f)(5). Thus, a citizen suit can be brought against any person who is alleged to be in violation of a 401 certification. North Carolina Shellfish Growers Association v. Holly Ridge Associates, 200 F. Supp. 2d 551, 558 (E.D. N.C. 2001).

CONCLUSION

For the reasons set forth above, the motion to dismiss this appeal should be denied.

Dated: August 6, 2007

_____
Ed Friedman

Assisted by:

_____
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(Limited appearance for purpose of assisting Mr. Friedman with opposition to Board's arguments on its motion to dismiss and dam owners' argument on Board's power to modify water quality certifications)