

STATE OF MAINE
Sagadahoc, ss.

SUPERIOR COURT
Civil Action
Docket No. AP-07-06

ED FRIEDMAN

Petitioner

v.

MAINE BOARD OF ENVIRONMENTAL
PROTECTION

Respondent

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

This matter comes before the court on Respondent Maine Board of Environmental Protection's (Board) motion to dismiss Petitioner Ed Friedman's appeal under M.R. Civ. P. 80C. For the reasons set forth below, the motion to dismiss is granted for lack of subject matter jurisdiction, namely the absence of reviewable final agency action for purposes of the Maine Administrative Procedure Act.¹

PROCEDURAL HISTORY AND BACKGROUND

On May 17, 2007, Mr. Friedman and sixty-three other individuals filed a petition with the Board seeking a public hearing on the issue of whether certain water quality certifications held by the owners of hydroelectric dams on the Androscoggin and Little Androscoggin Rivers should be modified to require safe downstream and upstream passage for American eels.

¹ Based on this outcome, it is not necessary to address the question of Petitioner Friedman's standing. See *Morse Bros. v. Webster*, 2001 ME 70, ¶ 32, 772 A.2d 842, 852; *Glynn v. City of South Portland*, 640 A.2d 1065, 1067 (Me. 1994). In fact, this decision assumes, without deciding, that Petitioner does have standing for purposes of this proceeding.

The petition was filed pursuant to the Board's governing statute, and a rule promulgated pursuant to the statute, authorizing any person to petition the Board to revoke, modify or suspend any license, permit, approval, order or certification issued by the Maine Department of Environmental Protection. See 38 M.R.S. § 341-D(3); 06-096 CMR, ch. 2, § 27.²

This was the second such petition in less than two years. As to the first petition, the Board did conduct a hearing; the petitioners were given the opportunity to present evidence in support of their petition, and the petition ultimately was dismissed for lack of substantial evidence. One of the petitioners before the Board appealed the dismissal to the Superior Court for Kennebec County. See *Watts v. Maine Bd. of Environmental Protection*, 2006 Me. Super. LEXIS 270 (Dec. 6, 2006). In that appeal, Justice Marden concluded that the court was without jurisdiction to hear

² The full text of section 341-D(3) is:

3. MODIFICATION, REVOCATION OR SUSPENSION. After written notice and opportunity for a hearing pursuant to the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV, the board may modify in whole or in part 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, whenever the board finds that:

- 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.

For the purposes of this subsection, the term "license" includes any license, permit, order, approval or certification issued by the department and the term "licensee" means the holder of the license.

the Rule 80C appeal because the Board's decision was discretionary and could not be considered final agency action. *Id.*

The present appeal stems from the Board's May 17, 2007 order dismissing the second petition on the ground that it presented "substantially and materially the same factual basis" as the first petition. Mr. Friedman filed an 80C appeal of the Board's decision on June 15, 2007, and the Board filed the present motion to dismiss on July 16, 2007.

DISCUSSION

Standard of Review

Rule 80C of the Maine Rules of Civil Procedure allows for judicial review of "final agency action or the failure or refusal of an agency to act." Such review is to be in accordance with the Maine Administrative Procedure Act (APA). M.R. Civ. P. 80C(a). This court may review agency action only if there is statutory authority to do so. *Sears, Roebuck and Co. v. City of Portland*, 144 Me. 250, 255, 68 A.2d 12, 14 (1949).

"Final agency action" is defined in the APA as "a decision by an agency 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. § 8002(4) (2006). Under the APA, judicial review is limited to final agency action unless such review "would not provide an adequate remedy." *Id.* at §11001(1) (2006).

The Board's Dismissal of the Petition Was Not Final Agency Action

The Board asserts that its decision to dismiss Mr. Friedman's petition was not final agency action because it did not affect any of Mr. Friedman's legal rights, duties or privileges, and he is not precluded from seeking further recourse from the Board if and when he can present sufficient evidence that would justify a hearing.

Mr. Friedman argues that the statute allowing this court to review decisions of the Board expands the scope of review beyond final agency action. He points to the language of 38 M.R.S. § 346(1), which states that "any person aggrieved by any order or decision of the board or commissioner may appeal to the Superior Court. These appeals to the Superior Court shall be taken in accordance with Title 5, chapter 375, subchapter VII." Mr. Friedman focuses on the words "any order or decision" and reads the statute as an expansion of judicial review beyond what is authorized under the APA.

This interpretation of the Board's enabling act is incorrect. Section 346(1) merely provides the statutory basis for judicial review of Board decisions. According to the statute's plain language, the grant of judicial review of "any order or decision of the board" is subject to the requirements of the APA. To read it otherwise would undercut the procedural mechanism that is already in place for judicial review of agency action. Rule 80C also makes reference to the APA and explicitly uses the term "final agency action."

It is therefore clear that "final agency action" by the Board is required before Mr. Friedman, or anyone else, may seek judicial review, unless "review of final agency action would not provide an adequate remedy," 5 M.R.S. §11001(1) (2006). However, that exception to the general requirement of final agency action addresses

situations in which judicial review prior to final agency action is justified because delaying review until final agency action would deprive a party of "an adequate remedy." Here, the Board has completed its consideration of the petition and has ordered it dismissed, so the exception does not apply.

In its May 17, 2007 decision to dismiss the second petition, the Board noted that it was "substantially and materially" based on the same facts as the first petition, and that the Petitioners had not shown any change in conditions that would alter the position of the Board. Thus, like the first petition, this petition was also dismissed for lack of substantial evidence. In the *Watts* decision, Justice Marden determined that the dismissal by the Board was not final agency action because Watts was not prevented "from petitioning the Board at a later date with more evidence." *Watts v. Maine Bd. of Environmental Protection*, 2006 Me. Super. LEXIS 270 (Dec. 6, 2006).

It appears that in the second petition there again was not enough evidence submitted to the Board, but there is still nothing to prevent Mr. Friedman from gathering the necessary evidence, if it exists, and again petitioning the Board. The dismissal of the second petition on the same grounds as the first does not transform that second dismissal into "final agency action."

The Board's Order is Not Subject to Judicial Review Because It Reflects a Decision Committed to the Agency's Sole Discretion

A separate reason why the Board's dismissal of the second petition is not subject to review under the APA is that it involves a matter committed to the sole discretion of the agency. "[E]ven when an agency action is final, it does not follow that the action is subject to judicial review." *New England Outdoor Ctr. v.*

Commissioner of Inland Fisheries and Wildlife, 2000 ME 66, ¶ 10, 748 A.2d 1009, 1013;

Me. Const. art. III, § 2. In *New England Outdoor Center*, the Law Court said:

[t]he Legislature may not constitutionally confer on the judiciary a commission to roam at large reviewing any and all final actions of the executive branch. Some executive action is by its very nature not subject to review by an exercise of judicial power. *Id.*, quoting *Brown v. State Dep't of Manpower Affairs*, 426 A.2d 880, 884 (Me.1981).

On its face, Section 341-D(3), in using the word "may," vests the Board with discretion to modify, revoke or suspend a license when it finds that one of the factors enumerated in section 341-D(3)(A)-(G) exists.³ By virtue of the phrase, "whenever the Board finds," the statute suggests that a finding that one or more of those factors exists is a prerequisite to Board action under that section, but the statute does not compel the Board to act even if it makes a such a finding.

The absence of any meaningful standards in section 341-D(3), upon which a court could review the Board's dismissal of the petition, confirms that the Board's dismissal of the petition was a non-reviewable exercise of the Board's discretionary authority. See *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) ("if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'").

³ "In general, the word 'may,' used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the statute, and when used in a statute is permissive, discretionary, and not mandatory." *Collins v. State*, 161 Me. 445, 449, 213 A.2d 835, 837 (1965), quoting *Roy v. Bladen School District No. R-31 of Webster County*, 84 N.W. 2d. 119, 124 (Neb. 1957). In *Collins*, the Law Court rejected the argument that the statutory word "may" should be construed to mean "must," based on the purposes of the statute. *Id.* A similar analysis here compels the conclusion that the Legislature, in enacting section 341-D(3), did not intend to compel the Board to take action whenever it finds a violation of a license occurs, but only to authorize it to do so, in its discretion.

In that sense, as Justice Marden recognized in the *Watts* case, section 341-D(3) in substance codifies the Board's discretionary authority to take enforcement action, by means of modification, revocation or suspension, if the Board determines to do so, based on a finding that one of the seven factors in section 341-D(3)(A)-(G) exists. See *Watts v. Maine Bd. of Environmental Protection*, 2006 Me. Super. LEXIS 270 (Dec. 6, 2006).⁴

In general, Maine courts are not free to review discretionary enforcement decisions. In *Bar Harbor Banking & Trust Co. v. Alexander*, the Law Court observed, "[t]he constitutionally mandated separation of powers forbids precipitous injunctive interference with the legitimate, ongoing executive function." (citations omitted). Moreover, judicial interference with apparently legitimate executive department activity not only disrupts the administrative process but also encourages the circumvention of statutorily authorized investigation and enforcement mechanisms." 411 A.2d 74, 77 (Me. 1980). Cf. *Herrle v. Town of Waterboro*, 2001 ME 1, ¶¶ 9-10, 763 A.2d 1159, 1161-1162.

The *Bar Harbor* case involved what the Law Court determined to be an inappropriate judicial infringement on the executive's enforcement authority, by means of an injunction prohibiting a bank regulator's attempt to conduct an investigatory hearing. The present case involves a regulatory agency's discretionary determination *not* to take action, but the same principle applies. See

⁴ Section 341-D(3) and the rules implementing it do require the Board to accept petitions filed under section 341-D(3), and the Board does not have discretion to refuse even to consider a petition. However, Petitioner Friedman does not allege that the Board refused to consider his petition; rather he objects to its dismissal without hearing after consideration. Thus, as the Board points out, this case does not involve a failure or refusal to act on the part of the agency; the agency did act, and did exercise its discretion, to the extent required by the statute and rule.

Dumont v. Speers, 245 A.2d 151, 155 (Me. 1968) (petitioners lacked right to appeal fisheries commissioner's discretionary decision not to require construction of fishway at dam).

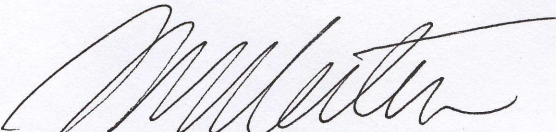
While the Law Court in *Brown* declined to "define the precise limits of the judicial power granted in the constitution," 426 A.2d at 884, it seems clear that a review by this court of the Board's decision to dismiss the petition without hearing would constitute an impermissible intrusion on the Board's discretionary authority.

CONCLUSION

For the foregoing reasons, the Board's motion to dismiss is GRANTED. Mr. Friedman's 80C appeal is DISMISSED for lack of jurisdiction.

The clerk shall incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: November 8, 2007



A. M. Horton
Justice

STATE OF MAINE
Sagadahoc, ss.

SUPERIOR COURT
Civil Action
Docket No. AP-07-010

FRIENDS OF MERRYMEETING BAY

Petitioner

v.

MAINE BOARD OF ENVIRONMENTAL
PROTECTION

Respondent

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

This matter comes before the court on Respondent Maine Board of Environmental Protection's (Board) motion to dismiss the appeal of Friends of Merrymeeting Bay (Friends) under M.R. Civ. P. 80C. For the reasons set forth below, the motion to dismiss is granted for lack of subject matter jurisdiction, namely the absence of reviewable final agency action for purposes of the Maine Administrative Procedure Act.¹

In a decision issued today, this court dismisses an appeal by Ed Friedman from the decision of the Board to dismiss his petition to modify the water quality certifications for designated hydro projects located on the Androscoggin and Little Androscoggin Rivers. *See Friedman v. Maine Board of Environmental*

¹ Based on this outcome, it is not necessary to address the question of standing raised by the Respondent Board. *See Morse Bros. v. Webster*, 2001 ME 70, ¶ 32, 772 A.2d 842, 852; *Glynn v. City of South Portland*, 640 A.2d 1065, 1067 (Me. 1994). As does the decision today in the companion case, *Friedman v. Maine Board of Environmental Protection*, Super. Ct., Sag. Cty., Docket No. AP-07-06, this decision assumes, without deciding, that the Friends do have standing for purposes of this proceeding.

Protection, Super. Ct., Sag. Cty., Docket No. SAG-AP-07-06. The Friends have filed a different petition seeking different relief with regard to different projects on the Kennebec River. In this instance, the Board held a public hearing in response to the petition and eventually determined not to take action to modify, suspend or revoke the permits or water quality certifications in question. The Board's analysis and rationale for its conclusion are reflected in a July 5, 2007 order dismissing the Friends' petition.

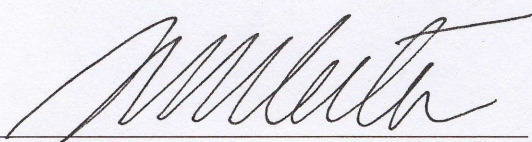
Thus, after a different procedural route and a more detailed consideration of the Friends' petition, the Board came to the same conclusion with respect to the Friends' petition as it did with respect to Mr. Friedman's petition: that no action was warranted and that the petition should be dismissed. Given this identity in outcome, and given that both petitions and both appeals arise under the same set of statutes and rules, this court discerns no difference in substance between the jurisdictional issues presented in this appeal and those presented in the *Friedman* case.

Perceiving no need to reiterate in detail its reasoning in the *Friedman* order, this court hereby adopts that reasoning and concludes that it lacks jurisdiction because there is no final agency action subject to judicial review for purposes of Rule 80C and the Maine Administrative Procedure Act.

For the foregoing reasons, the Board's motion to dismiss is GRANTED. The Rule 80C appeal of Friends of Merrymeeting Bay is DISMISSED for lack of jurisdiction.

The clerk shall incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: November 8, 2007



A. M. Horton
Justice