STATE OF MAINE
Sagadahoc, ss.

SUPERIOR COURT
Civil Action
Docket No. AP-07-10

FRIENDS OF MERRYMEETING BAY,

Petitioner,

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION,

Respondent.

PETITIONER'S CONSOLIDATED OPPOSITION TO MOTIONS TO DISMISS FILED BY RESPONDENT BOARD OF ENVIRONMENTAL PROTECTION AND THE PARTIES-IN-INTEREST

Petitioner Friends of Merrymeeting Bay ("FOMB") opposes the motions to dismiss filed by Respondent Maine Board of Environmental Protection (the "Board") and the Parties-in-Interest (the "Dam Owners"). A memorandum of law setting forth the bases for this opposition follows below.

NATURE OF THE CASE

Under § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, states are charged with the responsibility to protect the quality of their navigable waters when a discharger, such as a hydroelectric dam, requires a federal license. The mechanism to accomplish this is issuance of a water quality certification. Under § 401(d) of the Clean Water Act, 33 U.S.C. §1341(d), a state must set forth limitations in a certification that will assure a federal licensee will not cause a violation of state water quality standards. In Maine, water quality standards for the Kennebec River, as for other rivers in the State, require among other things that the river be suitable habitat for fish and eels.

The Department of Environmental Protection ("DEP") and the Board are responsible for administering the water quality standards and for issuing water quality certifications. 38 MRSA § 635-B. Under 38 MRSA § 341-D, the Board may modify a water quality certification when as few as one of seven criteria is met.

DEP issued water quality certifications to four dams on the Kennebec which are at issue here: the Lockwood Hydro Project, the Hydro-Kennebec Project, the Shawmut Hydro Project, and the Weston Hydro Project. All are owned by FPL Energy Maine Hydro LLC ("FPL") or an affiliate of FPL, except Hydro-Kennebec, which is owned by an affiliate of Brookfield Power.

The water quality certifications are not assuring that Kennebec water quality standards are being achieved because the certifications allow significant numbers of eels and fish to be killed and injured, and allow eel and fish habitat to be blocked and reduced to the point of grave concern. Accordingly, FOMB petitioned the Board to modify the certifications for the four dams so that they would require the dams to provide immediate, safe and effective passage for fish and eels (the "Petition"). After a two-day adjudicatory hearing, the Board denied FOMB's Petition.

In this action, FOMB appeals the Board's decision to deny the Petition. FOMB claims that (1) the Board's decision was unsupported on the whole record and was arbitrary, capricious and characterized by abuse of discretion; (2) the Board's decision was affected by errors of law; and (3) the Board's decision violated statutory provisions.

I. NON-FINAL DECISIONS OF THE BOARD OF ENVIRONMENTAL PROTECTION CAN BE APPEALED.

The Board and the Dam Owners argue that the Board's decision to dismiss FOMB's Petition is not a final agency action and thus this Court has no jurisdiction to entertain this appeal. Board's Motion to Dismiss ("Board Mot.") 8-9; Motion to Dismiss of Parties-in-Interest ("Dam Owners' Mot.") 3-5. As discussed below, the Board's decision is a final agency action. However, this Court need not decide that issue because in this case final agency action is not the sine qua non of an appeal.

First, 38 M.R.S.A. §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 M.R.S.A. § 346(1).

38 M.R.S.A. § 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, 769 A.2d 827, 828 (Me. 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 M.R.S.A. § 346(1) expanded the types of agency actions that could be appealed to include review of non-final decisions by the Board.[1]

Second, 5 M.R.S.A. § 11001(1) provides:

> Preliminary, procedural, intermediate or other nonfinal agency action shall be independently reviewable only if review of the final agency action would not provide an adequate remedy.

[1] The purpose of §346 is not, as the Dam Owners suggest elsewhere, to set forth a separate appeal method for emergency orders issued under 38 M.R.S.A. § 347-A(3). Section 347-A(3) itself sets forth that separate appeal method.

Even if the Board's decision to dismiss the Petition is considered nonfinal, under §11001(1) it is nonetheless appealable because there is no other adequate remedy for FOMB. Modification of water quality certifications can only be accomplished through a petition to the Board.

Justice Marden's opinion in Watts v. Maine Board of Environmental Protection, No. AP-06-19 (Me. Super. Cty., Ken. Cty. Dec. 6, 2006) found the petitioner there had an adequate remedy because he "has not been foreclosed by any agency action from pursuing the same claim at a later time" and could petition the Board again with more evidence. Id. at 6.[2] The fact that there might be more evidence of a claim to present to the Board at a future date does not mean there is an adequate remedy. There is always a chance with any claim before any agency (or any court, for that matter) that more evidence might be submitted in the future. It is also an unworkable standard. What if there will be no more evidence? How can that be proven? Or what if there is evidence but it does not surface for another decade? Justice Marden's opinion in Watts sets up a situation where petitions can be continually filed and rejected, with no way to break the cycle. FOMB is aware of no authority (and the Watts decision cites none) that supports such a ruling. Cf. Harding v. Comm'r of Marine Resources, 510 A.2d 533, 535-536 (Me. 1986) (the "final judgment rule," the judicial analogue to "final agency action," does not apply when necessary to avoid "undue disruption of administrative process" and when no appellate review would otherwise be available).

[2] It is not clear from Justice Marden's opinion whether more evidence is even needed to file another petition.

II. AN AGENCY DECISION IS NOT APPEAL-PROOF JUST BECAUSE THE AGENCY EXERCISES DISCRETION IN MAKING IT.

The Board and the dam owners suggest that since the Board has discretion to grant or dismiss a petition to modify a water quality certification, a decision not to modify is not appealable. Board Mot. 7-9; Dam Owners' Mot. 3. As a matter of law, they are wrong.

5 M.R.S.A. § 11007(4)(C)(6), which sets forth the manner and scope of judicial review of administrative actions, provides that a court can "reverse or modify the decision if the administrative findings, conclusions, inferences or decisions are characterized ... by abuse of discretion." This provision would make no sense if an agency decision that is discretionary is not appealable.

If the Maine Legislature had wanted to exempt discretionary decisions from judicial review, it certainly could have done so – in fact, the United States Congress, unlike the Maine Legislature, did just that. The federal APA at 5 U.S.C. § 701(a)(2) provides that judicial review provisions do not apply to agency action that "is committed to agency discretion by law." There is no comparable provision in the Maine APA. See Partnership of Brooks Brown, et al. v. Department of Manpower Affairs, 426 A.2d 880, 883 (Me. 1981) (noting broad definition of "final agency action" in Maine APA compared to the Model State Administrative Procedures Act upon which it is based).

Maine courts regularly review decisions that are made at the sole discretion of an agency. E.g., Becker v. Bureau of Parks and Lands, 2005 ME. 120, 886 A.2d 1280 (Me. 2005) (appeal of decision to award a submerged land lease)[3]; Phaiah v. Fayette, 2005 ME

[3] Under 12 M.R.S.A. § 1862, the Bureau of Public Lands "may grant a conveyance" of submerged land.

20, ¶8, 866 A.2d 863, 866 (Me. 2005) (appeal of zoning variance denial)[4]; Conservation Law Foundation v. LaPointe, 2004 Me. Super. LEXIS 131 (Hancock Cty. Sup. Ct. 2004) (appeal of decision to grant aquaculture lease)[5]; Forester v. Westbrook, 604 A.2d 31 (Me. 1992) (appeal of a decision to grant a zoning variance). This case follows this well worn path. Dumont v. Speers, 245 A.2d 151 (Me. 1968), a nearly 40 year old case cited by the Board, is not to the contrary. That case, in which the court dismissed a decision of the Commissioner of Inland Fisheries and Wildlife not to order construction of a fishway, was not an APA case – it was decided before the Maine APA was enacted, 15A Uniform Laws Annotated 1 (2007 Cumulative Annual Pocket Part) (Maine APA became effective on July 1, 1978), and does not implicate the judicial review provisions at issue in the case at bar.

The Board analogizes this case to an appeal of an agency's decision whether to adopt a rule. Board Mot. 9. That analogy hurts, not helps, the Board. Adoption of a rule can be invalidated if the rule is arbitrary, capricious or an abuse of discretion. 5 M.S.R.A. § 8058(1). But a decision not to adopt a rule can be overturned only if the rule was required to be adopted by law. Id. This shows that the Maine Legislature knows how to limit appeals of discretionary agency actions when it wants to, and it did so only in the context of decisions not to adopt rules.

The Board also compares the modification provisions in 38 M.R.S.A. § 341-D(3) with the statutory provision regarding Board assumption of jurisdiction in 38 M.R.S.A. § 341-D(2), noting that the latter contains the word "shall" while the former does not.

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[4] Under 30 M.S.R.A. § 4343(4), a municipal zoning board of appeals "may grant" a variance.

[5] Under 12 M.R.S.A. § 6072(1), the Commissioner of Marine Resources "may lease" coastal areas for aquaculture and "may grant a lease to any person."

Board Mot. 7. Again, this comparison hurts, not helps, the Board. In United States Public Interest Research Group v. Board of Environmental Protection, 2004 Me. Super. LEXIS 189 (Ken. Cty. 2004), the Board under § 341-D(2) assumed jurisdiction over issuance of a Clean Water Act wastewater discharge permit to the salmon farm industry. Once the Board assumed jurisdiction, it was faced with the decision of whether to issue a general permit covering the entire industry, or whether to issue separate permits to each individual salmon farm site. The relevant regulation provided that DEP (or the Board) "may issue a general permit" and set forth criteria to consider. Id. at ** 9-10. The Board issued a general permit, and environmental groups and members of the public appealed, claiming, among other things, that the Board should have issued individual permits, not a general permit. Despite the fact that the regulation provided that the Board "may issue" a general permit, the Superior Court decided the appeal on its merits and ruled on the question of whether the Board's decision was supported by substantial evidence (ultimately upholding the Board's decision).

The Board's and Dam Owners' "no appeal of discretionary decisions" argument leads to absurd results. The Board and Dam Owners claim that FOMB did have a right to submit a petition to modify an existing license, but nothing more. According to their argument, the Board could decide to dismiss FOMB's petition because it was submitted on a Thursday, or because the petitioner's name begins with an "F." The Maine Legislature did not intend this result.

Furthermore, FOMB asserts that the Board's decision was affected by errors of law and that the Board's decision violated statutory provisions. Petition ¶¶ 28-38. These bases for appeal do not implicate Board discretion at all.

III. FOMB IS NOT APPEALING AN EXERCISE OF ENFORCEMENT DISCRETION.

The Board and Dam Owners argue that, as the Board put it, the Board's decision not to grant FOMB's request is "akin to an unacceptable exercise of prosecutorial discretion, rather than to a final agency action." Board Mot. 8-9; Dam Owners' Mot. 4. They cite Watts v. Board of Environmental Protection, AP-06-19 (Me. Super. Ct. Ken. 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.

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

At the hearing on the Petition, FOMB did not ask the Board to revoke or suspend the water quality certifications. It did not ask the Board to impose a fine against the dam owners, or to sue them. FOMB made it clear that it sought to modify the certifications, and proffered specific language to do so. The modification language was set forth in Paragraph 2 of the direct testimony of FOMB Chairman Ed Friedman (attached as Exhibit A to the accompanying Affidavit of David A. Nicholas), and was as follows:

The dam operator shall provide immediate, safe and effective upstream and downstream passage for all indigenous migratory fish. For the purposes of this paragraph:

a. "Immediate" means the date this certification is approved by the Board of Environmental Protection.

b. "Safe" means that all fish migrating upstream can pass the dam and no fish migrating downstream are killed or injured by the dam.

c. "Effective" means efficiently.

d. "Fish" includes, but is not limited to, the American eel.

Water quality certifications are considered to be a license, DEP Rules Ch. 2, § 1(J), so in other words FOMB 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); see also Massachusetts v. Environmental Protection Agency, 127 S.Ct. 1438, 1459 (2007) (denial of a petition for rulemaking is not equivalent to a decision not to initiate an enforcement action). In fact, it is the opposite of asking for enforcement, because FOMB's position is that the certifications are too lax and enforcing lax certifications would serve no purpose. This situation is very different from the cases the Board and the Dam Owners cite.[6]

[6] Heckler v. Chaney, 470 U.S. 821 (1985); Linda R.S. v. Richard D., 410 U.S. 614 (1973) (review of decision by district attorney not to enforce child support law); Smith v. Shook, 237 F.3d 1322 (11th Cir. 2001) (appeal of 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); Fryeburg Water v. Fryeburg, 2006 ME 31, 893 A.2d 618 (Me. 2006) (appeal of town's refusal to issue cease and desist order for alleged building code violation); Herrle v. Waterboro, 2001 ME 1, 763 A.2d 1159 (Me. 2001) (appeal of decision not to grant citizen's request to enforce enforcement action against alleged zoning code violator); 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. (con't)

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 at 866.

IV. THE DAM OWNERS ARE NOT THE ONLY ONES WITH RIGHTS.

To be a final agency action a decision must affect the legal rights, duties or privilege of specific persons. 5 M.R.S.A. § 8002(4). The Board argues FOMB has 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 Mot. 8.

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 true. 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 (Ken. Cty. 2004) (environmental

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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).

groups' appeal of salmon farm industry wastewater discharge permit); Natural Resources Council of Maine v. Maine Land Use Commission, 2001 Me. Super. LEXIS 148 (Ken. 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, FOMB has a right – both by statute and by Board rules – to petition for modification of a water quality certification. See Massachusetts v. EPA, 127 S.Ct. at 1459 (in support of its holding that Massachusetts, which had petitioned for a rule adoption, could appeal denial of the petition, the Court specifically noted that [as with FOMB here] the "affected party had an undoubted procedural right to file in the first instance"). Moreover, FOMB 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.[7]

[7] 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 Mot. 8. Judge Marden made a ruling similar to this in Watts. However, this argument, and Judge Marden's ruling, was premised on the determination that FOMB'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.").

V. NO SEPARATION OF POWERS ISSUE IS RAISED BY THIS APPEAL.

The Board argues that even if the decision not to modify the water quality certifications were final agency action, this Court cannot rule on this appeal because to do so would violate the principle of separation of powers. This argument is without substance.

The basis of the separation of powers argument is that only the executive branch has discretion to decide when to take enforcement action. As discussed above, modifying a water quality certification is not the equivalent to enforcement action.

In any event, there can be no separation of powers issue because in the APA the Legislature expressly empowered courts to "reverse or modify" an agency decision "if the administrative findings, inferences, conclusions or decisions are...unsupported by substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion." 5 M.S.R.A. §§ 11007(4)(C) (5) and (6). The APA also provides that the court "may direct the agency to hold such proceedings or take such action as the court deems necessary." 5 M.R.S.A. § 11007(4)(B). The Board does not argue that these provisions of the APA are unconstitutional. This Court unquestionably has the power to order that FOMB's Petition be granted, and that the water quality certifications be modified.

VI. FOMB HAS STANDING TO APPEAL.

The Board argues that FOMB has no standing to appeal because it is not an "aggrieved party" under the APA. The Board's argument is wholly without merit.

The Law Court has held that "a 'person aggrieved' has standing to seek review of an administrative action and simultaneously vindicate public rights where such person

has suffered a 'particularized injury.' [Cite omitted]." Heald v. School Administrative Dist. No. 14, 387 A.2d 1, 3 (Me. 1978); Ricci v. Superintendent, Bureau of Banking, 485 A.2d 645, 647 (Me. 1984) (same). It is established that harm to aesthetic interests "establishes a direct and personal injury." Fitzgerald v. Baxter State Authority, 385 A.2d at 197.

Here, the evidence demonstrated the particularized injury to FOMB that makes it an aggrieved party. Ed Friedman, a member of FOMB and the organization's Chairman, submitted an affidavit (Nicholas Affidavit Exhibit B) on a motion to intervene (strangely, the Board forced FOMB to ask permission to intervene in the hearing, even though it was FOMB's own petition the Board was hearing) which detailed the harm dam operations are causing to FOMB members' aesthetic interests (¶¶ 12-13) and to FOMB's ability to carry out its mission (¶¶ 14-15). Evidence of aesthetic and economic harm to FOMB members were also presented at the hearing (Friedman direct testimony, pp 36-38, Nicholas Affidavit Exhibit A) and are included in the 80C Petition (¶¶ 2, 39-42).[8]

The Board and the dam owners sidestep this evidence and instead argue that FOMB cannot suffer particularized injury because no one suffers particularized injury from an agency's exercise of prosecutorial discretion. As discussed above, the Board's denial of the Petition is not analogous to an exercise of prosecutorial discretion.

The Board also argues that FOMB does not have standing because the Board never determined it was an aggrieved party (though the Board does not mention that the Board voted to allow FOMB to intervene). Board Mot. 12. This argument is alarming, as it urges a sea change in access to the courthouse to challenge agency action. Agencies

[8] An organization has standing to represent its members who are injured. Portland v. McKernan, 1992 Me. LEXIS 268, ** 5-6 (Sup. Ct. Cumberland Cty. 1993).

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.

In its standing argument, the Dam Owners contend that the "effect of the BEP's decision was to allow the dams to continue to operate as presently licensed. Preservation of the status quo in no way altered FOMB's current relationship to the Kennebec River." Dam Owners' Mot. 6. This argument is specious. Maine courts entertain appeals of agency decisions that maintain the status quo. E.g., FPL Energy Hydro LLC v. Department of Environmental Protection, 2007 ME 97, 926 A.2d 1197 (Me. 2007) (appeal of water quality certification denial); Phaiah v. Fayette, 2005 ME 20, ¶8, 866 A.2d at 866 (appeal of zoning variance denial).

Cases cited by the dam owners are inapposite. 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). In Mitchell v. Judicial Ethics Committee, 200 ME 83, 749 A.2d 1282, 1283 (Me. 2000), the court ruled that a judge had no standing to appeal an ethics committee advisory opinion because the opinion was advisory and thus not a binding decision. In Great Hill Fill & Gravel v. BEP, 641 A.2d 184 (Me. 1994), an appellant challenged an enforcement order issued to its neighbor as being too weak, and thus the case falls into the line of cases disallowing challenges to prosecutorial discretion.

Lastly, FOMB objects to the standing arguments by the Board and the Dam Owners because they call for an examination of the record, which the Board has not filed yet in this case.

VII. THE WATER QUALITY CERTIFICATIONS CAN BE MODIFIED.

The Dam Owners argue that this appeal should be dismissed because the water quality certifications can no longer be modified. This argument is meritless. It should also be noted that the Board did not rule on or base its decision on this issue. Board Decision, p. 10 (Board Mot. Exhibit B). In fact, in papers filed in connection with a motion to dismiss an 80C appeal similar to the instant one but involving dams on the Androscoggin River, the Board took the position that the Court should "not consider the question" of whether water quality certifications can be modified. Nicholas Affidavit Exhibit C.

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 absent a "reopener" in the FERC license. However, federal regulations on water quality certifications (not cited dam owners) belie this argument. 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.[9] See also 33 U.S.C. § 1370 (provision of CWA that preserves state authority to adopt and enforce "any standards or limitations respecting discharges of pollutants"). Even the Dm Owners cite a FERC decision which incorporated a modified water quality certification into a license absent a reopener. Public Utility District No. 1 of Pend Oreille County, 112 FERC ¶ 61,066 (July 11, 2005), at 61,412, n.50.

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 M.R.S.A. 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

[9] Elsewhere, the Dam Owners suggest that the EPA regulation on modification, 40 C.F.R. § 121.2(b), applies only to certifications that have not yet been incorporated into a new FERC license. This is a misstatement of what § 121.2(b) provides; by its plain language, the regulation is not so limited. Moreover, the dam owners do not cite, and FOMB is unaware of, any authority suggesting that it is in any limited in its applicability.

Gulf Island-Deer Rips Hydro Project, #L-17100-33-O-N, § 11.n (relevant excerpts are attached as Nicholas Affidavit Ex. D). 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).

Any other result would gut the statutory and regulatory provisions regarding modification. 38 M.R.S.A. 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). It would also lead to absurd results. 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. Saucier v. Portland, 1980 Me. Super. Lexis 1, *7 (Cum. 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 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, 868 A.2d 210, 219-220 (Me. 2005) (footnotes omitted) (emphasis added).[10] In this case, biological integrity of the Kennebec will not be achieved if the Board cannot exercise its statutory powers to modify a water quality certification.

Lastly, it should be noted that water quality certifications 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. In 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 (though such a suit would not be fruitful here since the certifications are so weak, which is why FOMB petitioned to modify them). The independent nature of certifications is a further indication that the Board has the ability to modify them.

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

VIII. DENYING THE RIGHT TO APPEAL WOULD DENY MEANINGFUL ACCESS TO THE JUDICIAL PROCESS.

Under Article I, Section 19 of the Maine Constitution, the Legislature cannot enact laws that deny meaningful access to the judicial process. Maine Medical Center v. Cote, 577 A.2d 1173, 1176 (Me. 1990). As the Law Court stated in the seminal case of Dwyer v. Maine, 151 Me. 382, 394-395, 120 A.2d 276, 283 (Me. 1956):

> The Constitution of Maine demands that 'every person for an injury done him in his person, reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.' Article I., Section 19, Constitution of Maine. Maine and its people always endeavor to exact justice under and according to the Constitution and common and statutory law.
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> * * *
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> There is usually a legal vehicle in Maine for the individual to seek justice if, or when, he feels that injustice has been 'done him in his person, reputation, property or immunities,' even though laws may be imperfect and human enforcement difficult. Maine takes pride in attempting to carry out the old maxim that 'for every wrong there is a remedy.'

The Board is taking a position antithetical to this tradition. Affected citizens have every right to seek judicial review of licensing decisions by a State agency, and there is ample precedent involving such review. The Legislature established a procedure whereby citizens could petition the Board to modify licenses that no longer make sense. That is what happened here: it is flatly absurd for the water quality certifications to allow the dams to kill an unlimited number of eels, so FOMB petitioned to modify the certifications. There is a wrong -- FOMB members are injured by the refusal to modify the dams because their aesthetic and economic interests are being harmed by the degradation caused by the dams -- and there is a remedy -- judicial review can reverse the Board's decision. In short, FOMB is entitled to a decision in this case on the merits.

CONCLUSION

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

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