STATE OF MAINE SAGADAHOC, ss	SUPERIOR COURT CIVIL ACTION DOCKET NO. AP-07-6
ED FRIEDMAN Petitioner, v. MAINE BOARD OF ENVIRONMENTAL PROTECTION Respondent.	RESPONDENT MAINE BOARD OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS RULE 80C APPEAL AND INCORPORATED MEMORANDUM OF LAW

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 pursue modification, suspension or revocation of currently valid water quality certifications issued by the Department of Environmental Protection ("Department"), and that the Petitioner lacks standing to bring the appeal.

This matter involves a decision by the Board to dismiss a petition filed by Petitioner, Ed Friedman, together with 63 other petitioners, including Friends of Merrymeeting Bay ("FOMB") of which Mr. Friedman is the President. 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 modify, revoke or suspend water quality certifications issued by the Department in connection with the

Federal Energy Regulatory Commission's ("FERC") licensing of 13 hydroelectric projects on the Androscoggin and Little Androscoggin Rivers. The petition was filed with the Board on May 19, 2006 (herinafter referred to as "Androscoggin II").

This was the second petition filed asking the Board for substantially the same relief, the first having been filed a little over seven months earlier. The first petition ("Androscoggin I") was filed by FOMB and Douglas Watts. Androscoggin I was dismissed by the Board on February 2, 2006 and an appeal of that decision, brought by Douglas Watts, but not FOMB, was dismissed by the Superior Court, (Marden, J.) on December 5, 2006, for lack of jurisdiction (decision attached as Exhibit A).

Addressing the second petition, which forms the subject of the present appeal, the Board exercised its discretion to dismiss the Androscoggin II petition on the grounds that "the present petition raises the same issues and has substantially and materially the same factual basis as those petitions dismissed by the Board little more than a year ago." Board's Decision Dismissing Androscoggin II, dated May 17, 2007, is attached as Exhibit B. The Board noted that "Petitioners here do not allege that conditions have changed since the last petitions were filed and dismissed, nor do they present any other considerations that materially affect the issues as initially presented to the Board." Exhibit B at 2. The decision whether to reopen and modify a permit or certification, and in this case to revisit a decision made some 15 months earlier regarding materially the same petition, is one the Legislature has left to the sole discretion of the Board. This appeal should be dismissed, as was the appeal on Androscoggin I, 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) (Marden, J.). In addition, for all the reasons stated below, the Petitioner, Mr. Friedman, necessarily 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 as early as 1978 and as recently as 2005.[1] Board Decision Dismissing Androscoggin I, dated February 2, 2006, at 3 – 14 (attached as Exhibit C). 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).

[1]The projects in issue are Brunswick Hydro Project, Lewiston Falls Hydro Project, and Gulf Island-Deer Rips Project, owned by FPL Energy Maine Hydro LLC; Pejepscot Hydro Project, owned by Topsham Hydro Partners; Worumbo Hydro Project, owned by the Miller Hydro Group; Riley-Jay-Livermore Project, and the Otis Project, owned by Verso Androscoggin LLC; Lower Barker Mill Project, Upper Barker Mill Project and Marcal Hydro Project, owned by Ridgewood Maine Hydro Partners, LP; Hackett Mills Hydro Project, owned by Hackett Mills Hydro Associates, and the Rumford Falls Hydro Project, owned by Rumford Falls Hydro LLC.

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 criteria are met.[2] 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 Chapter 2, § 27 (emphasis added). The petition must describe the factual basis for the petition, *including what evidence would 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.*

[2]Pursuant to 38 M.R.S.A. § 341-D, 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.

38 M.R.S.A. § 341-D (A) – (G).

B. Androscoggin I.

On November 10, 2006, FOMB and Douglas Watts filed a petition with the Board requesting that the Board modify the water quality certifications issued for eleven projects to provide immediate upstream and downstream passage for American eel and sea lamprey. None of the certifications or FERC licenses issued for the dams require such passage, and none of the projects currently have passage facilities. Exhibit C at 23. The owners of the dams in question filed responses to the petitions arguing that they should be dismissed. Exhibit C at 18 – 20.

At its regularly scheduled meeting on February 2, 2006, the Board heard from each petitioner, as well as the owners of the dams and a presentation by Department staff, who also act as staff to the Board, and who submitted a draft decision recommending that the petitions be dismissed. While FOMB was represented by counsel, Mr. Friedman, who is FOMB's President, was present and addressed the Board. After considering the arguments presented, the Board exercised its discretion and voted to dismiss the petitions. Exhibit C. Specifically, the Board decided, in its discretion, that the petitions did not describe a sufficient factual basis that, if proven at a hearing, would support the requested action by the Board with reference to the standards listed in the statute and rules. Exhibit C at 24 – 30. The Board also found that there were potentially significant legal impediments to the Board modifying a water quality certification that has been incorporated in a federal license, where the certification did not reserve to the Department the right to reopen the certification. Exhibit C at 22 – 30.

B. Dismissal of Appeal of Androscoggin I.

Petitioner Douglas Watts filed a Petition for Review of the Board's decision on Androscoggin I with the Superior Court on or about February 22, 2006. FOMB chose not to appeal. The Board filed a motion to dismiss the petition, similar to the present motion, arguing that the court lacked jurisdiction because there was no right to appeal the Board's decision which was discretionary in nature and that Douglas Watts could not demonstrate the standing necessary to maintain an appeal of the Board's order. The court agreed.

On December 6, 2006, the Superior Court (Marden, J.) granted the Board's motion to dismiss. While the Board made a number of arguments in support of its motion, including that Watts 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 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.

C. Androscoggin II Petition

On May 19, 2006, a little over seven months after Androscoggin II was submitted and just over three months after the Board dismissed the Androscoggin I petition, the present petition, Androscoggin II, was submitted. Exhibit D. Like Androscoggin I, Androscoggin II requested modification of the certifications to require eel passage. Both petitions invoked the same criteria in 38 M.R.S.A. § 341-D[3] and made essentially the

[3] In both petitions, petitioners argued that the dams caused eel mortality and as a result of this (1) the operation of the dams pose a threat to human health or the environment, (2) the certifications failed to include legally required standards on the date of issuance, and (3) the licensees have violated laws administered by the Department. 38 M.R.S.A. §§ 341-D(3)(C), (D) and (F). Androscoggin I had also

same legal arguments with regard to that criteria. Both petitions were addressed to the same dams, except Androscoggin II added two additional dams on the Androscoggin, the Rumford Falls Dam and the Otis Dam. However no project-specific evidence was provided relating to the additional dams. Nor did the inclusion of the two dams raise new issues specific to those dams. Exhibit D. Androscoggin II incorporates Androscoggin I by reference together with all supporting materials. *Id.*

On June 9, 2006, the Board Chair issued a scheduling decision in which he determined that the Androscoggin II petition would be held in abeyance pending the court's ruling on the Androscoggin I appeal. On May 17, 2007, after the Superior Court issued the decision dismissing the Androscoggin I appeal, the Board heard argument from the dam owners, lawyers for FOMB, and Mr. Friedman and Mr. Watts, regarding whether it would hold a hearing on whether to modify the subject water quality certifications or dismiss the petitions.

Based on the petitions submitted and oral argument, the Board exercised the discretion rested in it by 38 M.R.S.A. § 341-D and dismissed the petition. The Board did so on the grounds that Androscoggin II raised the same issues and had substantially and materially the same factual basis as the Androscoggin I petitions dismissed by the Board just four months earlier. Exhibit B at 2. Further, the Board found, the petitioners did "not allege that conditions have changed since the last petitions were filed and dismissed, nor do they present any other considerations that materially affect the issues as initially presented to the Board."[4] Exhibit B at 2.

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argued that there were changes in circumstances since the certifications were issued, 38 M.R.S.A. § 341-D(3)(E), but did not pursue this argument in Androscoggin II.

[4] The Board's rules do not address the situation where the same or substantially the same petition is filed after having been dismissed once. In the absence of a controlling agency rule, however, or a contrary

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 initiate proceedings to modify – 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

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requirement of statutory and constitutional law, an agency may "fill[]the procedural interstices by an ad hoc ruling," *Wiscasset v. Board of Environmental Protection*, 471 A.2d 1045, 1048 (Me. 1984). Here the Board's decision to exercise its discretion by dismissing a second petition which was substantially and materially similar to one only recently dismissed, in the absence of any allegation of changed circumstances, violated neither statutory nor constitutional principle. *Cf Driscoll v. Gheewalla*, 441 A.2d 1023, 1027 (Me. 1982) ("the general rule is that a board of zoning appeals or board of adjustment may not entertain a second application for a variance concerning the same property after a previous application has been denied, unless a substantial change of conditions had occurred or other considerations materially affecting the merit of the subject matter had intervened between the time of the first adjudication and the subsequent application").

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 initiate steps to modify, revoke or suspend.

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 proceed to hearing 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)

[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).

(Marden, J.) at 6.[6] The Board simply declined to exercise its discretion to take further steps at this time towards 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

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[6] Petitioners did not allege that conditions had changed since the last petitions were filed and dismissed and the Board found that they did not present any other considerations that materially affected the issues as initially presented to the Board. Exhibit B at 2.

ter, 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 proceed to hearing 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 initiate reopening of a certification by scheduling a hearing. 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 scheduling a hearing to initiate a 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 CERTIFICAITON WAS FINAL AGENCY ACTION, PETITIONER HAS NOT DEMONSTRATIED 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). "Any person" may petition the Board to hold a hearing to modify, suspend or revoke a license. 06-096 CMR Chapter 2, § 27. In answer to the dam owners' claim that Petitioner lacked standing to petition the Board in Androscoggin I, the Board stated that a "[t]he demonstration of harm or of standing as an aggrieved party that is necessary to bring an appeal is not required for a person to have standing to file a petition to revoke, modify or suspend a license." Exhibit C at 17. The Petitioner here therefore, was never required to, nor has the Board ever determined that he was an "aggrieved party," as a basis for filing Androscoggin II. Without such a finding by the Board, or competent evidence of Petitioner's standing before this Court, the appeal must be dismissed for lack of standing.

More fundamentally, Mr. Friedman has not and can not, as a matter of law, show 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 gone final and been in effect – in the case of one of the dams for over 25 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 initiate 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 proceed to hearing 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 the enforcement or non-enforcement with respect to the license of another when that decision is given to an agency to be made in is 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 Mr. Friedman and others 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 brought. As bringing a complaint gives a complainant no right to appeal a decision by the DEP 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. Mr. Friedman, therefore, like a third party in an attorney disciplinary proceeding "has no more standing to insert himself substantively into a license-based discipline system than he has to compel the issuance of a license." *Id.*

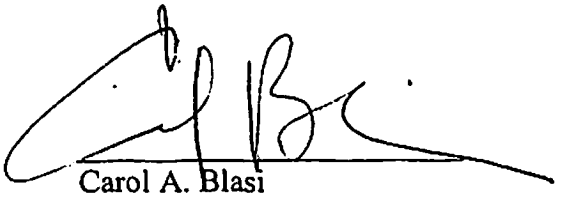
CONCLUSION

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: July 16, 2007

Respectfully submitted,

G. STEVEN ROWE
Attorney General



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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.