

STATE OF MAINE
SAGADAHOC, ss.

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

FRIENDS OF MERRYMEETING BAY,)	
)	RESPONDENT MAINE BOARD OF
Petitioner)	ENVIRONMENTAL PROTECTION'S
)	REPLY TO PETITIONER'S
v.)	CONSOLIDATED OPPOSITION TO
)	MOTIONS TO DISMISS FILED BY
MAINE BOARD OF)	RESPONDENT BOARD AND THE
ENVIRONMENTAL PROTECTION.)	PARTIES-IN-INTEREST
)	
Respondent)	

A. There is No Statutory Right to Appeal

In response to Respondent Maine Environmental Protection's ("Board") motion to dismiss this matter, Petitioner Friends of Merrymeeting Bay ("FOMB") argues that 38 M.R.S.A. § 346(1) (2001 & Supp. 2006) provides it a right of appeal. As Justice Marden stated, this argument, on its face, is "viscerally compelling, but nonetheless, legally insufficient." *Douglas H. Watts v. Maine Board of Environmental Protection* (Me. Super. Ct. Kenn. Cty., December 6, 2006) (Marden, J.), Exhibit A to Board's Motion to Dismiss (hereinafter "*Watts v. MBEP*") at 4. That is because 38 M.R.S.A. § 346(1) "incorporates 5 M.R.S.A. § 11001 (2002), as the standard for evaluating whether the Superior Court has jurisdiction." *Watts v. MBEP* at 5. Title 5, section 11001(1) provides that:

any person who is aggrieved by *final agency action* shall be entitled to judicial review thereof in the Superior Court ...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.*

Watts v. MBEP at 5, quoting 5 M.R.S.A. 11001(1) (emphasis in Decision). Justice Marden found that the Board's discretionary action "cannot be seen as *final* action since the agency did not pursue action on the allegations because of an insufficiency of evidence." *Id.* at 5-6 (emphasis in original). Similarly, the Board decided here, even after taking testimony and gathering facts at a hearing, that the record did not provide a sufficient factual basis to support reopening and modifying licenses. Exhibit B to Board's Motion to Dismiss at 4-9.

In addition, FOMB, like Mr. Watts, has failed to show that final agency action would not provide it an adequate remedy. *Watts v. MBEP* at 6. While the Board decided not to modify the water quality certifications issued by the Department of Environmental Protection, this "does not prevent Watts," or in this case FOMB, "from petitioning the Board at a later date with more evidence." *Id.* Neither 38 M.R.S.A. § 346(1), nor any other statute, therefore, provides FOMB with a right to appeal this wholly discretionary decision entrusted to the Board.

B. The Board's Decision is Not a Licensing Decision; Rather it is Investigatory in Nature. Akin to an Exercise of Enforcement Authority, and as Such is Left to the Sole Discretion of the Board.

Petitioner FOMB next argues that the Board's decision not to modify existing water quality certifications is a "licensing decision" and supports his ability to bring and maintain an appeal by citing to cases involving licensing decisions. On the contrary, the Board's authority to modify, suspend or revoke an existing license under 38 M.R.S.A. § 341-D(3) is investigatory in nature and is more akin to an exercise of enforcement authority than a licensing decision. Under 38 M.R.S.A. § 341-D(3) and the Department's procedural rules, 06-096 CMR 2.27, "the Board screens and evaluates petitions by allowing petitioners and interested parties to appear before the Board to present evidence on whether a sufficient factual basis exists to warrant a more

comprehensive public hearing.” *Watts v. MBEP*, at 4. “While the Board is charged with evaluating the merits of each petition, it will necessarily deny most petitions, reserving public hearings for only those select petitions which raise enough evidence as to call into question the reasoning for granting the license.” *Id.* at 4. Even if the Board takes the step of holding a hearing and developing a factual record, there is no requirement in the law that Board take any specific action with regard to a license. “After written notice and opportunity for a hearing, the board *may* modify in whole or in part any license, or *may* issue an order prescribing necessary correction action, or *may* act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license, whenever the board finds that” certain statutory grounds are met. 38 M.R.S.A. § 341-D(3) (emphasis added).¹ *See also* 06-096 CMR 2.27 (“After a hearing, the Board *may* modify in whole or in part any license, issue an order prescribing necessary corrective action, or refer a license to District Court for revocation or suspension when the Board finds that” certain grounds exist). If the Legislature had wanted to mandate action by the Board if certain factual findings were made, it would have used the legal action verb “shall” instead of “may.”

¹ The Board’s discretionary authority to take action with regard to an existing license is limited. The Board must find that one or more of the following grounds exist:

- 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)(3) (2001).

Like the decision of the Department of Inland Fisheries and Wildlife not to further investigate a third party complaint and initiate license revocation proceedings against certain whitewater outfitters, the Board's decision here not to take action to disturb final licenses is part of its investigatory powers left solely in the discretion of the executive branch. *New England Outdoor Center v. Commissioner of Inland Fisheries and Wildlife*, 2000 ME 66, ¶ 12, 748 A.2d 1009, 1014.²

C. Petitioner FOMB Does Not Have Standing to Bring this Appeal

Petitioner's arguments with regard to standing rely on its assertion that the Board's decision is a licensing decision rather than part of its investigatory authority. For all the reasons stated above, the Board's decision is not a licensing decision and thus Petitioner's arguments are misplaced and citations to case law inapt. Respondent Board of Environmental Protection relies on its Memorandum in Support of Motion to Dismiss to support its position that FOMB does not have standing to bring this appeal.

D. The Court Need Not Reach the Issue of the Board's authority to Modify the Terms of a Water Quality Certification under Federal Law


The issue raised by both Petitioner and the Parties-in-Interest, namely whether the Board has the authority to modify the terms of a water quality certification in areas not covered by a

² Petitioner contends that the doctrine of separation of powers, that one branch of government may not exercise any of the powers properly belonging to another, does not apply here because the Maine Administrative Procedure Act gives the court the power to reverse or modify agency decisions. This ignores the simple fact that the Maine Constitution overrides Maine law. Even if the Board's decision not to reopen and modify final licenses was considered final agency action, 5 M.R.S.A. § 11001(1), granting the right to appeal final agency actions in Superior Court "must be read in light of the constitutional doctrine of separation of powers." *Id.* ¶ 10, 748 A.2d at 1013 (quoting *State v. Hunter*, 447 A.2d 797, 800 (Me. 1982)). Some executive action, such as the discretionary decision not to reopen, investigate, and modify, suspend or revoke an existing license, may not be interfered with by the courts.

specific reservation of authority (a "reopener") in the certification itself, involves complicated issues of law involving two federal statutes, the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and the Federal Power Act, 16 U.S.C. §§ 791 *et seq.*, as well as State law, specifically 38 M.R.S.A. § 341-D(3) (2001). It is, moreover, an issue that was not decided by the Board in making the decision on appeal, nor is it one that has been tested in the courts. Given this, the Board respectfully submits that there is no reason for the Court to reach this issue in deciding the Board's motion to dismiss.

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Respectfully submitted,


Janet M. McClintock
Assistant Attorney General
Maine Bar No. 3284
6 State House Station
Augusta, Maine 04333-0006
207-626-8566
Attorney for Respondent
Maine Board of Environmental Protection