STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NOS. SAG-07-711, SAG-07-712, KEN-08-36
(consolidated)

ED FRIEDMAN,
Appellant
v.
MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Appellee

FRIENDS OF MERRYMEETING BAY,
Appellant
v.
MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Appellee

DOUGLAS HAROLD WATTS,
Appellant
v.
MAINE BOARD OF ENVIRONMENTAL PROTECTION,
Appellee

On appeal from Sagadahoc and Kennebec County Superior Courts

BRIEF OF APPELLEE
MAINE BOARD OF ENVIRONMENTAL PROTECTION

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INTRODUCTION

The Maine Board of Environmental Protection ("Board") has been asked on four occasions to use its discretionary authority to take steps to modify, suspend or revoke water quality certifications issued by the Department of Environmental Protection ("Department") to owners of hydropower projects on various Maine rivers. In each case the Board determined not to take action with regard to the certifications and dismissed the petitions. Each Board decision was appealed to Superior Court. No agency record was filed. Rather, each Rule 80C appeal was dismissed for lack of subject matter jurisdiction on the ground that the court was without power to review a wholly discretionary decision entrusted to the Board.

Three of these dismissals have now been appealed to this Court. Appellants are Ed Friedman, Douglas Watts and Friends of Merrymeeting Bay ("FOMB"), all petitioners. They argue that they are entitled to judicial review of the Board's dismissals of their petitions and ask that their cases be remanded to the Superior Court for review on the merits. The three cases have been consolidated for briefing and consideration.

While Appellants may be unhappy with the Board's failure to exercise its discretionary authority in the way they wanted, these decisions are wholly within the enforcement discretion of the Board and outside the jurisdiction of the courts. There is no statutory right of judicial review of the Board's dismissals. Furthermore, judicial review of the Board's decisions would impinge on the constitutionally mandated separation of powers. The Superior

Court's dismissals for lack of subject matter jurisdiction should be affirmed and Appellants' appeals should be dismissed.

STATEMENT OF FACTS

A. Statutory and Regulatory Framework

These cases involve a statute that, on its face, simply authorizes the Board to reevaluate and take action regarding final Department licenses. There is no provision for judicial review of a Board decision declining to exercise this authority. The Board has by rule allowed a citizen to bring issues to the Board's attention for possible action. Nothing in Maine law allows for the Board's dismissal of these requests to be reviewable.

Department licenses are issued by the Commissioner or the Board.[1] 38 M.R.S. §§ 341-A(4), 341-D(2), 344(2-A) (2001). An order approving or denying a license application is subject to administrative and judicial review. 38 M.R.S. §§ 341-D(4) & (5), 344(2-A), 346 (2001 & Supp. 2007); 06-096 CMR 2 §§ 19-20, 24-26. A license that is no longer subject to administrative or judicial appeal is final. *Sold, Inc. v. Town of Gorham*, 2005 ME 24, 868 A.2d 172.

The Board has the authority to investigate and take action regarding final licenses in limited circumstances. The Board's enabling statute provides that:

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[1] The Department is composed of the Commissioner and the Board. 38 M.R.S. §§ 341-A(2), 361-A(1-H) (2001). The Board consists of ten citizens appointed by the Governor, and is responsible for rulemaking proceedings, certain license decisions, appeals decisions, reviewing and approving administrative consent agreements, and providing the Department with guidance on enforcement priorities. 38 M.R.S. §§ 341-B to 341-E (2001). It is authorized to take action to modify, suspend or revoke licenses as described herein. *Id.*

> 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 it 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.

38 M.R.S. § 341-D(3) (2001) (emphasis added). 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 license, permit, order, approval or certification. *Id. See also* 06-096 CMR 2 § (J).

Section 341-D(3) authorizes the Board to act on its own motion to reevaluate existing licenses. Alternatively, the Board's rules set forth a procedure whereby the Commissioner or "any person" may bring to the Board's

attention a license which the Board should investigate. 06-096 CMR 2 § 27. Either way, the Board's action or inaction is wholly within its discretion.

Under the Board's rules, a petition must state the grounds for the requested action regarding a specific license and the factual basis in support of the request, and describe the evidence that will be offered to support the petition. *Id.* The licensee is given an opportunity to submit a written response. The matter is then scheduled for a regular meeting of the Board. After listening to presentations from the petitioner, the licensee, and Department staff, the Board must either dismiss the petition or schedule a public hearing. *Id.* If the Board proceeds to hearing, based on the factual record developed at the hearing, the Board will either dismiss the petition or issue an order which modifies in whole or in part any license, prescribes necessary corrective action, or refers a license to the Attorney General's Office to bring an action in District Court for revocation or suspension. 5 M.R.S. § 10051 (Supp. 2007); 38 M.R.S. § 347-A(5) (Supp. 2007); 06-096 CMR 2 § 27.

All of the water quality certifications at issue in Appellants' petitions were issued in connection with a Federal Energy Regulatory Commission ("FERC") licensing or relicensing process for operation of new or redeveloped hydropower projects or for continued operation of existing hydropower projects. Under section 401 of the federal Clean Water Act, 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

Department) that the activity will comply with that state's water quality standards. 33 U.S.C. § 1341.[2] This Court is familiar with water quality certifications. *FPL Energy Maine Hydro LLC v. Department of Environmental Protection*, 2007 ME 97, 926 A.2d 1197; *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, 868 A.2d 210, *aff'd*, 547 U.S. 370 (2006).

B. Procedural Background

On four occasions the Board received petitions from citizens asking it to exercise its discretionary authority to modify, suspend or revoke water quality certifications issued between 2 and 30 years ago for hydropower projects in Maine. The first petition, not appealed to this Court, is known as Androscoggin I. Because it forms the basis of the three later cases, all of which are before Court, it is described here. We will briefly describe the pertinent aspects of the three cases involving the petitions known as Androscoggin II, Kennebec and Union Gas. The petitions cited similar grounds for action[3] and a hearing was

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[2] 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.* 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). When existing FERC-licensed hydropower projects come up for relicensing, the Department may issue a new water quality certification for the continued operation of the project. A water quality certification is a Department "license" within the meaning of section 341-D(3).

[3] The petitioners argued that the Board had authority to act based on all or some of the following grounds: (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, (3) a change in circumstances warrants modification, suspension or revocation of licenses, or (4) the licensees have violated laws administered by the Department. 38 M.R.S. § 341-D(3)(C), (D), (E) & (F) (2001).

held on one. All were ultimately dismissed by the Board.

1. Androscoggin Appeals

a. Androscoggin I

The petitions to the Board that came to be known collectively as "Androscoggin I" were submitted by FOMB and Douglas Watts on October 3, 2005 and November 10, 2005, respectively, requesting that the Board take action to modify, suspend or revoke water quality certifications issued for a total of 11 hydropower projects on the Androscoggin and Little Androscoggin Rivers.[4] After listening to oral presentations from the petitioners, the owners of the dams and Department staff at its regularly scheduled meeting on February 2, 2006, the Board exercised its discretion and voted to dismiss the petitions.[5] App. 91-120. Specifically, the Board decided, in its discretion, that the petitions did not describe a sufficient factual or legal basis that, if proven at a hearing, would support the requested action by the Board with reference to the specified grounds listed in statute. App. 114-120. The Board also found that there were potentially significant legal impediments to the Board modifying

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[4] The certifications for continued operation of these hydropower projects were issued by the Department between 1978 and 2005. Appendix ("App.") 93-104. The corresponding FERC licenses were issued thereafter. *Id.* One of the certifications is the subject of an appeal pending in Superior Court. *FPL Energy Maine Hydro LLC v. Maine Board of Environmental Protection*, KENSC-AP-08-15 (Me. Super. Ct., Ken. Cty., filed Mar. 7, 2008) (Gulf Island-Deer Rips Project). None of the other certifications were appealed. While the certifications contain various requirements for fish passage, none of them require passage for eels. App. 111-112. The primary thrust of the petitions was to ask the Board to impose new eel passage requirements on the licensees. App. 92, 104-105, 108.

[5] The Superior Court stated on page 11 of it dismissal of the Androscoggin II appeal that the Board conducted a public hearing on the Androscoggin I petition. App. 11. It did not.

a water quality certification that did not specifically reserve to the Department the right to reopen the certification, but concluded that it need not decide this untested issue of law because it found an insufficient basis upon which to proceed to hearing. App. 112-114.[6]

On February 21, 2006, Mr. Watts sought review in Superior Court of the Board's decision. App. 122. FOMB chose not to appeal. The Board filed a motion to dismiss the Rule 80C appeal under M.R. Civ. P. 12(b)(1) arguing that the court lacked jurisdiction because there was no right to appeal the Board's decision which was discretionary in nature. *Id.* The court agreed.

On December 6, 2006, the Superior Court (Marden, J.) granted the Board's motion to dismiss the appeal. *Watts v. Maine Board of Environmental Protection*, KEN-AP-06-19 (Me. Super. Ct., Ken. Cty., December 6, 2006) (Marden, J.); App. 121-127. The court relied on the fact that the statute specifically provides that the Board "may" modify any license, "may" prescribe corrective action, or "may" take action to suspend or revoke any license. 38 M.R.S. § 341-D(3) (2001). App. 123. The court likened the Board's discretionary authority to take action with regard to a license to the discretionary authority to bring an enforcement action. App. 123-124. The

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[6] The Board deliberately did not reach this issue in any of the Board decisions in the instant appeals, App. 2-4, 29-30, 77, and neither did the Superior Court. It is not appropriate or necessary for this Court to reach this legal question because the case can and should be decided on jurisdictional grounds, and because the Board has not yet opined on its own authority under these circumstances. *See, e.g. American Automobile Manufacturers v. Massachusetts Department of Environmental Protection*, 163 F.3d 74, 81 (1st Cr. 1998) (generally describing the advisability of refraining from offering an interpretation of a statute administered by an agency before the agency has first offered its own interpretation).

court found, therefore, that it "is without power to review what is statutorily a discretionary decision entrusted to the Board." App. 127. Mr. Watts did not appeal.

b. Androscoggin II

On May 17, 2006, three months after the Board dismissed the Androscoggin I petition, Ed Friedman and 63 other petitioners, including FOMB, submitted a petition that became known as "Androscoggin II." App. 4-6. Androscoggin II covered the same hydropower projects as Androscoggin I, with the addition of two projects. *Id.*

At its regularly scheduled meeting on May 17, 2007, after hearing from the petitioners and dam owners, the Board dismissed the petition on the grounds that Androscoggin II raised the same issues and had substantially and materially the same factual basis as the Androscoggin I petition. App. 5. 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."[7] *Id.* On or about June 15, 2007, Mr. Friedman sought review in Superior Court of the Board's decision.

On November 8, 2007, the Superior Court (Horton, J.) granted the Board's motion to dismiss the appeal. *Friedman v. Maine Board of Environmental Protection*, SAG-AP-07-06 (Me. Super. Ct., Sag. Cty., November

[7] 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, and is supported by the principles of *res judicata*.

8, 2007) (Horton, J.); App. 10-17. The court held that it lacked subject matter jurisdiction to review the Board's decision because of the absence of reviewable final agency action for purposes of the Maine Administrative Procedure Act. *Id.* "The absence of any meaningful standards" in the enabling statute, the court said, "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." App. 15. Furthermore, under the constitutionally mandated separation of powers, a review by the court of the dismissals "would constitute an impermissible intrusion on the Board's discretionary authority." App. 17. The Rule 80C appeal was dismissed for lack of jurisdiction. *Id.* Mr. Friedman has appealed.

2. Kennebec Appeal

On October 3, 2005, FOMB and Douglas Watts filed petitions with the Board requesting that the Board modify, suspend or revoke the water quality certifications issued for four projects on the Kennebec River.[8]

At its regularly scheduled meeting on January 19, 2006, the Board heard from the petitioners, the owners of the dams, and Department staff, and voted to schedule a public hearing on the petition. App. 32. A public hearing to

[8] The certifications for continued operation of these four hydropower projects were issued by the Department between 1981 and 2004, with the corresponding FERC licenses issued shortly thereafter. App. 22 n.5. After 1998, all certifications were issued or amended to be consistent with a comprehensive agreement reached by the dam owners and the state to provide additional fish and eel passage in the Kennebec River. App. 22-23. Hence, all four certifications currently require phased-in fish and eel passage. None of the certifications or amendments thereto were appealed. In its petition, FOMB asked the Board to require *immediate* passage.

receive testimony from the parties and the general public was held on March 15 and 16, 2007 in Augusta. App. 35. Following that hearing, and after considering the testimony and written briefs of parties, the Board decided, in its discretion, not to take action to modify, suspend or revoke the certifications and dismissed the petitions. App. 21-53. Specifically, the Board decided that the record developed at the hearing did not provide a sufficient factual or legal basis that would support taking action against the certifications with reference to the specified grounds listed in statute. App. 24-29. On or about August 3, 2007, FOMB sought review in Superior Court of the Board's decision.[9]

On November 8, 2007, the Superior Court (Horton, J.) dismissed the Rule 80C appeal for the same reasons articulated in the Androscoggin II appeal. *Friends of Merrymeeting Bay v. Maine Board of Environmental Protection*, SAG-AP-07-10 (Me. Super. Ct., Sag. Cty., Nov. 8, 2007) (Horton, J.); App. 66-68. The court found that there was no difference in substance between the jurisdictional issues presented in the Androscoggin II and Kennebec appeals, even though in one case the Board dismissed the petition outright, and in the other dismissed the petition after conducting a hearing. App. 67. The court stated that "after a different procedural route and a more detailed consideration of the Friend's petition, the Board came to the same conclusion with respect to the Friend's petition as it did with respect to

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[9] Mr. Watts also filed a Rule 80C action which was ultimately dismissed for lack of subject matter jurisdiction. *Watts v. Maine Board of Environmental Protection*, SAG-AP-07-11 (Me. Super. Ct., Sag. Cty. January 17, 2008) (Horton, J.). Mr. Watts did not appeal.

Mr. Friedman's petition: that no action was warranted and that the petition should be dismissed." *Id.* The Court expressly referred to and adopted the reasoning of the Androscoggin I order in its dismissal of the Kennebec appeal. *Id.* FOMB has appealed.

3. Union Gas Appeal

Douglas Watts filed a petition with the Board on May 1, 2007, requesting that the Board modify the water quality certification issued for the Union Gas hydropower project on Messalonskee Stream.[10]

At its regularly scheduled meeting on October 4, 2007, the Board heard from Mr. Watts, the dam owner, and Department staff, and voted to instruct staff to draft a decision dismissing the petition. The Board adopted and issued its written decision dismissing the petition on November 15, 2007. App. 71-81. Exercising the discretion vested in it under section 341-D(3), the Board found that the petition did not describe a sufficient factual or legal basis that, if proven at a hearing, would support the requested actions by the Board with reference to the standards listed in statute and rule, and that other additional factors weighed against reopening and modifying the certification at that time.

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[10] The certification for continued operation of this hydropower project, which included five dams, was issued by the Department in 1995. It was not appealed. App. 71. The corresponding FERC license was issued in 1999. App. 72. No fish passage facilities were required at the project under the certification. App. 72. Mr. Watts asked the Board to modify the 1995 certification to require that the height of one of the five dams be lowered to the elevation of the natural bedrock ledge at the site in order to provide fish passage. App. 73-74. As explained in the Board's decision, Mr. Watts previously appealed to the Board, and then to the Superior Court (which appeal was dismissed), a separate 2005 permit and certification for dam repair activities. App. 72-73. The certification at issue in the Union Gas petition and the appeal before this Court is the 1995 certification for operation of the project.

App. 77-81. On or about November 5, 2007, Mr. Watts sought review in Superior court of the Board's decision.[11] App. 82-89.

On January 10, 2008, the Superior Court (Jabar, J.) granted the Board's motion to dismiss the appeal. *Watts v. Maine Board of Environmental Protection*, KEN-AP-07-73 (Me. Super. Ct., Ken. Cty., January 10, 2008) (Jabar, J.); App. 90. In a one page order, the court found that it lacked subject matter jurisdiction to hear the appeal, citing to the Androscoggin I decision. *Id.* Mr. Watts has appealed.

Consolidation of Appeals

This Court consolidated the Androscoggin II, Kennebec and Union Gas appeals for briefing and consideration, and ordered the Board to file a single appendix applying to all three cases. *See* January 30, 2008 and February 20, 2008 Orders Consolidating Appeals. The appendix was filed on March 10, 2008. The Joint Brief of Appellants was filed on March 17, 2008.

[11] Mr. Watts also sought a temporary restraining order to halt certain repairs being made to the dam. App. 69. On December 6, 2007, this motion was denied without hearing. *Id.*

STATEMENT OF ISSUES

I. WHETHER THERE EXISTS A STATUTORY RIGHT OF JUDICIAL REVIEW OF THE BOARD'S DISMISSAL OF A PETITION ASKING IT TO EXERCISE ITS DISCRETIONARY AUTHORITY TO MODIFY, SUSPEND OR REVOKE LICENSES UNDER SECTION 341-(D)(3).

II. WHETHER JUDICIAL REVIEW OF THE BOARD'S DISMISSAL OF A PETITION ASKING IT TO EXERCISE ITS DISCRETIONARY AUTHORITY TO MODIFY, SUSPEND OR REVOKE LICENCES IMPINGES ON THE CONSTITUTIONALLY MANDATED SEPARATION OF POWERS.

ARGUMENT

The Superior Court correctly dismissed Appellants' Rule 80C appeals as there is no statutory right of appeal from the Board's dismissal of a petition asking it to exercise its discretionary authority to take action to modify, suspend or revoke licenses under section 341-D(3). The Board's dismissal of such a petition is not "final agency action" that is reviewable under the Maine Administrative Procedure Act. Furthermore, the court's review would impinge on the constitutionally mandated separation of powers. The dismissals of Appellants' appeals for lack of subject matter jurisdiction should be affirmed.

I. STANDARD OF REVIEW.

In each of these cases, the Superior Court granted the Board's motion to dismiss the Rule 80C appeal for lack for subject matter jurisdiction. Whether subject matter jurisdiction exists is a question of law that the Law Court reviews de novo. *Norris Family Assocs., LLC v. Town of Phippsburg*, 2005 ME 102, ¶ 8, 879 A.2d 1007, 1011, *citing State v. Dhuy*, 2003 ME 75, ¶ 8, 825 A.2d 336, 341. The Court ordinarily reviews a judgment granting a motion to dismiss by examining the complaint in the light most favorable to the plaintiff and accepting the material facts of the complaint as true. *Brown v. Maine State Employers Association*, 1997 ME 24, ¶ 5, 690 A.2d 956, 958. Where the motion to dismiss challenges the jurisdiction of the court, however, the Court "do[es] not make any favorable inferences in favor of [the plaintiff]." *Davric Maine Corp. v. Bangor Historic Track, Inc.*, 2000 ME 102, ¶ 6, 751 A.2d 1024, 1028.

II. THERE IS NO STATUTORY RIGHT OF JUDICIAL REVIEW OF THE BOARD'S DISMISSAL OF A PETITION ASKING IT TO EXERCISE ITS DISCRETIONARY AUTHORITY TO MODIFY, SUSPEND OR REVOKE LICENSES UNDER SECTION 341-D(3).

The right to review of agency 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 agency action, the appeal should properly be dismissed. *Dumont v. Speers*, 245 A.2d 151, 155 (Me. 1968).

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 met. 38 M.R.S. § 341-D(3) (2001). This enabling statute authorizes the Board to take action regarding a final license if it so chooses. Any Board action is wholly within its discretion. The statute does not provide a right to appeal any Board decision not to exercise its discretion.

This power to modify, suspend or revoke licenses is part of the Department's enforcement power. As the Superior Court found below:

> [S]ection 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)(1)-(G) exists.

App. 16. *See also* App. 122-124, 126.

The legislative history of this provision reveals that the Board's discretionary authority to reevaluate and modify, suspend or revoke licenses has always been considered one of several enforcement mechanisms available to the Department. When the predecessor statute to section 341-D(3) was

enacted in 1973, it was housed in 38 M.R.S. § 451 governing enforcement of water pollution laws. Along with discretionary authority to bring enforcement actions, this law gave the Board discretionary authority to modify, suspend or revoke waste discharge licenses. P.L. 1973, c. 450, § 19 ("the board may, after opportunity for hearing, revoke, suspend or modify, in whole or in part, any license . . .). In 1977, this discretionary authority was expanded to apply to all Department licenses and moved into a new section 347 governing violations. P.L. 1977, c. 300, § 9. Later, a law intended to "clarify the procedures the department may invoke to pursue enforcement of a violation" repealed section 347 and divided its provisions into three new sections, one of which, section 347-B, housed this provision. L.D. 852, Statement of Fact, 114th Legis.; P.L. 1989, c. 311 § 4. It was not until the Legislature enacted the "Board Bill" in 1989, which clearly delineated Commissioner functions from Board functions, that the provision was moved into current section 341-D(3). P.L. 1989, c. 890, §§ A13, 40. In 1995, when paragraph G ("license fails to include any standard or limitation required" by the Clean Air Act) was added to the provision, the fiscal note attached to the legislative document indicated that the Department "will incur some minor additional costs to enforce certain federal air emissions standards over current licensees." L.D. 1672, Fiscal Note, 117th Legis.; P.L. 1995, c. 642, § 2.

Because the Board's decision declining to take further action under section 341-D(3) is wholly discretionary in nature, and is in the nature of an enforcement decision, it is not judicially reviewable. The Supreme Court has

held that judicial review is presumptively unavailable when there are no meaningful standards upon which a court may review an action. *Heckler v. Chaney*, 470 U.S. 821, 830-31 (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.'"). Where an action is wholly committed to the agency's discretion, there is "no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1972).

The courts have recognized that an agency's prosecutorial or enforcement authority is generally committed to the agency's absolute discretion. *See 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 this 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); *State v. Heald*, 382 A.2d 290, 301 (Me. 1978) ("It is well established that a reasonable prosecutorial discretion in the enforcement of criminal laws is inherent in our criminal justice system").

The *Chaney* Court stated that the presumption of unreviewability of enforcement decisions "may be rebutted where the substantive statute has provided guidelines for the agency to follow" in exercising its discretionary

authority. *Chaney*, 470 U.S. at 832-33 (agencies are not free to disregard legislative direction in the statutory scheme that the agency administers). Here, neither the enabling statute nor the Department's rules provide guidelines for the Board to follow in determining how and when, if one of the grounds for action exists, it should exercise its discretion.

Appellants incorrectly argue that the grounds listed in section 341-D(3) provide meaningful standards for judicial review of the Board's exercise of its discretion. It is true that the Board must find that one of the threshold grounds exist before it has the legal authority to take one of the enumerated actions (modify, prescribe corrective action, or refer for action in District Court to suspend or revoke). After the Board has made one of the requisite findings, thus establishing the authority to act, it then must decide whether, in its discretion, it will take action against a license. Here is where the Legislature has left the actual decision to act, or not, to the sole discretion of the Board. The list of threshold grounds serves to limit the Board's *authority* to act, not its *discretion.*[12] The enabling statute and implementing rules contain no standards upon which a court may review the exercise of the Board's discretion.

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[12] As the Superior Court below observed, "[o]n its face, Section 341-D(3), in using the word "may," vests the Board with discretion to modify, suspend or revoke a license when it finds that one of the factors enumerated in [statute] exists. 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 such a finding." App. 15. Rejecting the argument that "may" really means "must," the court stated that "[t]he Legislature, in enacting 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." App. 15 n.3.

The case cited by Appellants, *Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438 (2007), is inapposite. There the agency was required by law to regulate air pollutants upon a finding of endangerment, and the governing statute expressly made the agency's denial of the petition for rulemaking judicially reviewable. 127 S.Ct. at 1459-1463. Here, even if one of the requisite findings is made, there is no requirement that the Board exercise its discretionary authority. In addition, there is no express right to judicial review.

Agency decisions declining to exercise similar discretionary authority to modify, suspend or revoke licenses have been found to be judicially unreviewable. In *City of Olmstead Falls v. U.S. Environmental Protection Agency*, 233 F. Supp. 2d 890 (N.D. Ohio 2002), the court followed *Chaney* to hold that, "based on the obvious discretionary nature of the language used the regulations," it lacked subject matter jurisdiction over the "decision by the [Army Corp of Engineers] not to reevaluate the issuance of a Section 404 permit." *Id.* at 904-05 (the Army Corp "may reevaluate the circumstances and conditions of any permit . . . may determine that the public interest requires a modification of the terms or conditions of the permit . . . may suspend a permit . . . [or] may revoke regional permits). *See also Missouri Coalition for the Environment v. Corps of Eng'rs of the United States*, 866 F.2d 1025 (8th Cir. 1989). Nuclear Regulatory Commission decisions not to initiate proceedings to modify, suspend or revoke licenses, or take other enforcement action, have also

been held unreviewable. *See Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 158-60, 164-71 (2d Cir. 2004) (no subject matter jurisdiction to review denial of petition asking the Commission to exercise its "broad discretionary powers" to make safety-related changes to the operation of two nuclear power plants); *Massachusetts Public Interest Research Group, Inc. v. United States Nuclear Regulatory Commission*, 852 F.2d 9, 11, 15-19 (1st Cir. 1988) (no meaningful standards where regulation provides that the Commission "may institute a proceeding to modify, suspend or revoke a license or for such other action as may be proper by serving on the licensee an order to show cause . . .").

In addition, the Board's dismissals are unreviewable because the court's review would have no legal significance. In *Herrle v. Town of Waterboro*, 2001 ME 1, 763 A.2d 1159, this Court held that a zoning board of appeals decision declaring an interpretation of law for purposes of possible enforcement action may not be reviewed by the court. The selectmen determined that a gravel pit was grandfathered and therefore not in violation of the ordinance. The owners of property located near the gravel pit appealed the selectmen's violation determination to the zoning board of appeals, which agreed that the gravel pit was grandfathered. *Id.* at ¶¶ 2-4. The property owners sought review of the board's decision under Rule 80B. *Id.* at ¶ 5. The Superior Court held that the board erred as a matter of law in its interpretation of the ordinance and Maine law. *Id.* On appeal, this Court held that the board's decision should not have been reviewed by the Superior Court. *Id.* at ¶ 12.

> The only legal significance of the Superior Court's decision . . . was to provide a declaratory judgment on the issue of whether that violation determination was correct. Even if we were to affirm the Superior Court's decision finding error in the [zoning board of appeal's] legal analysis, the Board of Selectman could still decide in their discretion not to bring an enforcement action against [the gravel pit owner].

Id. at ¶ 10. Furthermore, the board's decision could not have been used to bring a citizen's suit against the gravel pit owner since only the municipality may bring actions enforcing locally administered land use laws. *Id.* at ¶ 11. Because the board's determination had no legal consequences, it was not reviewable by the court. This Court remanded to the Superior Court with instructions to dismiss the appeal. *Id.* at ¶ 12.

The same result obtains here. The Appellants seek judicial review of the Board's dismissals of their petitions requesting the Board to exercise its authority under section 341-D(3). The Board found in each case that none of the requisite factual or legal grounds for exercise of its authority were present. Appellants are particularly anxious to have the court review the Board's determination that the licenses did not "fail[] to include any standard or limitation legally required on the date of issuance," 38 M.R.S. § 341-D(3)(D) (2002). Yet even if the Superior Court were to find that the Board erred as a matter of law in its legal interpretation, the Board could still decide in its discretion not to take steps to modify, suspend or revoke license. Hence, any declaration of law by the court would have no legal consequences for purposes

of the Board's exercise of its discretionary authority under section 341-D(3).[13]

For these reasons, the Board's discretionary dismissals are not reviewable under the Maine Administrative Procedure Act. The Act provides for judicial review of "final agency action," which is defined 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) and 11001(1) (2002 & Supp. 2007).[14]

The Board acknowledges that its dismissals of the petitions were final in the sense that there was no further recourse before the Board on those

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[13] Such a court ruling would not help Appellants either, as there is no citizen suit provision authorizing citizen enforcement actions against Department licensees. *Cf.* 38 M.R.S. § 841(3) (Supp. 2007) (the commissioner or any littoral or riparian proprietor may commence an action to enjoin the violation the water level laws). If there is no express citizen suit provision in a statute, there is no private right of action. *In Re Wage Payment Litigation*, 2000 ME 162, ¶¶ 7-10, 759 A.2d 217, 221-22 (state labor laws did not include any provision for a private right of action and instead could be enforced only by the Attorney General). *See also Hottentot v. Mid-Maine Medical Center*, 549 A.2d 365, 367 (Me. 1988) (denying effort by doctor to enforce Department of Human Services rule against hospital on the grounds that enforcement was a state prerogative); *New England Outdoor Center v. Commissioner of Inland Fisheries and Wildlife*, 2000 ME 66, ¶ 12, 748 A.2d 1009, 1014 (the decision to pursue remedies in the face of an alleged statutory violation is a purely discretionary one on the part of the state agency with enforcement authority).

[14] Title 38 M.R.S. § 346 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." 38 M.R.S. § 346 (Supp. 2007). The Superior Court correctly held that section 346 provides for judicial review of Commissioner or Board decisions only to the extent authorized by the Maine Administrative Procedure Act. App. 13, 124-125.

petitions. The fact that a citizen may re-petition the Board in the future does not render the Board's dismissal of a petition a nonfinal decision.[15]

Rather, the dismissal is not "final agency action" because no specific person's "legal right, duties or privileges" were affected by the Board's dismissals. This was explained by the Supreme Court in interpreting an analogous provision in the federal administrative procedure act:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) and *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970)).

In this case, only the dam owners/certification holders themselves had even the potential to claim any "legal rights, duties or privileges" implicated by the Board's action, and the Board's dismissals of petitions to modify, suspend or revoke the licenses did not aggrieve them. The Board neither granted nor took away any license or certification, nor altered the terms or condition of those now in effect. The decision simply preserved the *status quo*.

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[15] Because the Board's dismissals were not preliminary or interlocutory decisions, the exception to the finality requirement at 5 M.R.S. § 11001(1) (permitting review of nonfinal action if review of the final agency action would not provide an adequate remedy) does not apply. *Id.*

Nor did the Board's dismissals of the petitions affect the "legal rights, duties or privileges" of Appellants or any other person. As the Superior Court correctly noted, under the enabling statute and implementing procedural rules, a petitioner is legally entitled to have the Board accept and consider the petition, and then exercise its discretion by either dismissing the petition or taking steps to modify, suspend or revoke the license, but no more. App. 16 n.4; 38 M.R.S. § 341-D(3) (2001); 06-096 CMR 2 § 27. If the Board exercises its discretion to dismiss the petition, no one, including the petitioner, has any further "legal rights, privileges or duties" in the process.[16]

Because there is no statutory right of appeal from a Board dismissal of a petition asking it to exercise its discretionary authority to modify, suspend or revoke a license under section 341-D(3), the Superior Court lacks jurisdiction

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[16] Appellants have not claimed, as they could not, that there has been a "failure or refusal to act" that is reviewable under the Maine Administrative Procedure Act. 5 M.R.S. § 11001(2) (2002). The Board fully considered each petition in accordance with statute and rule, and, in a written decision, addressed each petitioner's contentions and proffered evidence (or, in the case of the Kennebec petition, the factual record developed at hearing), and articulated the Board's reasoning for declining to exercise its discretion to take action against the licenses. App. 4-6, 21-53, 71-81. Nor can the Board's decisions declining to take the requested actions be characterized as a "failure or refusal to act" that may be appealed under 5 M.R.S. § 11001(2) (2002). A decision not to take a requested action 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, 330-31 (there was no failure or refusal to act, pursuant to 5 M.R.S. § 11001(2), where motion before administrative board to adopt a rule that would extend benefits failed to pass). In any case, judicial review of failure to act is available only if the agency's action is required by law. *See Eastern Maine Medical Center v. Maine Health Care Finance Commission*, 601 A.2d 99, 101 (Me. 1992); *Annable v. Board of Environmental Protection*, 507 A.2d 592, 593-594 (Me. 1986).

to hear an appeal of that decision. The Superior Court's dismissals of the appeals should therefore be affirmed.[17]

III. JUDICIAL REVIEW OF THE BOARD'S DISMISSAL OF A PETITION ASKING IT TO EXERCISE ITS AUTHORITY TO MODIFY, SUSPEND OR REVOKE LICENSES, WHICH DISMISSAL IS AKIN TO A DECISION NOT TO TAKE ENFORCEMENT ACTION, IMPINGES ON THE CONSTITUTIONALLY MANDATED SEPARATION OF POWERS.

Even if the Board's decision in this case could be considered "final agency action," pursuant to 5 M.R.S. § 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. 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,

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[17] For the same reasons underlining the absence of a right to appeal the Board's dismissals of petitions, Appellants themselves lack standing to appeal. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution); *Smith v. Shook*, 237 F.3d 1322, 1324 (11th Cir. 2001) (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). *See also Great Hill and Gravel, Inc. v. Board of Environmental Protection*, 641 A.2d 184 (Me. 1994) (where gravel pit owner and the Department entered into a consent agreement to resolve violations, abutter did not have standing to appeal the Board's approval of the agreement because "its legal rights and responsibilities were unchanged by the Board's decision"). The Board argued Appellants' lack of standing in the Superior Court, which did not reach this issue. App. 10 n.1, 122. The Board urges this as an alternate ground to uphold the Superior Court's dismissals of the Rule 80C appeals.

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. § 8002(4), defining final agency action, and 5 M.R.S. § 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 license, pursuant to section 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 Appellants seek in these cases. This Court is being asked to remand to the Superior Court for review of the legal and factual sufficiency of the Board's dismissal of their petitions. If the Superior Court were to decide in the Appellants' favor, the remedy would be a remand to the Board, ordering it to exercise its discretion in favor of scheduling a hearing on the petitions, where it has not already done so. Yet, under a plain reading of section 341-D(3), the Board is not compelled to take action against the licenses even if, after hearing, it finds that one of the threshold grounds for action exists. 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.

CONCLUSION

For all the reasons stated above, the Commission respectfully requests that the Court affirm the decision and dismiss the Appellants' appeal.[18]

Date: April 17, 2008

Respectfully submitted,

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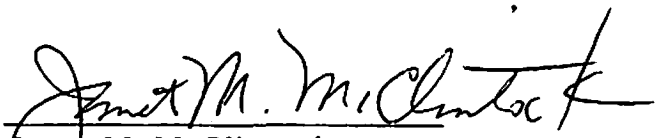

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[18] Of course, this outcome does not preclude Appellants from participating in other Department proceedings, including licensing proceedings and appeals of licenses to the Board. In addition, a citizen may bring to the Department's attention for possible enforcement action any violation of law or license. With regard to fish passage issues, citizens may seek assistance from other agencies as well. For non-FERC licensed dams, a citizen may ask the Commissioner of Marine Resources or the Commissioner of Inland Fisheries and Wildlife to order that fishways be erected. 12 M.R.S. §§ 6121 and 12760 (2005). For FERC-licensed dams, any citizen may participate in the FERC licensing process. In addition, any person may petition FERC, or ask the state or federal fisheries agencies to petition FERC, to impose additional fish passage requirements on a hydropower project under the authority reserved by FERC in a standard condition relating to conservation and development of fish and wildlife resources found in FERC licenses. 54 F.P.C. 1792 (October 31, 1975) (Article 15 is the relevant L-Form series;) *see also* App. 79, n.8, 116 n.24.

CERTIFICATE OF SERVICE

I, Janet M. McClintock, Assistant Attorney General, hereby certify that I have this day caused two copies of the foregoing **Brief of Appellee Maine Board of Environmental Protection** to be served on the counsel for the parties, by depositing the same in the United States mail, first-class postage prepaid, addressed as follows:

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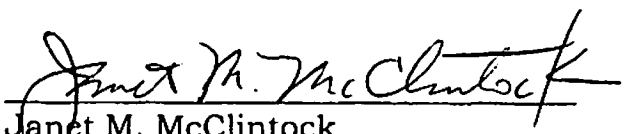

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