STATE OF MAINE
SAGADAHOC, ss.

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

FRIENDS OF MERRYMEETING BAY,)
Petitioner,)
v.)
MAINE BOARD OF ENVIRONMENTAL PROTECTION,)
Respondent.)

REPLY OF PARTIES-IN-INTEREST TO PETITIONER FRIENDS OF MERRYMEETING BAY'S OPPOSITION TO THE MOTIONS TO DISMISS

INTRODUCTION

FOMB says it "is entitled to a decision in this case on the merits." FOMB Memorandum in Opposition at 19. FOMB's view of the breadth of the courts' ability to review Maine agency decisions, however, would gut all principles of limited judicial review. Under the Maine Administrative Procedure Act ("APA"), only an "aggrieved person" is entitled to judicial review of "final agency actions." Because the BEP's decision to dismiss FOMB's petition for modification is not final agency action, and because FOMB is not an "aggrieved person," FOMB is *not* entitled to a "decision on the merits in this case." Put simply, the Judiciary is not a roving reviewer of all actions taken by the Executive Branch.

ARGUMENT

I. Final Agency Action Is Required For This Court To Have Jurisdiction.

FOMB argues that 38 M.R.S.A. § 346(1) allows appeals of any DEP decision, regardless of whether such decision constitutes final agency action. If that were the case, even interim and procedural orders would be appealable. Thus, procedural orders disposing of matters such as when a hearing will be scheduled, the order of appearance of parties at a hearing, and the like,

would be subject to judicial review. Clearly, 38 M.R.S.A. § 346(1) is not intended to lead to such a burdensome result.

The purpose of the language in 38 M.R.S.A. § 346(1), that appeals brought thereunder shall be in accordance with the procedures set forth in the Maine APA, is explanatory – not expansive, as claimed by FOMB. If the Legislature had intended that appeals of DEP decisions on petitions to modify, revoke, or suspend would not be in accordance with the procedures set forth in the Maine APA, the Legislature could have created an explicit exception for such appeals, just as it did with emergency orders issued by the BEP in Section 347-A(3).

FOMB's argument also is not supported by the Maine APA, which states that, except where expressly authorized by statute, any statutory provision that is inconsistent with the express provisions of the Maine APA shall yield to the applicable provisions of the Maine APA. 5 M.R.S.A. § 8003.

FOMB acknowledges that the only instance in which non-final agency action may be independently reviewable is if review of the final agency action would not provide an adequate remedy. This exception, however, is not applicable in the pending case because it assumes that the proceeding will indeed culminate in final agency action. Under 38 M.R.S.A. § 341-D(3), once the BEP declined to schedule a hearing, the proceeding was over. There is no more action for the BEP to take and therefore no reviewable final agency action will result.

FOMB argues that the BEP's decision not to modify the certifications was final agency action because Maine courts regularly review decisions that are made at the discretion of an agency and that not allowing an appeal of a BEP non-modification decision could lead to absurd results. FOMB misses the point. The mere fact that 38 M.R.S.A. § 341-D(3) gives the BEP discretion to modify, revoke, or suspend a license does not in and of itself make that decision "final agency action." FOMB's only "legal right, duty, or privilege" (5 M.R.S.A. § 8002(4)) is

the right to submit a petition to the BEP. DEP Reg. 2.27. FOMB exercised that right without interference. The discretionary decision challenged here – to not hold a hearing – did not affect any right, duty, or privilege of any specific person. So there was no reviewable final agency action. To hold otherwise would entirely read the words "which affects the legal rights, duties or privileges of specific persons" out of the definition of "final agency action." 5 M.R.S.A. § 8002(4).

FOMB implies that because members of the public may have standing to appeal permit decisions, that must mean the BEP decision in this case is final agency action. FOMB Memorandum in Opposition at 10-11. The three cases cited by FOMB, however, involved appeals of permit decisions that clearly affected the legal rights, duties, or privileges of specific persons -- the permittees or the permit applicant -- as required for final agency action. 5 M.R.S.A. § 8002(4). Those cases have no bearing on whether a decision *not* to modify a permit, as here, affects the legal rights, duties, or privileges of specific persons.

FOMB argues that because a licensee may seek modification of its own license, a decision on whether to modify a license cannot be akin to an agency's decision on whether to initiate enforcement action. Like enforcement action, though, action by the BEP to modify a license without the consent of the licensee is a unilateral action against the licensee, without the licensee's consent – unlike a licensee-initiated modification. Courts will not interfere with an agency decision not to take enforcement action, just as here the Court will not interfere with an agency decision that is not "final agency action" unless otherwise permitted by the Maine Legislature.

II. FOMB Is Not An Aggrieved Person.

Even assuming that the BEP decision not to modify the certifications affected legal rights, duties, or privileges of specific persons (and thus was final agency action), FOMB also

must be an "aggrieved person" to have standing to appeal. 38 M.R.S.A. § 346(1). FOMB's argument that Maine courts have reviewed agency decisions that preserve the *status quo* does not, without more, mean that FOMB is an aggrieved person. In order to be aggrieved, FOMB must demonstrate a particularized injury from a decision to preserve the *status quo*. "The agency's action must operate prejudicially and directly upon a party's property, pecuniary or personal rights." *Storer v. DEP,* 656 *A.2d* 1191, 1192 (Me. 1995) (internal citation omitted). In other words, it must be the *BEP's* action that operates prejudicially and directly upon FOMB's property, pecuniary, or personal rights.

While FOMB alleges that it has economic concerns, it has not provided support for how the *BEP's* decision harms those economic concerns. Whatever rights FOMB may have, those rights were not directly harmed or changed in any way by the BEP's decision.[1]

FOMB cites cases in which the Law Court has held that an aggrieved person has standing to seek review of an administrative action and simultaneously vindicate public rights. Memorandum in Opposition at 12-13. Those cases, in which the petitioner has suffered a particularized injury, again make clear that FOMB must have suffered a particularized injury to have standing here.

In *Heald v. School Administrative Dist. No. 14*, in ruling on whether a school administrative district was required to resubmit a bond issue to the voters, the Court held that the plaintiffs did not have standing because they had not suffered a particularized injury. The Court found no particularized injury because the statute at issue did not confer any rights upon the plaintiffs and because they failed to establish any direct injury to themselves. *Heald v. School*

[1] As the Court stated in *Ricci v. Superintendent, Bureau of Banking*, a case cited by FOMB, the central inquiry in determining whether a person is aggrieved by final agency action is whether the person has suffered an injury in fact distinct from the public at large. *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 646 (Me. 1984). FOMB does not have a personal right that is distinguishable from the public at large. Its economic concerns and aesthetic interests are no different than any other member of the public who uses or views the Kennebec River.

Administrative Dist. No. 14, 387 A.2d 1, 3-4 (Me. 1984). This is precisely the point of Parties-in-Interest – to be aggrieved, FOMB must have suffered a direct injury that was caused by the BEP action.

In *Fitzgerald v. Baxter State Park Authority*, the Court was called upon to determine whether the Baxter State Park Authority's change in the management of lands was in compliance with a charitable trust for the benefit of the public, and with its enabling statute. In finding standing in that case (the plaintiffs were actual users of the park, which is held in trust and managed for the public), the Court again required a direct and personal injury. *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 197 (Me. 1978). The Authority's change in the management of its lands operated directly and prejudicially on the plaintiffs' current use of the lands.

FOMB argues that Maine courts hear appeals all the time involving agency decisions that maintain the *status quo*. Memorandum in Opposition at 13-14. In all those cases, however, either the agency decisions alter the *status quo* so that they affect the petitioners, or the petitioners can show that they are harmed by maintaining the *status quo* – unlike in this case, where FOMB cannot show that it is harmed by the BEP's decision to maintain the *status quo*.

In *FPL Energy Hydro LLC v. DEP*, cited by FOMB, the Law Court reviewed the BEP's denial of a water quality certification for the Flagstaff water storage project. Without a state-issued water quality certification, the Federal Energy Regulatory Commission ("FERC") could not issue a new license for the continued operation of the hydropower project in that case. Thus, the decision changed the *status quo*, to the detriment of the project owner, by refusing to authorize the continued operation of the Flagstaff Project.

In *Phaiah v. Fayette*, also cited by FOMB, a Zoning Board of Appeals's denial of a variance requested by the landowner harmed the landowner in that case because the landowner

was unable to obtain a building permit to build on his property. So, regardless of whether the denial changed the *status quo*, the petitioner could show that the decision operated prejudicially and directly upon his property, pecuniary, or personal rights.

In both of these cases, the governmental decision operated prejudicially and directly on the applicant for a permit to use his property. The BEP's decision not to modify the certifications for the Parties-in-Interest's hydropower projects did not change FOMB's current ability to use and enjoy Merrymeeting Bay.

III. The BEP May Not Unilaterally Modify The Certifications.

FOMB argues that the Environmental Protection Agency's ("EPA") regulation at 40 C.F.R. § 121.2(b) allows the water quality certifications to be modified pursuant to agreement among BEP, EPA, and FERC. That regulation, however, is not applicable in instances in which BEP has issued a certification and FERC then has issued a license that incorporates the terms of the certification. Section 6 of the Federal Power Act provides that a FERC license may not be modified without the consent of the licensee. 16 U.S.C. § 799. Because the FERC licensee's consent is required for license modification, 40 C.F.R. § 121.2(b) can only apply if a FERC license, incorporating the terms of the certification, has not been issued.[2]

FOMB argues that not allowing modification of water quality certifications would gut the statutory and regulatory provisions regarding license modification. FOMB is mistaken, because these modification provisions also are applicable to the many other licenses, permits, and approvals issued by DEP.

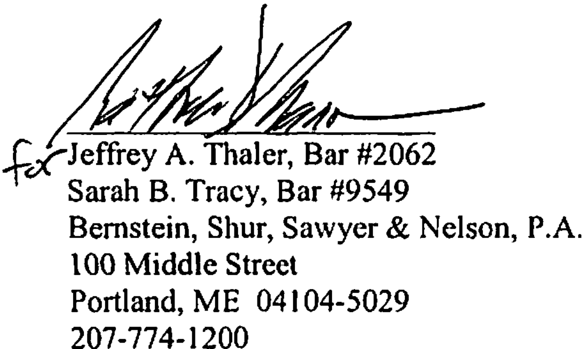
[2] FOMB misinterprets Parties-in-Interest's reliance on *Public Utility District No. 1 of Pend Oreille County*, 112 FERC ¶ 61,055 (July 11, 2005). Memorandum in Opposition at 16. In that decision FERC, in issuing a new license, incorporated into the new license the terms of a certification that had been modified by the state prior to FERC's issuance of the new license. Partie-in-Interest cited the *PUD No. 1* decision as support for the proposition that once a FERC license is issued, the licensee must consent to any modification of the license. In fact, in that FERC proceeding the licensee requested that FERC incorporate the terms of the modified certification into the new license. *Id.*, at p. 61,412, n.50. Significantly, that decision did not involve the incorporation of a certification that was modified after the license was issued.

Because a FERC license has been issued, one must look to the conditions of the federal license to determine under what circumstances the certification can be modified. FOMB appears to agree, citing a Maine Law Court decision that supports this proposition. FOMB notes that the Maine Supreme Judicial Court in *S.D. Warren* said that reopeners are essential to ensure water quality standards are met during the term of a FERC license. In other words, without a reopener, the BEP does not have the authority to amend a certification.[3]

CONCLUSION

For all of the foregoing reasons, the Parties-in-Interest respectfully request that the Court grant their motion to dismiss FOMB's petition.

Dated at Portland, Maine, this 3rd day of October 2007.



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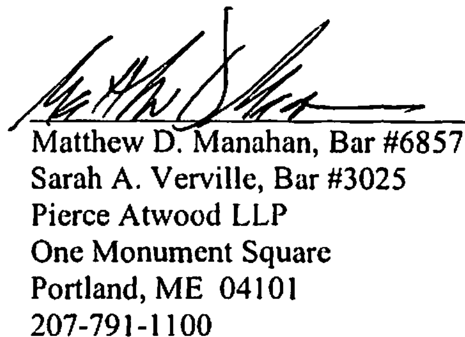

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[3] FOMB asserts that the BEP in a similar proceeding involving dams on the Androscoggin River took the position that the Court "should not" consider the question of whether water quality certifications can be modified. Memorandum in Opposition at 15. In fact, the BEP stated in that case that "there is no reason for the Court to reach this issue in deciding the Board's motion to dismiss." Memorandum in Opposition at Nicholas Affidavit Exhibit C.