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April 17, 2008

VIA HAND DELIVERY

Matthew Pollack, Esq., Clerk
Maine Supreme Judicial Court
205 Newbury Street
P.O. Box 368
Portland, Maine 04112-0368

Re: *Friedman v. Board of Environmental Protection*
Law Docket No. SAG-07-711

Friends of Merrymeeting Bay v. Board of Environmental Protection
Law Docket No. SAG-07-712

Watts v. Board of Environmental Protection
Law Docket No. KEN-08-36

Dear Mr. Pollack:

Enclosed please find for filing in the above-captioned consolidated cases an original and 9 copies of the Brief of Parties-in-Interest.

Sincerely,

Matthew D. Manahan

Enclosures
cc: Janet M. McClintock, AAG
David A. Nicholas, Esq.
Bruce M. Merrill, Esq.
Douglas H. Watts (pro se)
Jeffrey A. Thaler, Esq.
David Swetnam-Burland, Esq.
Kelly B. Boden, Esq.

SUPREME JUDICIAL COURT OF MAINE
SITTING AS THE LAW COURT

Law Court Docket Nos. SAG-07-711, SAG-07-712, KEN-08-36

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 THE SAGADAHOC AND
KENNEBEC COUNTY SUPERIOR COURTS

CONSOLIDATED BRIEF OF PARTIES-IN-INTEREST FPL ENERGY MAINE HYDRO LLC, HACKETT MILLS HYDRO ASSOCIATES, HYDRO KENNEBEC LIMITED PARTNERSHIP, MERIMIL LIMITED PARTNERSHIP, MESSALONSKEE STREAM HYDRO, LLC, MILLER HYDRO GROUP, RIDGEWOOD MAINE HYDRO PARTNERS, L.P., RUMFORD FALLS HYDRO LLC, TOPSHAM HYDRO PARTNERS, L.P., AND VERSO ANDROSCOGGIN, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

MAINE CASES

OTHER JURISDICTIONS

AGENCY DECISIONS

FEDERAL STATUTES

STATE STATUTES

RULES OF COURT

FEDERAL REGULATIONS

STATE REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

This case concerns the finality of water quality certifications ("certifications") issued by the Maine Department of Environmental Protection (the "Department"), for which appeal periods have long since expired. The appellants would have this Court rule that they have a right to require the Maine Board of Environmental Protection (the "Board") to modify previously issued, unappealed, and final certifications when the statutory criteria that only *permit* the Board to modify such certifications are met. The appellants' position would not only create a gaping new hole in the well-established rule that unappealed licenses are final agency actions on which the licensee may rely, but also would create an end-run around the finality of licenses after the appeal period's expiration. Further, the appellants' position would violate the constitutional separation of powers by inserting the courts into the Department's decision-making process regarding its discretionary enforcement power. This Court therefore should reject the appellants' position and affirm the decisions of the Superior Court.

STATEMENT OF FACTS

Parties-in-Interest are the owners of hydropower projects on the Androscoggin, Little Androscoggin, and Kennebec rivers, and on Messalonskee Stream. The projects are licensed by the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act, 16 U.S.C. §§ 791 *et seq.* Pursuant to Section 401 of the federal Clean Water Act, before FERC may issue a license for a hydropower project in Maine, the Department must certify to FERC that there is a reasonable assurance that the continued operation of the project will meet applicable state water quality standards. 33 U.S.C.

§ 1341. The Department issued certifications between 1978 and 2005 for all of the projects subject to this proceeding. It is undisputed that none of the appellants appealed the certifications to Superior Court.

After the appeal periods for the certifications expired, the appellants sought to modify those certifications pursuant to 38 M.R.S.A. § 341-D(3) to require immediate construction of eel passage facilities. Section 341-D(3) allows the Board, after written notice and opportunity for a hearing pursuant to the Maine Administrative Procedure Act ("APA"), to modify in whole or in part, issue an order prescribing necessary action, or act in accordance with the Maine APA to revoke or suspend a license when certain conditions are met.

To implement Section 341-D(3), Section 27 of the Department's Chapter 2 rules provides that any person may submit a petition to the Board that requests the Board to modify, suspend, or revoke a license. 06-096 CMR, ch. 2, § 27. Section 27 provides that, unless otherwise provided by law, no later than 30 days following the filing of the petition, and after notice and opportunity for the petitioner and the licensee to be heard, the Board shall dismiss the petition or schedule a hearing. *Id.* After a hearing (if one is held), the Board, at its discretion, may modify a license, issue an order prescribing necessary corrective action, or refer a license to the District Court for revocation or suspension, when the Board makes the required findings. *Id.* Or the Board, at its discretion, may dismiss the petition.

I. The Androscoggin Petitions

A. The Androscoggin I Petitions

On October 3, 2005, Friends of Merrymeeting Bay ("FOMB") submitted a petition that requested the Board to modify the hydropower permits and water quality certifications for six hydropower projects on the Androscoggin River. (Appendix or "App." at 104.) On November 10, 2005, Douglas H. Watts ("Watts") submitted a petition that requested the Board to modify the water quality certifications for 11 hydropower projects on the Androscoggin and Little Androscoggin rivers, including the six projects that were the subject of the FOMB petition (the FOMB and Watts petitions hereinafter will be collectively referred to as the "Androscoggin I petitions"). (App. at 104-105.)

On February 2, 2006, the Board provided FOMB, Watts, the hydropower owners, and the Department staff an opportunity to be heard on the Androscoggin I petitions. (App. at 122.) After consideration of written and oral argument by the appellants and the hydropower owners, the Board concluded that the "Petitioners' arguments and the offer of evidence by the Petitioners are insufficient to support granting the Petitioners' request that the Board schedule a hearing to consider revocation, modification or suspension of the permits and/or water quality certifications previously issued." (App. at 120.) Therefore, the Board dismissed the petitions. (*Id.*) Only Watts timely filed a petition with the Kennebec County Superior Court seeking judicial review of the Board's decision to dismiss his petition. (App. at 122.)

B. The Superior Court's Dismissal of Androscoggin I

On December 8, 2006, the Superior Court (Marden, J.) granted the motions to dismiss Watts's Rule 80C appeal. (App. at 126.) The Superior Court held that the Board's authority under 38 M.R.S.A. § 341-D(3) is discretionary, and that the courts do not have jurisdiction to review discretionary executive action. (App. at 122-124.)[1] The Superior Court also concluded that, for the Superior Court to have jurisdiction to review the Board's action, Watts needed to demonstrate that the Board's action was either final agency action, or, in the alternative, that final agency action would not provide Watts with an adequate remedy. (App. at 125.) The Superior Court concluded that Watts did not make either demonstration. (App. at 126.)

Watts did not appeal the Superior Court's decision in Androscoggin I.

C. The Androscoggin II Petition

On May 17, 2006, while the Watts Rule 80C appeal of Androscoggin I was pending in the Superior Court, and approximately 15 months after the Board had dismissed the Androscoggin I petitions, FOMB, Ed Friedman (the chairperson of FOMB), Watts, and other individuals filed another petition to modify the water quality certifications for the same 11 hydropower projects that were the subject of the Androscoggin I petition and an additional two projects on the Androscoggin River (the "Androscoggin II petition"), for the same reasons asserted in the Androscoggin I

[1] A copy of the Superior Court's Androscoggin I decision is included in the Appendix at 121-127. For ease of reference, when the Superior Court's decisions dismissing the various petitions are included in the Appendix, the Parties-in-Interest will refer to the Appendix when citing those decisions.

petition. (App. at 5.)

After considering the arguments of the parties, the Board found that the Androscoggin II petition raised the same issues and had substantially and materially the same factual basis as the Androscoggin I petitions, which the Board had dismissed "little more than a year ago." (*Id.*) The Board also found that the petitioners did not allege that conditions had changed since the Androscoggin I petitions were dismissed, and that the Androscoggin II petition did "not present any other considerations that materially affect the issues as initially presented to the Board." (*Id.*) Therefore, the Board dismissed the Androscoggin II petition.

Only Friedman filed a petition with the Sagadahoc County Superior Court seeking judicial review of the Board's dismissal of the Androscoggin II petition. (App. at 7.) On November 8, 2007, the Superior Court (Horton, J.) dismissed Friedman's appeal.[2] (App. at 17.)

II. The Kennebec Petitions

On October 3, 2005, Watts submitted a petition to modify the water quality certifications for four hydropower projects on the Kennebec River. (App. at 31.) On the same date, FOMB submitted a petition to modify the hydropower permits and water

[2] The principles of *res judicata* bar Friedman's appeal of Androscoggin II. FOMB, of which Friedman is chair, was a petitioner in both Androscoggin I and II, and yet it did not appeal either of those two Board decisions. Watts, the appellant in Androscoggin I, also was a petitioner in both Androscoggin I and II. In all material respects, the Androscoggin I and II proceedings were identical – the same river, almost all of the same dams, the same legal basis, the same relief requested, and the same parties or their privies. Because Friedman was in privity with FOMB and Watts, neither of whom appealed Androscoggin I or II to this Court, Friedman's appeal of Androscoggin II should be dismissed based on principles of *res judicata*.

quality certifications for the same four hydropower projects. *Id.* On January 19, 2006, the Board voted to schedule a public hearing on the petitions. (App. at 32.)

After a pre-hearing conference in July 2006, the Board Chair ruled that the Board would hold the public hearing in abeyance until the Department had issued condition compliance orders pertaining to the conditions of the certifications that were subject to Watts's and FOMB's petitions, and all appeal periods on the compliance orders had run. (App. at 33.) The Board Chair also ruled that, at that time, the Board would revisit the need for an adjudicatory hearing, the scope of any hearing, and whether and how any appeals of the condition compliance orders should be coordinated with the proceeding to modify the certifications. (*Id.*) The appellants chose not to appeal the Chair's abeyance order to the full Board, as they could have done pursuant to the Department's regulations. (*Id.*)

In August and September 2006, the Department issued the condition compliance orders. (*Id.*) No appeals of the condition compliance orders were filed.[3] (*Id.*)

On March 15 and 16, 2007, the Board held a two-day adjudicatory hearing on the petitions, which included daytime sessions devoted to testimony and cross-examination of the parties and the state's fisheries agencies, and an evening session devoted to

[3] The Department's compliance orders addressed the fish passage issues that are the subject of the Kennebec petitions. (App. at 33.) The appellants chose not to appeal those orders, which were final agency action, either to the Board or judicially, despite the fact that the Board Chair explicitly acknowledged the possibility that the compliance orders might be appealed and that subsequent procedural orders would have to take into account such appeals. (*Id.*) As discussed *infra*, to allow judicial review of the Department's compliance orders after the appeal period has expired would allow project opponents to circumvent the deadline for filing appeals. The appellants are not entitled to "a second bite at the apple."

testimony from members of the general public. (App. at 35.) After submittal of post-hearing briefs, the Board issued a written decision on July 5, 2007 declining to take any action to revoke, modify, or suspend the permits and water quality certifications at issue. (App. at 30.)

FOMB filed a petition with the Sagadahoc County Superior Court seeking judicial review of the Board's decision. (App. at 18.) Watts filed a petition with the Kennebec County Superior Court seeking judicial review of the Board's decision. (The Watts appeal was transferred to the Sagadahoc County Superior Court.) On November 8, 2007, the Superior Court (Horton, J.) dismissed FOMB's appeal. (App. at 66.) On January 17, 2008, the Superior Court (Horton, J.) dismissed the Watts appeal. *Watts v. Maine Board of Environmental Protection*, No. AP-07-011 (Me. Super. Ct., Sag. Cty., Jan. 17, 2008). Watts did not appeal the Superior Court's January 17, 2008 order, but FOMB's appeal of the Superior Court's November 8, 2007 order is part of this consolidated appeal.[4]

III. The Union Gas Petition

On May 1, 2007, Watts submitted a petition requesting that the Board hold a public hearing to modify the 1995 water quality certification for the Union Gas hydropower project on Messalonskee Stream (the "Union Gas petition").[5] (App. at 73.)

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[4] Because FOMB did not appeal the Board's decisions in Androscoggin I and II, FOMB is barred by principles of *res judicata* from challenging the Board's identical reasoning in the Kennebec proceeding. FOMB's appeal of the Superior Court's decision in the Kennebec proceeding should be dismissed for this reason as well.

[5] The appellants mischaracterize the proceedings before the Board regarding the Union Gas petition. (Appellants' Brief at 4.) In 2005, the Department issued a permit and water quality certification to the dam owner authorizing the repair of the Union Gas Dam. (App. at 73.) Friends

In a written decision issued on November 15, 2007, the Board dismissed the Union Gas petition.[6] (App. at 81.) The Board stated that "the petition does not describe a sufficient factual basis that, if proven at hearing, would support the requested modifications to the 1995 water quality certification and that other factors as articulated herein weigh against reopening and modifying the certification at this time." (*Id.*)

Watts filed a petition with the Kennebec County Superior Court seeking judicial review of the Board's dismissal of the Union Gas petition. On January 10, 2008, the Kennebec County Superior Court (Jabar, J.) dismissed Watts's appeal.[7] (App. at 90.)

IV. The Superior Court's Dismissals of the Androscoggin II, Kennebec, and Union Gas Petitions

On November 8, 2007, the Superior Court (Horton, J.) granted the motions to dismiss Friedman's appeal of the Androscoggin II petition for lack of subject matter jurisdiction, "namely the absence of reviewable final agency action for purposes of the

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of the Kennebec Salmon, Inc. ("FKS," of which petitioner Watts is president (*id.*)) appealed the permit and certification to the Board. (*Id.*) After consideration of the appeal, the Board affirmed the Department's order authorizing the repair work. (*Id.*) FKS sought judicial review, but the Superior Court dismissed the appeal because it was filed by a non-lawyer (Watts) on behalf of a corporation (FKS). (*Id.*) Watts did not appeal that Superior Court order. Watts's petition that is the subject of this appeal requested modification of the 1995 water quality certification for the FERC relicensing of the project, not modification of the 2005 repair order. (*Id.*) The subsequent repair of the dam thus is irrelevant to the proceeding at issue here, contrary to appellants' assertions in their brief.

[6] In footnote 2 of its Union Gas decision, the Board stated that it had acted on the petition as expeditiously as possible. The Board noted that Watts had agreed to the Board's schedule for consideration of the petition. (App. at 74.)

[7] Because Watts did not appeal the Board's decision in the Androscoggin II petition, or the Superior Court's decisions in the Androscoggin I and Kennebec petitions, Watts is barred by principles of *res judicata* from challenging the Board's or the Superior Court's identical reasoning in the Union Gas proceeding. Watts's appeal of the Superior Court's decision in Union Gas should be dismissed on that basis as well.

Maine [APA]."[8] (App. at 10.)

The Superior Court held that 38 M.R.S.A. § 341-D(3) requires "final agency action by the Board" before anyone may seek judicial review of the Board's dismissal of the Androscoggin II petition, "unless 'review of final agency action would not provide an adequate remedy.'" (App. at 13.) The Superior Court concluded that this exception to the requirement of final agency action did not apply, agreeing with the Superior Court's (Marden, J.) decision in the Androscoggin I appeal, and reasoning that the Board's dismissal of Androscoggin II was not final agency action because there "is still nothing to prevent Mr. Friedman from gathering the necessary evidence, if it exists, and again petitioning the Board." (App. at 14.)

The Superior Court also held that the Board's dismissal of Androscoggin II is not subject to review under the Maine APA because it is a matter committed to the sole discretion of the agency. (App. at 14.) The Superior Court noted that 38 M.R.S.A. § 341-D(3) on its face does not compel the Board to modify, revoke, or suspend a license when it finds that one of the enumerated factors in the statute exists. (App. at 15.) The Superior Court also noted that the Legislature, in enacting Section 341-D(3), did not intend to compel the Board to take action when it finds that one of the enumerated factors exists, but only to authorize it to do so, in its discretion. *Id.*

Finally, the Superior Court concluded that the Board's dismissal of Androscoggin II is not subject to judicial review because Maine courts may not review

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[8] The Superior Court stated that, based on this outcome, it was not necessary to address the question of whether Friedman had standing. (App. at 10.)

executive departments' discretionary enforcement decisions. (App. at 16-17.)

On the same day, the Superior Court (Horton, J.) dismissed FOMB's Rule 80C appeal of the Kennebec River petitions. (App. at 67.) While the Superior Court noted that a different procedural route preceded the Board's dismissal of the Kennebec River petitions, "this court discerns no difference in substance between the jurisdictional issues presented in this appeal and those presented in the *Friedman* [Androscoggin II] case." (App. at 67.) Again, the Superior Court concluded that it lacked jurisdiction over the Kennebec River appeal because there was no final agency action. (App. at 67.)

On January 10, 2008 the Superior Court (Jabar, J.) dismissed Watts's Rule 80C appeal of the Board's denial of the Union Gas petition because it found that it lacked subject matter jurisdiction to hear the appeal. (App. at 90.) The Superior Court referenced the Superior Court decision in Androscoggin I. (*Id.*)

ISSUES ON APPEAL

This appeal presents the following four questions:

1. Was the Superior Court correct that the Board's dismissals of the petitions are not reviewable final agency action?

2. Was the Superior Court correct that the Board's dismissals of the petitions were executive decisions committed to the Board's sole discretion?

3. Do the appellants lack standing to appeal the Board's dismissals of the petitions?

4. Have the appellants failed to state a claim upon which relief can be granted?

As explained below, because the answer to one or more of these questions is yes, this Court must deny these appeals.

ARGUMENT

STANDARD OF REVIEW AND RULES OF STATUTORY CONSTRUCTION

When this Court is called upon to review the interpretation of a statute, the Court first looks to the plain meaning of the text and "seeks to discern from the plain language the real purpose of the legislation, avoiding results that are absurd, inconsistent, unreasonable, or illogical." *Town of Eagle Lake v. Department of Education*, 2003 ME 37, ¶ 7, 818 A.2d 1034, 1037 (citation and quotation marks omitted). With regard to an agency's interpretation of a statute it is charged with administering, this Court has stated that "'the administrative agency's interpretation of a statute administered by it, while not conclusive or binding on this court, will be given great deference and should be upheld unless the statute plainly compels a contrary result.'" *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, ¶ 5, 868 A.2d 210, 214 (citation omitted), *aff'd*, 547 U.S. 370 (2006). *See also Wilson v. Bath Iron Works*, 2008 ME 47, ¶ 11.

ANALYSIS OF ISSUES ON APPEAL

I. Issue #1: The Board's dismissals of the petitions were not reviewable final agency actions.

A. For a Board decision under 38 M.R.S.A. § 341-D(3) to be judicially reviewable, there must be "final agency action."

The appellants assert that "the Superior Court ignored a bedrock precept of administrative law: judicial review of agency action is presumed." (Appellants' Brief at 20.) The appellants skip a very important word in their statement of this bedrock principal: judicial review of *final* agency action is presumed.

1. The plain meaning of 38 M.R.S.A. § 346 requires final agency action.

Title 38 M.R.S.A. § 346(1) addresses judicial appeals of orders or decisions of the Department, including orders or decisions made pursuant to 38 M.R.S.A. § 341-D(3). It states that "[e]xcept as provided in section 347-A, subsection 3, any person aggrieved by any order or decision of the board or commissioner may appeal to the Superior Court. These appeals to Superior Court shall be taken in accordance with Title 5, chapter 375, subchapter VII."[9] *Id.* Title 5, chapter 375, subchapter VII is that portion of the Maine APA entitled "Judicial Review - Final Agency Action," and it comprises 5 M.R.S.A. §§ 11001-11008.

With respect to the right of judicial review, the Maine APA provides that "[e]xcept where a statute provides for direct review or review of a pro forma judicial decree by the Supreme Judicial Court or where judicial review is specifically precluded or the issues therein limited by statute, any person who is aggrieved by *final agency action* shall be entitled to judicial review thereof in the manner provided by this subchapter." 5 M.R.S.A. § 11001(1) (emphasis added).

The meaning of 38 M.R.S.A. § 346 is plain. Judicial appeals of decisions of the Board or the Commissioner shall be taken in accordance with the judicial review provisions of the Maine APA, which limits such review to appeals of final agency actions by aggrieved persons. Section 346 is not duplicative of the Maine APA; the

[9] Section 347-A, subsection 3 addresses emergency orders issued by the Commissioner of the Department and is not relevant to this appeal.

reason the Legislature included Section 346 in the Department's statutes is to make clear that there is no requirement for an aggrieved person to appeal Commissioner decisions to the Board before appealing them to court. Otherwise an administrative appeal to the Board would be required before an aggrieved person could seek judicial review of a decision of the Commissioner, because the Maine APA's definition of "final agency action," limits judicial appeals to those agency decisions "for which no further recourse, appeal or review is provided within the agency." 5 M.R.S.A. § 8002(4), 38 M.R.S.A. § 341-A(2) (Department consists of Board and Commissioner). Because the appeals at issue here are from Board decisions, Section 346 adds nothing to the analysis under Maine's APA.

The appellants nonetheless argue that the words "any order or decision of the board or commissioner" in 38 M.R.S.A. § 346(1) mean that final agency action is not required. Had the Legislature wanted to preclude judicial review of Board or other Department decisions that do not meet the definition of "final agency action," the appellants reason, it was required to explicitly do so in Section 346(1). (Appellants' Brief at 24.) This argument fails because Section 346(1) plainly states that appeals shall be taken in accordance with the judicial review provisions of Maine's APA, which authorizes judicial review of *final* agency action.

The appellants argue that "the plain meaning" of Section 346(1) shows that "the Legislature intended to allow judicial review of petitions to modify," because "[i]f the Legislature had wanted to preclude judicial review, it could have done so as it did in other statutes." (Appellants' Brief, at 23-24). This is a red herring, because Section

346(1) expressly incorporates the judicial review provisions of the Maine APA; unlike a Board decision to deny a petition to modify, the statutes cited by the appellants relate to agency actions that meet the definition of "final agency action" (and thus would be subject to judicial review absent an express exception).

In any case, when the appellants assert that it is clear that "the Legislature intended to allow judicial review of petitions to modify," they are ignoring the statute at issue, which does not even *contemplate* petitions to modify. Section 341-D(3) does not provide for petitions to the Board; instead, it provides only for unilateral action by the Board itself. The Board decided on its own, in its rules, to authorize petitions to the Board asking the Board to exercise its discretionary Section 341-D(3) power to revoke, modify, or suspend a license. 06-096 CMR, ch. 2, § 27. The Legislature envisioned the Section 341-D(3) power as an enforcement power vested in the Board, not a right given to the public. By creating a mechanism for the public to submit petitions to the Board, the Board did not (and could not) divest itself of its unilateral authority to determine when and how to exercise its power under Section 341-D(3) to revoke, modify, or suspend a license.

The appellants' argument also is defeated by Section 8003 of 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 and the applicable provisions of the Maine APA shall govern in its stead. 5 M.R.S.A. § 8003. The appellants' argument that Section 346(1) allows judicial review even when there is no "final agency action" is inconsistent with the express provisions of Section 11001 of

the Maine APA, which limits judicial review to "final agency action." Because there is no express statutory authorization of judicial review of a decision not to modify a license under Section 341-D(3), and because Section 346(1) would be inconsistent with the Maine APA's "final agency action" requirement if Section 346(1) were interpreted to permit judicial review of a agency action that is not "final agency action," the appellants' view of Section 346(1) must fail.

This Court has stated that the "statutory scheme from which the [statutory] language arises must be interpreted to achieve a harmonious outcome." *Coker v. City of Lewiston*, 1998 ME 93, ¶ 7, 710 A.2d 909, 910. An interpretation of Section 346(1) that allows judicial review of orders or decisions of the Board that are not "final agency action" would not achieve a harmonious outcome, because it would create a huge exception to the final agency action requirement of the Maine APA, allowing judicial review of any non-final Department action for which there is no express statutory exception. If any order or decision of the Board were judicially reviewable, 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) was not intended to lead to such an absurd result.

2. Extrinsic sources also demonstrate that only judicial review of final orders or decisions by the Board is presumed.

Because the plain meaning of 38 M.R.S.A. § 346 resolves any question of its interpretation, there is no need to look to the statute's history, underlying policy, and

other extrinsic factors, as the appellants have tried to do in their effort to argue that judicial review of Board decisions under 38 M.R.S.A. § 341-D(3) does not require final agency action. Nonetheless, assuming *arguendo* that extrinsic sources should be examined, the extrinsic factors cited by the appellants also make clear that it is judicial review only of *final* agency action that is presumed.

For instance, the appellants look to the legislative history of 5 M.R.S.A. § 11001. (Appellants' Brief at 20.) The legislative history, however, supports the plain meaning of the statutory language and makes clear that only judicial review of *final* agency action is presumed: "This definition does not intend to change the traditional notion of what constitutes interlocutory rulings or the non-reviewability of such rulings . . . . The wording is intended as a codification of existing doctrines of 'finality.'" L.D. 1768, Statement of Fact (108th Legis. 1977), at 24. The legislative history of the Maine APA's definition of "final agency action" could not be clearer.

The U.S. Supreme Court in *Abbott Laboratories v. Gardiner*, 387 U.S. 136 (1967), on which the appellants rely, stated that "judicial review of *final* agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." (Appellants' Brief at 20 (emphasis added).) In *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), another case on which the appellants rely, the Supreme Court stated that "[f]rom the beginning 'our cases [have established] that judicial review of a *final* agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the

purpose of Congress.'" *Id.* at 670 (emphasis added) (quoting *Abbott Laboratories v. Gardiner*, 387 U.S. 136, 140 (1967)).

Unhappy with Maine case law, the appellants rely on cases from Wyoming and Alaska. They provide the appellants no additional help. In *Pisano v. Shillinger*, 835 P.2d 1136 (Wyo. 1992), the Wyoming Supreme Court discussed the Wyoming APA, "which establishes, in general, the right to have review of *final* agency decisions." *Id.* at 1138 (emphasis added). Also, in *State Dep't of Health v. A.C.*, 682 P.2d 1131 (Alaska 1984), the Alaska Court of Appeals relied in part on the Alaska APA, which allows for judicial review of a *final* administrative order, in holding that the Department of Health's order regarding the physical placement of a child was subject to judicial review. *Id.* at 1135 (concurring opinion).

In sum, the extrinsic sources cited by the appellants make clear that final agency action is required in most cases for an agency action to be judicially reviewable.

B. The Board's dismissals were not final agency action.

To be "final agency action," the agency action must affect the legal rights, duties, or privileges of specific persons. 5 M.R.S.A. § 8002(4). The decision of the Board not to exercise its unilateral power to modify a license[10] does not affect anyone's legal rights, duties, or privileges, because the Board has not taken any action to affect them.

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[10] The appellants' statement of issues misstates the issues on appeal. The appellants assert that the issues are whether the Superior Court erred "in ruling Board action on a petition to modify . . . is never 'final agency action' and thus never subject to judicial review." (Appellants' Brief at 18.) In fact, the issue is whether the Superior Court erred in ruling that Board action to *dismiss* a petition to modify is not "final agency action" and not subject to judicial review. If the Board modifies a license, that action would be "final agency action" subject to judicial review.

Under Chapter 2, Section 27 of the Department's rules, the only right held by the appellants is the right to *request* that the Board hold a hearing to consider whether to modify, suspend, or revoke a license. There is no dispute that the Board entertained the appellants' hearing requests. There is no other legal right that was affected by the Board's action, because the Board did not change anything – the existing final certifications issued for the FERC licenses for the hydropower projects were in effect before the Board's dismissals, and the FERC licenses remain in effect after the Board's dismissals. Because no change results from a Board decision not to exercise its power to modify, no right, duty, or privilege is affected. 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).

The appellants argue that the Board's dismissals were final agency action because the dismissals leave the appellants in the same position as an applicant that has been turned down for a permit. (Appellants' Brief at 44.) In support of their misplaced analogy, they state that the applicant could always file a new application for the same activity and provide more evidence that it is entitled to the permit, just like the appellants could file a new petition to modify. (Appellants' Brief at 44-45.) The appellants miss the point. The denial of a permit application affects the "legal rights, duties, or privileges" of the applicant because the applicant then is prohibited from engaging in some specific activity requiring a license from the Department. The Board's dismissal of the petitions here did not affect anyone's "legal rights, duties, or privileges," because the appellants' only legal right, duty, or privilege under the

Department's regulations is the right to request that the Board consider whether to hold a hearing to consider whether to modify a license.

Because the Board's decisions not to modify the licenses did not affect anyone's legal rights, duties, or privileges, they were not final agency action.

C. The exception to the "final agency action" requirement, allowing judicial review of nonfinal agency orders, is not applicable.

Under the Maine APA, 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. The appellants argue that even if this Court rejects their contention that the Board's decisions to dismiss the petitions were final agency action, their "appeals fall within [this] exception to the finality rule" because fish passage is important enough to justify judicial review. (Appellants' Brief at 48.)

There is nothing in the Maine APA that can be used to turn the "inadequate remedy" exception to the final agency action requirement into an "importance" exception. The legislative history of the Maine APA states that the "inadequate remedy" exception is a narrow one. The drafters stated that "[t]he 2nd sentence in subsection 1, taken from the Uniform Law Commissioners' Revised Model State APA, establishes a narrow exception for review of nonfinal action in cases where review of final action would not be effective." L.D. 1768, Statement of Fact (108th Legis. 1977), at 31.

The appellants' argument would require the courts subjectively to determine whether, if an agency action is not final agency action, it is "important" enough to

justify judicial review. The Maine APA does not support such an interpretation of the "inadequate remedy" exception, which would gut, for example, the principle that non-enforcement decisions are not judicially reviewable.

In any event, the appellants have an adequate remedy. The appellants want this Court to believe that if the Board's dismissals of their petitions under Chapter 2, Section 27 are not judicially reviewable, there is no avenue to seek redress for their claims. (Appellants' Brief at 30-34, 47-48.) The appellants offer a hypothetical relating to an illegally issued permit allowing the emission of poisonous gas to demonstrate the consequences that will occur if the Board's dismissals are not judicially reviewable. The hypothetical (Appellants' Brief at 30), however, is not pertinent for two reasons.

First, the way to address such an illegally issued permit is for the affected residents to seek judicial review of the permit when it is issued, within the timeframe allowed by law. Once the appeal period has expired, however, the license becomes final and unreviewable, except in limited and exceptional circumstances (set forth in Section 341-D(3)).

Second, FERC is the entity that issued the licenses at issue here, *i.e.*, the instruments that authorized the activity and incorporated the conditions of the certifications.[11] It is FERC, not the Department, that has the authority to modify and

[11] Note that, unlike in the appellants' hypothetical, the certifications here are not licenses that authorized any activity – they simply certified to the federal agency (FERC) that water quality standards will be met. 5 M.R.S.A. § 8002(5) (a "license" is a "permission"). The certifications are "licenses" only for the purposes of Section 341-D(3) and Chapter 2, Section 27. They do not "permit" anything.

enforce the licenses, including the conditions of the certifications incorporated into the licenses. *See* 33 U.S.C. § 1341(d); *Great Northern Paper, Inc.*, 77 F.E.R.C. ¶ 61,066 (1996) (once state has issued certification, Clean Water Act contemplates no further role for state in process of issuing, and ensuring compliance with, terms of federal license, except in specified circumstances where new certification is required).

Thus, the avenue for the appellants to seek redress is through FERC. In fact, in its dismissal of Androscoggin I, the Board noted that all FERC licenses contain a standard condition that requires that, for the conservation and development of fish and wildlife resources, a FERC licensee must construct, maintain, and operate reasonable facilities as may be ordered by FERC on its own motion or on recommendation by state and federal fish and wildlife agencies, after notice and opportunity for hearing. (App. at 116.) Further, under FERC's regulations, the appellants could file a complaint with FERC. *See* 18 C.F.R. § 385.206.

II. Issue #2: The Board's dismissals of the petitions are not subject to judicial review because they constitute decisions committed to the Board's sole discretion.

Even if the Board's dismissals of the petitions constitute final agency action or are subject to an exception to the limitation of judicial review to final agency actions, the decisions not to modify, revoke, or suspend the certifications are decisions committed to the sole discretion of the Board and are not judicially reviewable.

This Court has stated that the language in the Maine APA defining "final agency action" and allowing judicial review of final agency action "must be read in light of the constitutional doctrine of separation of powers. *See* Me. Const. art. III. The Legislature

may not constitutionally confer on the judiciary a commission to roam at large reviewing any and all final actions of the executive branch. Some executive action is by its very nature not subject to review by an exercise of judicial power." *Brown v. State, Dep't of Manpower Affairs*, 426 A.2d 880, 884 (Me. 1981).

Moreover, this Court has stated that, pursuant to Article III, section 2 of the Maine Constitution, "'the separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government.'" *New England Outdoor Center v. Commissioner of Inland Fisheries*, 2000 ME 66, ¶ 9, 748 A.2d 1009, 1013 (2000). Allowing challenges to Board decisions not to modify would allow an end-run around the finality of licenses after the appeal period has expired and would insert the courts squarely into the Department's executive decision-making process, creating logjams of cases at the administrative and judicial levels.

Consequently, even if the Board's dismissals are "final agency action" -- which they are not -- it does not mean that they are subject to judicial review. *Id.* ¶ 10, 748 A.2d at 1013.

A. The use of the word "may" in Section 341-D(3) is permissive, not mandatory.

1. The statutory context in which the word "may" appears indicates that its meaning is discretionary, not mandatory.

The appellants contend that the word "may" in 38 M.R.S.A. § 341-D(3) means "shall," and that it mandates the Board to modify a certification if any one of the listed criteria is met. (Appellants' Brief at 28-29.) The appellants are wrong. The word "may"

does not mean "shall," and 38 M.R.S.A. § 341-D(3) does not require the Board to modify a license, even if one or more of the listed criteria is met. An interpretation of 38 M.R.S.A. § 341-D(3) that would *mandate* the Board to modify a license long after appeal periods have expired would create a gaping exception to the rule of finality that is a fundamental principle of Maine administrative law.

The word "may" when used in a statute generally is intended to be discretionary, and not mandatory, subject to the overriding principle that legislative intent must control. *Boynton v. Adams,* 331 A.2d 370, 372 (Me. 1975); *Collins v. State,* 161 Me. 445, 451, 213 A.2d 835 (1965). *See also, generally,* Sutherland, *Statutes and Statutory Construction* § 57:7 (2000). In determining legislative intent, the courts give consideration "to the whole system of which the section at issue forms a part and all legislation on the same subject matter must be viewed in its overall entirety so that an harmonious result presumably intended by the Legislature will be reached." *In re Belgrade Shores,* 359 A.2d 59, 61 (Me. 1976). When reviewing Section 341-D in its entirety, it is clear that the Legislature intended that the word "may" would have its generally accepted meaning.

Title 38 M.R.S.A. § 341-D sets forth the Board's responsibilities and duties. That the Board's responsibility in Section 341-D(3) is permissive, not mandatory, is demonstrated by the multiple uses in that paragraph of the word "may" when referring to the Board's authority to modify, suspend, or revoke a license, and the juxtaposition of that paragraph with the immediately preceding (Section 341-D(2)) and the immediately following (Section 341-D(4)) paragraphs, which use the word "shall" when

speaking of the Board's authority -- clearly, the Legislature intended some different meaning and scope for the sandwiched provisions of Section 341-D(3).

Under Section 341-D(2) the Board "shall" assume jurisdiction over permit applications referred to it by the Commissioner, when the Board finds that certain criteria have been met. On the other hand, the Board "may" vote to assume jurisdiction of an application when, on its own, it finds that certain criteria have been met. In one instance, the Board is mandated to act; in the other the Board has the discretion to act.

Under Section 341-D(4), the Board "shall" review any final license decision made by the Commissioner when a person aggrieved by the decision timely files an appeal of the decision to the Board. On the other hand, the Board "may" hold a hearing at its discretion on the appeal.

In contrast, the sandwiched Section 341-D(3) never uses the word "shall." It only uses the word "may."

Unlike the word "may" in Section 341-D(3), the word "may" in the statutes cited by the appellants (Appellants' Brief at 25-26) does not give the agency discretion not to take the action at issue if the applicable standards are met. Under those authorities, the word "may" limits the discretion the agency has in the exercise of the agency's mandatory obligations. In the cases cited by the appellants relating to those statutes, the Court reviewed the agency decisions to determine whether the agency, in its grant or denial of the variance, license, or permit at issue, exercised its mandatory obligations in a manner consistent with the statutory criteria.

For instance, 30-A M.R.S.A. §§ 4353(2)(C) and 4353(4) allow a zoning board of appeals to grant a private property owner a variance from zoning restrictions imposed by a town on the use of property. Title 8 M.R.S.A. § 2 provides that municipal officers may license suitable persons to keep bowling alleys, shooting galleries, and billiards rooms in any place that will not disturb the peace and quiet of a family. Through enactment of these statutes, the Legislature expressed its intent that private property may be used by the private property owner if such use is consistent with the criteria established by the Legislature. If the administrative body to which authority has been delegated to exercise the authority has the discretion to deny use of such property even when it finds that the statutory criteria have been met, then the legislative intent in allowing use of such private property would be frustrated and result in the Executive Branch interfering with the role of the Maine Legislature.[12]

Audubon v. Board of Environmental Protection, No. CV-81-1422 (Me. Super. Ct., Cum. Cty., June 16, 1982) (Alexander, J.), 1982 Me. Super. LEXIS 106 (cited at Appellants' Brief at 28), also undercuts the appellants' argument that the word "may" in a statute does not show intent to preclude judicial review. The statute in that case provided that if the applicant demonstrates to the satisfaction of the board or municipality that certain criteria are met, "the board or municipality *shall* grant the permit upon such terms as are necessary to insure that the proposed activity will

[12] Chapter 529 of Department's rules provides that the Department may issue permits for certain wastewater discharges. 06-096 CMR, ch. 529. While it is not a Maine statute, the analysis is the same.

comply with the foregoing standards." *Audubon*, 1982 Me. Super LEXIS 106 at * 8 (emphasis added). That case had nothing to do with whether "may" is intended to be mandatory.

In *Roy v. City of Augusta*, 387 A.2d 237, 238 (Me. 1978) (cited at Appellants' Brief at 26), the Court reviewed the City of Augusta's decision not to renew a license to operate a billiard room. Augusta's ordinance implementing the statute provided that the municipal officers "shall" grant a license if the location is in such a place that it will not disturb the peace and quiet of a family. *Id.* at 238. Thus, in that case, under the ordinance, the municipal officers had a mandatory obligation to act. No inference regarding the use of the word "may" in the statute may be drawn from that case.

In other words, with respect to the authorities cited by the appellants, they are inapposite or the context indicated that the administrative body had a mandatory obligation to issue the approval if the applicant met the applicable standards.

The appellants argue that the cases cited by Justice Horton in his order dismissing the Androscoggin II appeal show that "may" in Section 341-D(3) is mandatory.[13] (Appellants' Brief at 26). To the contrary, those cases are clear that the use of the word "may" does not, in general, mandate agency action. For instance, in *Dumont v. Speers*, 245 A.2d 151 (Me. 1968), the Court addressed the appellants' contention that the use of the word "may" must be read as "shall." *Id.* at 153-154. The

[13] On the other hand, the appellants appear to agree that if the license at issue does not contain legally required standards, or if there has been a change in circumstances, then Section 341-D(3) merely "authorizes," *i.e.*, gives the Board the discretion, to modify the license. (Appellants' Brief at 36.)

Court found nothing "to give the public or third persons a claim *de jure* for a fishway in this dam." *Id.* at 153. Instead, the Court found that "a long legislative history in the treatment of fishways makes it clear that the Legislature never intended that this statute be mandatory instead of permissive." *Id.* Thus, the Court found that the Legislature had given the Commissioner of Inland Fish and Game the discretion to require a fishway at a given dam. *Id.* at 155.

2. Whether an agency has discretion not to take action is not the same as whether an agency must use its discretion appropriately in taking an action.

The appellants argue that the use of the word "may" in Section 341-D(3) does not show that denial of a petition to modify is non-reviewable discretionary agency action because courts regularly review agency decisions for abuse of "discretion." (Appellants' Brief at 25-26.) The question whether an agency has discretion to determine to take or not to take action, however, is not the same as the question whether an agency that has decided to take an action has appropriately used and not abused its discretion.

Non-reviewable "discretionary" agency action (the decision whether or not to act) is different from the "discretion" agencies must use in applying their judgment how to exercise their authority in performing their mandatory duties (such as when considering whether to issue a license). "Discretionary" here means that the agency can choose not to act, not that the agency must use its discretion in taking an action. The latter is what is meant by 5 M.R.S.A. § 11007(4)(C)(6) when it refers to review of agency actions for "abuse of discretion."

This is demonstrated by the use of the word "discretion" in the federal APA. The federal APA provides that a court reviewing agency action must set aside agency action found to be, *inter alia*, an abuse of discretion. 5 U.S.C. § 706(2)(A). On the other hand, the federal APA contains an express exception prohibiting judicial review of "discretionary" agency actions. 5 U.S.C. § 701(A)(2). If a court may review an agency decision for abuse of discretion, but may not review discretionary agency actions, then the two uses of the word "discretion" must be different.

The appellants ignore the different uses of the word "discretion" in the federal APA. Instead, they assert that the express exception for review of discretionary agency actions contained in the federal APA, and the lack of such an express exception in the Maine APA, demonstrates that discretionary agency action must be reviewable under the Maine APA. (Appellants' Brief at 25.) This argument is a red herring because the federal APA does not contain a definition of the term "final agency action." Because the Maine APA defines the term "final agency action" in a way that excludes discretionary actions that do not affect anyone's legal rights, duties, or privileges, there is no need for the Maine APA to contain a similar express exception.

The appellants' argument also ignores the fact that the non-reviewability of discretionary agency action, even if it were "final agency action," results from the constitutional separation of powers, not the Maine APA. The federal APA simply includes a codification of this constitutional principle. As noted earlier, this Court has stated that Maine's constitutional separation of governmental powers is "much more

rigorous" than that which is applied at the federal level. *New England Outdoor Center v. Commissioner of Inland Fisheries,* 2000 ME, 66, ¶ 9, 748 A.2d at 1013.

B. The Board's authority under Section 341-D(3) is the executive's discretionary power to take enforcement action.

The Board's authority under Section 341-D(3) is part of its discretionary power to investigate and enforce licenses. This is underscored by the legislative derivation of Section 341-D(3). Section 341-D(3) originally was enacted as part of a comprehensive effort to conform Maine's water pollution control laws with the Federal Water Pollution Control Act amendments of 1972. *See* L.D. No. 1945, § 191 & Statement of Fact (106th Legis. 1973). Tellingly, the section (at that time, 38 M.R.S.A. § 451(2)) was enacted as part of "Article 3. Enforcement," and provided that the Board may modify, revoke, or suspend a license, or issue an order prescribing necessary corrective action, whenever it found that there has been a violation of the license, that the licensee obtained the license by misrepresentation or failure to fully disclose all facts, that there has been a change in circumstance that requires a temporary or permanent reduction or elimination of the licensed discharge, or that there has been a violation of the statute. This demonstrates that the Legislature viewed the Board's authority to modify, revoke, suspend, or order corrective action as discretionary *enforcement* power.

The Board's ability to modify, suspend, or revoke a license under Section 341-D(3) involves the exercise of the agency's coercive power over the licensee. Deciding whether to modify, suspend, or revoke a license involves a balancing of a number of factors that are within the technical expertise of the Board, and of the "many variables

involved in the proper ordering of its priorities." *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Department issues many hundreds of licenses every year in accordance with statutes involving air, water, land use, natural gas and petroleum, natural resources, and hazardous materials, among others. Allowing judicial review of Board decisions not to modify, revoke, or suspend any of these permits or not to take corrective action, even when the Board may have determined that a licensee has violated a law administered by the Department, that the activity poses a threat to human health or the environment, that the license fails to include a legally required standard, or that there has been a change in condition or circumstances,[14] would insert the courts squarely into the Department's executive decision-making process, creating logjams of cases at the administrative and judicial levels. [15] As this Court has stated,

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[14] The appellants invoked these criteria from Section 341-D(3) as the bases for their petitions to modify the certifications. (App. at 32, 75.) Appellants have made many misleading or untrue claims in their brief about whether these criteria have been met. The merits of the Board's decisions are not before the Court in this appeal, but the parties-in-interest dispute the appellants' claims and note that the Board made detailed factual findings on these issues that are contrary to the appellants' claims. (App. at 5, 25-29, 77-80, 111-119). In fact, in the Kennebec hearing, all of the resource agencies opposed the petitions. (App. at 25-26, 42-43.)

[15] The appellants argue that the Superior Court in Androscoggin II was wrong, as a matter of law, in characterizing the Board's actions on the petitions as enforcement decisions, because the appellants did not ask the Board to enforce the certifications. (Appellants' Brief at 36.) This argument is a red herring, because the Androscoggin II petition and the FOMB Kennebec petition requested the Board to modify, revoke, or suspend the certifications, all of which are "enforcement" actions. (App. at 3, 31.) The appellants also state that they sought to modify the certifications to provide such immediate fish passage as would ensure that all fish migrating upstream can pass the dam and no fish migrating downstream are killed or injured by the dam, *i.e.*, a zero impact standard. This extreme interpretation of Maine's water quality standards would lead to illogical results, and shows why the Department makes decisions regarding fish passage facilities in the context of agency fishery management plans, on a case-by-case basis. (App. at 27, 78.) This interpretation also is not required by Maine's water quality standards. *See S.D. Warren Co. v. Board of Environmental Protection*, 2005 Me. 27, ¶¶ 23-26 (upholding Board's decision to require phased-in, as opposed to immediate, fish passage), *aff'd*, 547 U.S. 370 (2006).

"judicial interference with apparently legitimate executive department activity not only disrupts the administrative process but also encourages the circumvention of statutorily authorized investigation and enforcement mechanisms." *Bar Harbor Banking & Trust Co. v. Alexander,* 411 A.2d at 77 (Me. 1980).

Both the U.S. Supreme Court and this Court have held that the exercise of prosecutorial discretion is not subject to judicial review. *See Heckler v. Chaney,* 470 U.S. 821, 831 (1985) (stating that "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"); *Fryeburg Water Co. v. Town of Fryeburg,* 2006 ME 31, n.6, 893 A.2d 618, 623 ("The Ordinance cannot be read to mean, as SF contends, that a decision to not enforce the ordinance creates a right to appeal. The CEO is granted what is akin to prosecutorial discretion under the Ordinance"); *Herrle v. Town of Waterboro,* 2001 ME 1, ¶¶ 10-11, 763 A.2d 1159, 1161 (upholding town's refusal to act on request by resident to initiate enforcement action against neighbor for zoning violation, reasoning that courts lack jurisdiction to engage in appellate review of exercise of prosecutorial discretion by municipalities); *New England Outdoor Center v. Commissioner of Inland Fisheries and Wildlife,* 2000 ME 66 ¶ 12, 748 A.2d at 1014 (upholding dismissal of petition for review of commissioner's determination not to pursue license revocation actions because requiring commissioner to hold public hearing on whether whitewater outfitters were affiliated entities would be improper interference with the agency's discretionary power to investigate).

The appellants argue that Board action is mandated under Section 341-D(3) because substantively the criteria in Section 341-D(3) are important. (Appellants' Brief at 29-30.) The appellants also argue that, contrary to the reasoning in the Superior Court's Androscoggin II decision, Section 341-D(3) contains standards that are no less meaningful than the "natural scenic beauty" standard upheld in *Finks v. Maine State Highway Commission*, 328 A.2d 791 (Me. 1974),[16] and thus the courts are well-positioned to review the Board's decision. (Appellants' Brief at 35.) That the criteria, however, are important does not change the meaning of the word "may" in Section 341-D(3). Instead, the criteria are among the variables that the Board considers in whether to take action, just as when an agency considers many variables in whether to take other enforcement action. In fact, the standards in Section 341-D(3) are general enforcement-related concepts that are not appropriate for judicial review of how and when the Board should exercise its enforcement discretion.

The appellants' argument (Appellants' Brief at 38) that modifications made by the Board at the request of a licensee are not enforcement actions is inapposite. A request by a licensee to amend a license is subject to a license amendment application process that does not involve Section 341-D(3) or Chapter 2, Section 27.

The appellants cite *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438 (2007), which involved the review of EPA's denial of a petition for rulemaking, as

[16] The appellants fail to recognize that this Court subsequently held that a "natural beauty" standard, like the one at issue in *Finks*, is excessively vague because it is not capable of being measured or judged. *Kosalka v. Town of Georgetown*, 2000 ME 106, ¶17, 752 A.2d 183, 187.

support for the argument that a request to modify a license is not enforcement action. (Appellants' Brief at 38-39.) In that case, the Supreme Court stated that, "[a]s we have stated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. That discretion is at its height when the agency decides not to bring an enforcement action." *Id.* at 1459 (citations omitted). In assessing whether denial of a petition for rulemaking was reviewable, the Court noted that agency denials of a petition for rulemaking are less frequent, more apt to involve legal as opposed to factual analysis, and are subject to more formalities than enforcement-related decisions.[17]

Like an assessment of whether to initiate other kinds of enforcement action, and unlike the denial of a petition for rulemaking, consideration of whether to modify a license under Section 341-D(3) involves a factual analysis, more than a legal analysis. For instance, the Board must make factual findings as to whether circumstances have changed, whether the licensee is in violation of the license or a law administered by the Department, whether the licensee obtained the license fraudulently, and whether the

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[17] The appellants state that petitions for modification are infrequent and that, as far as they know, these petitions were the first to be brought under Section 341-D(3). (Appellants' Brief, at 39). In fact, at least one other petition to modify a permit was filed prior to these petitions. *See Report to the Joint Standing Committee on Marine Resources and the Joint Standing Committee on Natural Resources in Response to Resolve Chapter 109 (LD 1528, LR 1911)* (January 30, 2008), at 8. Further, although petitions to modify were infrequent in the past, since 2005 the appellants have filed six such petitions (two in connection with Androscoggin I, one in connection with Androscoggin II, two in connection with the Kennebec, and one in connection with Union Gas). If this Court adopts the appellants' arguments, there will be a flood of petitions not only to the Department but to other administrative agencies with similar discretionary enforcement power to modify, revoke, or suspend licenses.

licensed activity poses a threat to human health and the environment. These are not primarily questions of law; they are primarily questions of fact.

The appellants argue that this Court should permit review of enforcement decisions that are based on errors of law. (Appellants' Brief at 40.) They argue that it is not clear that Maine law bars review of decisions not to enforce, and they cite the decisions in *Richert v. City of South Portland,* 1999 ME 179, 740 A.2d 1000, and *Toussaint v. Town of Harpswell,* 1997 ME 189, 698 A.2d 1063, as support. (Appellants' Brief at 40-41.) Those cases do not support that proposition.

Richert and *Toussaint* started with appeals to municipal zoning boards of appeals of code enforcement officers' non-enforcement decisions. This Court, in the subsequent consideration of the ZBA decisions, did not consider whether the initial non-enforcement decisions were properly before the ZBA or whether the ZBAs' decisions were properly before the Court. Thus, there is no basis in those cases to distinguish challenges to non-enforcement decisions that are based on legal determinations from those that are based on factual determinations; in either case, the non-enforcement decisions are not subject to judicial review.

This is demonstrated by this Court's later decision in *Herrle v. Town of Waterboro,* 2000 ME 1, 763 A.2d 1159, in which the Court considered whether, under the Waterboro ordinance, the initial non-enforcement decision was properly before the ZBA. The Court stated that the ZBA's decision was merely advisory because, under the Waterboro ordinance, only the Board of Selectmen has discretion to decide whether to take enforcement action. *Id.* at ¶¶ 9, 12, 763 A.2d at 1161-1162. In reference to

Toussaint, the Court stated that "[n]either the authority of the ZBA nor the jurisdiction of the court was challenged in that case." *Id.* at n. 1, 763 A.2d at 1162.[18] Thus, *Richert* and *Toussaint* cannot be relied upon as support for the proposition that non-enforcement decisions, even those based solely on "legal" determinations, are subject to judicial review.[19]

Finally, the appellants argue that the Superior Court's reliance in Androscoggin II on *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d at 77, is misplaced because that decision did not involve review of an agency enforcement decision, but rather review of a temporary restraining order prohibiting an agency from holding a hearing. (Appellants' Brief at 42-43). As the Superior Court in Androscoggin II stated, however, it is the principle of the *Bar Harbor Banking* decision that applies: "Maine courts are not free to review discretionary enforcement decisions." (App. at 16.)

Thus, the Board's decision not to modify a license under Section 341-D(3) is a discretionary enforcement-related decision that is not reviewable by the courts, because

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[18] The dissent in *Herrle*, in reliance on *Richert* and *Toussaint*, stated that "[w]hen a municipality refuses to bring an enforcement action because it believes its ordinance has not been violated, we permit a neighbor to challenge that legal (as distinguished from discretionary) determination." 2001 ME 1, at ¶ 14, 763 A.2d at 1162. But, as noted above, in *Richert* and *Toussaint* this Court did not consider whether the initial non-enforcement decisions were properly before the ZBA or whether the ZBAs' decisions were properly before the Court. Thus, there is no basis in those cases to distinguish challenges to non-enforcement decisions that are based on legal determinations from those that are based on factual determinations. In any case, here the Board's determinations not to modify the certifications were primarily factual, not legal, determinations, and thus would not be subject to judicial review even under the dissent in *Herrle*.

[19] Permitting such review would insert the courts squarely into an agency's executive decision-making power because enforcement decisions are based on mixed conclusions of law and fact, as well as a review of available resources and the likelihood of success, and other practical considerations.

review of decisions not to modify a license under Section 341-D(3) would violate the constitutional separation of powers.

C. A decision not to take action under Section 341-D(3) is not judicially reviewable because licensees are entitled to rely on the finality of licenses.

The appellants argue that there is no reason why a Board dismissal of a petition to modify "a purportedly defective license should be any less appealable than the Board's decision to originally issue the license." (Appellants' Brief at 36.) On the contrary, there are good reasons to make Board action discretionary after initial appeal periods have expired. Allowing challenges to Board decisions not to modify not only would be an impermissible judicial intrusion into the Department's discretionary enforcement power but also would allow an end-run around the finality of licenses after the appeal period has expired. Moreover, for those cases in which a project opponent petitions the Board to modify a license, it would allow project opponents to circumvent the deadlines for filing appeals. Giving project opponents the ability to avoid the deadlines for filing appeals would render meaningless the Maine APA's deadlines for filing appeals. *Cf. Wright v. Town of Kennebunkport*, 1998 ME 184 (appeal is not timely if within 30 days of code enforcement officer's denial of request to revoke permit that is more than 30 days old).

A licensee is entitled to rely on the finality of a license even when there is a legal defect in the license. *See Leake v. Town of Kittery*, 2005 ME 65, 715 A.2d 162 (declining to decide whether permittee's expansion of business was in violation of zoning ordinance at time of issuance of permit because zoning board of appeals issued valid variance

approving expansion and appeal period had expired; courts will not consider challenges to unappealed variance); *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598 (if permittee has complied with terms of valid permit, abutter may not challenge issuance of certificate of occupancy based on legal defect in underlying permit after expiration of appeal period for initial permit); *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545 (invalidating stop work order when based on error in issuing building permit, after expiration of appeal period for building permit); *Wright v. Town of Kennebunkport*, 1998 ME 184, 715 A.2d 162 (invalidating ZBA's decision to revoke legally defective permit after the appeal period has expired).

Similarly, a licensee is entitled to rely on the finality of a license even when the licensee is in violation of a law administered by the Department, there is a threat to human health or the environment, or there has been a change in circumstances. Section 341-D(3) creates a limited exception to the rule that once appeal periods have expired, a license is final. But to allow court challenges to Board decisions not to modify a license under Section 341-D(3) would give project opponents an unauthorized end-run around the finality of licenses.

The Board's own regulations acknowledge the importance of the finality of licenses, even in the event of a typographical error. Chapter 2, Section 22 allows any person to request the Department to issue a corrected license to correct any clerical error or omission, for a period of 30 days following the effective date of the license. 06-096 CMR, ch. 2, § 22. The Department must consider the request within 30 days of receipt of the request. *Id.* Once the 30-day period and the applicable appeal period have

expired there is no right to correct even a clerical error or omission, and the licensee is entitled to rely on the finality of the license, even if it contains an error.

The Board itself in the Kennebec proceedings recognized the importance of the finality of licenses. It stated that the "ability of the Board to reopen and modify a license is a powerful tool that should not be used lightly." (App. at 80.) "Hence, there must be good reason to disturb and modify an existing license, whether it has been in existence for one year or several decades." (*Id.*) In accordance with this Court's precedent on interpreting statutes, substantial deference should be accorded the Board's interpretation of Section 341-D(3).

In short, if the Legislature had intended to create a broad exception to the statutory deadlines for seeking judicial review contained in the Maine APA, the Legislature would have said so. This is further reason why the word "may" in Section 341-D(3) should be given its generally accepted meaning, and not be construed to create a judicially reviewable decision when the Board decides not to modify a license.

III. Issue #3: The appellants do not have standing to bring this appeal.

The Superior Court assumed for purposes of its decisions that the appellants had standing to seek judicial review of the Board's dismissals of their petitions. (App. at 10.) The standing issue is different from the final agency action issue. The standing question focuses on whether petitioners are "aggrieved" by the final agency action – assuming there has been final agency action. 5 M.R.S.A. § 11001(1); 38 M.R.S.A. § 346(1). An agency action may be a "final agency action" because it affects the legal rights, duties, or privileges of specific persons (say, the licensee), but a petitioner (not the licensee)

may not have standing to challenge that final agency action because it does not "operate prejudicially and directly upon a party's property, pecuniary or personal rights." *Storer v. DEP*, 656 A.2d 1191, 1192 (Me. 1995) (to be aggrieved requires that person must have suffered particularized injury from agency action).

The Board's decisions not to modify the certifications did not operate "prejudicially and directly" upon the appellants' "property, pecuniary or personal rights" because they did not change the *status quo* with respect to the appellants. That is, the Board did not take any action, and thus the FERC licenses that were in effect before the petitions remain in effect, without modification.

In the absence of any change, the appellants were not "aggrieved" by the Board's dismissals. *Great Hill Fill & Gravel, Inc. v. Board of Environmental Protection*, 641 A.2d 184, 184-85 (Me. 1994) (noting that "[t]o have standing to challenge a final agency action, a litigant must demonstrate a particularized injury *as a result of the action*" and concluding that "[Petitioner's] legal rights and responsibilities were unchanged by the Board's decision. It cannot demonstrate any particularized injury. [Petitioner] had no standing to challenge the decision" (emphasis added)); *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 197 (Me. 1978) (plaintiffs, users of Baxter Sate Park, had standing because Authority's proposal to allow timber clearing adversely impacted their current and future use of Park and altered *status quo*.)

The appellants are not aggrieved, so they do not have standing, and the Superior Court's dismissals should be affirmed for that alternative reason as well.

IV. Issue #4: The appellants fail to state a claim upon which relief can be granted because the Board does not have the power to do what the appellants have requested.

This Court's 2005 decision in *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, 868 A.2d 210, *aff'd*, 547 U.S. 370 (2006), stated that reopeners are "essential" for the Department to have authority to take action to modify water quality certifications issued under the federal Clean Water Act. *Id.* at ¶ 28, 868 A.2d at 219. This reasoning recognized that without reopeners, the FERC license may not be modified except with the consent of the licensee. *See* 16 U.S.C. § 799.

The appellants state that they want the Board to require fish passage at the projects. (Appellants' Brief at 36.) But there are no reopeners in the certifications at issue here that reserve the Department's right to reopen the certifications to change their fish passage provisions as appellants request, so the Board has no authority to provide the relief requested by the appellants. (App. at 29, 77, and 113.) Absent such a reopener, FERC may not incorporate the terms of a revised certification into a FERC license without the licensee's consent. *See, e.g., Public Utility District No. 1 of Pend Oreille County*, 112 FERC ¶ 61,055 (July 11, 2005), at 61,412 n.50 ("[b]ecause the original certification contains no reservation of authority for Washington Ecology to amend it in this manner, and the revisions were issued after the one-year deadline for state action, the Commission is not required to accept the revised certification"). Consequently, any purported modification of the certifications would have no effect on the FERC licenses and the appellants would not get the relief from the Board that they are seeking.

In the proceedings before the Superior Court on the Androscoggin II and Kennebec petitions, the appellants argued that EPA's rule relating to water quality certifications (40 C.F.R. § 121.2(b)) provides that certifications may be modified at any time upon agreement of the state certifying agency, the federal licensing agency, and EPA. (App. at 19, Docket Sheet Entry 9-26-07, Petitioners' Consolidated Motions to Dismiss.) The EPA rule, however, does not apply to certifications for FERC licenses that have already been issued, because the purpose of the certification is simply to certify that the activity will comply with state water quality standards; once the federal agency has issued the federal license there is no further role for the state certifying agency (absent a reopener in the certification).

Thus, the Superior Court's dismissals should be affirmed for the alternative reason that these appeals fail to state a claim upon with relief can be granted, pursuant to M.R. Civ. P. 12(b)(6).

CONCLUSION

For the reasons stated herein, this Court should affirm the Superior Court's dismissals of these Rule 80C appeals.

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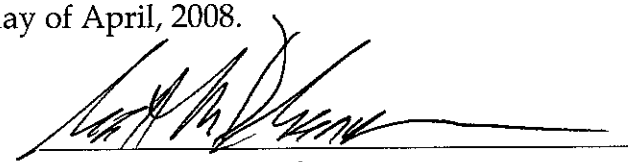

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