STATE OF MAINE
SAGADAHOC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-07-6

ED FRIEDMAN,	)
	)
Petitioner,	)
	)
v.	)
	)
MAINE BOARD OF ENVIRONMENTAL PROTECTION,	)
	)
Respondent.	)

PETITIONER ED FRIEDMAN'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS PARTIES-IN-INTEREST

Petitioner Ed Friedman submits this memorandum of law in opposition to the motion to dismiss filed by parties-in-interest (the "dam owners"). The dam owners incorporate by reference the motion to dismiss filed by the Board of Environmental Protection (the "Board"), Motion to Dismiss of Parties-In-Interest and Incorporated Memorandum of Law ("Dam Owners' Mem.") 4, and Mr. Friedman accordingly incorporates herein his opposition to that motion.

Mr. Friedman requests that the oral argument on the motions to dismiss in this case be consolidated with oral argument on the motions to dismiss in another 80C appeal of Board, Friends of Merrymeeting Bay v. Maine Board of Environmental Protection, Docket No. AP-07-10 (Sagadahoc County), because they involve substantially similar issues.

NATURE OF THE CASE

The Androscoggin River should be teeming with migrating fish and eels. It is not. Dams block the migration of fish and eels, and slice them up in their unscreened turbines. The dams have degraded the habitat for migratory fish and eels in the Androscoggin.

Under § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, states are charged with the responsibility to protect the quality of their navigable waters when a discharger, such as a hydroelectric dam, requires a federal license. The mechanism to accomplish this is issuance of a water quality certification. Under § 401(d) of the Clean Water Act, 33 U.S.C. §1341(d), a state must set forth limitations in a certification that will assure a federal licensee will not cause a violation of state water quality standards. In Maine, water quality standards for the Androscoggin, as for other rivers in the State, require among other things that the river be suitable habitat for fish and eels.

The Department of Environmental Protection ("DEP") and the Board of Environmental Protection ("Board") are responsible for administering the water quality standards and for issuing water quality certifications. 38 MRSA § 635-B. Under 38 MRSA § 341-D, the Board may modify a water quality certification when as few as one of seven criteria is met.

Mr. Friedman and approximately 60 other individuals, including state legislators, filed a petition with the Board to modify the water quality certifications of Androscoggin dams so that they require safe and effective passage for American eels. While water quality certifications of dams on other rivers in the State require migratory fish and eel passage (even if inadequate), certifications for most Androscoggin dams do not require any passage at all. And indeed, except for a few dams on the lower part of the

Androscoggin providing and up and downstream passage for limited fish species, and a few more further upstream providing downstream passage only, the dams do not provide any fish or eel passage. (See "Summary of Eel/Anadromous Fish Passage Facilities/Requirements" prepared by DEP, attached as Exhibit A). A recent study shows that on the upper part of the Androscoggin, part of the historic range of the American eels, eels are now extremely rare or no longer in existence.[1] Thus, the Board dismissed the Petition even though evidence is pointing towards extirpation of eels. That decision should be reversed and the Board should be ordered to modify the certifications, or at least proceed to a hearing on the matter.

ARGUMENT

Much of the dam owners' arguments involve the Maine Administrative Procedures Act. As the United States Supreme Court stated about the federal Administrative Procedures Act, the APA is to

> cover a broad spectrum of administrative actions, and this Court has echoed this theme by noting that the Administrative Procedures Act's 'generous review provisions' must be given a 'hospitable' interpretation....[O]nly upon a showing of 'clear and convincing evidence' of a contrary intent should courts restrict access to judicial review. [Cites omitted].

Abbott Laboratories v. Gardner, 383 U.S. 136, 140-141 (1967). Here, the dam owners take an unduly restrictive view of the Maine APA which this Court should reject.

I. NON-FINAL DECISIONS OF THE BOARD OF ENVIRONMENTAL PROTECTION CAN BE APPEALED.

The dam owners argue that the Board of Environmental Protection's (the "Board") decision to dismiss Mr. Friedman's petition (the "Petition") is not a final

---

[1] Yoder, et al., "The Spatial and Relative Abundance Characteristics of the Fish Assemblages in Three Maine Rivers" (2006). Mr. Friedman discussed this study at the Board meeting in which the Board voted to dismiss the Petition.

agency action and thus cannot be appealed. As discussed below, the Board's decision is a final agency action. However, this Court need not decide that issue because in this case final agency action is not the sine qua non of an appeal.

First, 38 M.R.S.A. §346(1) expressly provides that "any person aggrieved by any order or decision of the board or commissioner may appeal to Superior Court." An appeal would then be governed by the procedures set forth in the Maine Administrative Procedures Act. 38 M.R.S.A. § 346(1).

38 M.R.S.A. § 346(1) would have no purpose if it merely repeated what the Maine APA already provided – a right to appeal final agency action. Maine v. White, 2001 ME 65 ¶ 4 (2001) (statutes are to be interpreted as being free from unnecessary and superfluous language). By using the term "any" to modify "order or decision," 38 M.R.S.A. § 346(1) expanded the types of agency actions that could be appealed to include review of non-final decisions by the Board not to take enforcement action.[2]

Second, 5 M.R.S.A. § 11001(1) provides:

> Preliminary, procedural, intermediate or other nonfinal agency action shall be independently reviewable only if review of the final agency action would not provide an adequate remedy.

Even if the Board's decision to dismiss the Petition is considered nonfinal, under §11001(1) it is nonetheless appealable because there is no other adequate remedy for Mr. Friedman. Modification of water quality certifications can only be accomplished through a petition to the Board.

Justice Marden's opinion in Watts v. Maine Board of Environmental Protection, No. AP-06-19 (Me. Super. Cty., Ken. Cty. Dec. 6, 2006) found the petitioner there had an

[2] The purpose of §346 is not, as the dam owners suggest, "to set forth a separate appeal method for emergency orders issued under 38 M.R.S.A. 347-A(3)." Dam Owners' Mem. 1, n.1. Section 347-A(3) itself sets forth the separate appeal method.

adequate remedy because he "has not been foreclosed by any agency action from pursuing the same claim at a later time" and could petition the Board again with more evidence. Id. at 6.[3] The fact that there might be more evidence of a claim to present to the Board at a future date does not mean there is an adequate remedy. There is always a chance with any claim before any agency (or any court, for that matter) that more evidence might be submitted in the future. It is also an unworkable standard. What if there will be no more evidence? How can that be proven? Or what if there is evidence but it does not surface for another decade? Justice Marden's opinion in Watts sets up a situation where petitions can be continually filed and rejected, with no way to break the cycle. Mr. Friedman is aware of no authority (and the Watts decision cites none) that supports such a ruling. Cf. Harding v. Comm'r of Marine Resources, 510 A.2d 533, 535-536 (Me. 1986) (the "final judgment rule," the judicial analogue to "final agency action," does not apply when necessary to avoid "undue disruption of administrative process" and when no appellate review would otherwise be available).

II. THE BOARD'S DECISION WAS FINAL AGENCY ACTION.

Under the Maine APA,

> 'Final agency action' means 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.A. § 8002(4). The dam owners' claim that the Board's dismissal of the Petition is not a final agency action is unavailing.

[3] It is not clear from Justice Marden's opinion whether more evidence is even needed to file another petition.

A. An Agency Decision Is Not Appeal-Proof Just Because The Agency Exercises Discretion In Making It.

The dam owners suggest that since the Board has discretion to grant or dismiss a petition to modify a water quality certification, a decision not to modify is not a final agency action. As a matter of law, the dam owners are wrong.

5 U.S.C. § 11007(4)(C)(6), which sets forth the manner and scope of judicial review of administrative actions, provides that a court can "reverse or modify the decision if the administrative findings, conclusions, inferences or decisions are characterized ... by abuse of discretion." This provision would make no sense if an agency decision that is discretionary cannot be final.

If the Maine legislature had wanted to exempt discretionary decisions from judicial review, it certainly could have done so – in fact, the United States Congress, unlike the Maine legislature, did just that. The federal APA at 5 U.S.C. § 701(a)(2) provides that judicial review provisions do not apply to agency action that "is committed to agency discretion by law." There is no comparable provision in the Maine APA. See Partnership of Brooks Brown, et al. v. Department of Manpower Affairs, 426 A.2d 880, 883 (Me. 1981) (noting broad definition of "final agency action" in Maine APA compared to the Model State Administrative Procedures Act upon which it is based).

Maine courts regularly review decisions that are made at the sole discretion of an agency. E.g., Becker v. Bureau of Parks and Lands, 2005 Me. 120, 886 A.2d 1280 (Me. 2005) (appeal of decision to award a submerged land lease)[4]; Phaiah v. Fayette, 2005 ME 20, ¶8, 866 A.2d 863, 866 (Me. 2005) (appeal of zoning variance denial)[5]; Conservation

[4] Under 12 M.R.S.A. § 1862, the Bureau of Public Lands "may grant a conveyance" of submerged land.

[5] Under 30 M.S.R.A. § 4343(4), a municipal zoning board of appeals "may grant" a variance.

Law Foundation v. LaPointe, 2004 Me. Super. LEXIS 131 (Hancock Cty. Sup. Ct. 2004) (appeal of decision to grant aquaculture lease)[6]; Forester v. Westbrook, 604 A.2d 31 (Me. 1992) (appeal of a decision to grant a zoning variance). This case follows this well worn path.

The dam owners' argument leads to absurd results. The dam owners argue that Mr. Friedman did have a right to submit a petition to modify an existing license (Dam Owners' Mem. 5), but nothing more. Thus, according to the dam owners, the Board could decide to dismiss Mr. Friedman's petition because it was submitted on a Thursday, or because Mr. Friedman has a beard, and such a decision could not be reviewed. The Maine legislature did not intend this result.

B. Mr. Friedman Is Not Appealing An Exercise Of Enforcement Discretion.

The dam owners argue that the Board's "decision not to grant Mr. Friedman's request is akin to an agency or municipality opting not to exercise its prosecutorial discretion, rather than to a final agency action." (Dam Owners' Mem. 6).[7] However, Mr. Friedman's petition to the Board to modify the water quality certifications for multiple dams on the Androscoggin River was not a request to the Board to take enforcement action.

In his petition to the Board, Mr. Friedman did not ask the Board to revoke or suspend the water quality certifications – two options that by law can be the subject of a

[6] Under 12 M.R.S.A. § 6072(1), the Commissioner of Marine Resources "may lease" coastal areas for aquaculture and "may grant a lease to any person."

[7] The dam owners cite the following cases to this effect: Heckler v. Chaney, 470 U.S. 821 (1985); Fryeburg Water v. Fryeburg, 2006 ME 31, 893 A.2d 618 (Me. 2006) (appeal of town's refusal to issue cease and desist order for alleged building code violation); Herrle v. Waterboro, 2001 ME 1, 763 A.2d 1159 (Me. 2001) (appeal of decision not to grant citizen's request to enforce enforcement action against alleged zoning code violator); Great Hill and Gravel v. Board of Environmental Protection, 641 A.2d 184 (Me. 1994) (third party appeal of enforcement order);

Board petition. He did not ask the Board to impose a fine on the dam owners for violating the certifications. Nor did Mr. Friedman ask the Board to take civil enforcement action against the dam owners for violating water quality standards, or to launch an investigation into whether the dam owners broke the law.

Rather, Mr. Friedman petitioned the Board to change the terms of the water quality certifications. Water quality certifications are considered to be a license, Department of Environmental Protection ("DEP") Rules Ch. 2, § 1(J), so in other words Mr. Friedman asked that the terms of the various licenses be amended or modified to comply with the statutory standards. Such a petition is not seeking an enforcement action. See Connecticut Fund for the Environment v. Acme Elect-Plating, 822 F Supp. 57 (D. Conn. 1993) (appeal of a Clean Water Act discharge permit application is not an enforcement proceeding). In fact, it is the opposite of asking for enforcement, because Mr. Friedman's position is that the certifications are too lax and enforcing lax certifications would serve no purpose. This situation is very different from the cases the dam owners cite.

III. MR. FRIEDMAN HAS STANDING TO FILE THIS APPEAL.

The dam owners argue that the "effect of the BEP's decision was to allow the dams to continue to operate as presently licensed. Preservation of the status quo in no way altered Mr. Friedman's current relationship to the Androscoggin River." Dam Owners' Mem. 8. This argument is specious. Maine courts entertain appeals of agency decisions that maintain the status quo. E.g., FPL Energy Hydro LLC v. Department of Environmental Protection, 2007 ME 97, 926 A.2d 1197 (Me. 2007) (appeal of water

quality certification denial); Phaiah v. Fayette, 2005 ME 20, ¶8, 866 A.2d 863, 866 (appeal of zoning variance denial).

The dam owners also argue that Mr. Friedman does not suffer a particularized injury. This, too, is wrong. The Maine Law Court has held that harm to aesthetic interests "establishes a direct and personal injury suffered by the plaintiffs" Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 197 (Me. 1978). Aesthetic harm was alleged in the Petition. Mr. Friedman is also prepared to provide evidence of economic concerns as well.[8]

Cases cited by the dam owners are inapposite. In Storer v. Department of Environmental Protection, 656 A.2d 1191 (Me. 1995), the court ruled that an applicant for a permit did not have standing because he received the permit he appealed and thus was not harmed by, but rather benefited from, agency action (he wanted to dispute the Board's jurisdiction). In Mitchell v. Judicial Ethics Committee, 749 A.2d 1282 (Me. 2000), the court ruled that a judge had no standing to appeal an ethics committee advisory opinion because the opinion was advisory and thus not a binding decision. In Great Hill Fill & Gravel v. BEP, 641 A.2d 184 (Me. 1994), an appellant challenged an enforcement order issued to its neighbor as being too weak, and thus the case falls into the line of cases disallowing challenges to prosecutorial discretion.[9]

---

[8] Standing was never reached by the Board, and Mr. Friedman was never given an opportunity to present full evidence regarding standing. To the extent it needs to be addressed here, Mr. Friedman should be given the opportunity to supplement the record with standing evidence, if the dam owners truly contest it.

[9] The dam owners seem to suggest that Mr. Friedman cannot demonstrate standing because only the target of an enforcement action can have standing to appeal an enforcement decision; a non-enforcement decision cannot be appealed. However, as set forth above, this case is not an appeal of an exercise of enforcement discretion. Again, members of the public are regularly found to have standing to appeal permitting decisions. E.g., Conservation Law Foundation v. Lincolnville, 2001 Me. Super. LEXIS 26, at **24-25 (Waldo Cty. 2001) (environmental group had standing to appeal subdivision approval where group's member regularly passes by the property which has unique features "'critical' to her spiritual and emotional fulfillment"). This case is not different.

III. THE DOCTRINE OF RES JUDICATA DOES NOT BAR THIS APPEAL.

The dam owners argue that because the Board dismissed an earlier petition to modify water quality certifications of certain Androscoggin dams, res judicata operates to bar the second petition (and this appeal). This argument should be rejected.

The doctrine of res judicata applies to prior administrative proceedings, provided that such proceedings contain the "essential elements of adjudication." See Town of Freeport v. Greenlaw, 602 A.2d 1156, 1160 (Me. 1992). The "essential elements of adjudication" include:

> 1) adequate notice; 2) the right to present evidence and legal argument and to rebut opposing evidence and argument; 3) a formulation of issues of law and fact to apply rules to specified parties concerning a specified transaction; 4) the rendition of a final decision; and 5) any "other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question." Town of North Berwick v. Jones, 534 A.2d 667, 670 (Me. 1987) (quoting Restatement (Second) of Judgments § 83(2) (1982)).

Town of Ogunquit v. The Cliff House, 2000 ME 169, ¶11, 759 A.2d 731, 735 (Me. 2000). The essential elements of adjudication are not present here and were not present for the earlier petition. First, there was no right to present evidence. While the petition to modify had to specifically describe the factual basis for the petition, including what evidence *will be offered* to support the petition, Board Rules, Ch. 2, Rule 27, evidence was not permitted to be presented at the public meeting at which the Board denied the earlier Androscoggin petition. Evidence can only be presented in an adjudicatory hearing, which was not granted.

Second, there was no right to rebut legal argument. Dam owners filed what was essentially a motion to dismiss the earlier petition to modify the water quality certifications, and the Board would not consider a response to that legal argument. In

addition, the Petition was submitted by a substantial number of individuals not party to the first petition.

Third, there was no formulation of issues of law and fact because a hearing on the petition to modify was not granted and litigation of the petition never got to that stage.

Moreover, res judicata does not apply to the extent there was not an identity of parties. The Petition at issue here includes two additional dams, Otis and Rumford Falls that were not covered by the previous petition. It is Mr. Friedman's understanding that these dams are owned by companies not involved in the earlier petition regarding modification of certifications for Androscoggin dams.

Further, the Petition introduced substantial new evidence that could not have been discussed or litigated in the earlier petition regarding the Androscoggin dams. For instance, the Petition cited a Department of Marine Resources fishway report for Brunswick dam, work by J.M. Casselman and Boyd Kynard on eels, and a white paper on American eels.

IV. THE WATER QUALITY CERTIFICATIONS CAN BE MODIFIED.

The dam owners claim that the water quality certifications can no longer be modified, thus this appeal should be dismissed. This argument is meritless.

The dam owners argue that once the Federal Energy Regulatory Commission ("FERC") issues a license for a dam, a water quality certification cannot be modified absent a "reopener" in the FERC license. However, federal regulations on water quality certifications (not cited dam owners) belie this argument. 40 C.F.R. § 121.2(b) provides:

> The certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator.

Here, the certifying agency is the Board, the licensing agency is FERC, and the Regional Administrator is the EPA Region I (New England) administrator. 40 C.F.R. § 121.1(e), (b), and (d) (definition of terms). Thus, once this Board decides to modify the water quality certification, it can work with FERC and EPA to get the modification implemented. See also 33 U.S.C. § 1370 (provision of CWA that preserves state authority to adopt and enforce "any standards or limitations respecting discharges of pollutants").

Of course, even apart from this regulation, there is nothing to prevent the Board from submitting the modified certifications to FERC and asking that FERC enter into negotiations to amend the licenses.[10]

Moreover, State law is clear that modification of water quality certifications is allowed. The plain meaning of 38 M.R.S.A. 341-D(3) and Ch. 2, § 27 is that certifications can be modified. Merrill v. Sugarloaf Mountain Corp., 2000 Me 16, p. 11, 745 A.2d 378, 384 (2000) ("The most fundamental rule of statutory construction is the plain meaning rule. When statutory language is plain and unambiguous, there is no need to resort to any other rules of statutory construction."); Christensen v. Harris County, 529 U.S. 576, 588 (2000) (same for construction of a regulation); see Kittery Retail Ventures, LLC v. Town of Kittery, 2004 ME 65, p. 10 (2004) (first look to plain meaning of law to determine legislative intent).

[10] The dam owners state that the EPA regulation on modification, 40 C.F.R. § 121.2(b), "applies only to certifications that have not yet been incorporated into a new FERC license." Dam Owners' Mem. 12, n.8 (the dam owners erroneously cite to 40 C.F.R. § 121.1(e) instead of 121.2(b)). This is a misstatement of what § 121.2(b) provides; by its plain language, the regulation is not so limited. Moreover, the dam owners do not cite, and Mr. Friedman is unaware of, any authority suggesting that it is in any limited in its applicability.

Consistent with the plain meaning of the modification statute and rule, DEP in its response to comments on another hydroelectric project, Gulf Island-Deer Rips Hydro, stated that the Board always has the authority under 38 M.R.S.A. § 341-D(3) to modify a water quality certification. FPL Energy Maine Hydro LLC Water Quality Certification of Gulf Island-Deer Rips Hydro Project, #L-17100-33-O-N, § 11.n. Similarly, a water quality certification need not contain specific "reopener" language to be modified, as the Gulf Island-Deer Rips water quality certification makes clear. Id. (DEP specifically rejected the idea that a reopener clause is required to modify water quality certifications).

Any other result would gut the statutory and regulatory provisions regarding modification. 38 M.R.S.A. 341-D (3) and DEP Rules at Ch. 2, § 1.J. define "license" to include any "certification issued by the Department." There are no exceptions. To rule that water quality certifications cannot be modified would impermissibly read "certification" out of § 341-D(3) and Ch. 2, § 1.J and render that term superfluous in the statute and regulation. State of Maine v. White, 2001 ME 65, ¶ 4 (2001) (statutes are to be interpreted as being free from unnecessary and superfluous language). It would also lead to absurd results. The term of a FERC license is 30-50 years. According to the dam owners, even if it turns out their operations kill every living thing in the river, nothing can be done about it until the license is renewed in 30-50 years.
Saucier v. Portland, 1980 Me. Super. Leixs 1, *7 (Cumberland Co. 1980) ("There is a well accepted principle of interpretation that statutes, and here governmental guidelines, will not be given an interpretation which will produce an absurd result.").

The absurdity of such a situation was recognized by the Maine Supreme Judicial Court in the S.D. Warren case. In S.D. Warren, the company argued that the Board had

no power to include a "reopener" clause in a 401 certification. The court, in rejecting that argument, articulated a rationale equally applicable here:

> The BEP is expressly granted the authority to issue section 401(a)(1), 33 U.S.C.A. § 1341(a)(1), certifications pursuant to 38 M.R.S.A. § 464(4)(F)(1-A). Considering the purpose of Maine's water quality standards, stated at 38 M.R.S.A. § 464(1), the authority to include "reopeners" is "essential to the full exercise of powers specifically granted" to the BEP. See Hallissey, 2000 ME 143, P11, 755 A.2d at 1072. *This authority is essential because if the conditions are not as effective as planned, the water quality standards will not be met and the BEP's goal to "restore and maintain the chemical, physical and biological integrity of the State's waters . . ." will not be achieved during the forty-year term of the FERC license.* The Board's interpretation of 38 M.R.S.A. § 464 as implicitly authorizing the inclusion of "reopeners" is reasonable and the statute does not plainly compel a contrary result.

S.D. Warren v. Board of Environmental Protection, 2005 ME 27, ¶ 28 (2005) (footnotes omitted) (emphasis added).[11] In this case, biological integrity of the Androscoggin will not be achieved if the Board cannot exercise its statutory powers to modify a water quality certification.

Lastly, it should be noted that water quality certifications impose ongoing independent obligations. DEP and the Board have the power to enforce their own water quality certifications, even if they cannot enforce the terms of FERC licenses. In addition, the terms of a water quality certification are enforceable by private parties or a state in federal court under the "citizen suit" provision of the federal Clean Water Act. The independent nature of certifications is a further indication that the Board has the ability to modify them.

[11] This part of the S.D. Warren case was not the subject of the appeal heard by the U.S. Supreme Court.

CONCLUSION

For the reasons set forth above, the motion to dismiss this appeal should be denied.

Dated: September 14, 2007

Ed Friedman

Assisted by:

David A. Nicholas
Maine Bar No. 010049
20 Whitney Road
Newton, Massachusetts
Ph.: (617) 964-1548
Fax: (617) 663-6233
(Limited appearance)