STATE OF MAINE SUPERIOR COURT SAGADAHOC, ss. CIVIL ACTION DOCKET NO. AP-07-10 FRIENDS OF MERRYMEETING BAY, **JOINT** MOTION TO DISMISS OF Petitioner, PARTIES-IN- INTEREST HYDRO KENNEBEC LIMITED V. PARTNERSHIP, FPL ENERGY MAINE HYDRO, LLC, AND MAINE BOARD OF MERIMIL LIMITED PARTNERSHIP ENVIRONMENTAL PROTECTION, AND INCORPORATED MEMORANDUM OF LAW Respondent.

INTRODUCTION

Parties-in-Interest Hydro Kennebec Limited Partnership ("Hydro Kennebec"), FPL Energy Maine Hydro, LLC ("FPLE"), and Merimil Limited Partnership ("MLP") (collectively, "Parties-in-Interest") move to dismiss this appeal, for the reasons contained in Respondent Maine Board of Environmental Protection ("BEP") Motion to Dismiss dated August 31, 2007. Parties-in-Interest agree with the BEP that (a) this Court lacks jurisdiction to hear the appeal of Friends of Merrymeeting Bay ("FOMB") and (b) FOMB lacks standing to file the appeal. In addition, the appeal should be dismissed because the water quality certifications for the projects at issue are no longer subject to modification.

BEP's Motion to Dismiss is incorporated herein by reference.

BACKGROUND

Maine law provides that the BEP "may modify in whole or in part any license" for certain statutorily defined reasons. 38 M.R.S.A. § 341-D(3). The Department of Environmental Protection's ("DEP's") rules, specifically 06-096 CMR Chapter 2, § 27, establish that "[a]ny

person, including the Commissioner, may petition the [BEP] to revoke, modify or suspend a license." This rule further provides that the BEP must either dismiss such a request or hold a hearing on the petition.

On September 28, 2005 and September 29, 2005, Douglas H. Watts and FOMB, respectively, filed petitions to modify, suspend, or revoke water quality certifications and hydropower permits issued by the DEP, pursuant to Section 401 of the federal Clean Water Act (the "CWA"), 33 U.S.C. § 1341, and pursuant to the Maine Waterway Development and Conservation Act ("MWDCA"), 38 M.R.S.A. §§ 630 et seq., for four hydropower projects on the Kennebec River. Pursuant to the provisions of 38 M.R.S.A. § 341-D(3), the BEP determined to hold a public hearing to consider whether the permits and water quality certifications previously issued for the four projects should be modified, suspended, or revoked.

Following the public hearing on March 15-16, 2007, and after consideration of the testimony from the public hearing and written briefs of the parties, on July 5, 2007 the BEP declined, in its discretion, to take any action to revoke, modify or suspend the permits and water quality certifications. FOMB filed a Petition for Review of the BEP's determination pursuant to M.R. Civ. P. 80C on August 6, 2007.

ARGUMENT

As set forth in the BEP's Motion to Dismiss (1) this Court lacks jurisdiction to hear FOMB's appeal, and (2) FOMB lacks standing to file this appeal. In addition, this Court lacks jurisdiction to hear FOMB's appeal because the water quality certifications for the projects at issue are no longer subject to modification.

2

(W0824963.1)

I. This Court lacks jurisdiction to hear FOMB's appeal.

For the reasons stated in the BEP's Motion to Dismiss, this Court lacks jurisdiction to hear FOMB's appeal.

38 M.R.S.A. § 346(1) provides that any person aggrieved by an order or decision of the board may appeal to the Superior Court. This section also states that such appeals must be "in accordance" with the APA, which limits appeals to "final agency actions." 5 M.R.S.A. § 11001(1). The BEP action at issue in this appeal is not "final agency action" with respect to FOMB because it does not affect any legal rights, duties, or privileges held by FOMB. 5 M.R.S.A. § 8001(4).

FOMB does not have a legal right to force the BEP to modify an existing license. The BEP possesses sole discretion whether to pursue modification, revocation, or suspension of a license. The statute at issue, 38 M.R.S.A. § 341-D(3), provides that "[a]fter written notice and opportunity for a hearing pursuant to the Maine Administrative Procedure Act, . . . the board [i.e., the BEP] may modify . . . any license, or may issue an order prescribing necessary corrective action, or may . . . revoke or suspend a license, whenever the board finds that [certain conditions are met.]" (Emphasis added.) This statutory language establishes that the BEP's authority to modify an existing license is discretionary.

The corresponding regulatory provision in no way imposes limitations on the BEP's discretion. Chapter 2, Section 27 of the DEP's rules simply elaborates on Section 341-D(3) by providing that "[a]ny person, including the Commissioner, may petition the [BEP] to revoke, modify or suspend a license," and requiring that the BEP, within 30 days of receiving such a request, must "dismiss the petition or schedule a hearing." 06-096 CMR Chapter 2, § 27. The rule further provides that, in the event the BEP holds a hearing, "[a]fter a hearing, the [BEP] may

modify in whole or in part any license, issue an order prescribing necessary corrective action, or refer a license to District Court for revocation or suspension" when the BEP finds that certain conditions have been met. *Id.* (emphasis added). This rule does not entitle a petitioner such as FOMB to a BEP decision that modifies, revokes, or suspends a license. How the BEP proceeds after holding a hearing pursuant to Chapter 2, Section 27 of the rules and 38 M.R.S.A. § 341-D(3) is left to the BEP's discretion.

FOMB's only "right, duty, or privilege" under this regulatory scheme is the right to submit a petition to the BEP requesting that the BEP modify an existing license. FOMB has exercised this right without interference. The law entitles FOMB to nothing more. In fact, because the BEP held a public hearing in response to FOMB's petition, FOMB got more than it was entitled to under the statute. Thus, the BEP's decision to dismiss FOMB's petition did not, and could not have, affected a legal right, duty, or privilege held by FOMB. Therefore, the BEP's decision is not a "final agency action" that may be the subject of an M.R.Civ. P. 80C appeal.

The BEP's decision not to grant FOMB's request is akin to an agency or municipality opting not to exercise its prosecutorial discretion, rather than to a final agency action. Not only does the repeated use of the word "may" in 38 M.R.S.A. § 341-D(3) connote the discretionary nature of the BEP's authority to pursue license modification, but equally significant are the grounds upon which the BEP may amend, revoke, or suspend a license, such as: violation of a license condition, misrepresentation of facts in order to obtain a license, and failure of the licensee to comply with any law administered by the DEP. 38 M.R.S.A. § 341-D(3). Such grounds are prosecutorial in nature.

{W0824953.1}

Both the U.S. Supreme Court and Maine Law 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 "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, ¶ 19 n.6, 893 A.2d 618 (Me. 2006) ("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"); *Harrle v. Town of Waterboro*, 2001 ME 1, ¶¶ 10-11, 763 A.2d 1159, 1161-62 (upholding the town's refusal to act on a request by a resident to initiate an enforcement action against a neighbor for a zoning violation, reasoning that courts lack jurisdiction to engage in appellate review of the exercise of prosecutorial discretion by municipalities). The BEP's discretionary authority at issue in this case is no different. As such, this Court lacks jurisdiction to review the BEP's decision not to modify the water quality certifications ("WQCs") for the projects at issue, and FOMB's petition must be dismissed.

II. FOMB lacks standing to file this appeal.

For the reasons stated in the BEP's Motion to Dismiss, FOMB lacks standing to appeal. Parties-in-Interest are unable to conceive of any grounds on which FOMB would have standing to appeal the BEP's decision. The Law Court has established that, "[t]o acquire standing to obtain judicial review of an administrative action, a person must demonstrate a particular injury therefrom. The agency's action must actually operate prejudicially and directly upon a party's property, pecuniary or personal rights." *Storer v. DEP*, 656 A.2d 1191, 1192 (Me. 1995) (internal citation omitted).

(WC824963.1)

While FOMB clearly disagrees with the BEP's decision to deny his request to modify the WQCs at issue, the effect of the BEP's decision is to allow the projects to continue to operate as presently licensed. Preservation of the *status quo* in no way altered FOMB's current relationship to the Kennebec River. In the absence of any change to the *status quo* FOMB has no claim that it was "aggrieved" by the BEP's decision. *Great Hill Fill & Gravel, Inc. v. BEP*, 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.)).

Further, preservation of the *status quo* in no way adversely affects a property, pecuniary, or personal right held by FOMB or its members. Any interest held by FOMB and its members is a right they share with all other members of the public, and not a "personal right" that if impinged upon would result in a "particularized injury" sufficient to give a person standing. The Law Court has clearly stated that a person must suffer a "particularized injury" in order to have standing. See, e.g., Mitchell v. Judicial Ethics Committee, 2000 ME 83, ¶ 4, 749 A.2d 1282, 1283; Great Hill Fill & Gravel, 641 A.2d at 184-85. In determining whether a person has suffered a particularized injury "the central inquiry is whether the party seeking judicial relief has suffered an injury in fact distinct from the harm experienced by the public at large." Ricci v. Superintendent, Bureau of Banking, 486 A.2d 645, 647 (Me. 1984). To the extent the BEP

(W0824963.1)

¹ FOMB's petition states that the hearing testimony of FOMB member and Chairman Ed Friedman established that he has conducted kayaking tours and instruction in Merrymeeting Bay and on the Kennebec River since the mid 1980s and the services he conducts on the Bay and rivers are a significant part of his business. Mr. Friedman's testimony, however, demonstrated that the services he conducts are not on the Kennebec River in the vicinity of the dams whose licenses FOMB has requested be modified. *Transcript of BEP Public Hearing*, at page 37:14 – 20 (March 15, 2006). To the extent that FOMB contends that alleged harm to Mr. Friedman's tours gives FOMB standing, the testimony does not support that contention.

decision challenged by FOMB has any impact at all on FOMB's rights, this impact is no different than the impact on other members of the public. As such, FOMB lacks standing.

III. The water quality certifications for the projects are no longer subject to modification.

A WQC is required under Section 401 of the CWA before a federal agency may issue a permit for any activity that may result in any discharge into navigable waters. See 33 U.S.C. § 1341(a). The WQC must certify to the federal permitting agency that the activity will meet state water quality standards; if the state denies certification, the federal agency may not issue a permit for the activity.

Under the Federal Power Act ("FPA"), Congress created a "broad federal role in the development and licensing of hydroelectric power." *American Rivers v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997). The CWA, however, has diminished the reach of the FPA by "expressly requiring the Commission to incorporate into its licenses state-imposed water-quality conditions" under Section 401, including reopener provisions. *Id*.

Once a FERC license is issued, it generally may not be altered except upon "mutual agreement between the licensee and the Commission." 16 U.S.C. § 799. Thus, the water quality certification would need to include a specific reopener, incorporated into the FERC license (which the licensee has accepted), to allow a state to modify a certification and then for FERC to modify the FERC license. S.D. Warren v. Board of Environmental Protection, 2005 ME 27, ¶23-26. Absent such a reopener, FERC may not incorporate the terms of a revised certification into a FERC license. 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").

The BEP found that none of the permits and certifications at issue in this proceeding contains a condition that reserves the DEP's right to "reopen" the certification to modify the fish passage conditions contained in the certifications. The BEP therefore has no authority to modify these WQCs as requested by FOMB and thus, FOMB's petition fails to state a claim upon which relief can be granted.

CONCLUSION

As discussed in the BEP's Motion to Dismiss, this Court lacks jurisdiction to hear FOMB's appeal and FOMB has not demonstrated legal standing to bring the appeal. Further, because the BEP does not have authority to modify the WQCs at issue here, FOMB's appeal fails to state a claim upon which relief can be granted.

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

Dated at Portland, Maine, this 5th day of September, 2007.

Matthew D. Manahan, Bar #6857 Sarah A. Verville, Bar #3025 PIERCE ATWOOD LLP One Monument Square Portland, ME 04101

207-791-1100

Attorneys for Party-in-Interest, Hydro Kennebec Limited Partnership Jeffrey A. Thaler, Bar #2062

Sarah B. Tracy, Bar #9549

Bernstein, Shur, Sawyer & Nelson, P.A.

100 Middle Street P.O. Box 9729

Portland, ME 04104-5029

207-774-1200

Attorneys for Parties-in-Interest FPL Energy Maine Hydro, LLC and Merimil Limited Partnership

NOTICE

In accordance with M. R. Civ. P. 7(b)(1), any matter in opposition to this motion must be filed no later than twenty-one (21) days after the filing of this motion. Failure to file timely opposition will be deemed a waiver of all objections to this motion, which may be granted without further notice or hearing.