STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NOS. SAG-07-711, SAG-07-712, KEN-08-36
(consolidated)

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

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

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

BRIEF FOR PENOBSCOT BAY WATCH, THE FOREST ECOLOGY NETWORK, PEACE ACTION MAINE AND FRIENDS OF SEBAGO LAKE AS AMICI CURIAE

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INTEREST OF AMICI CURIAE

Penobscot Bay Watch works to meet the information needs of those around Penobscot Bay and the greater Gulf of Maine who would stand up for the natural world in their 'backyards' when those places are menaced by inappropriate development, pollution discharges or inappropriate fishing activities. We take part as stakeholder or interested party in decision-making by local, state and federal agencies that approve or deny development or discharge permits and licenses affecting Penobscot Bay. We help grassroots activists in communities around the Bay bring their campaigns to the attention of the public, the media and government decision makers.

As a citizens' association dedicated to protection, restoration and conservation of Penobscot Bay's natural resources and environment since 1992, we have been involved in Maine Department of Environmental Protection (DEP) rulemaking, discharge licensing, and development permit reviews, participating both as stakeholders and as appellants before the Maine Board of Environmental Protection (BEP). As such, we believe that the Board of Environmental Protection has been arbitrary and capricious in refusing to modify existing state permits to bring them into compliance with state and federal laws and regulations. Furthermore, the loss of the right to appeal such a decision would interfere with the mission of our organization by markedly reducing our options for lawful public interest advocacy, and would overall weaken democracy for Mainers.

The Forest Ecology Network (FEN) is a non-profit organization founded in 1996 as a result of efforts to pass a statewide referendum to ban clear-cutting. FEN’s mission is to protect, preserve, and restore the Maine Woods. This includes the protection of

wildlife, forest restoration, promotion of sustainable forestry, protection of natural resources, enhancement of biological diversity, and support for the creation of large-scale wilderness reserves.

As part of our mission to protect wildlife and natural resources, and enhance biological diversity in the Maine Woods, the restoration of native fish runs is of paramount importance. The headwaters of all major rivers in Maine start in the North Woods. Because the dams on these rivers do not provide adequate fish passage, the fish populations have been significantly altered, having a profound impact on both terrestrial and aquatic food chains.

Likewise, as an activist organization, we believe that the denial of judicial review in this matter is a denial of our right to have a court determine whether or not the Board of Environmental Protection acted in an arbitrary manner in declining to bring its rules into compliance with federal and state law.

Peace Action Maine - Maine's largest peace organization, has worked for 25 years to promote peace through grassroots organizing, citizen education, and issue advocacy. Peace Action Maine is a voice of education and a center for all people committed to disarmament and creative responses to conflict. We bring to our work a deep and lasting commitment to nonviolence, justice, and the empowerment of all people.

Peace Action Maine believes that we ourselves - we humans – are the direct cause of the current crises of climate change, resource depletion and widespread pollution. The destruction of Maine's marine ecosystem is but one local instance of an important global phenomenon. A key part of Peace Action Maine’s agenda is our "Reclaim Maine Initiative," which takes an integrated and holistic approach to the many problems we

face. An effective ebb and flow of migratory fish in our rivers and to and from the Gulf of Maine is an essential ingredient to "reclaiming Maine," as is the fundamental right to appeal agency decisions gone bad.

The mission of Friends of Sebago Lake is to restore and protect the high quality of Sebago Lake. Sebago Lake once possessed the world's finest inland lake beaches. Unnatural lake level regulation has greatly harmed the beaches, shorelines and ecosystem of Sebago Lake. In addition, the Presumpscot River - Sebago Lake watershed once contained one of the finest anadromous and catadromous fisheries in the world. Friends of Sebago Lake believes the presence of impassable dams has decimated this fishery. Through research and education, Friends of Sebago Lake strives to inform public and regulatory agencies of the harmful impacts caused by the present altered hydrologic flow. We hope through our efforts, good science and environmental integrity will form the foundation of management decisions that restore and protect this world class natural resource.

Friends of Sebago Lake believes the fisheries of Maine rivers emptying into the Gulf of Maine are significantly connected and must be considered as one. The safe passage of all native diadromous fish is vital to the health of river and lake ecosystems of Maine. Friends of Sebago Lake has also appeared before agencies. We understand that the right of judicial review is fundamental to our democracy and must be maintained. For these reason we are participating in filing this Amicus Brief.

QUESTIONS PRESENTED

1. Did the Superior Court err in ruling Board action on a petition to modify under 38

M.R.S.A. § 341-D(3) and Rule 27 is never subject to judicial review because action on a petition is committed to the agency's sole discretion?

2. Did the Superior Court err in ruling Board action on a petition to modify under 38 M.R.S.A. § 341-D(3) and Rule 27 is never "final agency action" and thus never subject to judicial review?

3. Even if the Board's dismissals are nonfinal, should the appeals go forward because review of final action would not provide an adequate remedy to Petitioners?

STATEMENT

As described in the Appellant brief for this matter, Maine DEP issued water quality certification for 21 dams on four rivers: the Androscoggin, Little Androscoggin, and Kennebec Rivers and Messalonskee Stream. Appellants contend that these certifications allow a serious threat to the environment because they fail to require dams to provide safe passage for indigenous migratory fish, and therefore injure and kill American eel and other indigenous species, block fish migration and reduce habitat.

Appellants filed three petitions with the BEP under 38 M.R.S.A. § 341-D(3) (2001) and BEP regulations. In these petitions, each appellant requested that the certifications at issue be modified to require safe passage for eels and other indigenous migratory fish.

Two of the petitions were dismissed by BEP and one went to an adjudicatory hearing and was then dismissed. Appellants filed M.R. Civ. P. 80C appeals of the three BEP decisions and each court ruled that it had no jurisdiction to hear the appeal, because the BEP's action was not final and because the BEP had sole, unreviewable discretion in

this matter. The present appeal, pursuant to 5 M.R.S.A. § 11008(1) (2001), followed and we submit this Amici Curiae brief in support of Appellants' position in this matter.

INTRODUCTION

We concur with the arguments presented in the comprehensive brief submitted by the three appellants in this matter. To summarize, we believe that safe and effective diadromous fish passage is critical to the health and well being of all Maine rivers, Maine people and the Gulf of Maine. We believe that the lack of safe and effective diadromous fish passage violates the Maine Water Quality Standards and the Federal Clean Water Act. We contend that the BEP has acted in an arbitrary and capricious manner by refusing to modify existing permits to bring them into compliance with state and federal laws.

Most importantly, we believe that the system of checks and balances between the three branches of government, is threatened in this matter. The right to judicial review of an agency decision is on par with the presumption of innocence until guilt is proven beyond a reasonable doubt. Furthermore, the right to appeal is specifically expressed in the BEP rules. The lower courts have a right, as well as a responsibility, to review the decisions at issue in this matter. By declining to do so, these courts have further consolidated power in the executive branch.

Given that the Superior Court rulings in the Androscoggin, Kennebec and Messalonskee decisions contain numerous errors of fact and law, loss of the right of judicial review constitutes a significant threat to our work as activist organizations. It puts us at the mercy of political appointees who are given immunity from review in this matter. If anything, the courts should err on the side of inclusiveness when considering

questions of abuse of discretion by the executive branch.

As community organizations, we feel very strongly about the denial of judicial review and the impact that such a decision has on citizen groups and community members who find themselves taking positions in opposition to the executive branch.

ARGUMENT

Since the U. S. Supreme Court decision in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 401 (1971), 91 S.Ct. 814, the right to judicial review of administrative agency actions has been recognized as integral to the rights of those throughout this country who work tirelessly to protect their communities making them better, safer and healthier places. ("Section 701 of the Administrative Procedure Act, 5 U.S.C. § 701 (1964 ed., Supp. V), provides that the action of "each authority of the Government of the United States….is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." *Overton Park* at 410. The Maine Administrative Procedures Act (APA) does not restrict judicial review in any manner and there is no provision in the Maine APA that even mentions the "committed to agency discretion by law," exemption. 5 M.R.S.A. § 11007(4)(C)(6) (2002).

In fact, Maine's Administrative Procedures Act specifically allow for superior court review of agency action.

> **§11001. Right to review**
>
> **1. Agency action.** Except 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 Superior Court*** in the manner provided by this subchapter. 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.

2. Failure or refusal of agency to act. Any person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court. The relief available in the Superior Court shall include an order requiring the agency to make a decision within a time certain. [Emphasis added]

5 M.R.S.A. §11001.

Even prior to *Overton Park*, important decisions opened the door to activist participation before administrative agencies. See *Office of Communication, United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (granting the consumer public standing to challenge administrative actions). This led to the increased possibility of judicial review and standing to seek same. See *Abbott Laboratories, Inc., v. Gardner,* 387 U.S. 136 (1967) and *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965) (protection of scenic amenities is an important motivation for citizen involvement in administrative proceedings). Five years later, the U.S. Supreme Court confirmed the expanded concept of standing expressed in *Scenic Hudson*. See *Association of Data Processing Service Organizations, Inc. v. Camp*., 397 U.S., 150, 157 (1970) (That interest [giving standing], at times, may reflect "aesthetic, conservational, and recreational" as well as economic values.)

The appellants having been recognized as parties with standing in administrative matters, and entitled to judicial review upon appeal, maintain it is a large step backwards for the BEP to argue that judicial review is precluded in the matter of the agency's refusal to bring existing permits in line with federal and state law. By validating the agency's argument, the lower courts slammed the door in the face of the activists and community groups that participated in this matter on the administrative level and developed and filed their appeal with the Superior Court.

These are matters not susceptible to executive discretion but rather matters that deserve, and must be subject to, judicial review. If the Maine Superior Courts refuse to review these decisions, what value do they place on community involvement and citizen participations, and, most importantly, on the line of cases that established standing and the right of judicial review for groups like FEN, Penobscot Bay Watch, Peace Action Maine and Friends of Sebago Lake? Such refusal to review agency decisions, on the part of the Superior Courts, is a rejection of Chief Justice Marshall's assurance in *Marbury v. Madison*, that "where the heads of the department are the political…agents of the executive…to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But *where a specific duty is assigned by law, and individual rights depend upon the performance of that duty*, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy. [Emphasis added] (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

The Appellants in this matter played by the rules before the BEP, and, in filing their subsequent appeals to the Superior Courts in two counties. But those courts changed the rules on the basis of "agency discretion," and "non-finality." Only the courts of the state of Maine stand between concerned citizen activists and unfettered discretion of the executive branch. We respectfully ask this court to remind the lower courts of their rights as well as their concomitant responsibility to, as Chief Justice Marshall articulated, grant these appellants "a right to resort to the laws of [their] country for a remedy." *Marbury* at 166.

CONCLUSION

For the reasons set forth above, the dismissals of the 80C actions should be reversed, and the cases should be remanded to the Superior Court for determinations on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 14, 2007 I caused two copies of the Brief for Amicus Curiae to be served on the following counsel of record and pro se appellant by pre-paid first class mail at the following addresses:

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