STATE OF MAINE SAGADAHOC, ss	SUPERIOR COURT CIVIL ACTION DOCKET NO. AP-07-6
ED FRIEDMAN)) Petitioner,)) v.)) MAINE BOARD OF ENVIRONMENTAL) PROTECTION)) Respondent.)	RESPONDENT MAINE BOARD OF ENVIRONMENTAL PROTECTION'S REPLY TO PETITIONER'S MEMORANDUM IN OPPOSITION TO THE BOARD'S MOTION TO DISMISS

A. There is No Statutory Right to Appeal

In response to Respondent Maine Environmental Protection's ("Board") motion to dismiss this matter, Petitioner Ed Friedman argues that 38 M.R.S.A. § 346(1) (2001 & Supp. 2006) provides him a right of appeal. As Justice Marden stated, this argument, on its face, is "viscerally compelling, but nonetheless, legally insufficient." *Douglas H. Watts v. Maine Board of Environmental Protection* (Me. Super. Ct. Kenn. Cty., December 6, 2006) (Marden, J.), Exhibit A to Board's Motion to Dismiss (hereinafter "*Watts v. MBEP*") at 4. That is because 38 M.R.S.A. § 346(1) "incorporates 5 M.R.S.A. § 11001 (2002), as the standard for evaluating whether the Superior Court has jurisdiction." *Watts v. MDEP* at 5. Title 5, section 11001(1) provides that :

> any person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court ...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.*

Watts v. MDEP at 5, quoting 5 M.R.S.A. 11001(1) (emphasis in Decision). Justice Marden found that the Board's discretionary action "cannot be seen as *final* action since the agency did not pursue action on the allegations because of an insufficiency of evidence." *Id.* at 5 – 6 (emphasis in original). The Board's determination in this case – namely that the second Androscoggin petition to modify was materially the same as the first, which it had already dismissed because of lack of a proffer of sufficient evidence to proceed to hearing – similarly cannot be seen as final action subject to appeal under 38 M.R.S.A. § 346(1).

In addition, Mr. Friedman, like Mr. Watts, has failed to show that final agency action would not provide him an adequate remedy. *Watts v. MDEP* at 6. While the Board determined not to proceed to public hearing on the proffer of evidence before it, this "does not prevent Watts," or in this case Mr. Friedman "from petitioning the Board at a later date with more evidence." *Id.* Neither 38 M.R.S.A. § 346(1), nor any other statute, therefore, provides Mr. Friedman with a right to appeal this "wholly discretionary screening decision entrusted to the Board." *Id.*

B. The Board's Decision is Not a Licensing Decision; Rather it is Investigatory in Nature, Akin to an Exercise of Enforcement Authority, and as such Left to the Sole Discretion of the Board.

Petitioner Friedman next argues that the Board's decision not to hold a public hearing to determine whether to modify the water quality certifications in issue is a "licensing decision" and not an exercise of enforcement authority, and supports his ability to bring and maintain an appeal by citing to cases involving licensing decisions. On the contrary, as the court found in *Watts v. MBEP*, the Board's authority under 38 M.R.S.A. § 341-D(3) to determine whether to hold a public hearing is investigatory in

nature and is more akin to an exercise of enforcement authority than a licensing decision. Under 38 M.R.S.A. § 341-D(3), "the Board screens and evaluates petitions by allowing petitioners and interested parties to appear before the Board to present evidence on whether a sufficient factual basis exists to warrant a more comprehensive public hearing." *Watts v. MBEP*, at 4. The Board is "charged with evaluating the merits of each petition, ... reserving public hearings for only those select petitions which raise enough evidence as to call into question the reasoning for granting the license." *Id.* at 4. The decision not to proceed to hearing after this evaluation does not affect the license in any way; the license is neither changed nor revoked. Like the decision of the Department of Inland Fisheries and Wildlife not to further investigate a third party complaint and initiate license revocation proceedings against certain whitewater outfitters, the Board's decision here not to proceed to public hearing is part of its investigatory powers left solely in the discretion of the executive branch. *New England Outdoor Center v. Commissioner of Inland Fisheries and Wildlife*, 2000 ME 66, ¶ 12, 748 A.2d 1009, 1014.

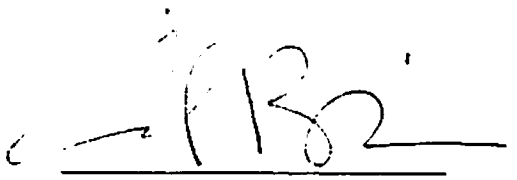
C. Petitioner Friedman Does Not Have Standing to Bring this Appeal

Petitioner's arguments with regard to standing rely on his assertion that the Board's decision is a licensing decision rather than part of its investigatory authority. For all the reasons stated above, the Board's decision is not a licensing decision and thus Petitioner's arguments are misplaced and citations to case law inapt. Respondent Board of Environmental Protection relies on its Memorandum in Support of Motion to Dismiss to support its position that Mr. Friedman does not have standing to bring this appeal.

Dated: August 9, 2007

Respectfully submitted,

G. STEVEN ROWE
Attorney General



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