STATE OF MAINE
SAGADAHOC, ss.

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

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| ED FRIEDMAN, | ) | |
| | ) | REPLY OF PARTIES-IN-INTEREST |
| Petitioner, | ) | FPL ENERGY MAINE HYDRO LLC, |
| | ) | HACKETT MILLS HYDRO |
| v. | ) | ASSOCIATES, RIDGEWOOD MAINE |
| | ) | HYDRO PARTNERS, L.P., AND |
| MAINE BOARD OF | ) | RUMFORD FALLS HYDRO LLC TO |
| ENVIRONMENTAL PROTECTION, | ) | PETITIONER ED FRIEDMAN'S |
| | ) | OPPOSITION TO THE PARTIES-IN- |
| Respondent. | ) | INTEREST'S MOTION TO DISMISS[1] |

## INTRODUCTION

The view of Maine administrative law offered by Petitioner Ed Friedman in his Reply to the Parties-in-Interest's Motion to Dismiss ("Reply"), and in particular his interpretation of the array of agency actions that can be appealed to Superior Court, would insert the courts as caretaker of the Executive Branch of government, and is contrary to all notions of separation of powers upon which our government system is based. Put simply, the Judiciary is not a roving reviewer of all actions taken by the Executive Branch. The court may review only "final agency actions," as that term is defined.

## ARGUMENT

### I. Final Agency Action Is Required For This Court To Have Jurisdiction.

Petitioner argues that 38 M.R.S.A. § 346(1) allows appeals of any Department of Environmental Protection ("DEP") decision, regardless of whether such decision constitutes final agency action. If that were the case, even interim and procedural orders would be appealable.

[1] We are authorized to inform the Court that Party-in-Interest Miller Hydro Group joins in this Reply. We have not heard from Parties-in-Interest Topsham Hydro Partners, L.P. and Verso Androscoggin LLC.

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) is not intended to lead to such a burdensome result.

The purpose of the language in 38 M.R.S.A. § 346(1), that appeals brought thereunder shall be in accordance with the procedures set forth in the Maine Administrative Procedures Act ("APA"), is explanatory – not expansive – as claimed by the Petitioner. If the Legislature had intended that appeals of DEP decisions on petitions to modify, revoke, or suspend would not be in accordance with the procedures set forth in the Maine APA, the Legislature could have created an explicit exception for such appeals, just as it did with emergency orders issued by the Board of Environmental Protection ("BEP") in Section 347-A(3).

Petitioner's argument also is not supported by 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. Petitioner's interpretation of 38 M.R.S.A. § 346(1) is inconsistent with the Maine APA, which expressly requires final agency action. 38 M.R.S.A. §§ 346(1) and 341-D(3) do not authorize otherwise.

Petitioner acknowledges that 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. This exception, however, is not applicable because it assumes that the proceeding will culminate in final agency action. Under 38 M.R.S.A. § 341-D(3), once the BEP declined to schedule a hearing, the proceeding was over. There is no more action for the BEP to take and therefore no reviewable final agency action will result.

Petitioner argues that the BEP's decision not to modify the certifications was final agency action because Maine courts regularly review decisions that are made at the sole discretion of an agency and that not allowing an appeal of a BEP non-modification decision could lead to absurd results. The cases Petitioner cites in support of this contention, however, involved not just the review of the exercise of an agency's discretion but, more importantly, involved the review of final agency action in which a specific person's legal rights, duties, or privileges were affected.

In any event, Petitioner misses the point. Regardless of the BEP's reason for non-modification, the mere fact that 38 M.R.S.A. § 341-D(3) gives the BEP discretion to modify, revoke, or suspend a license does not in and of itself make that decision final agency action. Petitioner's only legal right, duty, or privilege is the right to submit a petition to the BEP. Petitioner exercised that right without interference; if he had not been allowed to file the hearing petition, that might have been "final agency action" that affected a right Petitioner holds. But the discretionary decision challenged here – to not hold a hearing – did not affect any right, duty, or privilege held by Petitioner. So there was no reviewable final agency action. 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."

The BEP's discretion not to modify the certifications is akin to an agency's discretion to take or not take enforcement action, because a decision not to take enforcement action affects only the object of the potential enforcement action, not a petitioner interested in "good government." Courts will not interfere with an agency decision not to take enforcement action, just as here the Court will not interfere with an agency decision that is not "final agency action" unless otherwise permitted by the Maine Legislature.

## II. The Petitioner Is Not An Aggrieved Person.

Even assuming that final agency action is not required, Petitioner must be an "aggrieved person." 38 M.R.S.A. § 346(1). Petitioner's argument that Maine courts have reviewed agency decisions that preserve the *status quo* does not, without more, mean that Petitioner is an aggrieved person. In order to be aggrieved, petitioner must demonstrate a particularized injury from a decision to preserve the *status quo*. "The agency's action must operate prejudicially and directly upon a party's property, pecuniary or personal rights." *Storer v. DEP,* 656 1191, 1192 (Me. 1995) (internal citation omitted). In other words, it must be the *BEP's* action that operates prejudicially and directly upon Petitioner's property, pecuniary or personal rights. Whatever rights Petitioner may have, those rights were not directly harmed by the BEP's decision.

While Petitioner alleges that he has economic concerns, he has not demonstrated either that those economic concerns rise to the level of a "property or pecuniary right" or provided support for how the *BEP's* decision harms those economic concerns.[2] Finally, he does not have a personal right that is distinguishable from the public at large. His economic concerns and aesthetic interests are no different than any other member of the public who uses or views the Androscoggin River.

Petitioner tries to distinguish cases cited by the Parties-in-Interest with respect to whether a person's rights have been directly harmed by an agency decision. Reply, p.10. As the Petitioner acknowledges, however, only the target of an enforcement action has standing to appeal an enforcement decision because a non-enforcement decision cannot be appealed. Reply,

[2] Petitioner states that he is prepared to provide evidence of his economic concerns. It is too late for that. While the BEP's regulations allow any person to submit a petition to modify, revoke, or suspend a license, Petitioner knew or should have known that to seek judicial review of a BEP decision not to modify the certifications, he must be an aggrieved person. Thus, he should have made such demonstration when he described to the BEP the evidence he would rely on to support modification of the certifications. Such petitions, once filed, may not be supplemented except in a public hearing. DEP Reg. 2.27.

footnote 9. This is precisely the point of the Parties-in-Interest. Just as a non-enforcement decision may not be appealed, neither may a non-modification decision. Similarly, just as the target of an enforcement action may appeal an enforcement decision, so too may the licensee appeal a license modification decision that affects the licensee's rights.

## III. The Superior Court's Decision in Andro I Bars This Appeal.

Petitioner next argues that the doctrine of *res judicata* is inapplicable to the Andro II petition and to this appeal. The Parties-in-Interest, however, do not contest Petitioner's right to submit a second petition. The issue here is whether the doctrine of *res judicata* bars Petitioner's petition for judicial review of the BEP's non-modification in Andro II. Thus, Petitioner's citation to the "essential elements of adjudication" in determining the application of *res judicata* to administrative agency actions is inapposite; the key is whether the *Superior Court's* dismissal of Mr. Watts's Andro I appeal bars Petitioner from filing this appeal.

Petitioner argues that there is no privity of parties because the Andro II petition involves two additional dams, Otis and Rumford Falls, owned by companies not involved in the Andro I proceeding.[3] Privity among the dam owners subject to Andro I and Andro II, however, is not relevant to whether there is privity between Mr. Watts and Petitioner Friedman. There is privity between the Petitioner and Mr. Watts with respect to the Andro I appeal -- a fact that Petitioner does not deny. The fact that Petitioner introduced evidence that was not introduced during the Andro I BEP proceeding is not relevant because the matters presented to this Court for decision are the same matters presented to and discussed by the Court in the Andro I appeal.

## IV. The BEP May Not Unilaterally Modify The Certifications.

Petitioner next argues that the Environmental Protection Agency's ("EPA") regulation at

[3] The Otis dam is owned by Verso Androscoggin LLC, the owner of several dams subject to Andro I.

40 C.F.R. § 121.2(b) allows the water quality certifications to be modified pursuant to agreement among BEP, EPA, and the Federal Energy Regulatory Commission ("FERC").[4] That regulation, however, is not applicable in instances in which BEP has issued a certification and FERC then has issued a license that incorporates the terms of the certification. Section 6 of the Federal Power Act provides that a FERC license may not be modified without the consent of the licensee. 16 U.S.C. § 799. Because the FERC licensee's consent is required for license modification, 40 C.F.R. § 121.2(b) can only apply if a FERC license, incorporating the terms of the certification, has not been issued.[5]

Petitioner argues that not allowing modification of water quality certifications would gut the statutory and regulatory provisions regarding license modification. Petitioner is mistaken, because these modification provisions also are applicable to the many other licenses, permits, and approvals issued by DEP.

Because a FERC license has been issued, one must look to the conditions of the federal license to determine under what circumstances the certification can be modified. The Petitioner appears to agree, citing a Maine Law Court decision that supports this proposition. Petitioner notes that the Maine Supreme Judicial Court in *S.D. Warren* has said that reopeners are essential to ensure water quality standards are met during the term of a FERC license. Reply, p. 15. In other words, without a reopener, the BEP does not have the authority to amend a certification.

[4] Petitioner argues that the Parties-in-Interest ignore this regulation (Reply, p. 12), yet Petitioner then argues that Parties-in-Interest misstate the regulation (Reply, footnote 10).

[5] Petitioner's argument that once the BEP decides to modify the certifications, it can work with FERC and EPA to get the modification implemented shows that Petitioner agrees with the Parties-in-Interest that a modified certification has no independent effect unless its terms have been incorporated into an amended FERC license.

## CONCLUSION

For all of the foregoing reasons, the Parties-in-Interest respectfully request that the Court grant their motion to dismiss Mr. Friedman's petition.

Dated at Portland, Maine, this 21st day of September 2007.

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