STATE OF MAINE SUPREME JUDICIAL COURT
CUMBERLAND, ss. 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

On appeal from Sagadahoc and Kennebec County Superior Courts

JOINT BRIEF OF APPELLANTS

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I. Overview

Under the federal Clean Water Act ("CWA'"), a state water quality certification is a prerequisite to obtaining a federal license for an activity such as operating a hydroelectric dam. 33 U.S.C. § 1341 (2001). In Maine, the Department of Environmental Protection ("DEP") is responsible for issuing water quality certifications. 38 M.R.S.A. § 635-B (2001). A certification cannot be issued if the activity would cause a violation of State water quality standards. 38 M.R.S.A. § 464(4)(F)(3) (2002 & Supp. 2007).

At issue here are water quality certifications DEP issued for 21 dams on four rivers: the Androscoggin, Little Androscoggin, and Kennebec Rivers, and Messalonskee Stream. Ed Friedman, Friends of Merrymeeting Bay ("FOMB') and Douglas H. Watts ("Appellants" or "Petitioners") contend these certifications allow violations of water quality standards and pose a serious threat to the environment because the certifications do not require the dams to provide safe passage for indigenous migratory fish. Appellants contend that the dams kill and injure significant numbers of American eel and other indigenous species with their turbines, block fish migration, and reduce habitat, all to the point of grave concern. See pp. 6-11, infra.

Under a formal procedure established by 38 M.R.S.A. § 341-D(3) (2001) and Board of Environmental Protection ("Board") regulations, Me.

Dept. of Env't Prot., 01 096 2-27 (hereinafter,"Rule 27") (App. at 129), Appellants filed three petitions with the Board (each covering different dams) requesting the certifications be modified to require safe passage for eels and other indigenous migratory fish. See pp. 7-11, infra. Two of the petitions were dismissed, and one of the petitions went to an adjudicatory hearing and was then denied. See pp. 12-14, infra.

Appellants filed M.R. Civ. P. 80C appeals of the three Board decisions. The Superior Court in each case ruled it had no jurisdiction to hear the appeal because the Board's action was not "final" and because the Board had sole, unreviewable discretion to do what it wants with the petitions. See pp. 15-18, infra. This appeal, pursuant to 5 M.R.S.A. § 11008(1) (2001), followed.

II. Procedural History

On May 17, 2006, Ed Friedman filed a petition to modify water quality certifications for dams on the Androscoggin and Little Androscoggin Rivers ("Friedman Petition"). App. at 5. On May 17, 2007, the Board dismissed the petition. App. at 5-6 (Board dismissal of Friedman Petition). Mr. Friedman timely filed, pro se, a petition to review the Board's decision in Sagadahoc County Superior Court on June 15, 2007, AP-07-06 ("Friedman 80C Appeal"). App. at 1 (docket sheet) and 7-9 (Friedman 80C Appeal). The Board and real parties in interest dam owners moved to dismiss the appeal on June 16, 2007 and August 14, 2007, respectively. App. at 1, 2 (docket sheet). Oral argument on the

motions was heard on October 18, 2007. App. at 3 (docket sheet). Justice Horton granted the motions to dismiss on November 8, 2007 (App. 10-17, hereinafter "Friedman 80C Dismissal"), and the order of dismissal was entered on the docket sheet on November 15 2007 (App. at 3). An appeal to the Law Court was timely filed on December 4, 2007,[1] and bears the Law Docket number SAG-07-711.

FOMB filed a petition to modify water quality certifications for four Kennebec River dams on October 3, 2005 ("FOMB Petition"). App. at 31. On January 19, 2006, the Board voted to schedule a pubic haring on the petition. App. at 32.[2] The Board required FOMB to file a motion to intervene in the hearing, even though FOMB had filed the petition. On July 6, 2006, the Board granted intervenor status to FOMB. App. at 33. After several pre-hearing conferences (App. at 33-34), an adjudicatory hearing was held to receive testimony from the parties and the general pubic (App. at 35). The hearing was held on March 15 and 16, 2007, in Augusta. App. at 35. Twelve witnesses testified, not including members of the public. App. at 35-47. Post hearing briefs were filed. App. at 48-52. On July 5, 2007, the Board denied the FOMB Petition. App. at 21-30. FOMB timely filed a petition to review the Board's decision in Sagadahoc County Superior Court on August 6, 2007, AP-07-10 ("FOMB

[1] The Appendix inadvertently includes a docket sheet for AP-07-06 that was duplicated before the notice of appeal was docketed.

[2] Douglas Watts filed a similar petition regarding the Kennebec dam certifications, and his petition was essentially consolidated with FOMB's.

80C Appeal"). App. at 18 (docket sheet) and 54-65 (FOMB 80C Appeal). The Board and the real parties in interest dam owners moved to dismiss the appeal on September 4 and 6, 2007, respectively. App. at 18 (docket sheet). Oral argument on the motions was heard on October 18, 2007. App. at 20 (docket sheet). Justice Horton granted the motions to dismiss on November 8, 2007 (App. 66-68, hereinafter "FOMB 80C Dismissal"), and the order of dismissal was entered on the docket sheet on November 15 2007 (App at 20). An appeal to the Law Court was timely filed on December 4, 2007,[3] and bears the Law Docket number SAG-07-712.

Douglas Watts filed a petition to modify the water quality certification for a dam to be rebuilt on Messalonskee Stream on May 1, 2007 ("Watts Petition"). App. at 73. The Board dismissed the petition on November 15, 2007. App. at 71-81. Mr. Watts timely filed, pro se, a petition to review the Board's dismissal in Kennebec County Superior Court on November 5, 2007, AP-07-73. ("Watts 80C Appeal"). App. at 69 (docket sheet), 82-89 (Watts 80C Appeal). Mr. Watts moved for a temporary restraining order to prevent the dam from being built, and that was denied. App. at 69 (docket sheet). On December 17 and 19, 2007, respectively, the real party in interest dam owner and the Board moved to dismiss the appeal. App. at 69 (docket sheet). No oral argument was heard on the motion. Justice Jabar granted the motion to

[3] The Appendix inadvertently includes a docket sheet for AP-07-10 that was duplicated before the notice of appeal was docketed.

dismiss on January 10, 2008 (App. 90, hereinafter "Watts 80C Dismissal"), and the order of dismissal was entered on the docket sheet the same date (App. at 70). An appeal to the Law Court was timely filed on January 18, 2008 (App. at 70), and bears the Law Docket number KEN-08-36.

III. Water Quality Certifications For Hydroelectric Dams

Section 401 of the CWA, 33 U.S.C. § 1341, requires an applicant seeking a federal permit for an "activity … which may result in any discharge into the navigable waters" to obtain a certification from the appropriate state that any such discharge will comply with, among other things, state water quality standards. S.D. Warren Co. v. Board of Environmental Protection, 2005 ME 27, ¶ 8, 868 A.2d 210, 214, aff'd, 547 U.S. 370 (2006) ("The purpose of the certification is to confirm that the contemplated discharge will comply with the water quality standards of the CWA and the effected state."). Consistent with the CWA, Maine law provides that a water quality certification can be issued only if the standards of a water quality classification are met. 38 M.R.S.A. § 464(4)(F)(3). A certification must contain any limitations on the licensed activity that are necessary to assure attainment of water quality standards. 33 U.S.C. § 1341(d).

Hydroelectric dams must obtain water quality certifications because they need Federal Energy Regulatory Commission ("FERC") licenses. S.D. Warren Co. v. Maine Board of Environmental Protection,

547 U.S. 370 (2006). In Maine, water quality certifications are issued by DEP. 38 M.R.S.A. § 635-B.

Among other things, certifications must assure protection of migratory fish because, as discussed more fully below, that is required by State water quality standards. The waters of the four rivers involved in the cases at bar are classified as Class B and Class C. 38 M.R.S.A. § 467-1(A)(2), (b)(1)(a) and (b) (2001 and Supp. 2007); 38 M.R.S.A. § 467-1(E)(1)(a) (2001 and Supp. 2007); 38 M.R.S.A. § 467-4(A)(9) and (10) (2001 and Supp. 2007) (classifications of waters).

DEP does not have a cohesive approach to protecting migratory fish from the adverse effects of dams. Certification provisions regarding safe passage for American eel and other indigenous species vary greatly from dam to dam, even on the same river. [4] A number of certifications provide for literally no passage at all, such as those for many of the dams on the Androscoggin (App. at 7, Friedman 80C Appeal) and for the dam on the Messalonskee (App. at 85, Watts 80C Appeal ¶¶ 16, 20). Other

[4] Appellants note not all passage is safe passage. Passage can be provided through turbines or over the top of dams when the water is high, but eels and other fish get killed and injured when trying to pass a dam that way. See Summary of Petitions, Petition Proceedings, Public Hearing Testimony, and Post-Hearing Briefs for the FOMB Petition (hereinafter, "FOMB Petition Proceeding Summary") at App. at 38 (summary of FOMB direct testimony), 44 (Watts rebuttal), 45 (FOMB rebuttal). See also direct testimony of Ed Friedman ¶¶ 20-24, 28, submitted to the Board in connection with the FOMB Petition ("Friedman Direct"), attached as Exhibit A to the Nicholas Declaration in opposition to the motion to dismiss the FOMB 80C Appeal, docket sheet entry September 26, 2007 (App. 19). To counter this problem, some dams on other rivers screen or shut down their turbines during eel migration periods. Friedman Direct, ¶¶ 30-33.

certifications require minimal measures, such as those for the Kennebec dams that require only studies. Friedman Direct ¶ 3. A few water quality certifications (not ones at issue here) require significant measures, including installation of upstream and downstream passage facilities, operation measures to provide passage, and restrictions on water level and flows. S.D. Warren Co. v. Department of Environmental Protection, 2004 Me Super. LEXIS 115, * 3, n.1 (May 4, 2004), aff'd, S.D. Warren v. Board of Environmental Protection, 2005 ME 27, 868 A.2d 210 (2005), aff'd, 547 U.S. 370 (2006). This helter-skelter way of regulating fish passage does not work. The biological integrity of the rivers has been dramatically impaired by the dams, and water quality standards are not being met. App. at 7, 9 (Friedman 80C Appeal); App. at 56, 57, 61 (FOMB 80C Appeal ¶¶ 8, 12, 29, 32); App. at 85-87 (Watts 80C Appeal ¶¶ 16, 20,21).

Appellants are two individuals who use, and a conservation group whose members use, these rivers for commercial and recreational purposes (collectively, "Appellants" or "Petitioners"). Frustrated by DEP's poor stewardship, which is harming their use and enjoyment of the rivers,[5] they availed themselves of a procedure to modify water quality

[5] Ed Friedman, a member of FOMB and the organization's Chairman, submitted an affidavit to the Board (attached as Exhibit B to the Nicholas Affidavit submitted in opposition to the motion to dismiss the FOMB 80C Appeal, docket entry 9/26/2007, App. at 19) detailing harm dam operations are causing to FOMB members' aesthetic interests (¶¶ 12-13) and to FOMB's ability to carry out its mission (¶¶ 14-15). Evidence of aesthetic and economic harm to FOMB members was also presented at the adjudicatory hearing on the (con't)

certifications. 38 M.R.S.A. § 341-D(3) authorizes the Board to modify certifications, and Rule 27 of Chapter 2 of the Board rules, authorizes "any person" to petition the Board to make such a modification. § 341-D(3) and Rule 27 provide the Board may modify a certification if as few as one of seven criteria is met. Appellants filed separate petitions (collectively, the "Petitions") with the Board to modify certifications for (1) sixteen dams on the Androscoggin and Little Androscoggin (the "Friedman Petition"), (2) four dams on the Kennebec (the "FOMB Petition") and (3) one dam on the Messalonskee (the "Watts Petition").[6] They asked the Board to modify the certifications to require safe passage for eels and other indigenous migratory fish. App. at 7 (Friedman 80C Appeal, p. 1) App. at 56 (FOMB 80C Appeal ¶ 8); App. at 83 (Watts 80C Appeal ¶ 6).

Kennebec Petition (Friedman Direct ¶¶ 36-38). The 80C Appeals also allege injury. App. at 7 (Friedman 80C Appeal); App. at 54-55, 62-63 (FOMB 80C Appeal ¶¶ 2, 39-43); and App. at 9 (Watts 80C Appeal ¶ 9). The underlying Petitions contained additional facts to establish standing, but the Board did not file a record on appeal in these cases so that information is not before the Court. Although the Superior Court did not rule on standing, App. at 10, n.1, these facts establish Appellants have suffered a particularized injury, see e.g., Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 197 (Me. 1978) (harm to aesthetic interests "establishes a direct and personal injury"), and are thus "persons aggrieved," Heald v. School Administrative Dist. No.74, 387 A.2d 1, 3 (Me. 1978); In re Lappie, 377 A.2d 441, 442-444 (Me. 1977).

[6] The Friedman Petition, which was submitted by 63 individuals and FOMB in addition to Mr. Friedman, requested that certifications for the following hydroelectric dams be modified: Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, Deer Rips, Gulf Island, Livermore, Otis, Jay, Riley, Rumford Falls, Barker Lower Mills, Barker Upper Mills, Hacketts Mills, and Marcal. App. at 4-5. The FOMB Petition requested that certifications for the following hydroelectric dams be modified: Lockwood, Hydro-Kennebec, Shawmut, and Weston. App. at 56. The Watts Petition requested that the certification for the Union Gas dam be modified. App. at 83.

IV. The Grounds For The Petitions

The Petitions asserted four of the modification criteria contained in the statute and rule were met. App. at 7-9 (Friedman 80C Appeal); App. at 56-57 (FOMB 80C Appeal ¶ 10); App. at 86 (Watts 80C Appeal ¶ 19).

First, Petitioners asserted that the water quality certifications do not contain standards or limitations legally required on the date of issuance. 38 M.S.R.A. § 341-D(3)(D); Rule 27(D). Petitioners asserted that by failing to provide for safe upstream and downstream passage, the certifications fail to contain provisions assuring compliance with water quality standards. Specifically, the certifications fail to assure:

- Class B and Class C waters of the rivers will "be suitable for . . . habitat for fish and other aquatic life," a standard required by 38 M.R.S.A. § 465(3)(A) and 4(A) (2001 & Supp. 2007);

- Class B waters of the rivers will be "unimpaired" habitat, a standard required by 38 M.R.S.A. § 465(3)(A). "'Unimpaired' means without a diminished capacity to support aquatic life." 38 M.R.S.A. § 466(11) (2001 & Supp. 2007);

- Class B waters of the rivers will "support all aquatic species indigenous to the" rivers "without detrimental changes in the resident biological community," a standard required by 38 M.R.S.A. § 465(3)(C);

- Class C waters of the rivers will "support all species of fish indigenous to the" rivers "and maintain the structure and function of the resident biological community," a standard required by 38 M.R.S.A. § 465(4)(C);[7]

[7] "'Without detrimental changes to the biological community' means no significant loss of species or excessive dominance by any species or group of species attributable to human activity." 38 M.R.S.A. § 466(12). "'Community function' means mechanisms of uptake, storage and transfer of life-sustaining materials available to a biological community which determines the efficiency of use and the amount of export of the materials from the community." (con't)

- existing uses of the rivers (as habitat for fish and eels) are being maintained and protected, a standard required by 38 M.S.R.S.A. § 464(4)(F)(1);

- the standards of classification of the water body are met, as required by 38 M.R.S.A.. § 464(4)(F)(3).

App. at 9 (Friedman 80C Appeal, p. 3); 57 (FOMB 80C Appeal ¶ 12), 86-87 (Watts 80C Appeal ¶ 21).

Second, Petitioners asserted the activities covered by the water quality certifications (dam operations) pose a threat to the environment. 38 M.S.R.A. § 341-D(3)(C); Rule 27(C). The certifications allow significant numbers of fish and eels to be killed and injured in the dam turbines and allow eel and other fish habitat to be blocked and rendered unusable. App. at 56, 57 (FOMB 80C Appeal ¶¶ 8, 11); App. at 85, 96, 88 (Watts 80C Appeal ¶ 16, 20, 29); App. at 9 (Friedman 80C Appeal, p. 3).

Third, Petitioners asserted there has been a change in condition or circumstance that requires modification of the certifications. 38 M.S.R.A. § 341-D(3)(E); Rule 27(F). With respect to the dam on the Messalonskee, the Petition asserted the following changes since the certification was issued in 1995: (1) the removal of the dam in 2001 restored the stream to its natural, free-flowing condition and improved

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38 M.R.S.A. § 466(3)." "'Community structure' means the organization of a biological community based on numbers of individuals within different taxonomic groups and the proportion each group represents of the total community." 38 M.R.S.A. § 466(4).

passage for migrating eels (the Petition was filed because the dam owner was proposing to rebuild the dam); (2) the removal of the Edwards Dam had restored access to the Messalonskee to various migratory fish species; and (3) the water quality of the Messalonskee had improved after Cascade Woolen Mill closed. App. at 75-76 (Board Denial of Watts Petition, pp. 5-6); App. at 82-83 (Watts 80C Appeal ¶¶1, 2). With respect to dams on the other rivers, the Petitions asserted, among other things, that evidence showing the magnitude of the harm to eels and other indigenous fish had greatly increased since the certifications were first issued. App. at 32 (FOMB Petition Proceeding Summary); App. At 58 (FOMB 80C Appeal ¶ 14).

Fourth, Petitioners asserted the licensees are violating a law administered by DEP, a criterion for modification set forth in 38 M.S.R.A. § 341-D(3)(F) and Rule 27(G).[8] Specifically, the dams cause violations of water quality standards because the certifications do not require, and on most of the dams the dam owners do not provide, safe passage for eels and other indigenous fish. App. at 57 (FOMB 80C Appeal ¶ 12); App. at 32 (FOMB Petition Proceeding Summary); App. at 7 (Friedman 80C Appeal, p. 1). DEP can only issue a water quality certification if the standards of the water body are met. 38 M.R.S.A. 464(4)(F)(3).

In sum, Petitioners requested the Board to fix defective water quality certifications.

[8] The Watts Petition did not assert this ground for modification.

V. Board Action On The Petitions

Rule 27 requires that a petition to modify state which of the seven modification criteria are being invoked, and specifically describe the factual basis for the petition, including what evidence will be offered to support the petition. "The petition, once filed, may not be supplemented, except in a public hearing." Rule 27. Rule 27 further provides:

> Unless otherwise provided by law, no later than 30 days following the filing of a petition to revoke, modify or suspend, and after notice and opportunity for the petitioner to be heard, the Board shall dismiss the petition or schedule a hearing on the petition. The procedure before the Board is the same as described in section 24(b)(6) [which, in turn, incorporates the adjudicatory proceedings requirements of the Maine Administrative Procedures Act].

"After a hearing, the Board may modify in whole or in part any license" when the Board finds that any one of seven criteria are met. Rule 27.

A. The Friedman Petition

The Board voted to dismiss the Friedman Petition. In a written decision, the Board stated the petition "raises the same issues and has substantially and materially the same factual basis" as an earlier-filed petition to modify water quality certifications for dams on the Androscoggin, which the Board had also dismissed. App. at 5. That earlier-filed petition (hereinafter, "First Androscoggin Petition") resulted in an appeal (discussed more fully below) in which the Superior Court ruled that when a petition to modify is denied by the Board, the petitioner is free to submit another petition with additional evidence. Watts v. Board of Environmental Protection, 2006 Me. Super. LEXIS 270

(Dec. 6, 2006) (a copy of this decision is included in App. at 121-127; for the Court's convenience, Appellants will refer to the Appendix when citing this decision). The Friedman Petition (the subject of this appeal) included dams that were not included in the First Androscoggin Petiton, included more evidence, was brought on behalf of more citizens, and was submitted after new, relevant precedent from the Supreme Court in S.D. Warren v. Board of Environmental Protection, 547 U.S. 370. App. at 8-9 (Friedman 80C Appeal, pp. 2-3).

B. The FOMB Petition

An extensive adjudicatory hearing was held on the FOMB Petition. Among other things, the hearing evidence established that the operations of the dams kill and injure significant numbers of eels and fish, and that the dam owners are not required to, and in fact do not, provide safe passage. App. at 57-58 (FOMB 80C Appeal ¶¶ 11-14). The Board voted to deny the FOMB Petition on July 5, 2007. A written decision on the denial was issued. App. at 21-30.

C. The Watts Petition

It was important that the Board deal with the Watts Petition in a timely manner because the dam that was the subject of the petition had been breached since 2001 and its owner was proposing to rebuild it (thus preventing the Messalonskee from flowing freely at the site). App. at 82-83, (Watts 80C Petition ¶¶1-6). Making matters worse, the dam was not required to provide safe fish passage. App. at 86 (Watts 80C Appeal

¶ 20). The Board did not act on the petition within 30 days as required by Rule 27, the dam owner began rebuilding the dam in July 2007, and the Board voted to dismiss the petition on October 4, 2007. App. at 83 (Watts 80C Appeal ¶¶ 6-8). The Board then delayed issuing a written decision until November 15, 2007, which was after the appeal deadline. Mr. Watts was forced to appeal the vote before receiving a written decision denying his petition. In the interim, the dam was rebuilt. App. at 83 (Watts 80C Appeal ¶ 7).

VI. The Rule 80C Appeals

Rule 80C appeals of all three Board decisions were timely filed. The grounds for the appeals will be only briefly described here.

Appellants asserted that the Board made errors of law that went to the heart of its decision-making. For instance, the Board applied the wrong standards in deciding whether the certifications are missing a required limitation – safe passage for eel and other indigenous migratory fish. The Board concluded that the certifications can authorize zero eel and fish passage. To arrive at this conclusion, the Board (1) considered matters unrelated to applicable water quality standards, and (2) misconstrued the applicable water quality standards that are to be safeguarded by the certifications. App. at 9 (Friedman 80C Appeal, p. 3); App. at 61-61 (FOMB 80C Appeal ¶ 29-32); App. at 88 (Watts 80C Petition ¶¶ 29-31). Both are errors of law. The 80C Appeals of the petitions set forth a number of legal errors that, pursuant to 5 M.R.S.A.

§ 11007(4)(C)(4) (2002), formed the basis of the requests in each case to reverse the Board's decision. App. at 9 (Friedman 80C Appeal, p. 3); App. at 61-62 (FOMB 80C Appeal ¶¶ 28-36); App. at 88 (Watts 80C Appeal ¶¶28-31).

Appellants also asserted the Board's decisions:

- were unsupported by substantial evidence on the whole record, a ground for reversal set forth in 5 M.R.S.A. § 11007(4)(C)(5). App. at 7-9 (Friedman 80C Appeal, p. 1-3); App. at 58-60 (FOMB 80C Appeal ¶¶ 16-27); App. at 85-87 (Watts 80C Appeal ¶¶ 18-26).

- were arbitrary, capricious and characterized by abuse of discretion, a ground for reversal found in 5 M.R.S.A. § 11007(4)(C)(6). App. at 7 (Friedman 80C Petition, p. 1); App. at 56-60 (FOMB 80C Appeal ¶¶ 16-27); App. at 85-87 (Watts 80C Petition ¶¶ 18-23).

- violated statutory provisions of the Clean Water Act and the Board's enabling statute, a ground for reversal found in 5 M.R.S.A. § 11007(4)(C)(1). App. at 62 (FOMB 80C Petition ¶¶ 37, 38).[9]

Dam owners participated in the Rule 80C appeals as real parties in interest.

VII. Dismissal Of The Rule 80C Appeals

The Board and the dam owners moved to dismiss the appeals. The Board did not file the record of appeal in any of the three cases. Rather, it moved to stay the filing of the record until after the motions to dismiss were decided. The motion to stay the filing of the record was granted in the Friedman Petition Appeal (App. at 19, Docket entry 8/28/07), and not ruled on in the FOMB and Watts Petition Appeals.

[9] Only the FOMB 80C Appeal asserted this ground.

All three Rule 80C appeals were dismissed.

A. The Friedman 80C Appeal (SAG-07-711)

On November 8, 2007, the Superior Court (Horton, J.) dismissed the Friedman 80C Appeal. App. at 10-17. Citing Watts v. BEP (App. at 121-127), which dismissed the Rule 80C appeal of the First Androscoggin Petition, the Court found that a petition to the Board for modification under § 341-D(3) is not "final agency action" and thus not judicially reviewable because a petitioner can always come back to the Board and submit another petition with more evidence. App. at 14. The Court also ruled that 38 M.R.S.A. § 346(1) (2001 & Supp. 2007), which provides any person aggrieved by "any" Board decision may appeal to Superior Court in accordance with the Maine Administrative Procedures Act ("APA"), does not alter the finality requirement. App. at 13. The Court also held the exception to the APA's finality rule -- that an appeal may be had when "review of final agency action would not provide an adequate remedy," 5 M.R.S.A. § 11001(1) (2002) -- is inapplicable because "the Board has completed its consideration of the petition and has ordered it dismissed, so the exception does not apply." App at 13-14.

Further, the Court held: "A separate reason why the Board's dismissal of the second [Androscoggin] petition is not subject to review under the APA is that it involves a matter committed to the sole discretion of the agency." App at 14. The Court ruled because 38

M.R.S.A. § 341-D(3) provides the Board "may" modify a certification, the Board is not compelled to modify even if it finds one of the enumerated criteria is met. App. at 15. The Court also stated: "The absence of any meaningful standards in section § 341-D(3), upon which a court could review the Board's dismissal of the petition, confirms the Board's dismissal of the petition was a non-reviewable exercise of the Board's discretionary authority. App at 15. The Court characterized the Board's ability to modify a certification as "discretionary enforcement action" not subject to review. App. at 16.

B. The FOMB 80C Appeal (SAG-07-712)

On November 8, 2007, the Superior Court (Horton, J.) dismissed the appeal of the Board's decision to deny the Kennebec Petition. App. at 67. After noting the Board dismissed the FOMB Petition just as it did the Friedman Petition, albeit "after a different procedural route and a more detailed consideration," the Court held:

> Given this identicality [sic] in outcome, and given that both petitions and both appeals arise under the same set of statutes and rules, this court discerns no difference in substance between the jurisdictional issues presented in this appeal and those presented in the *Friedman* case.

App. at 67. The Court stated it "adopts the reasoning" of the order dismissing the Friedman 80C Appeal and dismissed the FOMB 80C Appeal Petition for lack of jurisdiction "because there is no final agency action subject to judicial review…" App at 67.

C. The Watts 80C Appeal (KEN-08-36)

On January 10, 2008, the Superior Court (Jabar, J.) dismissed the appeal of the Board's dismissal of the Watts Petition. The reasoning of the Court, in its entirety was: "The Court finds that it lacks subject matter jurisdiction to hear the appeal. See Watts v. Me. DEP, Kenn. # AP-06-19." App. at 90. In addressing the dismissal of the Watts 80C Appeal, Mr. Watts will address the legal errors of Watts v. DEP, since that decision was incorporated by reference.

STATEMENT OF ISSUES FOR REVIEW

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?

ARGUMENT

I. STANDARD OF REVIEW.

This Court has held "[t]he legal sufficiency of a complaint challenged by a motion to dismiss is a question of law subject to de novo review." Person v. Department of Human Services, 2001 ME 124 (¶ 8), 775 A.2d 363, 365. In a case where the motion to dismiss challenges jurisdiction, no factual inferences are made. Id.

II. THE SUPERIOR COURT ERRED IN HOLDING THE BOARD HAS UNREVIEWABLE DISCRETION TO ACT ON THE PETITIONS.

The Superior Court concluded that the Board's dismissals were not subject to review under the APA because the Petitions were matters "committed to the sole discretion of the agency." App. at 14 (Friedman 80C Appeal Dismissal); App. at 123 (Watts v. BEP). There were three bases for this conclusion: (1) the use of the word "may" in § 341-D(3) "vests the Board with discretion to modify," App. at 15 (Friedman 80C Appeal Dismissal); App. at 123 (Watts v. BEP); (2) there is an absence of meaningful standards in § 341-D(3) upon which a court could review the Board's dismissal of the petition, App. at 15 (Friedman 80C Appeal Dismissal); and (3) the decision on a petition to modify is an enforcement decision, which is unreviewable, App. at 16 (Friedman 80C Appeal Dismissal); App. at 122, 126 (Watts v. BEP). As a matter of law, the Superior Court's analysis was incorrect.

A. Judicial Review Of Agency Action Is Presumed.

In its analysis, the Superior Court ignored a bedrock precept of administrative law: judicial review of agency action is presumed. This presumption is rooted in the fundamental principle that the Executive is not all-powerful. A system of checks and balances guards against arbitrariness and requires the Executive to follow the rule of law. Unless this presumption can be overcome, judicial review is available.

The right to have agency action reviewed is contained in 5 M.R.S.A. § 11001(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 review of the final agency action would not provide an adequate remedy.

In their comment on § 11001, the drafters of this provision left no doubt about their intention: "This section establishes a presumption in favor of judicial review (See Abbott Laboratories v. Gardiner, 387 U.S. 136 (1967))." Me. Leg. Doc. No. 1768, 108th Leg., 1st Sess., commentary to § 11001 (1977).

The Supreme Court in Abbott Labs, the case referred to in the drafters' comment, held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." 387 U.S. at

140. The Court stated that the APA "embodies the basic presumption of judicial review." Id. The Court affirmed earlier precedent that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 387 U.S. at 141 (quoting Rusk v. Cort, 369 U.S. 367, 379-380 (1962)). See also, e.g., Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action"); Pisano v. Shillinger, 835 P.2d 1136, 1139 (Wyo. 1992) (clear and convincing evidence of legislative intent to preclude review is required); Alaska Dept. of Health and Social Services v. A.C., 682 P.2d 1131, 1135 (App. Ct. Alaska 1984) (concurrence) (same).

There are compelling, historical, reasons for this presumption. As one commentator on administrative law wrote:

> The argument of Aristotle that government should be by law, and not by men, represented a protest directed toward the earlier Grecian systems of despotically controlled administrative law. Aristotle was protesting the results of delegating discretionary powers to administrators; he urged that the executive department of the government should be subjected to the rule of law. It can be so subjected only through the courts, for as the venerable A. V. Dicey observed three quarters of a century ago the very concept of the Rule of Law 'means in the last resort the right of the judges to control the executive government.'

Frank E. Cooper, 1 State Administrative Law, 42 (American Bar Foundation 1965) (footnotes omitted). As another commentator on administrative law noted in a seminal article on review of agency action,

subjecting the Executive to the rule of law was on the minds of this Nation's founders:

> … 'Arbitrary government' had been among the evils listed . . . in the Declaration of Independence. Americans did not strike the fetters of English arbitrariness in order to convert to homemade shackles. '[A]bhorrence of caprice' . . . remains a 'fundamental value'. . . Vast powers are not delegated to make possible oppression. In a democratic system abuse of power is intolerable; it carries the seed of corruption and a threat to the entire democratic fabric.

Berger, Administrative Arbitrariness and Judicial Review, 65 Col. L. Rev. 55, 55-56 (1965). Another noted scholar has written:

> The presumption of reviewability under the APA is based on a set of considerations, loosely captured in the notion of the rule of law, that relate to the perceived need to constrain the exercise of discretionary power by administrative agencies. Judicial review serves important goals in promoting fidelity to statutory requirements and, where those requirements are ambiguous or vague, in increasing the likelihood that the regulatory process will be a reasonable exercise of discretion instead of a bow in the direction of powerful private groups.

Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, 52 U. Chi. L. Rev., 653, 655 (1985) (footnotes omitted).

Courts have long articulated the importance of judicial review of agency action. The Supreme Court in Bowen v. Michigan Academy of Family Physicians, 476 U.S. at 670, noted:

> In Marbury v. Madison, 1 Cranch 137, 163 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that '[the] very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.' Later, in the lesser known but nonetheless important case of United States v. Nourse, 9 Pet. 8, 28-29 (1835), the Chief Justice noted the traditional observance of this right and laid the foundation for the modern presumption of judicial review:

> 'It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process…leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.'

And the Supreme Court in Bowen quoted the legislative history of the APA to similar effect:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

Bowen, 476 U.S. at 671.[10]

B. The Legislature Did Not Intend To Preclude Review Of Petitions To Modify.

There is no evidence that the Legislature intended to preclude review of a petition to modify.

1. The Plain Meaning Of The Relevant Statutes Show The Legislature Intended To Allow Judicial Review.

The plain meanings of the relevant statutes, which are the first places to look to determine the Legislature's intent, Kimball v. Land Use Regulation Comm'n, 2000 ME 20, ¶ 18, 745 A.2d 387, 392, show the Legislature intended to allow judicial review of petitions to modify. The

[10] The Court in Bowen also noted that "[a] strong presumption finds support in a wealth of scholarly literature." 476 U.S. at 672.

Legislature expressly provided that (except for emergency orders, not at issue here) judicial review of any Board decision is allowed. 38 M.R.S.A. § 346(1) provides in relevant part:

> . . . any person aggrieved by any order or decision of the board or commissioner may appeal to Superior Court. These appeals shall be taken in accordance with Title 5, chapter 375, subchapter VII [the judicial review provisions of the APA].

If the Legislature had wanted to preclude judicial review, it could have done so as it did in other statutes. See 10 M.R.S.A. § 8003(5)(B) (Pamph. 2007) (no judicial review of administrative consent agreements entered into by bureau, office, board or commission within the Division of Administrative Services); 39-A M.R.S.A. § 153-A(6) (2001 & Supp. 2007) (no judicial review of certain cases handled by the Advocate Program of the Workers' Compensation Board); 5 M.R.S.A. § 651(3)(D) (Supp. 2007) (no judicial review of awards made by Employee Suggestion System Board); 17 M.R.S.A. § 1032(4) (2006) (choice of criminal or civil prosecution for cruelty to birds not judicially reviewable).[11] See also Dumont v. Speers, 245 A.2d 151, 152, 155 (Me. 1968) (cited in Friedman 80C Appeal Dismissal, App. at 16-17) (now-repealed 12 M.R.S.A. § 2201, part of the former Fish and Game Laws, provided only dam owners could appeal an Inland Fisheries & Game decision on a petition for a fishway).

[11] Washington Public Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883, 886 (9th Cir. 1993) (noting that if Congress had wanted to bar Clean Water Act citizen suits in the face of administrative actions, it could have done so it had in other environmental statutes).

The APA is also broadly worded, and in no way restricts judicial review of discretionary actions.[12] 5 M.R.S.A. § 11007(4)(C)(6) (2002), 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 appealed. Tellingly, while 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 such provision in the Maine APA.[13]

2. The Use Of The Word "May" In § 341-D(3) Does Not Show Intent To Preclude Judicial Review.

The Legislature's use of the word "may" in § 341-D(3) does not show intent to preclude judicial review of a petition to modify.

Courts regularly review discretionary agency decisions made under statutes using the word "may." Under 30-A M.R.S.A. § 4353(2)(C) and (4) (Pamph. 2007), a zoning board of appeals "may grant a variance" if certain criteria are met. A decision to deny a variance is appealable. Phaiah v Town of Fayette, 2005 ME 20, ¶ 8, 866 A.2d 863, 866 (2005);

[12] The lone exception is that an agency's decision not to adopt a rule can be appealed only where the rule was required to be adopted by law. 5 M.S.R.A. § 8058(1) (2002). Again, this shows that had the Legislature wanted to limit appeals of discretionary agency actions on petitions, it could have done so.

[13] Appellants note that this exception under the federal APA is "a narrow one." Heckler v. Chaney, 470 U.S. 821, 830 (1985).

Perrin v. Town of Kittery, 591 A.2d 861 (Me. 1991). Under 8 M.R.S.A. § 2 (1997), a municipal officer "may license suitable persons" to operate a billiard room "in any place it will not disturb the peace and quiet of a family." A decision to deny a billiard room license is appealable. Roy v. Augusta, 387 A.2d 237 (Me. 1978). Under DEP Code Me. R. 06 096 529 CMR 2(a) the Board "may" issue a general wastewater discharge permit if certain criteria are met. A decision to issue a general permit is appealable. USPIRG v. Board of Environmental Protection, 2004 Me. Super. LEXIS 189 (August 26, 2004). None of these cases was cited by the Superior Court.

The cases the Superior Court did cite do not require any other result. Dumont v. Speers, 245 A.2d 151, did not hold that judicial review was unavailable for discretionary decisions. Rather, the Court held that citizens who filed a petition for a fishway, the ruling on which was within the discretion of the Commissioner for Inland Fish and Game, had no statutory right to appeal. Id. at 155. By statute, the right to appeal was limited to dam owners. Id. at 152. Here, 38 M.R.S.A. § 346(1) provides Petitioners a right to appeal. In addition, Dumont v. Speers was decided before the Maine APA was enacted.

Collins v. State, 161 Me. 445, 213 A.2d 835 (1965), was a habeas corpus case in which the Court resolved the issue of whether word "may" in a parole statute required the Parole Board to immediately take custody

of a parole violator. Collins had nothing to do with the issue of whether discretionary agency actions are reviewable.

The Superior Court in the Friedman 80C Appeal Dismissal also cited the Collins Court's quotation of Roy v. Bladen School District No. R-31 of Webster County, 84 N.W.2d 119 (Neb. 1957) regarding the "in general" permissive meaning of the word "may." Roy v. Bladen shows that discretionary agency actions are subject to judicial review. In that case, citizens petitioned a county board to change school districts. The governing statute provided "[t]he board may, after a public hearing on the petition," allow the change "whenever they deem it just and proper and for the best interests of the petitioner or petitioners so to do." 84 N.W.2d at 124. The court specifically noted such a decision by a county board is subject to judicial review, id. at 125, and the case was decided on the merits, id. at 125-126.

It could be no other way. If discretionary decisions were not reviewable, agencies would have carte blanche to act arbitrarily, ignore or misinterpret the law they are charged with administering, and disregard evidence. See also Audubon v. BEP, 1982 Me. Super. LEXIS 106, at * 28 (June 16, 1982) ("Discretion granted by legislative or administrative authority does not usually include the right to act arbitrarily and without criteria [citations omitted]. It is the personal responsibility of members of non-professional boards such as B.E.P. to determine the facts and to set and apply the standards entrusted to them by law [citations omitted].

The powers conferred upon public agencies which involve the exercise of judgment are in the nature of public trusts . . .").

Second, even assuming discretionary agency actions are not reviewable -- which Appellants vigorously dispute – in some statutes the word "may" does not connote discretion. § 341-D(3) is such a statute. One of the Superior Court's premises for finding no judicial review -- that § 341-D(3) vests the Board with discretion because of the word "may" -- is thus wrong.

In Maine, it has been settled since the Civil War that:

> The general rule in the construction of statutes is, that when a public body is clothed with power, and furnished with means to do an act required by the public interests, the execution of that power may be insisted upon as a duty, though the statute conferring be only permissive. . . [As stated by] Nelson, C.J. in the Mayor, &c., of New York v. Furze, 3 Hill 612 . . . 'This statute,' he remarks, referring to the one, the construction of which the Court was called on to determine, 'is one of public concern, relating exclusively to the public welfare; and though *permissive mainly* in its terms, it must be regarded, upon well settled rules of construction, as *imperative* and peremptory upon the corporation. When the public interest calls for the execution of the power thus conferred, the defendants are not at liberty arbitrarily to withhold it.'

Milford v. Orono, 50 Me. 529, 532-533 (1864) (statute authorizing towns to aid families of Army volunteers is mandatory) (italics in original). As more recently stated by this Court, "when the word 'may' is used in imposing a public duty upon public officials in the doing of something for the sake of the public good, and the public or third persons have an interest in the exercise of the power, then the word 'may' will be read 'shall,' the exercise of the power being deemed imperative by legislative

intendment." Schwanda v. Bonney, 418 A.2d 163, 167 (Me. 1980) (statute providing that town "may" grant concealed weapon permit to person of good moral character is mandatory). See also Low v. Dunham, 61 Me. 566, 568-569 (1872) (statute providing a court "may issue an order to" sell attached property is mandatory).

The § 341-D(3) provisions regarding modification are mandatory. The Board administers environmental protection laws exclusively for the public good. Indeed, in enacting the water quality laws at issue here, the Legislature stated it "finds that the proper management of the State's water resources is of great public interest and concern to the State in promoting the general welfare; . . . in providing habitat for fish, shellfish and wildlife; source of recreational opportunity; and as a resource for commerce and industry." 38 M.R.S.A. § 464(1). As noted by the court in Audubon v. BEP, 1982 Me. Super. LEXIS 106, at * 28, the Board's responsibility is very much in the nature of a public trust.

Moreover, the criteria of § 341-D(3) would only make sense if satisfying one of them mandated modification. § 341-D(3)(D) (invoked by Appellants) authorizes modification whenever the Board finds that "[t]he license fails to include any standard or limitation legally required on the date of issuance." § 341-D(3)(G) authorizes modification whenever the Board finds that "[t]he license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990." The Board could not have discretion to continue a license that does not

contain legally required standards. Put another way, the Board could not have discretion to continue a license it had no discretion to issue in the first place.

§ 341-D(3)(C) (also invoked by Appellants) authorizes modification when "[t]he licensed discharge or activity poses a threat to human health or the environment." Again, the Board could not have discretion to continue a license that poses a threat to human health or the environment.

To underscore this point, Appellants challenge the Board to respond to the following hypothetical. A factory emits a poisonous gas that is killing nearby residents. The factory's air emission permit issued by the State fails to include a limit on the poisonous gas required by law. The residents petition the Board under § 341-D(3) and Rule 27 to modify the permit to include a limit on the poisonous gas. Is the Board required to modify the permit? If it does not, do the residents have the right to appeal that decision to court? Does the Board really take the position that it has absolute immunity from appellate review of such a decision, regardless of the actual damage being done to Maine's people, air, land and water?

Furthermore, the Legislature did not intend to grant the Board discretion to ignore the dictates of the State's water quality laws, which underlie the Petitions filed by Appellants. 38 M.R.S.A § 464(1) states in relevant part:

* * *

> The Legislature declares that it is the State's objective to restore and maintain the chemical, physical and biological integrity of the State's waters and to preserve certain pristine state waters. The Legislature further declares that in order to achieve this objective the State's goals are:
>
> * * *
>
> C. That water quality be sufficient to provide for the protection and propagation of fish, shellfish and wildlife and provide for recreation in and on the water.
>
> The Legislature intends by passage of this article to establish a water quality classification system which will allow the State to manage its surface waters so as to protect the quality of those waters and, where water quality standards are not being achieved, to enhance water quality. This classification system shall be based on water quality standards which designate the uses and related characteristics of those uses for each class of water and which also establish water quality criteria necessary to protect those uses and related characteristics. The Legislature further intends by passage of this article to assign to each of the State's surface water bodies the water quality classification which shall designate the minimum level of quality which the Legislature intends for the body of water. This designation is intended to direct the State's management of that water body in order to achieve at least that minimum level of water quality.

(Emphasis added). The Legislature could not be clearer: the State must manage a river to meet the minimum level of water quality assigned to that river. Where water quality is not being met, the water quality must be enhanced. S.D. Warren, 2005 ME 27, ¶ 21, 868 A.2d at 217-218 (where designated uses of a water are not being achieved, "the Legislature intended the quality of the water to be enhanced so that the uses are achieved"). Compare Dumont v. Speers, 245 A.2d at 153-154

(Legislature did not intend to make fishways mandatory under old Fish and Game Laws).

The Legislature itself sets the classification for water bodies in the State. 38 M.R.S.A. §§ 467-469. The four rivers at issue here are classified in various segments as B and C waters. Class B waters must be of sufficient quality to support all aquatic species indigenous to those waters with no detrimental changes to the resident biological community. 38 M.R.S.A. § 465(3)(C). Class C waters must be of sufficient quality to support all species indigenous to those waters and to maintain the structure and function of the resident biological community. 38 M.R.S.A. § 465(4)(C). Water quality certifications for federally licensed activities on the four rivers must assure that these standards are met. 33 U.S.C. §§ 1341(a) and (d) (CWA provisions requiring certifications to assure attainment of state water quality standards); FPL Energy Maine Hydro LLC v. Department of Environmental Protection, 2007 ME 97, ¶ 25, 926 A.2d 1197, 1204 (water quality certification for dam could not be issued because it would degrade the waters of the impoundment below Class C). The Board does not have the option to continue a certification that fails to assure the minimum level of water quality assigned to the rivers because the Legislature directed the State to manage water bodies to achieve that minimum level.

As the cases at bar show, any other result leads to disaster: FERC licenses have terms of 30-50 years, so a water quality certification that

fails to protect water quality will have significant adverse effects on a river if not fixed during the long term of the license. The Court recognized this problem in the S.D. Warren case. There, the Court found an implied authority to place re-opener clauses in certifications within the broader authority to modify certifications as necessary to ensure they achieve legislative goals and purpose. 2005 ME 27, ¶ 28, 868 A.2d at 219-220. This Court stated:

> 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 v. Sch. Admin. Dist. No. 77, 2000 ME 143, ¶ 11, 755 A.2d 1068, 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. [Footnotes omitted].

Id.

With respect to fish passage in particular, where fish passage is necessary to attain the established minimum level of water quality, it must be included in a water quality certification. As this Court has held, fish passage measures contained in a water quality certification "clearly bear on the attainment of" water quality standards. Bangor Hydro-Electric v. Board of Environmental Protection, 595 A.2d 438, 443 (Me. 1991); S.D. Warren Co. v. Department of Environmental Protection, 2004 Me. Super. LEXIS 115, at * 12 (May 4, 2004)(quoting Bangor Hydro-Electric). Indeed, the Board concluded the certification for the S.D. Warren dam had to include eel passage provisions in order to assure

compliance with water quality standards. S.D. Warren, 2004 Me. Super. LEXIS 115, at **12-14. Appellants are entitled to argue to the Superior Court that safe passage for eels and other indigenous fish similarly is required for the certifications of the dams at issue here.

3. § 341-D(3) Contains Meaningful Standards.

Contrary to the finding of the Superior Court, § 341-D(3) and Rule 27 contain meaningful standards which can be reviewed by a court. Indeed, courts have applied the standards invoked by Appellants many times:

- Courts determine whether a permit includes a legally required standard or limitation. E.g., S.D. Warren, 2007 ME 27, ¶ ¶ 18-29, 868 A.2d at 217-220 (determining legality of re-opener clause and dissolved oxygen criteria in water quality certification); USPIRG, 2004 Me. Super. LEXIS 189, at ** 16-19 (resolving whether MEPDES permit was legally required to include omitted conditions regarding protection of Atlantic salmon);

- Courts apply an "imminent and substantial endangerment to health or the environment" standard in citizen suits under the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. § 6972 (a)(1)(B); Maine People's Alliance v. Mallinckrodt, 471 F.3d 277, 296 (1st cir. 2006); Interfaith Community Organization v. Honeywell International, 399 F.3d 248, 258-264 (3d Cir. 2005); Wilson v. Amoco, 989 F. Supp. 1159, 1173-1177 (D. Wyo. 1998);

- Courts apply a "change in circumstances" standard. E.g., Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 393 (1992) (courts can modify consent decrees for "significant change in circumstances"); Mackin v. City of Boston, 969 F.2d 1273, 1277 (1st Cir. 1992) (same); Verizon New England v. Pubic Utilities Commission, 2005 ME 16, ¶¶ 8-12, 866 A.2d 844, 848-849 (determining "a change of circumstances" standard was met warranting Commission's review of previously issued order); Park Center v. Zoning Board of Woodbridge, 839 A.2d 78, 82-83 (App. Div. N.J. 2004)

(determining no "significant change in circumstances" warranted amendment of site plan approval).

The standards in this case are certainly no less meaningful than the standard specifically upheld and applied in Finks v. Maine State Highway Comm'n, 328 A.2d 791, 793 (Me. 1974) (State could take land near highways "for the preservation and development of natural scenic beauty") or applied in Verizon, 2005 ME 16, ¶¶ 8-12, 866 A.2d at 848-849 (sufficient evidence that "passage of time" warranted Commission's modification of order).

Furthermore, the modification criteria are applied in the context of the underlying law at issue, which here are the water quality laws. The water quality standards in those laws, discussed above, themselves set forth specific standards that have been construed and applied by courts. Save Our Sebasticook, 2007 ME 102, 928 A.2d 736, 745-746; S.D. Warren v. BEP, 2004 Me Super. LEXIS 115.

4. The Board's Dismissals Were Not The The Exercise Of Prosecutorial Discretion.

The Superior Court found that the Board's authority to act on a petition to modify is discretionary authority to take enforcement action, the exercise of which the Court held is unreviewable. App. at 16 (Friedman 80C Appeal Dismissal); App. at 123-124 (Watts v. BEP). As a matter of law, the Superior Court was wrong in characterizing the Board's actions on the Petitions as enforcement decisions.

Appellants did not ask the Board to enforce the current water quality certifications. To the contrary, Appellants' position is that the certifications are too lax and enforcing lax certifications would serve no purpose. Appellants made it clear they sought to modify the certifications, and in the adjudicatory hearing on the Kennebec Petition FOMB proffered specific language to do so.[14]

The purpose of the modification provision of § 341-D(3) is to provide a method for the Board to fix defects in licenses. If a license never should have been issued in the first place, or if over time it has become ineffective or noncompliant with governing standards, § 341-D(3) authorizes the Board to take remedial steps and modify the license. There is no reason why a Board decision on whether to fix a purportedly defective license should be any less appealable than the Board's decision to originally issue the license.

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[14] The modification language was set forth Friedman Direct ¶ 2, and was as follows:

> The dam operator shall provide immediate, safe and effective upstream and downstream passage for all indigenous migratory fish. For the purposes of this paragraph:
>
> a. "Immediate" means the date this certification is approved by the Board of Environmental Protection.
>
> b. "Safe" means that all fish migrating upstream can pass the dam and no fish migrating downstream are killed or injured by the dam.
>
> c. "Effective" means efficiently.
>
> d. "Fish" includes, but is not limited to, the eel.

The same issues arise in a petition to modify as in an original application for a license: what standards are required or barred by law, what conditions will protect public health and the environment, etc. These are the bread-and-butter issues of appeals of Board licensing decisions. E.g., Save Our Sebasticook, 2007 ME 102, ¶¶ 30-35, 928 A.2d at 745-746 (appellant claimed water quality certification violated antidegradation provisions of water quality standards); S.D. Warren, 2007 ME 27, 868 A.2d 210 (appellant claimed dissolved oxygen criteria in water quality certification was impermissible under State water quality standards and that the Board had no statutory authority to require eel and fish passage); Atlantic Salmon Federation v. Board of Environmental Protection, 662 A.2d 206 (appellants claimed statute protecting river segment prohibited permit to build hydroelectric dam); USPIRG v. Board of Environmental Protection, 2004 Me. Super. LEXIS 189, at ** 12-19 (appellants claimed, among other things, (1) wastewater discharge permit for aquaculture industry was not protective enough of Atlantic salmon, and (2) Board had no authority to include mixing zone in permit).

The Superior Court in Watts v. BEP characterized a petition to modify a water quality certification as "concern[ing] the Board's alleged non-enforcement of Maine's water quality classification and antidegradation law." App at 123. The court conflated licensing and enforcement. A water quality certification is a license. 38 M.R.S.A. § 341-D(3); Me. Dept. of Env't Prot., 01 096 2-1(J) (App. at 128). Like all

licenses and permits, it implements statutory standards. Air emission licenses implement ambient air quality standards. 38 M.R.S.A. § 590(2) (2001 and Supp. 2007). A Land Use Regulation Commission permit implements the development standards of a zoning district. 12 M.R.S.A. §§ 685-B(2) (2005 and Supp. 2007). When a license is issued or modified it is not an enforcement proceeding.

Appellants also note certifications can be modified at the request of the licensee. A modification can remove or relax specific conditions the Board deems no longer necessary to ensure compliance with water quality standards. Such a modification would hardly be an enforcement action.

A recent United States Supreme Court case, Massachusetts v. Environmental Protection Agency, 127 S. Ct. 1438 (2007), is instructive on this issue. In that case, the Court analyzed whether denial of a petition for rulemaking is subject to judicial review, or whether it is analogous to an agency's refusal to initiate enforcement proceedings. Id. at 1459. In finding denial of a petition for rulemaking reviewable, the Court stated:

> There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. [Cite omitted]. In contrast to nonenforcement decisions, agency refusals to initiate rulemaking 'are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.' [Cite omitted]. They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance.

Id..

Applying that analysis here shows that denial of a petition to modify is not analogous to a refusal to initiate an enforcement proceeding. Petitions for modification are not merely infrequent; as far as Appellants know, the petitions regarding these certifications were the first petitions under § 341-D(3) ever filed. The Petitions involved legal analysis – e.g, whether certifications omitted legally required standards. The petitions were subject to the special formalities of Rule 27, which requires a specific form of petition and requires that the Board take action on the petition within a specified period of time. While it is unclear whether a public explanation is legally required, the Board in fact did issue them for the dismissals of the Petitions. And Rule 27 provided Appellants with "an undoubted procedural right to file" the Petitions "in the first instance." See also Connecticut Fund for the Environment v. Acme Electro-Plating, 822 F. Supp. 57 (D. Conn. 1993) (appeal of a Clean Water Act discharge permit application is not an enforcement proceeding).

The Superior Court in Watts v. Board analogized the Petitions to a request to a Code Enforcement Officer ("CEO") to enforce a zoning ordinance. A more apt analogy would be denial of a zoning variance. Under 30-A M.R.S.A. § 4353(2)(C)(4), a municipal zoning board of appeals "may grant" a variance. If a variance is denied, that decision can be appealed for abuse of discretion, errors of law, or findings not

supported by the substantial evidence in the record. E.g., Phaiah v. Fayette, 2005 ME 20, ¶8, 866 A.2d at 866. Appellants note that Watts v. BEP, which the Watts 80C Appeal Dismissal incorporated by reference, itself is self-contradictory as to whether petitions to modify are part of an enforcement scheme. The court in that case stated the Board will hold hearings on "petitions which raise enough evidence as to call into question the reasoning for granting the license," App. at 124. That is hardly an enforcement concept.

5. This Court Should Permit Review Of Enforcement Decisions That Are Tainted By Errors Of Law.

Even if Board dismissal of a petition to modify is considered a decision not to enforce, it is not clear that Maine law bars all review of such a decision. This Court permitted an appeal of a decision not to enforce in Richert v City of South Portland, 1999 ME 179, 740 A.2d 1000. In that case, Richert complained to the CEO that her neighbor took in tenants in violation of the zoning code. The CEO declined to take enforcement action, Richert appealed to the Zoning Board of Appeals ("ZBA"), which also declined to take enforcement action, and Richert appealed. The Superior Court denied the appeal, but this Court overturned the Superior Court's ruling. The case turned on whether under the South Portland zoning ordinance, the neighbors were the "resident occupants" of the building and therefore allowed to engage in the "home occupation" of letting rooms. The Court overturned the ZBA decision because the ZBA misinterpreted the meaning of "resident

occupants." See also Toussaint v. Harpswell, 1997 ME 189, 698 A.2d 1063 (appeal of a ZBA decision not to enforce a zoning law).

The Superior Court in Watts v. Board cited Herrle v. Town of Waterboro, 2001 ME 1, 763 A.2d 1159, for the proposition that "[a]bsent statutory authority, courts should dismiss appeals seeking review of discretionary action." App. at 122 (Watts v. BEP); see also App. at 16 (Friedman 80C Appeal Dismissal). In Herrle, neighbors of a gravel pit appealed a ZBA ruling that the pit did not violate a zoning ordinance. The neighbors contended that the ZBA misinterpreted a grandfather clause in the ordinance. But it was not the ZBA that had the power to enforce the zoning ordinance in that case; it was the Town Board of Selectmen, which was not a party. The ZBA ruling, this Court found, was only advisory and not subject to judicial review. 2001 ME 1 at ¶ 9, 763 A.2d at 1161. This Court also noted the governing statute authorized only municipalities, and not private parties, to bring an action to enforce land use laws, and thus the neighbors did not have standing.[15] This Court in dictum stated that [e]ven if we were to affirm the Superior Court's decision finding error in the ZBA's legal analysis, the Board of Selectmen could still decide in its discretion not to bring an enforcement action. . ." Id. at ¶ 10, 763 A.2d at 1162. However, the Court did not actually state that had it been the Board of Selectmen misinterpreting the ordinance, then there could have been no appeal. The dissent in

[15] By contrast, Rule 27 authorizes "any person" to file a petition to modify.

Herrle noted that Richert and Toussaint permitted a neighbor to challenge the legal determination by a municipality that a zoning ordinance was not violated. 2001 ME 1 at ¶ 14, 763 A.2d at 1162.[16]

Richert and Toussaint can be harmonized with Herrle by recognizing that the Herrle Court's comment about enforcement discretion is -- with respect to reviewability -- only inapt dictum, and mistakes of law made in the course of exercising enforcement discretion are reviewable, as in Richert and Toussaint.[17]

The Superior Court also cited to Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d 74 (Me. 1980), for the proposition that "[i]n general, Maine courts are not free to review discretionary enforcement decisions." App. at 7. However, Bar Harbor Bank and Trust is inapposite. There, the Court vacated a temporary restraining order that prohibited the Bureau of Consumer Protection from investigating whether a bank had violated consumer protection laws.[18] The basis of the decision was not that discretionary enforcement actions are unreviewable. Rather, the Court applied the doctrine of primary jurisdiction and held that the agency in the first instance must be given a chance to perform its statutory duties (which included conducting a

[16] In other cases, courts cite Herrle in dictum. E.g., Salisbury v. Bar Harbor, 2002 ME 13, ¶¶ 10-11, 788 A.2d 598, 601 (2002); Violette v. Winslow, 2004 Me. Super. Lexis 103, at *13 (June 11, 2004).

[17] The alternative appears to be a finding that Herrle overruled Richert and Toussaint.

[18] The equivalent in the cases at bar would be an injunction against the Board prohibiting a ruling on the Petitions.

hearing concerning possible violations).[19] See also New England Outdoor Ctr. v. Commissioner of Inland Fisheries and Wildlife, 2000 ME 66, 748 A.2d 1009, (cited in Friedman 80C Appeal Dismissal, App. at 14-15) (court will not direct agency on specifics of how to conduct an investigation). In the instant cases, the Board performed its statutory duty to rule on the Petitions, and dismissed them.

In sum, the Board misinterpreted the water quality laws, and that affected its decisions. Appellants should be entitled to a review of such flawed decisions.

[19] The Court in Bar Harbor stated that the primary jurisdiction doctrine "is designed to resolve the question of who should act first. Where the administration of a particular statutory scheme has been entrusted to an agency, the Court will postpone consideration of an action until the agency has made a designated determination if such postponement will protect the integrity of the statutory scheme." 411 A.2d at 78 (quoting Woodcock v. Atlass, 359 A.2d 69, 71 (Me. 1976)).

III. THE SUPERIOR COURT ERRED IN RULING THAT BOARD ACTION ON A PETITION TO MODIFY IS NEVER "FINAL" BECASE A NEW PETITION CAN BE FILED AT A LATER DATE.

The Maine APA provides:

> '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) (2002 and Supp. 2007). The purpose of requiring finality has been described as follows:

> The finality requirement reflects reasoned policy judgments that administrative processes should proceed with a minimum of interruption and that litigants as a group are best served by a system that prohibits piecemeal appellate consideration of rulings that may fade into insignificance by the time the initial decision-maker disassociates itself from the matter.

2 Am. Jur. Administrative Law 2d § 459 (2004) (footnotes omitted).

Here, Rule 27 establishes the procedure for the Board to follow when a petition to modify is filed. The Board must dismiss the petition or hold an adjudicatory hearing and then rule. Both decision-making routes were employed in the cases at bar. And the results were the same: the Board voted to deny the Petitions, and explained why in writing. There is nothing interlocutory about the dismissals. Absent a court order, the Board will not take any further action on the petitions.

With respect to finality, Appellants are in the same position as an applicant who has been turned down for a permit. An unsuccessful applicant could always file a new application for the same activity and provide more evidence that it is entitled to the permit. License denials

are nonetheless final agency actions that are judicially reviewed. E.g., FPL v. Department of Environmental Protection, 2007 ME 97, 926 A.2d 1197 (water quality certification denial); Hannum v. Board of Environmental Protection, 2006 ME 51, 898 A.2d 392 (Natural Resources Protection Act permit denial); Phaiah v. Fayette, 2005 ME 20, 866 A.2d 863 (zoning variance denial); Hall v. Board of Environmental Protection, 498 A.2d 260, 265 (Me. 1985) (sand dune permit denial).

Any other result would essentially insulate all evidence-based agency decisions from review. No one could argue that an agency decision was unsupported by substantial evidence on the whole record (asserted here) because more evidence might be submitted at another proceeding. No one could challenge a decision on the grounds that the agency made an error of law, acted arbitrarily and capriciously, or exceeded its statutory authority (also all asserted here), again, because more evidence might be submitted at another proceeding (even though the quantum or quality of evidence has nothing to do with those bases for appeal).

Furthermore, Appellants are unaware of any authority holding that a party to an adjudicatory proceeding (as FOMB was) is not entitled to review because of lack of finality. In addition, the legislative history of 5 M.R.S.A. § 8002(4) makes clear that decisions in licensing and adjudicatory proceedings are final agency actions. Commentary to § 8002(4), Me. Leg. Doc. No. 1768, 108th Leg., 1st Sess. (1977) ("The

definition [of 'final agency action'] is intended to make all agency decisions affecting one's legal rights, duties or privileges judicially reviewable, not just those made in licensing or adjudicatory proceedings.") (emphasis added).

Moreover, in the case of the Watts Petition, with the dam now completely rebuilt and the free-flowing habitat now destroyed, any new evidence that Mr. Watts might have gathered has now also been destroyed. This case perfectly illustrates the fundamental problem with the Superior Court's reasoning that there is no final agency action because new petitions can be filed with more evidence. In addition, the Watts Petition Dismissal left no doubt the Board would not entertain petitions to modify water quality certifications. The Board stated:

> Further, efforts to revisit fish and eel passage issues after-the-fact by petition on a dam-by-dam basis is generally an inappropriate vehicle to advance fish restoration. The impact of dams on migratory species and the need for fish and eel passage in a particular watershed are best evaluated whenever dams are licensed or re-licensed.

App. at 80. The Board could not be clearer that its final answer is "no."

IV. EVEN IF THE BOARD'S DISMISSALS OF THE PETITIONS ARE NONFINAL ACTIONS, THE RULE 80C ACTIONS SHOULD NOT HAVE BEEN DISMISSED BECAUSE "THE NO ADEQUATE REMEDY" EXCEPTION APPLIES.

Even if the Board dismissals are considered nonfinal, these appeals fall within an exception to the finality rule. The APA at 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.

The Superior Court held this exception does not apply:

> However, that exception to the general requirement of final agency action addresses situations in which judicial review prior to final agency action would deprive a party of 'an adequate remedy.' Here, the Board has completed its consideration of the petition and has ordered it dismissed, so the exception does not apply.

App. at 13-14.

This Court in Northeast Occupational Exchange v. Bureau of Rehabilitation, 473 A.2d 406, 409-410 (Me. 1984) found that the legislative intent behind the exception to the finality rule was:

> . . . the 'ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow.' [Citation omitted].

The Superior Court did not inquire into whether Petitioners would suffer irreparable harm pending final agency action. Instead, the Superior Court in the Kennebec and Androscoggin cases, and the Superior Court in Watts v. BEP, which was adopted wholesale in the Watts 80C

Dismissal, seem to be saying that Petitioners got the remedy they wanted: a decision on the Petitions.[20] But the remedies they actually wanted were water quality certifications that requires safe fish passage.

If the Board's dismissals were truly nonfinal because Petitioners can continually file new petitions, then there could not be a stronger case for reviewing nonfinal action. As the United States Supreme Court stated in Amoco Production v. Village of Gambell, 480 U.S. 531, 545 (1987): "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." (In the case of the Watts Petition, the Messalonskee dam was rebuilt while the Board, in untimely fashion, denied the petition). Migration of eels and other indigenous fish is blocked, and these species are being killed and injured in dam turbines. Every migration season without safe passage is a season that will never be reclaimed for Petitioners and other river users. Even worse, Petitioners presented evidence to the Board they believe clearly demonstrates the eel population in the rivers is in grave danger. The Superior Court needs to review the Board's dismissals of the Petitions now.[21]

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[20] This contradicts the Superior Court's finding that there was not final agency action.

[21] Appellants also note that it is questionable whether the finality rule applies to Board decisions at all, given that 38 M.R.S.A. § 346(1) provides "any" order can be appealed in accordance with the APA. This language is in clear contrast with statutes that provide final agency orders are reviewable in accordance (con't) with the APA. For example, the Hospital and Health Care Provider Cooperation Act, 22 M.R.S.A. § 1847 (Supp. 2007) provides: (con't)

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.

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> An applicant, certificate holder or intervenor aggrieved by a final decision of the department . . . is entitled to judicial review of the final decision in accordance with the Maine Administrative Procedure Act.

(Emphasis added). As another example, domestic relations law on enforcement of child support, 19-A M.R.S.A. § 2453, provides:

> A person aggrieved by a final action of the commissioner under this article may file an action under the Maine Rules of Civil Procedure, Rule 80C seeking review of that action. Administrative remedies must be exhausted prior to such review.

(Emphasis added). If the Legislature had wanted to limit appeals of Board actions to final actions, it could have done so as it did in other statutes. WASHPIRG v. Pendleton Woolen Mills, 11 F.3d at 886; cf. Roberta v. Southwest Harbor, 449 A.2d 1138, 1140 (1982) ("nothing in a statute may be treated as surplusage if a reasonable construction giving each word meaning and force is possible"). At the very least, 38 M.R.S.A. § 346(1) shows the right to appeal Board decisions should be broadly construed.

CERTIFICATE OF SERVICE

I certify that on March 17, 2007 I caused two copies of the Joint Brief of Appellants to be served on the following counsel of record for Appellee and Real Parties In Interest by pre-paid first class mail at the following addresses:

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