STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-07-73

Douglas H. Watts **Petitioner** **v.** **Maine Board of Environmental Protection** **Respondent**	**Response of Petitioner to Respondents Motions to Dismiss.**

1. Respondents claim that no Maine court has any right to review any Maine BEP denial of any Maine citizen's petition under 38 MRSA §341-D(3) to modify any Maine water quality certification on any Maine river. This means that if the Maine BEP issues a legally defective 30 year license that causes an entire Maine river to be killed and the Maine BEP refuses to fix the license, the river must stay dead for the next 30 years and nobody can do anything about it. This is what is happening now on Messalonskee Stream in Waterville, Maine. Because the Maine BEP refuses to fix its own correctable error, Messalonskee Stream is now being killed.

The goal of Maine's water quality laws is "to restore and maintain the chemical, physical and biological integrity of the State's waters ... " 38 MRSA §464(1). The purpose of water quality certification is to confirm that the discharge will comply with state water quality standards.[1] For hydro dams, the life spans of water quality certifications match those of the federal dam licenses, from 30 to 50 years. If a water quality certification does not allow for attainment of legal water quality standards during the license term, the Legislature's purpose in enacting water quality standards is not achieved. For this reason, the BEP can modify water quality certifications to correct defects in them that defeat their statutory purpose.[2]

[1] "This provision may be the most important action of this legislation. I call the Senate's attention to section 21. This section requires that any applicant for a federal license or permit obtain certification of reasonable assurance of compliance with water quality standards before that applicant can receive any license or permit." (Sen. Edmund S. Muskie. 116 Cong. Rec. 8,984 (1970) on H.R. 4148 after amendment by the Conference Committee).
[2] See 38 MRSA §341-D(3) and *S.D. Warren v. Maine BEP*, 2005 ME 27, ¶28. ("This authority is essential ...")

A Maine water quality certification can be appealed to Superior Court within 30 days of issuance. Respondents argue that if a simple typographical error in a water quality certification causes an entire river to be killed for 50 years, and the flawed certification is not appealed by citizens within 30 days of issuance, the BEP has the unreviewable authority to allow that error to remain for the next 50 years, even if it kills an entire river and it violates every Maine water quality law. This is absurd.

When interpreting statutes the Court seeks to discern from the plain language the real purpose of the legislation, avoiding results that are absurd, inconsistent, unreasonable, or illogical. Further, the Court considers the whole statutory scheme for which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved. *Town of Eagle Lake v. Commissioner, Dept. of Education,* 2003 ME 37. Respondents' argument subverts and defeats the intent of the entire statutory scheme of Maine's water classification laws: "to restore and maintain the chemical, physical and biological integrity of the State's waters ... " 38 MRSA §464(1). A statute should be interpreted so that its manifest purpose, policy or object can be accomplished. *John Hancock Mut. Life Ins. Co. v. Harris Trust Savings Bank*, 510 U.S. 86, 94 (1993). Respondents' claim requires us to believe the Legislature intended the BEP to keep defective, illegal certifications in effect even after their defects have been revealed and the defects are causing massive damage to rivers for decades. This is absurd.

In *S.D. Warren v. Maine BEP*, the Maine Supreme Court held that the BEP's job is to uphold Maine's water quality laws, not defy and undermine them. (¶8: "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."). The Court further held that the BEP must interpret Maine's water quality laws so that their legislative goals can be achieved (*Id.* at ¶28: "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.").

The plain language of 38 MRSA §341-D(3) criterion (d) ("The license fails to include any standard or limitation legally required on the date of issuance") shows its legislative purpose is to

give the BEP the authority to modify water quality certifications when evidence shows they fail to prevent violations of the legal classification, standards and designated uses of a waterbody. The entire statutory framework of Maine's water quality laws show that the Maine BEP has an affirmative responsibility to ensure its water quality certifications *actually achieve* their legislative purpose throughout their 30 to 50 year life span.[3] This means the BEP has an affirmative responsibility to correct serious defects in certifications as soon as they are discovered. The BEP has no more discretion to allow a defective and illegal certification to remain in place than it has discretion to issue a defective and illegal certification in the first place.

This is not a discretionary enforcement issue.

2. The Legislature shall have sole authority to make any changes in the classification of the waters of the State. 38 MRSA §464(2)(D). No waterbody shall fail to meet the minimum standards of its assigned water quality classification. 38 MRSA §464 (4)(F)(3). The Maine BEP may not issue water quality certification for an activity that causes or contributes to a waterbody failing to meet its minimum standards of classification. 38 MRSA §464 (1)(C). The BEP does not have the discretion to create water quality standards or issue certifications that violate standards.[4] Once the BEP issues a water quality certification with a life span of 30-50 years, it has two ongoing responsibilities. The first is to make sure the licensee obeys the conditions in the certification. The second is to make sure the certification instrument itself achieves its legislative purpose throughout its life-span. This is seen in *S.D. Warren*, where the BEP included re-opener clauses in certifications because of concerns that methods prescribed to provide adequate dissolved oxygen levels in the dam impoundments might not prove effective over the 40 year license terms. By Respondents' logic, the BEP has the unreviewable power to deny all citizens' petitions under §341-D(3) to re-open the S.D. Warren certifications even if all evidence shows the prescribed methods are not working and all of the fish in the river are being killed. And because the 30-day appeal clock for certification issuance would have long expired, citizens are stuck with a dead river for rest of the 40 year licenses. This is *exactly* what Respondents are claiming here. The Legislature did not intend the BEP to willfully and knowingly flout state and

[3] See *S.D. Warren v. Maine BEP*, ¶21: "The legally designated uses of a waterbody must actually be present and if the designated uses are not presently being achieved, the Legislature intended the quality of the water be enhanced so that the uses are achieved."

[4] See *FPL Energy v. Maine BEP* (2007 ME 97) at ¶25: "Class C is Maine's minimum EPA-approved water quality standard for hydropower impoundments and, therefore, under federal law, Maine is not permitted to apply a less stringent standard than Class C to a hydropower impoundment ..."

federal law and play "gotchya." [5]

Respondents fail to cite any statute which overrides Mr. Watts' explicit statutory right to appeal.

3. The power of the court to review administrative action is statutorily prescribed. *Sears, Roebuck and Co. v. City of Portland*, 144 Me. 250, 255, 68 A.2d 12, 14 (1949). *Any* person aggrieved by *any* order or decision of the BEP or the DEP commissioner may appeal to the Superior Court. These appeals to the Superior Court shall be taken in accordance with Title 5, Ch. 375, subchapter VII. 38 MRSA §346(1)(emphasis added). Final agency action is "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 MRSA §8002(4). The right of an aggrieved person to appeal *any* final decision or action of the Maine BEP to Superior Court is explicitly provided by statute. 38 MRSA §346(1). This right is further emphasized in 5 MRSA §11001(1): "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." These statutes provide citizens with an explicit right to appeal a final agency action by the Maine BEP. Respondents fail to cite any *statute* which supercedes the explicit appeal rights for final BEP actions granted to Mr. Watts by statute by 38 MRSA §346(1) and 5 MRSA §11001(1).

The Board's refusal to take timely action on this petition has made this a final agency action.

4. The BEP's Nov. 15, 2007 decision order at page 4, footnote 1 states, "Petitioner has agreed to

[5] *See* 38 MRSA §636(8) (The department shall approve a project when it finds that the applicant has demonstrated that there is reasonable assurance that the project will not violate applicable state water quality standards, including the provisions of 38 MRSA §464 (4)(F), as required for water quality certification under the United States Water Pollution Control Act, Section 401.) The plain language of §636 shows that when the BEP no longer has "reasonable assurance" that a project is *not* violating standards, the Legislature intended the BEP to take action and address the deficiences by modifying the certifications -- not to completely ignore them and let entire rivers die for decades. The Court in *S.D. Warren* said exactly the same thing: "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."

the Board's schedule for consideration of the petition." This is false. I never approved or agreed to any "schedule" for the BEP's consideration of my petition other than the 30 days required by §341-D(3) and Ch 2. §27.

38 MRSA §341-D(3) and Ch. 2 §27 of BEP rules require that within 30 days of receipt, the BEP shall dismiss or schedule for public adjudicatory hearing a petition to modify a license. The BEP received my petition on May 1, 2007. The BEP then asked the dam owner to provide written comments by June 21, 2007. This was 21 days after the BEP's statutory deadline for ruling on my petition had expired. The BEP then did nothing for the next four months. In August, I called the Board's executive analyst, Cynthia Bertocci, and asked her if the BEP had dismissed my petition without telling me because I had heard nothing about its status since I filed it. Ms. Bertocci told me the BEP had not yet taken up my May 1, 2007 petition because the Board had been very busy during the summer with other matters. Ms. Bertocci told me that because the BEP was still very busy with other matters, they would not be able to take up my petition until October at the earliest.

The Board finally took up my petition on October 5, 2007 and dismissed it. The BEP did not issue a written decision document until Nov. 15, 2007. This was nearly 6 months after the 30 day statutory deadline had expired for the Board to act on my petition.

In the two other §341-D(3) petitions I have filed since 2005, DEP staff have been meticulous in contacting me by phone, email and/or in person to ask my *permission* for the BEP to consider my petition after the 30 day statutory deadline had passed. For example, on Nov. 3, 2005 DEP staff Cynthia Bertocci approached me in person at a BEP meeting and asked my permission to delay BEP consideration of his October, 2005 petition regarding the Kennebec and Androscoggin Rivers until December -- after the 30 day statutory deadline. I agreed to this delay. In December 2005, Ms. Bertocci phoned me at my home to ask my approval for the BEP to consider my petition in January 2006 in conjunction with two similar petitions filed by Friends of Merrymeeting Bay. I agreed to this delay.

None of this happened when I submitted my Messalonskee Stream petition on May 1, 2007. Neither Ms. Bertocci or anyone from the BEP ever made any attempt to contact me by phone,

letter or email to ask my permission to delay consideration of my Messalonskee Stream petition past the statutory 30 day deadline of June 1, 2007. I only learned of the official status of my May 1, 2007 petition when my wife called Ms. Bertocci in early August and I called Ms. Bertocci a week later. Ms. Bertocci told me that the "earliest" the BEP might hear my petition was in October. This shows that BEP and DEP staff were fully aware in August that the BEP was already 60 days late in ruling on my May 1 petition; and in August they were *already planning* to be at least 120 days late in ruling on my petition.

When I filed my May 1, 2007 petition, Messalonskee Stream was in its natural condition, the Union Gas Dam did not exist and no work had occurred at the site since 2001. Had the BEP acted upon my petition within the 30 days *required* by statute (June 1, 2007) and dismissed my petition for insufficient evidence, I would have had at least 60 days to gather additional evidence at the dam site before dam reconstruction began and submit a new petition before dam reconstruction had begun. The BEP's refusal to obey the statutory 30-day deadline put me in a Catch-22. In November, the BEP cited a need for more evidence as one reason for its dismissal; and by the BEP's refusing to issue a finding on my petition until November, the BEP deprived me of any opportunity to gather the additional site evidence the BEP said it needed. This case is similar to an agency deliberately delaying for months a ruling on a legal petition to preserve a historical or archaeological site from impending destruction and then, after the agency has allowed the site to be destroyed, denying the request for lack of evidence or mootness or both.[6]

The BEP's decision is a final agency action because the BEP dismissed Mr. Watts' petition as a matter of law.

5. Mr. Watts provided evidence showing the water quality certification issued by the BEP in 1995 for the Union Gas Dam must be modified because it fails to include standards and

[6] The BEP claims at p. 4, fn. 1 in its Nov. 15, 2007 decision document that its 5 month 'schedule' was necessary in part to give the dam owner a chance to comment on Mr. Watts' petition. This is ludicrous. The BEP gave the dam owner a comment deadline (June 21st) that exceeded by several weeks the statutory 30 day deadline for the BEP to actually rule on Mr. Watts' May 1 petition. The BEP fails to explain how it can legally set a comment deadline for several weeks *after* the BEP's statutory decision deadline on Mr. Watts' petition. The BEP never asked Mr. Watts nor did Mr. Watts ever give his consent to the BEP to extend the 30 day statutory deadline for ruling on his May 1 petition. BEP and DEP staff did it without ever consulting Mr. Watts.

limitations legally required at issuance. Watts BEP Petition at 10.[7] For 80 years the 35 foot high Union Gas Dam prevented all indigenous, migratory fish species native to Messalonskee Stream from safely moving upstream and/or downstream it. The collapse of the dam in 2001 allowed free access to the stream to be restored for the first time in more than a century. Watts provided uncontested evidence showing the pending reconstruction of the dam would eliminate the existing free access for all fish living in the stream. This new blockage at the Union Gas Dam site violates the Class C water quality standards for Messalonskee Stream, which requires that Messalonskee Stream provide suitable habitat for all of its indigenous fish species at all times. In its Nov. 15, 2007 finding at 8, the BEP summarily dismissed Mr. Watts' claim, saying: "Neither state nor federal law requires fish passage to be part of a certification in every case." Because the BEP's entire dismissal of this claim is based on this broad interpretation of law the BEP's dismissal must be considered a final agency action.[8] If the BEP is going to dismiss Mr. Watts' claim on such a broad interpretation of law it is axiomatic that there is no additional "evidence" that Mr. Watts can present to alter the BEP's conclusion.

6. In his May 1, 2007 petition, Mr. Watts provides uncontested evidence showing that the reconstruction of the Union Gas Dam will cause severe annual fish kills of American eels on Messalonskee Stream, will destroy 1.5 miles of its free-flowing natural habitat, will prevent all safe migration of native fish up and down the stream at the dam site in perpetuity. Watts BEP Petition at 10. This will cause Messalonskee Stream to fall from full attainment of its Class C standard to full *non-attainment* of its Class C water quality classification. 38 MRSA § 465(4)(C) (Discharges to Class C waters may cause some changes to aquatic life, except that the receiving waters must be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community). The Maine

[7] The Maine BEP may only issue a water quality certification order for a hydropower project if the standards of classification of the waterbody are met. 38 MRSA §464 (4)(F)(3). If the standards of classification of the waterbody are not being met, the Maine BEP may only issue a water quality certification order if the project does not cause or contribute to the failure of the waterbody to meet the standards of classification. *Id*. Messalonskee Stream is classified as "C" by the Maine Legislature. Class C waters "shall be of such quality that they are suitable for the designated uses of ... recreation in and on the water ... and as a habitat for fish and other aquatic life." 38 MRSA § 465(4)(A). Discharges to Class C waters may cause some changes to aquatic life, except that the receiving waters must be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community. 38 MRSA § 465(4)(C). If a project under review for water quality certification prevents an indigenous fish species from living in its native habitat in a stream, the project must be modified to allow the fish species to live in the stream. Otherwise, the BEP cannot issue a water quality certification order for the project. 38 M.R.S.A. § 465(4)(C). 38 MRSA §464 (4)(F)(3).

[8] The BEP's 11 page decision document is notable for its repeated use of the word "evidence" and the absence of any discussion of the evidence Mr. Watts presented.

BEP has has no legal right to allow activities which allow a waterbody to fall below its legal standards of classification. No waterbody shall fail to meet the minimum standards of its assigned water quality classification. 38 MRSA §464 (4)(F)(3). The Maine BEP may not issue water quality certification for an activity that causes or contributes to a waterbody failing to meet its minimum standards of classification. 38 MRSA §464 (1)(C).Because the Maine BEP final decision order of Nov. 15, 2007 does not even mention this claim, its Nov. 15, 2007 decision must be considered a summary dismissal and a final agency action.

7. In his May 1, 2007 petition, Mr. Watts cited and preserved by reference his claims and evidence from his June 2005 Maine BEP appeal of the Maine DEP dam reconstruction permit for the Union Gas Dam. Watts BEP Petition at 17. The key claim preserved is that reconstruction of the Union Gas Dam violates Maine's Anti-Degradation statute, 38 MRSA §464 (4)(F)(1), which states: "The existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-stream uses are those uses which have actually occurred on or after November 28, 1975, in or on a waterbody whether or not the uses are included in the classification of the waterbody." On May 1, 2007 Mr. Watts presented uncontested physical evidence to the Maine BEP showing that since the summer of 2001 the section of Messalonskee Stream adjacent to the Union Gas Dam site has been inhabited by American eels, striped bass, sea lamprey, blueback herring, Atlantic salmon, freshwater sponges, stoneflies, caddis flies, sandpipers and other animals and organisms that require access to natural, free-flowing stream habitat to survive. Reconstruction of the Union Gas Dam will destroy all of the existing habitat in Messalonskee Stream for these organisms for in approx. 1.5 miles of Messalonskee stream. The existing in-stream uses of Messalonskee Stream by these various animals have actually occurred from summer 2001 to the present and must be maintained and protected as a matter of law. The BEP's Nov. 15, 2007 written decision document did not mention or address this claim and therefore must be taken as a summary dismissal of this claim and a final agency action.

It's not about the evidence.

8. At page 10 of its Nov. 15, 2007 decision document, the BEP declares its reluctance to consider the physical evidence presented by Mr. Watts and him or any other person on this topic in the

future : “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. Finally, the Dept. of Inland Fisheries and Wildlife and the Dept. of Marine Resources have primary responsibility for fisheries management in Maine. It is appropriate for the Board to rely on the expertise, experience and data of these agencies to use the legal authority which they have to petition FERC to re-open a federal license to provide fish and eel passage whenever they find that the evidence warrants such passage and the passage is consistent with State fisheries management goals.” And at 9: “The Board notes that legal mechanisms exist for state and federal fisheries agencies to petition FERC at any time for the installation or improvement of fish passage facilities at any licensed project in order to protect and provide passage for migrating fish, and that no petitions have been made for the project at issue here.” The BEP at page 7 expresses its great reluctance to consider Mr. Watts’s evidence proffer *regardless* of its substance: “The Petitioner asks the Board to modify water quality certification that was issued for the Union Gas Project. The certification does not contain any requirements for fish passage, nor does the certification contain a condition that reserve the Department’s right to require such passage in the future (a so-called ‘re-opener’ provision) ... Whether the Board has authority to modify the terms of a water quality certification in areas not covered by a specific reoponer in the certification itself involves complicated issues of law involving two federal statutes, the Clean Water Act and the Federal Power Act, as well as 38 MRSA §341-D(3). The Board, however, does not need to decide this untested issue of law because, as set forth below, the Board finds that there is an insufficient basis upon which to proceed to hearing on the petition before it.”

The reasons offered by the BEP for dismissing Mr. Watts’ petition are not tied to the quality of evidence Mr. Watts presented nor the quality of any evidence Mr. Watts could possibly present in the future. Instead, the reasons are all about why -- as a general policy -- the BEP does not want to consider citizen requests under §341-(D)(3) to modify water quality certifications at hydro-dams regardless of the evidence and why the BEP may not have the legal authority to modify water quality certification that do not contain ‘reopeners’ regardless of the evidence.

While the Board’s 11-page decision document repeatedly claims the dismissal is based solely

upon "insufficient evidence," the actual evidence submitted by Mr. Watts is mentioned and discussed only once in the entire document, on page 7: "While Petitioner has offered compelling photographic evidence of the riverine habitat above the site of the Union Gas Dam and below the Automatic Dam, including evidence that juvenile eels are migrating upstream through the current breach in the dam, the significance of eel passage through the Union Gas site is difficult to assess." In his petition, Mr. Watts states that Messalonskee Stream's Class C water quality standards requires it to be suitable habitat for all of its indigenous fish species, including the American eel. Mr. Watts presented extensive photographic evidence showing that large numbers of eels are now swimming freely up and down the stream at the dam site; and that this access will be completely blocked once the dam is rebuilt. Here, the BEP admits Mr. Watts has provided "compelling" evidence showing that American eels are now swimming up the stream past the dam site. But then the BEP downplays this photographic evidence by saying the "significance" this "compelling evidence" that American eels are now able to swim up Messalonskee Stream past the dam site is "difficult to assess." This is deliberate gobbledygook.

Here the BEP admits Mr. Watts has provided sufficient evidence to show American eels are now swimming freely past the dam site in substantial numbers. That the rebuilt 35-foot high concrete dam will totally block this free access is elementary. Mr. Watts' central claim in his petition is that the Class C water quality standards for Messalonskee Stream require American eels to have free access up and down Messalonskee Stream at the dam site. In this passage, the BEP admits to the sufficiency of the physical evidence provided by Mr. Watts but dismisses his claim that Class C water quality standards require all of Messalonskee Stream to be suitable habitat (ie. accessible) for its indigenous American eels. This passage shows the BEP's dismissal is based solely on interpretation of statute and has nothing to do with sufficiency of evidence. This brief passage is the *only place* in the 11-page decision where the BEP actually mentions and discusses the evidence submitted by Mr. Watts.

There is a very specific and disingenous reason why the BEP (actually, DEP staff, who wrote the document) only discusses Mr. Watts' evidence proffer on page 7, under the heading "Threat to the Environment," and nowhere else. DEP staff specifically chose to mention Mr. Watts' evidence only under this heading because of the wide discretionary latitude offered to the Board under criteria C in §341-(D)(3)(C), 'the activity poses a threat to human health or the

environment.' And here, sure enough, the BEP claims that even if Mr. Watts' evidence shows the activity causes a native fish species (the American eel) to go extinct in the entire 200 square mile Belgrade Lakes/Messalonskee Stream watershed, this does not mean Mr. Watts has shown the activity is a 'threat to the environment.' This is absurd and dilatory. An activity that causes the extinction of a native fish species throughout a watershed is a violation the Class C water quality standard established for Messalonskee Stream and the Class GPA standards established for the Belgrade Lakes by the Maine Legislature. 38 MRSA § 465(4)(C). (Discharges to Class C waters may cause some changes to aquatic life, except that the receiving waters must be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community.) Although this is the central claim of Mr. Watts' petition and evidentiary proffer, the BEP goes out of its way to ignore it. This is why the BEP's decision is a final agency action. If the BEP refuses to credibly examine Mr. Watts' evidentiary proffer here, Mr. Watts has no hope of the BEP credibly considering any evidentiary proffer in the future.

For the reasons cited by Justice Marden in 2006
the court has jurisdiction to hear this matter

9. The BEP summarily dismissed Mr. Watts' petition in spite of the evidence presented and in spite of any evidence Mr. Watts could possibly present in the future. As such, the BEP's decision forecloses Mr. Watts from pursuing 'the same claim at a later time.' *Watts v. BEP* at 6 (Kenn. Sup. Ct., AP-06-19, Dec. 6, 2006, *Marden, J.*).[9] It is axiomatic that if the BEP dismisses a petition on a given topic as a matter of policy and statutory interpretation, Mr. Watts is foreclosed from 'petitioning the Board at a later date with more evidence' on that topic. *Id.* The plain language of §346(1) -- "any decision or action" -- shows the Legislature intended for people aggrieved by Maine BEP decisions and actions to have ample and liberal access to the courts. This is shown by the fact that the Legislature enacted §346(1) to guarantee appeal rights for citizens aggrieved by final BEP decisions even though appeal rights for final agency actions by all executive agencies are separately provided within the APA. The only logical explanation for this redundancy is that the Legislature wished to make certain there could be no question of an

[9] "Finally, Watts has also failed to show that final agency action would not provide him an adequate remedy. In this case, the decision by the Board not to proceed with a public hearing because of a lack of sufficient evidence does not prevent Watts from petitioning the Board at a later date with more evidence. Watts has not been foreclosed by any agency action from pursuing the same claim at a later time."

aggrieved citizen's right to appeal *any* final Maine BEP action to Superior Court. Respondent State of Maine asks the court to invent out of whole cloth a statutory bar to the explicit statutory right granted to aggrieved citizens to appeal a final action of the Maine BEP.

This is not a separation of powers issue.

10. Citing to *New England Outdoors v. Commr. of Inland Fisheries & Wildlife,* (2000 ME 66), Respondents argue that because not every single final agency action is reviewable by a court, the instant action is not reviewable by the court.[10] The question at hand is not whether every single final agency action of every executive branch agency is reviewable by the court. The question at hand is why this specific Maine BEP final agency action is *not* reviewable by the court in spite of the explicit appeal rights granted to citizens under §346(1) and the APA to appeal final agency actions by the Maine BEP to Superior Court. Respondent Maine never answers this question.

Plaintiffs in *New England Outdoors* asked the court to *require* the Commissioner of Fish & Wildlife to conduct an internal investigation of a whitewater outfitting company's potential affiliation with other outfitters. See *New England Outdoors* at ¶12. In *New England Outdoors*, there was no statute which allowed the plaintiff to petition for a public adjudicatory hearing and required agency to make a formal decision in 30 days; nor was there specified and statutorily described criteria to guide the agency's decision. In the instant case, all of this is true. Mr. Watts has a statutory right to present a petition and evidence to modify a license and the BEP must within 30 days dismiss the request or conduct a public adjudicatory hearing on it. The seven criteria for modification are highly specific and unambiguous. Mr. Watts is not asking the court to order the BEP to conduct an internal investigation. Mr. Watts is asking the court to review the BEP's final agency action denying Mr. Watts' request for a public adjudicatory hearing on the physical evidence Mr. Watts himself has gathered and presented which shows that license modification is required under §341-D(3)(D): the license fails to include standards or limitations legally required at issuance. This criterion is very cut and dried. Either the license fails to include standards or limitations legally required at issuance -- or not. Respondent Maine argues that even

[10] The pertinent section of *New England Outdoors* states: "The broad language of **5 M.R.S.A.** § 8002(4) (defining final agency action) and **5 M.R.S.A.** § **11001**(**1**) (conferring jurisdiction on the Superior Court to review final agency action) must be read in light of the constitutional doctrine of separation of powers. The Legislature may not constitutionally confer on the judiciary a commission to roam at large reviewing any and all final actions of the executive branch. Some executive action is by its very nature not subject to review by an exercise of judicial power. Thus, even when an agency action is final, it does not follow that the action is subject to judicial review."

if a petitioner provides evidence showing that a license fails to include standards or limitations legally required at issuance, the BEP is free to refuse to fix the defective license even if it causes the death of an entire river for decades; even if it causes massive violations of Maine water quality standards for an entire human generation; and even if it causes the extinction of one or more fish species.

Respondent Maine's citation of *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74 (Me. 1980) is misapplied because the facts in that case are so dissimilar to those here. In *Bar Harbor*, the Law Court struck down a temporary restraining order which forbade the Superintendent of the Bureau of Consumer Protection from conducting a public investigatory hearing. Mr. Watts is not asking the Court to forbid the Maine BEP from doing anything. Mr. Watts is asking the court to exercise its explicit statutory authority under §346(1) to review the BEP's October 5, 2007 final decision document for errors of law, abuse of discretion and findings not supported by evidence in the record.

By Maine's argument, no BEP or DEP
denials of applications can ever be final agency actions.

11. By Respondents novel interpretation of 'final agency action,' no BEP permit or other denial can ever be final because the applicant or petitioner is not barred from re-applying for the same permit at some time in the future. For example, an applicant denied a BEP permit for a dock under the Natural Resources Preservation Act should be barred from appeal because they can always apply for a dock permit for the same dock or a slightly different dock at some time in the future. This is not true. See, for example, *Hannum v. Maine BEP*, 2003 ME 123.

Mr. Watts has Standing

12. To the extent Mr. Watts' standing in this case is construed as being limited to any person who can demonstrate a particular interest is harmed, it is settled that harm to aesthetic, environmental or recreational interests confers standing. *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 196-97 (Me. 1978) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972) (plaintiffs who were users of State park and who intended to use it in the future had standing to enjoin Park

Authority from clearing timber blowdowns). Mr. Watts has been a longtime regular and frequent user of Messalonskee Stream where it is now being completely destroyed by the subject illegal dam.

Conclusion

13. Respondents argue the Legislature has granted the Maine BEP sole discretionary authority to destroy an entire river, river system or watershed for a half century if the BEP feels like it. They never say why this is a good thing. They never say how this helps our rivers. They never say how this helps Maine citizens. They never say how this is harmonious with the goals of the Clean Water Act and Maine's water quality laws. They never say how this squares with what Senator Edmund Sixtus Muskie said on the floor of the United States Congress in 1970: "This provision may be the most important action of this legislation. I call the Senate's attention to section 21. This section requires that any applicant for a federal license or permit obtain certification of reasonable assurance of compliance with water quality standards before that applicant can receive any license or permit."

Dated in Augusta, Maine, December 26, 2007.

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