

**March 26, 2012: Mr. Leithiser's Response to the Motion to Dismiss**



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Ms. Susan Lessard, Chair

Maine Board of Environmental Protection

Dear Chair Lessard and others at the Maine Board of Environmental Protection,

This letter is in response to Mr. Doyle's Motion to Dismiss as explained on the preceding page. I must admit that I find it somewhat odd that a member of the public must show aggrieved status to appeal a decision regarding Public Benefits. As this is about "Public Benefit" determination, it seems the logical place and time for members of the public to be able to simply appeal the decision.

Mr. Doyle's arguments cite cases of a court of law; however the BEP is not a court of law. While bound by Maine statutes, the Board is "a citizen board created by the Legislature." Further, its purpose is "to provide informed, independent and timely decisions" and "to provide for credible, fair, and responsive public participation in Department decisions. Statute directs the Board to exercise independent judgment on the matters before it" (with emphasis added, from the Maine BEP website Purpose Page). Information from that page also states that the Board "shall review, may hold a hearing at its discretion on... final license or permit decisions made by the commissioner when a person aggrieved by a decision of the commissioner appeals to the Board." I think the key phrase here is "at its discretion."

What determines an "aggrieved person"? As Mr. Doyle notes, the term is not defined in Title 38. Mr. Doyle then uses a definition provided in Chapter 2 rules as "commonly interpreted by Maine Courts." Mr. Doyle footnotes that Chapter 2 rules do not apply to public benefit determination, and again the BEP is not a court of Law, rather it is tasked to "exercise independent judgment."

With regard to a Maine public benefit determination, any member of the Maine public should have the right to appeal that decision. As a taxpayer in Maine, I am a stakeholder in the Juniper Ridge Landfill. My taxes help to support the State Planning Office, which has mismanaged oversight of the landfill by creating amendments to the Operating Services Agreement but notifying no one (including the DEP) of those changes. My taxes also support the DEP, which issued a partial approval of public benefit using numbers that don't add up. Those factors alone should provide standing for an appeal. Mr. Doyle, though (again citing a court case) says that a person must show "particularized injury or harm." In this case, any Maine taxpayer has "particularized harm" because only Maine taxpayers' money supports JRL operations and oversight; residents of other states or countries do not pay property or income taxes for this purpose. As a homeowner in Old Town, my property values may be impacted by an expansion of the landfill. My family is also impacted negatively by the ever-increasing number of trash trucks traveling through town (and no, the trucks do not all travel only on the Interstate). The fact that only three of Maine's taxpayers filed an appeal does not mean that others could not have done so. There is no other affordable avenue through which a member of the public can appeal the Public Benefit Determination, yet Mr. Doyle aims to exclude the public in its entirety. 38 M.R.S.A. §.1310-N(3-A)(B)

("the commissioner shall make the determination of public benefit in accordance with section 1310-AA, and the commissioner's determination under that section is not subject to review by the department or the board as part of the licensing process under this section [relating to solid waste facilities licensing]).

It is probably very obvious that I am not a lawyer, but I will cite some legal cases to support my claim of standing:

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), the United States Supreme Court determined in a seven-to-two decision that the plaintiffs did have standing. This case involved mercury pollution from the operation of a wastewater treatment plant. The Court deemed the plaintiffs' "reasonable fears" regarding the mercury pollution sufficient to support standing. The importance of this decision is that the plaintiffs were a group of people, not an individual, and the group's "reasonable fears" were sufficient.

Likewise, in *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Supreme Court addressed the issue of standing in environmental cases: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." The Court held that "the party seeking review [must] be himself among the injured." As a resident of Old Town and a taxpayer in Maine, I believe that I am among those "injured" by the commissioner's decision.

According to *American Jurisprudence second edition*, the general approach to standing in environmental matters is "Although it is the usual rule that one must be personally adversely affected before he or she has standing to prosecute an action, the court may grant standing where matters of great public interest and societal impact are concerned (citing *Jenkins v. State*, 585 P.2d 442 [Utah, 1978]). This liberalization of the requirements governing standing has particularly been applied to actions to protect environmental interests (citing *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247 (1972) and *Wisconsin's Environmental Decade, Inc. v. Public Service Commission of Wisconsin*, 69 Wis. 2d 1[1975])." (59 Am Jur 2d Sec. 42)

In Grad's *Treatise on Environmental Law* (Matthew Bender, 2002), the basic law regarding standing as related to the National Environmental Pollution Act of 1969 (NEPA) is given by Grad as *US v. Students Challenging Regulatory Procedure*, 412 U.S. 669 (1973), acronym SCRAP (Grad at Chapter 9.04 [2] [a]). Subsequent to SCRAP, that the harm may be general does not preclude standing for any harmed individual or affected group. The Court is quoted "indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury... To deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread government actions could be questioned by nobody. We cannot accept that conclusion." 412 U.S. at 687-688). Further "injury in fact" is interpreted broadly to determine standing in such cases. "Injury in fact, as shown in the SCRAP case, clearly includes injury to aesthetic and

environmental values even though such injury may be small or remote, as long as it gives the person a direct stake in the outcome of the litigation.” Grad at 9-243.

Lynne Williams, Esq. of Bar Harbor also wrote to you concerning the issue of standing (March 21, 2012, Evergreen Wind Power II). I take from part of that letter:

In *Conservation Law Found. V. Town of Lincolnville*, 2001 WL 1736584 (Me. Super.), the Superior Court held that the Conservation Law Foundation had standing to bring suit against the town of Lincolnville based on the individual standing of a sole member. They further found that such standing did not depend on that sole member having been a member during any of the municipal proceedings. *Id* at 8.

The courts have long been expansive in granting standing in environmental challenges. See *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, 955 F.2d 1199, 12-05 (8<sup>th</sup> Cir. 1992) (plaintiffs lived four miles from the site at issue and were found to have standing to challenge a permit that allowed farmers to drain wetlands, given that the plaintiffs hunted on the wetlands and enjoyed the “aesthetic beauty” of the site); *Port of Astoria v. Hodel*, 595 F.2d 467, 476 (9<sup>th</sup> Cir. 1979). Maine courts have taken a similar view. In *Conservation Law Foundation*, the appellee argued that appellant had not demonstrated a “particularized injury” sufficient to give him standing to pursue the appeal. The court however, noted that “[a]s abstract and general as injury to the environment may seem, it is well settled that such injury is sufficient to support standing as to any plaintiff as to any plaintiff who used the effected environment. *Conservation Law Foundation* at 4, citing decisions in *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed.2d 636 (1972) and *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 37 L.Ed.2d 254 (1973). The court goes on to note that “ a few cases can be found that deny standing for failure to show any injury whatever, or for failure to show that any injury was caused by the challenged act... Nonetheless, standing to protect the environment is thoroughly entrenched...” *Conservation Law Found.* at 4.

The right to appeal an administrative decision is governed by statute. *Nelson v. Bayroot*, 2008 ME 91, ¶ 9. However, the Law Court has stated that “[w]hile the language employed in these statutes is often similar, the requirements for standing to appeal may differ depending on the purpose of the administrative agency and on the interests the agency was created to protect.” *In the Matter of Lappie*, 377 A.2d 441, 442 (Me. 1977). For example, in *Consumers for Affordable Health Care, Inc. v. Superintendent of Ins.*, 2002 ME 158, 809 A.2d 1233 (2002), the Law Court affirmed the standing of CAHC to bring an appeal from an order of the Superintendent of Insurance due to statute granting appeal rights to any person who was a party to the underlying hearing. *Id.* at ¶ 14-17, 809 A.2d at 1238-39.

The DEP itself, in the course of hearing appeals of agency decisions, has taken the position that “person aggrieved” should be broadly construed, in accordance with its regulations.<sup>1</sup> *FPL Energy Maine Hydro, LLC v. Dep’t of Env’tl. Protection*, 2006 Me. Super. LEXIS 130, at \*20 (May 25, 2006).

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<sup>1</sup> Although the DEP rules containing the definition of “person aggrieved” are specifically inapplicable to public benefit determinations, it is instructive.

Mr. Doyle argues that none of the particularized injuries alleged by the appellants flow directly from the public benefit determination, and for that reason they should not be permitted to challenge the determination as a whole. The Law Court has expressly rejected this very type of narrow argument in the appeal of an administrative body's findings: "The Board asserts that an appellant must be aggrieved by a particular finding of the Board in order to have standing to appeal on the ground that the particular finding is not supported by substantial evidence. We do not agree." *Lappie*, 377 A.2d at 442.

I am directly impacted (injured) by the commissioner's partial approval of public benefits determination. As mentioned earlier, I am a taxpayer in Old Town, but request to my local government to appeal decisions regarding Juniper Ridge have not been followed through. Despite arguments to the contrary, the existing Host Community Agreement with the City of Old Town contains the following provision:

(f) Suspension of Payments. Notwithstanding anything above to the contrary, the obligation of Casella to make the payments or provide the benefits set forth in Sections 3.1(a) and 3.1(b) above shall be suspended in the event that, and for so long as, the City:

(i) appeals or funds a third party to appeal to any administrative or judicial body any federal, state or local permit, license, approval or determination including, but not limited to, any of the foregoing issued by DEP to the State and/or Casella relating to the Landfill or any expansion thereof (provided that the City's participation in any such permit, license, approval or determination process up to the point of decision shall not be a basis for suspending payment under this provision).

Given that Casella has therefore limited public participation in this process already by imposing financial penalties on the municipality in the event that it challenges any decision by the DEP through this process, the individuals in this case should be granted standing to appeal in order to vindicate the public interest. *See Lappie*, 377 A.2d at 443 ("Although a person adversely affected [by an administrative decision] is likely to be motivated by considerations of his personal interest, his action results in vindication of the public interest.").

I am also impacted by trash truck traffic, and though the odor issues at the landfill have improved, I have filed many odor complaints through the "Juniper Ridge Odor Complaint Hotline." I also frequently drive on Old Town's Route 43, and have to look at the blight on the previously scenic landscape every time I pass the Landfill.

Lastly, with regard to whether or not I filed an actual appeal, I think it is clear that I did so when reading the entire document. The statutes governing the Board's responsibilities clearly provide for the remedy that I have requested. 38 M.R.S.A. § 341-D(4)(A) ("The board is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of

law established by the commissioner.”). The statute cited by Mr. Doyle is simply a grant of authority to the Commissioner to request modification based on certain conditions and in no way acts as a limit on the Board’s authority to hear appeals and modify decisions of the Commissioner, as it is specifically authorized to do. My appeal should be recognized for what it is, an appeal of the Commissioner’s suggested conditions and a request to the Board to modify those conditions.

I believe that I have provided enough information at this point and that the Board uses its independent judgment and determines that members of the Maine public do indeed have standing in Maine Public Benefit determinations. Despite Mr. Doyle’s complaints, I believe that the Board should hear the appeals of all three appellants and then decide if or what action should be taken, based on the merits of those appeals.

Thank you for your consideration; I anxiously await your response.

Respectfully,

Charles B. Leithiser

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