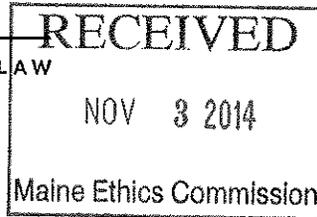


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November 3, 2014

Jonathan Wayne, Executive Director  
Commission on Governmental Ethics and Election Practices  
135 State House Station  
Augusta, ME 04333-0135

***RE: Response to Mainers for Fair Hunting Request for Investigation***

Dear Mr. Wayne:

Please accept this letter as our response to the recent request made by your office to respond to the request for investigation

***I. MWCC Did Properly Report All Contributions from the Maine Bowhunters Association ("MBA"). See Appendix 10.***

The check that is shown in the Maine Bowhunter's newsletter in Appendix 10 was an oversized, non-deposit check designed purely for the purpose of a photo opportunity. The \$10,000 check represented the total aggregate contribution of the Maine Bowhunters Association (MBA) on that date and was used as a display at the Maine Moose Permit Lottery Drawing on June 14.

MBA has never written a \$10,000 check to MWCC, and all contributions to this date (totaling \$10,300.00) from MBA were disclosed appropriately as evidenced in the MWCC's campaign disclosure reports contained in the appendices included in the Commission's materials today.

Reference:

9/27/13- \$2,000.00 (Filed: October Quarterly 2013)

1/17/14-\$3,000.00 (Filed: April Quarterly 2014)

5/01/14-\$2,800.00 (Filed: 11 Day Pre Primary 2014)

6/06/14-\$2,500.00 (Filed: 42 Day Post Primary 2014)

*2. The Request for an Investigation filed by Mainers for Fair Bear Hunting ("MFBH") is a Desperate Last Minute Attempt to Score Political Points in the Final Days Before the November Election.*

A. The Maine Wildlife Conservation Council Has Been Filing Reports For Over One Year With No Objection From MFBH.

The Maine Wildlife Conservation Council BQC has been active and filing campaign finance reports in compliance with Maine election law since the summer of 2013. In these reports, included in the Commission's materials today, we have disclosed in-kind contributions made to our BQC, as well as expenditures made for the production of all television, radio and other campaign materials. The request for this investigation comes only two business days before Election Day, hardly enough time to produce anything but a convenient newspaper headline for the proponents of Question 1.

Mainers for Fair Bear Hunting ("MFFBH") has demonstrated a pattern of conduct in the last month of the campaign as evidenced by their failed attempt through litigation to convince the Maine courts to intervene on their behalf. In their Opposition to the Plaintiff's Motion for Expedited Appeal of the Superior Court Order, the Attorney General's office, representing the Department of Inland Fisheries and Wildlife, made this argument very clearly:

"Plaintiff's delays are particularly inexcusable sine the IFW's views and positions on bears and bear baiting, hounding, and trapping, have been consistent, longstanding, and well publicized. Since at least 1989, and through the last bear referendum in 2004 (Question 2) through the present, IFW has consistently interpreted its statutory directives and authority as requiring it to publicly encourage and promote bear baiting, hounding, and trapping as legitimate forms of bear hunting and as effective and necessary forms of bear management in Maine. See 12 M.R.S. Sections 10051, 10053(1), 10056, 10103(2) & 10108(2)."

p. 2 of the Opposition brief attached.

In a footnote to the quotation above, the Attorney General goes even further:

"Plaintiffs were well aware of IFW's long-standing policy to publicly promote its position on these issues, even conceding that it was IFW's activities with respect to the 2004 bear referendum that motivated Plaintiff Hansberry to seek information from IFW back on March 26, 2013." Pls. Compl. 5-7.

Given MFFBH's pattern of delay, and the fact that the Department of Inland Fisheries and Wildlife have consistently and publicly stated their position on this issue and their intention to advocate against such legislative attempts to deny them of their current management tools, the Commission should consider why the party requesting this investigation didn't bring this matter to the attention of the Commission in a timeframe where disclosure (if even required) could have been more adequately addressed.

B. Maine Courts Have Already Decided That the Activities of IFW Are Lawful.

On October 22, 2014, Superior Court Justice Joyce Wheeler denied a Motion for a Temporary Restraining Order (TRO) after MFFBH alleged that the Maine Department of Inland Fisheries and Wildlife (MDIFW) was engaged in illegal campaign activities. To the contrary, Justice Wheeler ordered:

“The Commissioner of DIFW and DIFW have the responsibility, pursuant to 12 M.R.S. §10053(1) and 10003(2), to manage all wildlife resources in Maine. When necessary to accomplish their statutory duties, the Commissioner and DIFW have the statutory duty, pursuant to 12 M.R.S. §10105(1) to authorize the taking of wildlife including bears, subject to conditions and restrictions established by the Commissioner and DIFW. Pursuant to 12 M.R.S. § 10056, they are also charged with increasing the public’s knowledge and understanding of wildlife resources and the management of those resources, and with the promotion of such resources. The Commissioner and DIFW have the authority, pursuant to 12 M.R.S. §10108(2), to implement programs to promote the hunting of Maine wildlife, including the hunting of bears. Such programs, “may include the coordination of activities between the public and private sectors, and the utilization of promotional missions, exhibits, brochures, technical assistance and expertise as necessary to develop and promote” hunting activities in Maine, including the hunting of bears.” See page 2 of the Order on Motion for Temporary Restraining Order.

3. *IF&W Did Not Make In-Kind Contributions to MWCC.*

A. The Department of Inland Fisheries and Wildlife is Statutorily Charged With Educating the Public About the Wildlife Management Best Practices, and As Such, Those Activities Are Not “Contributions” to the BQC.

As evidenced in Justice Wheeler’s Order referenced above, IFW has the legal authority to engage in the conduct complained of by MFFBH and has consistently and publicly stated its intentions to educate the public about the Department’s concerns with these attempts to legislatively deny them of their management tools. In Appendix 1 of the Commission’s materials, there is a Statement of Chandler Woodcock, Commissioner, Department of Inland Fisheries and Wildlife dated September 23, 2013 which makes this point very clearly.

B. Most of IF&W’s Activities Were Done Completely Independent of MWCC And As Such, Can Not Be Considered In-Kind Contributions to MWCC.

In their Opposition to Plaintiff’s Motion for an Expedited Appeal, the Attorney General, acting as counsel to the Defendant IFW stated that:

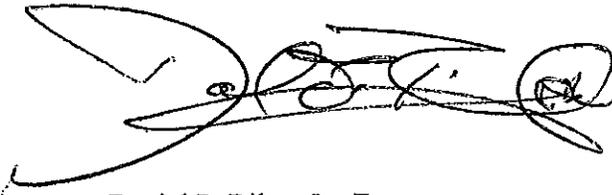
"IFW had no role in producing or paying for the advertisements and has no control over whether they are aired on television, and is incurring no additional costs to the extent these advertisements continue to air on television". Defendant's Opposition brief p. 9.

IFW, as they did in 2004 with respect to Question 2, has exercised their statutory duty to educate the public. The mere fact that this duty dovetails with MWCC's work on the campaign against Question 1 in this election cycle does not make these activities by IFW "contributions" to the campaign. In addition, since IFW's activities were within their authority under Maine law, MWCC had no obligation to disclose any potential or alleged in-kind contributions from IFW.

4. *The Legislature has Treated State Agencies Like IFW Distinctly under Maine's Lobbyist Disclosure Law and that Same Intent Applies in the Context of a Referendum Question.*

Under Chapter 15 of M.R.S. Title 3, the Maine Legislature has established the procedures and requirements for registration and reporting of lobbying activity. Section 316-A of that chapter sets up a parallel, but separate, registration requirement for state agency employees while exempting them from the disclosure and reporting requirements applicable to everyone else. Since referenda questions are simply an alternative process to the normal legislative process, it follows that the lack of any statutory requirements applicable to state agencies for campaign finance disclosure related to referenda questions provides evidence of the legislature's intent to exempt state agencies from the reporting and disclosure requirements applicable to BQCs. MFFBH has had ten years to go to the Maine Legislature and request that state agencies be subject to these disclosure and reporting requirements but has not availed themselves of that opportunity.

Very truly yours,

A handwritten signature in black ink, appearing to read "Daniel P. Riley, Jr.", with a stylized flourish at the end.

Daniel P. Riley, Jr., Esq.

DPR/rjc  
Enclosure.

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

MAINERS FOR FAIR BEAR  
HUNTING AND KATIE HANSBERRY,

Plaintiffs,

v.

MAINE DEPARTMENT OF INLAND  
FISHERIES AND WILDLIFE

Defendant,

And

MAINE WILDLIFE CONSERVATION  
COUNCIL,

Intervenor,

Docket No. CUMB-14-448

**DEFENDANT MAINE DEPARTMENT OF INLAND FISHERIES AND WILDLIFE'S  
OPPOSITION TO PLAINTIFFS' MOTION FOR EXPEDITED APPEAL OF  
SUPERIOR COURT ORDER**

Defendant Maine Department of Inland Fisheries and Wildlife ("IFW") opposes Plaintiffs' motion for an order expediting their appeal of the Cumberland County Superior Court's order denying their motion for a temporary restraining order in the above-matter. As is discussed more fully below, the motion should be denied because: 1) the appeal is interlocutory; 2) Plaintiffs' own failure to act expeditiously prejudices IFW and Intervenor Maine Wildlife Conservation Council ("MWCC"), deprives the Court of a meaningful opportunity to consider the parties' arguments, and has created the sense of urgency that Plaintiffs now claim justifies

expedited review; and 3) as a result of Plaintiffs' delay there is no meaningful relief that the Court could afford that would justify hearing this appeal in an expedited manner.

### BACKGROUND

#### IFW's activities concerning Question 1

In this case Plaintiffs seek to enjoin IFW from certain statutorily mandated and otherwise authorized activities with respect to Question 1, "An Act to Prohibit the Use of Dogs, Bait or Traps When Hunting Bears Except under Certain Circumstances." Plaintiffs filed their motion to expedite five days after their appeal – time they used to prepare a 20-page brief on the merits – leaving only six days for the Court to accept and consider additional argument, and issue a decision, before the Referendum vote they seek to influence.

Plaintiffs' delays are particularly inexcusable since IFW's views and positions on bears and bear baiting, hounding, and trapping, have been consistent, longstanding, and well-publicized. Since at least 1989, and through the last bear referendum in 2004 (Question 2) through the present, IFW has consistently interpreted its statutory directives and authority as requiring it to publicly encourage and promote bear baiting, hounding, and trapping as legitimate forms of bear hunting and as effective and necessary forms of bear management in Maine.<sup>1</sup> See 12 M.R.S. §§ 10051, 10053(1), 10056, 10103(2) & 10108(2). Moreover, the specific activities that Plaintiffs now challenge on the eve of the election have been occurring for many months, and in some cases, well over a year. For instance, IFW's informational Bear Fact Sheet, which Plaintiffs now assert is an unlawful use of agency resources, has been publicly available in various forms since at least 2004. The IFW Commissioner's participation in a press conference on Question 1 (in response to the announcement that Question 1 had been approved as a ballot question), which Plaintiffs also now

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<sup>1</sup> Plaintiffs were well aware of IFW's long-standing policy to publicly promote its position on these issues, even conceding that it was IFW's activities with respect to the 2004 bear referendum that motivated Plaintiff Hansberry to seek information from IFW back on March 26, 2013. Pls.' Compl. 5-7.

challenge as a misuse of agency resources, occurred on September 13, 2013 -- over a year ago. The "YouTube" videos on IFW's website, which Plaintiffs now challenge, have for the most part been available on IFW's website since at least August 2014. Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("Motion for TRO and PI"), at 5. Although IFW employees have appeared in more recent television advertisements, those advertisements were filmed, produced, and paid for by, and, thus, are the speech of MWCC and not IFW. It is unclear why Plaintiffs, who submitted their first request under Maine's Freedom of Access Act ("FOAA") to IFW in March 2013, chose to wait so long before pursuing their legal claims.

#### The Plaintiffs' Complaint

Plaintiffs, who were well aware of IFW's views on and opposition to Question 1, filed the complaint underlying this appeal on September 30, 2014 -- less than a month ago. The complaint sought, inter alia: an order enjoining IFW from further using agency resources in opposition to Question 1; an order requiring IFW to remove material concerning Question 1 from its website, YouTube and other outlets; and an order requiring that television advertisements in opposition to Question 1, in which IFW employees appeared, be immediately removed from the air.<sup>2</sup> Plaintiffs did not, contemporaneously with the filing of the complaint, file a motion for a temporary restraining order or preliminary injunction. They did, however, include an application for transfer to the Business and Consumer Docket ("BCD"), which was later withdrawn.

Plaintiffs failed to properly effectuate service of the complaint on IFW. In any event, just days after the complaint was filed, counsel for IFW reached out to Plaintiffs' counsel, informed her of the insufficiency of service and offered to accept an acknowledgement of service on IFW's behalf. During the same call, counsel for IFW also suggested requesting an immediate

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<sup>2</sup> The television advertisements are not the property of IFW but, rather, were produced, paid for and distributed by MWCC.

conference (with either the Cumberland Superior Court or the BCD) in order to 1) most efficiently address the FOAA portions of the Plaintiffs' complaint, and 2) develop an efficient, judicially-supervised method for IFW to continue responding to Plaintiffs' voluminous FOAA requests, which, as already narrowed by the parties, had by then occupied hundreds of hours of IFW time and had generated approximately 90,000 responsive e-mails. The parties agreed that Plaintiffs would consider IFW's suggested course of action and then get back to IFW's counsel.

Counsel for IFW then promptly executed and returned to Plaintiffs' counsel an acknowledgement of service on Monday, October 6, 2014. Thereafter, Plaintiffs' counsel never contacted counsel for IFW to discuss a conference with the court and, instead, two days later filed the Motion for TRO and PI.

#### The Motion for TRO and PI

Eight days after filing the complaint, and without any further discussion with IFW's counsel, the Plaintiffs filed their Motion for TRO and PI and three supporting affidavits on October 8<sup>th</sup>. The Motion for TRO and PI alleged that an immediate order was "necessary to avoid irreparable harm to Plaintiffs, to Maine voters, and to the integrity of the November 4 State election." Plaintiffs' Motion for TRO and PI, at 20. Plaintiffs did not file a motion for an expedited hearing. MWCC filed a motion to intervene on October 16, 2014. IFW filed an opposition to the Motion for TRO and PI on October 16<sup>th</sup>, along with an answer to the complaint. The Superior Court heard argument on the motion on October 17<sup>th</sup>, granted MWCC's motion for intervention from the bench, and on October 22<sup>nd</sup>, issued an order denying Plaintiffs' request for a temporary restraining order only. In so ruling, the Superior Court found that IFW's actions in opposition to Question 1 were statutorily authorized; that the government speech doctrine applied and barred the Plaintiffs' claim, which the Superior Court held was premised, at least in

part, upon Plaintiffs' asserted first amendment rights; that the Plaintiffs failed to demonstrate irreparable harm; and that any harm to Plaintiffs was outweighed by the public interest.

### The Appeal

Plaintiffs then filed the present appeal on October 23<sup>rd</sup>. However, rather than immediately seeking an expedited appeal, Plaintiffs again delayed taking action for an additional five days, to the detriment of the Law Court, IFW and MWCC, by not filing a motion for expedited appeal until the afternoon on Tuesday, October 28<sup>th</sup>. Plaintiffs' pattern of delays in seeking protection for the rights they now claim to be highly time-sensitive severely undermines their position, and militates against granting their eleventh-hour request for expedited review.

### ARGUMENT

1. The appeal is interlocutory, and no exception to the final judgment rule exists in this case.

IFW agrees with and incorporates all of the arguments made by MWCC in its opposition to Plaintiffs' motion to expedite this appeal, including those in Section A of MWCC's opposition regarding the interlocutory nature of Plaintiffs' appeal of the Superior Court's denial of a TRO. In addition, IFW notes this matter is unlike other cases where this Court has permitted interlocutory appeals of preliminary injunctions where "substantial rights of a party will be irreparably lost if review is delayed until final judgment." *Department of Environmental Protection v. Emerson*, 563 A.2d 762, 766 (Me. 1989), citing *Moffett v. City of Portland*, 400 A.2d 340, 343 n. 8 (Me. 1979). Here, the Superior Court specifically found that Plaintiffs have failed to demonstrate irreparable harm from the speech and activities they seek to restrain. In the absence of irreparable harm, Plaintiffs are not entitled to interlocutory review of the denial of the Motion for TRO and PI.

2. Plaintiffs unreasonably delayed filing the motion to expedite their appeal, not only to the prejudice of Defendant IFW and Intervenor MWCC, but also to the detriment of the Court.

Plaintiffs have caused delays at every step, including: 1) filing their complaint only recently on September 30, 2014, while challenging IFW activities that had been known to Plaintiffs for, in some cases, over a year; 2) filing their Motion for TRO and PI eight days after filing their belated complaint; and now 3) requesting an expedited appeal just one week before the November 2014 election, and five days after filing their notice of appeal. Considered in the aggregate, these inexplicable and unnecessary delays undercut the request for expedited review, since any urgency that now exists arises from Plaintiffs' own failures to expedite matters.

*See Nader v. Land*, 115 Fed.App. 804, \*806, 2004 WL 2452695 (6<sup>th</sup> Cir. 2004) (denying motion to expedite appeal "principally because the plaintiffs have not proceeded expeditiously," and "where the appellants have delayed for such a long time for no stated or apparent reason."); *see also Fund for Animals v. Fritzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) ("Our conclusion that an injunction should not issue is bolstered by the delay of the appellants in seeking one.");<sup>3</sup> *Hessel v. Christie's Inc.*, 399 F. Supp. 2d 506, 520-521 (S.D.N.Y. 2005) ("A party's delay in moving for preliminary injunctive relief undercuts the sense of urgency that typically accompanies such a motion[.]") (citation omitted).

In any event, the Court should also decline to expedite Plaintiffs' appeal in light of the prejudice that will result. Plaintiffs used their most recent delay in seeking expedited treatment of their appeal to their advantage, taking those five days to prepare a 20-page brief on the merits. That delay has not only prejudiced IFW and MWCC by depriving them of a similar opportunity to brief the merits, but also deprived the Court of a meaningful opportunity to

<sup>3</sup> In *Fund for Animals*, the court referred to plaintiffs' 44 day delay in seeking injunctive relief as "inexcusable." *Id.*

) consider the parties' arguments and order any potential relief in the short amount of time that now remains before the election.

In similar circumstances, the Arkansas Supreme Court has consistently refused to expedite consideration of appeals filed shortly before relevant elections, concluding that they leave inadequate time for the appellee to prepare a brief and for the court to deliberate on the issues presented. In *McCuen v. Harriis*, 318 Ark. 522, 523, 891 S.W.2d 350 (1994), the Court denied a motion for an expedited appeal, explaining:

Here, we are asked to require the appellee to present a brief in time to hold arguments on Monday, November 7, 1994, so that the case will be decided prior to the election. To do so would not only be unfair to the appellee, it would also not give this Court the time needed for deliberation of the issue or issues to be presented. We, therefore, must deny the motion for expedited consideration.

) *McCuen*, 318 Ark., at 523. Similarly, the Arkansas Supreme Court focused on harm to the appellee and the impossibility of sufficient judicial review in another opinion denying a motion for expedited consideration when the motion was filed September 29 and appellant asked for a hearing prior to October 12, the day before absentee voting commenced. *Stillely v. Bradley*, 342 Ark. 274, 274-5, 27 S.W.3d 436 (2000); see also *Ward v. Priest*, 350 Ark. 462, 88 S.W.3d 416 (2002) (denying expedited review where ballot-question committee filed motion on October 28 asking court to decide case prior to November 5 election).

Here, not only have Plaintiffs delayed multiple times throughout the proceedings of this case, but their request for last-minute consideration will prejudice appellees and would not afford this Court ample time for review. For these reasons the Plaintiffs' motion for an expedited appeal should be denied in this case.

3. As a result of Plaintiffs' delay there is no meaningful relief that the Court could afford that would justify hearing this appeal in an expedited manner.

Plaintiffs' unnecessary and inexcusable delays have brought this appeal to the brink of the election, thereby rendering any relief that the Court could afford impractical and meaningless.

In *Lamarche for Governor Committee v. Commission on Governmental Ethics and Election Practices*, 2006 ME 126, ¶ 1 n. 1, 908 A. 2d 1205, this Court did consider an expedited appeal the week before the November 7, 2006 general election. However, the circumstances in that case were different from those at hand. In *Lamarche*, the Court found that resolution of the appeal before the election was important where the issue was whether there had been "independent expenditures" in television advertisements "for any communication that expressly advocates the election or defeat of a clearly identified candidate." *Lamarche*, 2006 ME 126, ¶ 2. Had such a determination been made, *Lamarche* would have been entitled to receive additional public funds equal to the reported independent expenditure pursuant to 21-A M.R.S. § 1125(9). *Id.* *Lamarche* could have used those funds in the final days of the campaign with significant effect. Here, Plaintiffs have failed to show how any order from the Court coming a day or two before the Referendum vote could have any real world effect.

Here, the relief sought by Plaintiffs is an order requiring IFW to "cease further use of IF&W resources on campaign activity; to immediately remove partisan political content from IF&W's website, You Tube channel, Facebook page, and other media outlets; [and] to immediately terminate the dissemination of television advertisements produced using IF&W staff time and resources." Plaintiffs' Motion for TRO and PI, at 20. However, given Plaintiffs' delay, and the nearness of the impending election, little if any time would remain for any order by this Court to have any practical and meaningful effect should Plaintiffs ultimately prevail on

their appeal. This is the case even if the Court were to allow only minimal time for IFW and MWCC to prepare briefs, and for the Court to deliberate and decide this appeal and (if Plaintiffs prevail) remand this case to the Superior Court.

Moreover, at this point, the speech that Plaintiffs seek to silence has already been completed and made available to the public, and IFW has no plans to expend additional agency resources to create new videos, fact sheets, or other media projects involving bears, bear baiting, hounding or trapping, or bear management prior to the November 4<sup>th</sup> election.<sup>4</sup> And, as the Superior Court found, an order restricting IFW's speech would unreasonably interfere with its prerogative – and indeed statutory duty – to educate the public on matters within the scope of the agency's expertise.

As for the television advertisements in which IFW employees appear in opposition to Question 1, those were produced, paid for and distributed by MWCC, not IFW. The MWCC is a private entity that is separate and independent of IFW. IFW had no role in producing or paying for the advertisements and has no control over whether they are aired on television, and is incurring no additional costs to the extent these advertisements continue to air on television.

#### CONCLUSION

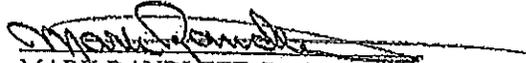
For all of the foregoing reasons, the Court should deny Plaintiffs' motion for an expedited appeal.

<sup>4</sup> Media projects that IFW created before the filing of Plaintiffs' complaint may continue to be publicly available. IFW may also otherwise continue to express its views (through IFW's existing website resources, social media, verbally, and/or in written form) on Question 1 between now and the election.

Dated: October 29, 2014

Respectfully submitted,

JANET MILLS  
Attorney General



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