

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

James W. Parker, Chair

Cynthia S. Bertocci
Executive Analyst

Ruth Ann Burke
Board Clerk

January 17, 2019

Mr. Jason Mitchell
President & Chief Operating Officer
Whole Oceans, LLC
c/o Pierce Atwood
254 Commercial Street
Portland, ME 04101

Ms. Holly Faubel
P.O. Box 216
1 Steamship Point
Belfast, ME 04915

Mr. Brian Rayback
Pierce Atwood
254 Commercial Street
Portland, ME 04101

RE: Whole Oceans, LLC Wastewater Discharge License #W-009190-6F-A-N,
MEPDES Permit # ME0037478
Ruling on Motion to Dismiss the Appeal of Holly Faubel

Dear Parties:

By letter dated January 7, 2019, Whole Oceans filed with the Board of Environmental Protection (Board) a motion to dismiss the appeal of Holly Faubel for lack of standing as an aggrieved person.

In its motion to dismiss, Whole Oceans argues that Ms. Faubel does not meet the Department's definition of "aggrieved person," and cannot demonstrate that she will be directly and adversely affected by the Commissioner's decision in any way that is different from the rest of the general public. Whole Oceans comments that Ms. Faubel's residence in Belfast is approximately 14 miles straight line distance from the project site. Whole Oceans argues that, while Ms. Faubel states that she swims in Belfast Bay and consumes produce from these waters, her use of the waters of the Penobscot River, Belfast Bay, and the Gulf of Maine is not distinct from others who use these waters and, therefore, has not demonstrated a particularized injury as a result of the Commissioner's licensing decision.

By letter dated January 14, 2019, Ms. Faubel filed a response to the motion. In her response, Ms. Faubel reiterates her concerns that the water intake pipes at the facility will disturb mercury contaminated sediments in the river, draw mercury contaminated water into the facility, and discharge methyl mercury into the river thereby adversely impacting the water quality of Penobscot River and Penobscot Bay and the level of mercury in seafood harvested from these waters. She argues that the project will degrade water quality in Penobscot Bay, Belfast Bay, and the Gulf of Maine, and lists the revisions to the license which she believes should be made to ensure compliance with the Clean Water Act. Regarding her standing, Ms. Faubel briefly, and without providing detail, generally argues that the project will adversely affect her activities including swimming and the purchase of local seafood.

The requirements for filing an appeal of a licensing decision of the Commissioner are set forth in the Department's Rule Chapter 2, *Rule Concerning the Processing of Applications and Other Administrative*

Matters (Chapter 2). While all interested persons may comment on an application while it is being reviewed by the Department, and the Department accepts and considers all such comments prior to rendering a decision, State law and Chapter 2 limit those who can appeal a Commissioner's licensing decision to aggrieved persons. 38 M.R.S. § 341-D(4); Chapter 2 § 24. Chapter 2 § 1(B) defines an "aggrieved person" as:

[a]ny person whom the Board determines may suffer particularized injury as a result of a licensing or other decision. The Board will interpret and apply the term "aggrieved person," whenever it appears in statute or rule, consistent with Maine state court decisions that address judicial standing requirements for appeals of final agency action.

Maine's highest court has held that "[a] particularized injury occurs when a judgment or order adversely and directly affects a party's property, pecuniary, or personal rights," *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18, 973 A.2d 735, that "[a] person suffers a particularized injury only when that person suffers injury or harm that is "in fact distinct from the harm experienced by the public at large,"" *id.* (quoting *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984)), and that the person filing the appeal has the burden of proving that they meet the definition of an aggrieved person, *id.* at ¶ 14.

In considering the motion to dismiss, I note that Ms. Faubel resides a considerable distance from the site of the proposed project and has not asserted that she utilizes the waters of the Penobscot River in the vicinity of the proposed project. While Ms. Faubel believes that the Commissioner's decision is deficient in certain respects, she has not demonstrated that her property in Belfast, her pecuniary (financial) rights, or her personal rights will be adversely and directly affected by the Commissioner's licensing decision in this matter, or alleged that she will suffer injury or harm from the licensing decision in any way that is distinct from harm that would be suffered by the general public. Therefore, Ms. Faubel has not demonstrated that she is an "aggrieved person" under Department rules and Maine law. Accordingly, Whole Oceans' motion to dismiss Ms. Faubel's appeal for lack of standing as an aggrieved person is granted, and the appeal is dismissed.

This decision dismissing Ms. Faubel's appeal for lack of standing as an aggrieved person may be appealed to the full Board. Any such appeal must be filed with the Board by Friday, January 25, 2019 at 5:00 pm.

In response to a request from Whole Oceans and in the interest of conserving resources, the deadline for Whole Oceans' comment on the admissibility of Ms. Faubel's proposed supplemental evidence is stayed pending resolution of any appeal of this dismissal to the full Board.

If you have any questions, you may contact Cynthia Bertocci, Board Executive Analyst, at (207) 287-2452 or Scott Boak, Assistant Attorney General, at (207) 626-8566.

Sincerely,



James W. Parker, Chair
Board of Environmental Protection

cc: Service List