

STATE OF MAINE  
SUPREME JUDICIAL COURT SITTING AS THE LAW COURT  
Docket No. Ken-12-574

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THANKS BUT NO TANK, et al.	)	
	)	
Appellants,	)	<b>APPELLANTS' MOTION</b>
	)	<b>FOR DECLARATORY JUDGMENT</b>
v.	)	<b>VOIDING RECENT PERMIT</b>
	)	<b>MODIFICATIONS</b>
MAINE DEPARTMENT OF	)	<b>and</b>
ENVIRONMENTAL PROTECTION	)	<b>ENJOINING FURTHER PERMIT</b>
	)	<b>MODIFICATIONS DURING THE</b>
and	)	<b>PENDANCY OF THIS APPEAL</b>
	)	
DCP MIDSTREAM PARTNERS, LP,	)	
	)	
Appellees.	)	

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**APPELLANTS' MOTION TO VACATE RECENT MODIFICATIONS TO**  
**THE PERMIT THAT IS THE SUBJECT OF THIS APPEAL**  
**AND**  
**TO ENJOIN ANY FURTHER MODIFICATIONS**  
**DURING THE PENDANCY OF THIS APPEAL**

On December 2, 2011, in the above-captioned Rule 80C appeal, Appellants challenged final agency action by the Maine Department of Environmental Protection (“DEP” or “Department”) granting Permit No. L-25359 to construct a marine import, storage, and distribution terminal for liquefied petroleum gas (“LPG”) at Mack Point, in Searsport, Maine. Under the longstanding precedents of this Court, once the appeal was filed, the Department was divested of its jurisdiction to reconsider, amend or modify that permit. *See, e.g., York Hosp. v. Dep’t of Health and Human Servs.*, 2008 ME 165, ¶33 (“‘appeal terminates the authority of the tribunal to modify its decision’”)(quoting *Gagne v. City of Lewiston*, 281 A.2d 579 (Me. 1971)). Yet, a year later, on December 11, 2012, over Appellants’ jurisdictional and substantive objections, the Department issued a second “Findings of Fact and Order,” modifying Permit No.

L-25359 in two fundamental ways. First, it modified the permit to re-route a mile-long transfer pipeline linking the deep-water pier that would receive ocean-going LPG supertankers and the terminal's 22.7 million gallon LPG storage tank, so that the pipeline would bisect the existing Irving and Sprague fuel tank farm, thus increasing the risks and consequences a major industrial accident would pose to the environment and to existing uses. Second it transferred Permit No. L-25359 from the original applicant, Appellee DCP Midstream Partners, LP, to a fourth-tier subsidiary shell company, DCP Searsport LLC (together as "DCP" or "Applicants"), with unknown and unrevealed assets. This transfer effectively "ring fences" DCP Midstream Partners, LP, with several layers of limited liability protection, thus limiting Appellants' and others' ability to hold DCP Midstream Partners, LP, liable for damages in the event of an accident at this facility. (See Department of Environmental Protection, *Department Order in the Matter of DCP Searsport, LLC*, Permit No. L-25359, Dec. 11, 2012, attached as Ex. A.)

DEP's action, modifying and transferring Permit No. L-25359 while that permit was under the exclusive jurisdiction of this Court, was and is improper, unauthorized, and will upset the stability of the decision currently undergoing review. It also forces the absurd result that, to preserve their rights, Appellants must now file a *second appeal* of the same permit, for the same project, on essentially the same grounds, and in the same Superior Court, even as their first appeal remains pending in this Court. Accordingly, to prevent this sort of administrative and judicial chaos, and waste of limited resources, Appellants request that this Court declare the Department's December 11, 2012, *Findings of Fact and Order* null and void because it was entered in the absence of jurisdiction, and enjoin the Department from upholding the modification or further modifying Permit No. L-25359 during the pendency of this appeal.

### **BACKGROUND**

On Oct. 24, 2011, the Department of Environmental Protection issued a permit authorizing DCP Midstream Partners, LP, to construct a \$40 million LPG shipping terminal, bulk storage tank, and truck and rail distribution facility on approximately 48 acres on Mack Point in

Searsport, Maine. The facility would include a deepwater pier and unloading facility capable of receiving ocean-going LPG tankers, a mile-long pipeline to a 22.7 million gallon cryogenic LPG storage tank and a 90,000 gallon pressurized LPG storage tank, together with a vast array of LPG-fueled heaters, pipes, valves, flares, pumps, refrigeration units, three truck load-out racks and one railcar load-out rack, and other ancillary equipment (together as the “Terminal”). (R. 6:1-7)

This would be the largest LPG Terminal on the East Coast, yet is proposed to be built in the midst of a well-developed mixed-use area along Route One in Searsport, and would abut several residences, a motel and restaurant.<sup>1</sup> (R. 6; App. 25B). Appellants are an ad-hoc coalition of residents and small business owners that formed Thanks But No Tank (“TBNT”) as an incorporated Maine association to support, protect, and maintain the region’s economy, environment, scenic character and quality of life. TBNT’s members, which include most of the individually named Appellants in this case, and many others, are concerned that this extreme industrial activity poses severe risks to the environment, existing natural-resource based uses, and the public health, safety and welfare. In their comments to the Department and in their claims before the lower court, Appellees have argued that this project violates the Site Location of Development (“Site Law”) and Natural Resource Protection Acts (“NRPA”), 38 M.R.S.A. §§

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<sup>1</sup> Two Appellants – Albert Hall and Tom Gocze – own properties abutting the proposed LPG Terminal, and for this reason were granted standing by the Superior Court. (Superior Court Order at 4-6, 17). In addition, several Appellants own residential and business properties in the immediate neighborhood of the proposed project, *see Friends of Lincoln Lakes v. Town of Lincoln*, 2010 ME 78, ¶ 14, 2 A.3d 284 (standing is liberally granted to abutters and neighbors), and all Appellants are directly and personally affected. *See Uliano v. Bd. of Env’t’l Prot.*, 2009 ME 89, ¶ 30, n.7 (in addition to property and pecuniary interests, aesthetic interests are sufficient to confer standing to litigate under environmental statutes). Appellants intend to brief their challenge to the Superior Court’s dismissal of TBNT and the remaining TBNT members as part of Appellants’ primary brief to the full Court (*see* Notice of Appeal at 1) and, for purposes of this motion, rely upon the uncontested standing of Hall and Gocze, *see Grand Beach Ass’n v. Old Orchard Beach*, 516 A. 2d 551, 554 n.1 (Me. 1986) (allowing multi-appellant appeal to proceed where at least one appellant has standing). Nonetheless, Appellants are prepared to also brief standing issues at this time if so requested.

480-A *et seq.* and 481 *et seq.*, because it does not fit harmoniously within the existing natural environment and that – as a direct result of the reduced scenic character, heavy industrialization, risk of severe accident, increased pollution, and lower quality of life – the project would devastate the community and economy of the region, make life for those in close proximity to the facility unviable and their homes and businesses unmerchantable.

To protect their property and personal and pecuniary interests, Appellants filed a Rule 80C appeal in Kennebec County Superior Court on Dec. 2, 2011. That appeal raised numerous claims, including – relevant to this motion – that under the Site Law and NRPA the Department is statutorily obligated to consider the potentially very severe impacts an accident, or the increased risk of an accident, may have upon the environment, existing navigational and recreational uses, and upon the public health, safety and welfare. *See* 38 M.R.S.A § 480-D(1) (NRPA) and *id.* §§ 481, 484(1) (Site Law); *see also Friedman v. Public Utilities Commission*, 2012 ME 90, ¶¶ 7-11, 48 A.3d 794, 798-801 (Me. 2012) (where agency is statutorily charged with protecting public safety, it is reversible error to issue order without expressly determining the merits of health and safety concerns raised by complainants).

While that appeal was pending, on October 22, 2012, DCP Midstream Partners, LP, and DCP Searsport LLC, jointly filed an application with DEP to transfer Permit No. L-25359 to DCP Searsport LLC and to substantively modify the permit by changing the route of the mile-long transfer pipeline that would carry liquefied petroleum gas from tanker ships docked in Penobscot Bay to the 22.7 million gallon cryogenic LPG bulk storage tank located along Route One. The original route followed the train tracks along Long Cove. (R. 7; 3-2). The new route would bisect the existing Irving and Sprague fuel tank farms (31 tanks containing approximately 55 million gallons of volatile petroleum fuels and chemicals) and, as shown in the application, would be elevated above ground except where traversing private and town roads and rail tracks.

(See DCP Searsport, LLC, *Minor Revision Application*, “Fig. 1 Transfer Pipe Route Comparison.”)<sup>2</sup> Although the requested amendment is characterized by DCP and the Department, as a “minor revision,” Appellants are concerned that the pipeline route amendment will exponentially increase the safety risks posed by this proposed development to the environment, wildlife, existing resource-based uses, and the public health, safety and welfare. (Ex. B, Motion for Writ of Prohibition Ex. 3) (*See also* TBNT Comments, Ex. C).

Appellants filed objections with the Department (*id.*) and, when the Department demurred, filed a Motion for Writ of Prohibition with the Superior Court. (Ex. B.) In the meantime, the Superior Court Order issued its decision on November 13, 2012, denying Appellants claims. Appellants timely filed an appeal with this Court on December 4, 2012. As of the filing of the notice of appeal, the Superior Court had taken no action on the pending Petition for Writ of Prohibition and Appellees had filed no response to that Petition.

In its filings with both the Department and the Superior Court, Appellants cited the controlling precedents of the Law Court that unequivocally hold that DEP was divested of its jurisdiction to amend or modify this permit once the original appeal was filed. (Ex. B.) Nonetheless, on Dec. 11, 2012, the Department issued its second final “Findings of Fact and Order” approving the modification and transfer of Permit No. L-25359. (Ex. A.)

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<sup>2</sup> DCP Searsport LLC’s application was included as exhibit 2 in Appellants’ *Motion for Writ of Prohibition* originally filed with the Kennebec County Superior Court in this docket on Nov. 16, 2012 and which is attached here as Ex. B.

## ARGUMENT

### **1. THIS COURT HAS JURISDICTION TO CONSIDER THIS REQUEST.**

This Court has jurisdiction over this matter pursuant to the Maine Administrative Procedures Act (“APA”), 5 M.R.S.A. §§ 11001 and 11008,<sup>3</sup> the Uniform Declaratory Judgments Act, 14 M.R.S.A. § 5951, *et seq.*,<sup>4</sup> 14 M.R.S.A. § 5301,<sup>5</sup> and 4 M.R.S.A. § 7.<sup>6</sup>

Additionally, Petitioners respectfully submit that the plenary application of the common law extraordinary writs of mandamus and prohibition, which have been incorporated in M.R.Civ.P. 80B, pursuant to M.R.Civ.P. 81(c),<sup>7</sup> are appropriate remedies in this case to preserve

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<sup>3</sup> The Maine APA authorizes aggrieved parties to seek judicial review of final agency actions, thereby transferring jurisdiction over the challenged action from the executive to the judicial branch. 5 M.R.S.A. § 11001.

<sup>4</sup> The Maine Declaratory Judgments Act, 14 M.R.S.A. § 5953, provides that,

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

<sup>5</sup> 14 M.R.S.A. § 5301 provides in relevant part: “The Supreme Judicial Court and the Superior Court shall have and exercise concurrent original jurisdiction in proceedings in ... prohibition ... [and] ... mandamus....”

<sup>6</sup> 4 M.R.S.A. § 7 provides in relevant part:

The Supreme Judicial Court may exercise its jurisdiction according to the common law not inconsistent with the Constitution or any statute... It may issue all writs and processes, not within the exclusive jurisdiction of the Superior Court, necessary for the furtherance of justice or the execution of the laws in the name of the State....

<sup>7</sup> M.R.Civ.P. 81(c) provides that:

**(c) Scire Facias and Certain Extraordinary Writs Abolished.** The writs of scire facias, mandamus, prohibition, certiorari, and quo warranto are abolished. Review of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, shall be in accordance with procedure prescribed by Rule 80B. Any other relief heretofore available by any of such writs may be obtained by appropriate action or motion under the practice prescribed by these rules. In any proceedings for such review or relief in which an order that an agency or other party do or refrain from doing an act is sought, all provisions of these rules applicable to injunctions shall apply.

the *status quo* and to prevent the Department from acting in usurpation of this Court's jurisdiction. "Although the extraordinary writs of mandamus and prohibition have been abolished in Maine, *see* M.R.Civ.P. 81(c), relief in the nature of mandamus or prohibition 'may be obtained by appropriate action or motion under the practice prescribed by [the Maine Rules of Civil Procedure].' *Id.*" *Department of Corrections v. Superior Court*, 622 A.2d 1131, 1134 (Me. 1993) (invoking jurisdiction under 14 M.R.S.A. § 5301 and 4 M.R.S.A. § 7). *See also Hancock & Washington County Bar Ass'ns, et al. v. Superior Court*, 612 A.2d 847 (Me. 1992) (purpose of writ of prohibition is to keep an inferior court within the limits of its jurisdiction and prevent its encroachment on the jurisdiction of other tribunals) (citing *Curtis v. Cornish*, 109 Me. 384, 388, 84 A. 799, 800 (Me. 1912)); *Norton v. Emery*, 108 Me. 472, 476, 81 A. 671, 672 (Me. 1911) (writ of prohibition is an extraordinary judicial writ, directed to an inferior tribunal to prevent use or usurpation of judicial functions.)<sup>8</sup>

## **2. THE 2011 APPEAL IN THIS MATTER TERMINATED THE AUTHORITY OF DEP TO MODIFY PERMIT NO. L-25359.**

In Maine, as this Court has repeatedly explained, a valid appeal of final agency action divests a state administrative agency of jurisdiction over the challenged permit for purposes of reconsideration or modification:

We have clearly limited an agency's authority to exercise power over final agency actions that have been appealed. In *Gagne v. City of Lewiston*, 281 A.2d 579 (Me. 1971), we considered for the first time the authority of an agency to reconsider or modify its decision while an appeal was pending. We held "that the appeal terminates the authority of the tribunal to modify its decision unless the court remands the matter to the tribunal for its further action, thereby reviving its authority." *Gagne*, 281 A.2d at 583. The establishment of such a rule is in accord

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<sup>8</sup> In Maine, "[a]n agency's actions are quasi-judicial in nature when it adjudicates the rights of a party before it." *Dowey v. Sanford Housing Authority*, 516 A.2d 957, 960 (Me. 1986), *quoting*, *Lyons v. Board of Dir. of Div. of School Admin. Dist. No. 43*, 503 A.2d 233, 236 (Me. 1986).

with the reasoned concept that an appeal removes the matter from the administrative tribunal to the Superior Court. More importantly, the rule “[e]nsures the stability of the decision” while undergoing judicial review.” *Id.* (citations omitted).

This rule has been reaffirmed in *Eastern Maine Medical Center v. Health Care Finance Comm’n*, 601 A.2d 99, 101 (Me. 1992) (“[A]n appeal from final agency action automatically removes jurisdiction from the administrative agency to the court system”), and *Portland Sand & Gravel, Inc. v. Town of Gray*, 663 A.2d 41, 43 (Me. 1995) (“[A]n agency loses jurisdiction over a pending matter .... when a party aggrieved by a decision of the agency seeks direct judicial review of that decision in the Superior Court.”)....

...We have expressly held that modifications to agency decisions are unauthorized if the matter being modified is on appeal and the court has not directed the agency to take further action. *Gagne*, 281 A.2d at 583; *E. Me. Med. Ctr.*, 601 A.2d at 101.

*York Hosp. v. Department of Health and Human Services*, 2008 ME 165, ¶¶ 33-36, 959 A.2d 67, 74 (Me., 2008).

Accordingly, aside from authority to stay the effect of Permit L-25359 as necessary to preserve the *status quo*, 5 M.R.S.A. § 11004, the agency is without jurisdiction to modify or amend the permit while the appeal is pending. *Cf.* Maine R. Civ. P. 62(G) (limiting power of reviewing court only to actions appropriate to preserve the *status quo* or to ensure the effectiveness of the judgment while reviewing court’s order is undergoing appellate review); *see also, Tibbetts v. Tibbetts*, 406 A.2d 78, 80 (Me.1979) (“As a general rule the taking of an appeal has two consequences: (a) the trial court is divested of jurisdiction to take any action except in aid of the appeal; and (b) execution of the judgment is stayed while that appeal is pending.”)(construing former Rule 62(a)).

This Court has previously applied the *Gagne* rule to Department and Board of Environmental Protection proceedings. In the case of *Ethyl Corp. v. Adams*, 375 A. 2d 1065, 1067-69 (Me. 1977), the Board of Environmental Protection twice summarily denied an application for certification of a waste water pollution control facility, informing the applicant by

means of a letter written by Department staff. The applicant then appealed the denials to Superior Court. Subsequently, after an appeal of final agency action had been initiated, the Board of Environmental Protection issued its “Findings and Order” confirming the denial. *Id.* In making its decision, however, the Superior Court ignored the after-the-fact Findings and Order by the Board, on the theory that under *Gagne* post-appeal agency actions were taken without jurisdiction and were therefore null and void:

Although the court received the ‘Findings and Order’ into evidence ‘*de bene*,’ it disregarded them in reaching its judgment for the reason that they ‘represent Board action subsequent to the filing of the appeals. . . and cannot be used to vary or enlarge the statements of Board action prior to the appeals.’ In declining to give probative value to the Board’s ‘Findings and Order,’ the Justice correctly applied this Court’s reasoning in *Gagne v. Inhabitants of City of Lewiston, Me.*, 281 A.2d 579, 583 (1971)....

*Ethyl Corp. v. Adams*, 375 A. 2d at 1073.

The above precedents reflect the governing statutes under the Maine APA, which provides clear legislative direction authorizing appeals of final agency action. 5 M.R.S.A. § 11001. Agency jurisdiction is a legislative determination, *Valente v. Board of Env’tl Prot.*, 461 A.2d 716, 718 (Me. 1983), and, when an APA appeal is filed, the necessary effect is to transfer jurisdiction over the matter from the executive to the judicial branch. *See Tomer v. Maine Human Rights Com’n*, 2008 ME 190, ¶ 8 (“The authority granted to courts pursuant to the APA allowing judicial review of ‘final agency actions’ is a jurisdictional issue.”).

This is as it must be. Otherwise, if an agency could modify a permit while it was the subject of a pending appeal, it would create a scenario where, as here, just to preserve its rights, an appellant would be forced to file a second appeal of the same permit, for the same project, on essentially the same grounds or additional grounds, and in the same court as the first appeal – while the first appeal remains pending. This is an absurd and wasteful result. If final agency actions can be modified while undergoing judicial review under the APA, appellants and the

judiciary would have a constantly moving target rather than a truly final order to review. Appellants would be forced to file repeated, multiple appeals as modifications are permitted. Judicial dockets would be subjected to administrative chaos, and interested parties would be overwhelmed by unreasonable and potentially crushing legal expenses. The legislature could never have intended the APA to subject the courts and interested parties to such a confusing, duplicative, and wasteful process. *See Tenants Harbor v. Dept. of Env't'l. Prot.*, 2011 ME 6, ¶ 9, 10 A.3d 722, 726 (Me. 2011) (Courts construe statutes to “avoid absurd, inconsistent, illogical, or unreasonable results.”).

Here, Appellants’ timely 2011 appeal of the Department’s Order issuing Permit No. L-25359 to DCP Midstream Partners, LP, formally transferred jurisdiction over the substance of this permit from the executive to the judicial branch. 5 M.R.S.A. § 11001. Accordingly, DEP patently and unambiguously lacked jurisdiction to modify and transfer that permit in December 2012, and the Court should vacate and revoke the modification and transfer as null and void for want of jurisdiction.

**3. THE MODIFIED PERMIT DIRECTLY IMPACTS ISSUES RAISED IN THE ORIGINAL APPEAL AND, IF LEFT INTACT, WILL RESULT IN JUDICIAL AND ADMINISTRATIVE CHAOS.**

The Department and DCP have raised three arguments why the modification and transfer should be allowed to go forward even as the original permit is undergoing judicial review. First, Appellee “DCP” contends that the modification is unrelated to the issues on appeal in the original permit, and therefore the modification is not foreclosed. Second, the Department and DCP contend that because the original permit was not stayed and remains effective, the Department necessarily retains regulatory authority to process modifications and transfer

requests of the permit. Third, DCP argues that the jurisdictional bar on modifications applies only to major modification – not to “minor revisions.” For the reasons set forth below, each of these contentions is without merit.

*a. The 2012 Modifications Directly Impact Issues Raised In The 2011 Appeal.*

The legal rule divesting DEP of jurisdiction over this permit has particular force with regard to the Department’s 2012 modified *Findings of Fact and Order*, because that Order directly affects, modifies, and exacerbates issues raised in Appellants’ pending 2011 appeal of the original. Accordingly, action is needed not only to preserve this Court’s exclusive jurisdiction, but also to preserve the stability of the decision on appeal.

Specifically, Count II of the appeal challenges the Department’s refusal to consider impacts to the environment, existing uses *and the public safety and welfare* due to the potential for “fires, leaks, and explosions” from the propane terminal facility. (Pl. Comp. at ¶¶ 55, 56, 63, 69-74). Appellants fully briefed this issue at the Superior Court level, stating that:

The proposed DCP Terminal will severely impact and ... adversely affect existing uses of the natural environment and the public health, safety and welfare, [38 M.R.S.A.] §§ 481, 484(1) (Site Location Law), due to both the risk of an accident or a terrorist attack and to mandatory federal safety and security procedures.

Petitioners and many other members of the public raised concerns regarding the risk of accidents, security issues, and the impact federal safety and security requirements will have upon recreation, fishing, navigation, and existing natural resource-based uses. The agency, however, utterly and illegally ignored these very serious concerns. *See, e.g.* Order at 14 (“The Department did not identify any other issues involving navigational uses [or] habitat or fisheries...”). What’s worse, it issued the Order without any evidence in the record regarding potential impacts of an accident, or of federally mandated safety and security precautions and exclusion zones. Nor is there any evidence in the record regarding whether – given the extreme safety risks the project poses to adjacent public and private properties and waters – the development can fit harmoniously into the existing natural environment such that it will not adversely affect existing uses protected

under the Site Location Law. Rather, the Department simply refused to consider these issues.

(Appellants' Superior Court Brief, at 31). *See also* Appellants' Superior Court Reply Brief, at 22-25; *Friedman*, 2012 ME 90, ¶¶ 7-11, 48 A.3d 794 (where agency is statutorily charged with protecting public safety, it is reversible error to issue order without expressly determining the merits of health and safety concerns raised by complainants). The Department, in contrast, argued below that, under the Site Location of Development and Natural Resource Protection Acts, it is without authority to consider the risk of an accident. (DEP Superior Court Brief at 13).

Thus, the question of the scope of the Department's review of Permit No. L-25359 – and whether it's refusal to consider the risk and potential impacts of an accident upon the environment, existing uses, and public health, safety, and welfare is reversible error – is squarely before this Court in the pending appeal of the Petitioners' *first* challenge to Permit No. L-25359. The modification and transfer alters and destabilizes the decision being reviewed by bringing new facts and circumstances and new arguments into the mix. As described in Petitioners' comments to the Department objecting to the proposed modification and transfer, relocating the propane transfer pipeline so that it bisects the existing Irving and Sprague fuel storage tank farms – which contain approximately 31 fuel storage tanks and 55 million gallons of highly volatile petrochemicals – would exacerbate the risk and impacts of an accident due to the potential for multiple or cascading accidents involving either source.<sup>9</sup> This, in turn, increases the potential impacts not only to nearby properties and the public, but also to the terrestrial and aquatic environments, wildlife and existing recreational and natural resource-based uses protected under the Site Location of Development and the Natural Resources Protection Acts. It also increases

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<sup>9</sup> *See, e.g.*, Comments of TBNT member Tara Hollander documenting potential for small-scale accident to snowball into a major industrial catastrophe capable of destroying both the LPG terminal and the adjacent tank farm, including images of a similar tank farm destroyed in a domino-effect accident in England. Attached as Ex. C. *See also* Ex. B.

the risks posed to the public health, safety and welfare. 38 M.R.S.A. §§ 480-A, 481. Likewise, transferring the original permit to a separate, limited liability shell company, that may be intentionally under-capitalized so as to shield project investors from liability in the event of a major accident, raises new concerns over this new entity's financial capacity to safely operate the facility and whether it can (or will) cover the costs of any future damages and remediation of environmental impacts from an accident or from abandonment of the project when it is no longer profitable.

Thus, the modification alters certain facts and raises new factual and legal issues that were not addressed in the original permit, not considered by the Superior Court, and which involve after-the-fact additions to the administrative record. It is simply not possible for the Courts or Appellants to litigate a moving target; nor is it appropriate or fair to require Appellants to file repetitive, duplicative appeals just to protect their rights. Nor would it make any sense to allow simultaneous duplicative dockets challenging multiple permit variations in the same project, or to hold up the pending appeal so that an appeal of the modified permit could be filed, consolidated, and the whole case re-briefed (especially now that the two cases would be at different levels of the court system).

In short, were the Court to construe the APA and the case law to allow modifications and duplicative appeals of Permit No. L-25359, management of this case would become an unmanageable task and an inappropriate waste of the limited resources of the courts, the agency, and the parties. Accordingly, Appellants respectfully ask that the Court hold to its prior rule and order that, unless and until this Court upholds the challenged permit or remands it to the agency, "thereby reviving its authority," *Gagne*, 281 A.2d at 583, the Department is without jurisdiction to make modifications and that the Department's December 11, 2012, "Findings of Fact and Order" is null and void because it was entered in the absence of jurisdiction.

*b. The Department's Rules Do Not Provide It With Authority To Modify Permits Under Appeal.*

Second, the Department rejected Appellants' request to defer processing the application pending a final determination by the courts in the pending appeal of Permit No L-25359, on grounds that the "permit is in effect and the Department necessarily retains regulatory authority with respect to that permit." (Letter from Commissioner Aho to Appellants, Nov. 8, 2012, attached as Ex. 1 to Ex. B).

The Commissioner states that the "DCP" applicants' request for a transfer was "legally required" under the Department's Chapter 2 rules because of the "change in ownership" of the underlying property. (*Id.*) The rules, however, do not mandate the Department act on that request (particularly if it does not have jurisdiction to do so). Rather, the rules simply provide that "[p]ending determination on the application for approval of a transfer, the transferee shall abide by all of the conditions of such license, and is jointly or severally liable with the original licensee for any violation of the terms and conditions thereof." 06-096 CMR, ch 2, § 21(C)(1). Thus, action was not "required" by this or any other DEP rule.

Moreover, the transaction that precipitated the "change in ownership" was not an arms length transaction between unrelated entities. Rather, it is part of a transparent effort to "ring-fence" the liabilities for this dangerous facility into a potentially under-capitalized, limited liability company (DCP Searsport LLC) that is a subsidiary of the permit holder, Appellee DCP Midstream Partners, LP. A litigant cannot interfere with the jurisdiction of this Court during the pendency of an appeal by simply manufacturing a transfer of its rights to a wholly-owned subsidiary, with dubious assets.

The Department's position is also flawed because it conflates the transfer application with the application to *modify* the permit. They are quite different. To the extent that the

Department might retain jurisdiction to process the *transfer* application – and Appellants contend it has none since this determination is substantive not ministerial – nothing in the Department’s rules provide it with “regulatory authority” to modify a permit under appeal. Rather, the APA, 5 M.R.S.A. § 11001, and four decades of precedents of this Court definitively establish that the agency’s jurisdiction ceases upon appeal of a final agency action and that it has no authority to reconsider or modify a permit while it is under appeal. *York Hosp.*, 2008 ME 165, ¶¶ 33-36.

*c. The 2012 Modification And Transfer Is Not Minor, Nor Is There Any Exemption From The Gagne Rule That Would Allow The Department To Make So-Called Minor Modifications To A Permit Undergoing Appeal.*

Third, DCP argues that unlike *York Hospital*, the modification and transfer here are minor revisions, and that the Department retains jurisdiction to make minor changes to a permit pending appeal. There is no “minor revision” exception from the rule transferring jurisdiction from the executive to the judicial branch upon timely filing of an appeal. As noted in *Ethyl Corp. v. Adams* – which involved no modifications whatsoever, but only issuance of a post-appeal “Findings and Order” explaining and defending actions taken prior to the appeal – the Court refused to consider *any* Board actions taken after an appeal had deprived it of jurisdiction. 375 A. 2d at 1073. Any other approach would be unworkable and jeopardizes the stability of the matter under review. Otherwise, it would open the door for the Department to simply classify a modification as “minor,” as it did here, regardless of the potential impacts. Moreover, the key issue from a jurisdictional perspective is not whether the Department thinks the modification is minor, but whether the modification directly impacts issues raised in the original appeal.

In this case, the issues raised by the transfer and modification are not minor or merely procedural; nor are they unrelated to the issues on appeal. The financial and technical capacity of the project developer is a central performance standard under the Site Law, 38 M.R.S.A. § 484(1), and the Department’s rules. 06-096 CMR, ch. 373. Here, the 2012 transfer of the permit

brings into question the scope of the financial capacity standard and the Department's overall review – i.e. must the Department evaluate the applicant's financial capacity (or require a performance bond) to cover the cost of damages to the environment, private property and the public health, safety and welfare, in the event of an accident? Therefore, since the question of whether the Department's scope of review must consider the risk and consequences of a potential accident is one of the issues now before this Court, it was premature and *ultra vires* for the Department to act on the transfer application while this appeal is pending.

Likewise, the pipeline siting modification exponentially increases the already severe public and environmental safety risks posed by this proposed facility – significantly increasing the risk that a leak in the elevated pipeline<sup>10</sup> could cause an accident at the tank farm as well as the propane terminal, potentially leading to a cascading and even larger and more damaging accident. Rather than a “minor” issue, the transfer pipeline is one of the most vulnerable features of the design of this proposed facility. As noted in Appellants' letters to the Department asking it to desist from processing the application, this is the exact scenario that led to one of the worst industrial accidents in history – the 1984 disaster in Mexico City's PEMEX LPG Terminal. (Ex. B, at Ex. 3, p. 2; Ex. C.) Accordingly, because the Department was without jurisdiction to modify or transfer Permit No. L-25359, and because the modification and transfer implicates important and significant issues that are central to the pending appeal, the Court should declare the modification and transfer null and void.

### **CONCLUSION**

For the foregoing reasons, Appellants respectfully submit that this Court should declare the Department's December 11, 2012, Findings of Fact and Order null and void because it was

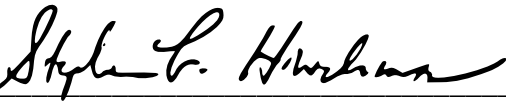
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<sup>10</sup> In its December 11, 2012, Findings of Facts and Order, DEP erroneously states that the mile-long pipeline is “primarily buried.” (Ex. A at p. 2). However, this pipeline is actually designed to sit above-ground for most of its route through the fuel tank farm.. (Ex. B, at Ex. 2, 1-3 to 1-4).

entered in the absence of jurisdiction, and enjoin the Department from further modifying Permit No. L-25359 during the pendency of this appeal.

Respectfully submitted,

December \_\_\_\_, 2012

By:   
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**STATE OF MAINE**  
**SUPREME JUDICIAL COURT SITTING AS THE LAW COURT**  
**Docket No. Ken-12-574**

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THANKS BUT NO TANK, et al.	)	
	)	
Appellants,	)	
	)	<b>ORDER</b>
v.	)	
	)	
MAINE DEPARTMENT OF	)	
ENVIRONMENTAL PROTECTION	)	
	)	
and	)	
	)	
DCP MIDSTREAM PARTNERS, LP,	)	
	)	
Appellees.	)	

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Appellants’ motion to vacate Appellee Department of Environmental Protection’s Dec. 11, 2012 Findings of Fact and Order (“Order”) modifying and transferring Permit No. L-25359 is granted. During the pendency of this appeal, the Department of Environmental Protection shall not issue any other Order transferring or modifying Permit No. L-25239.

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Dated

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Justice, Maine Supreme Judicial Court

## CERTIFICATE OF SERVICE

I hereby certify that on Dec. \_\_\_\_, 2012, I served a copy of this **MOTION TO VACATE RECENT MODIFICATIONS TO THE PERMIT THAT IS THE SUBJECT OF THIS APPEAL AND TO ENJOIN ANY FURTHER MODIFICATIONS DURING THE PENDANCY OF THIS APPEAL** upon the following:

Maine Department of Environmental Protection  
c/o Margaret Bensinger,  
Office of the Maine Attorney General  
6 State House Station  
Augusta, ME 04333-0006

DCP Midstream Partners, LP  
c/o James T. Kilbreth, Esq.  
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By: \_\_\_\_\_  
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### List of Exhibits

- EX. A: Department of Environmental Protection, *Department Order in the Matter of DCP Searsport, LLC*, Permit No. L-25359, Dec. 11, 2012
- EX. B: Appellants *Request for Writ of Prohibition*, filed in the Kennebec County Superior Court, Nov. 16, 2012, together with the following exhibits:
- Ex. 1: Letter from Patricia Aho, Commissioner, Maine Department of Transportation Denying Petitioners' Request to Stop Processing the Minor Revision and Transfer Application for Permit No. L-25359 (Dated Oct. 8, 2012, received Oct. 12, 2012),  
*and*  
Interested Party Letter regarding DCP Searsport, LLC, L-25359-26-E-T & L-25359 26-F-M, Searsport (Oct. 15, 2012)
- Ex. 2: Excerpts from DCP Midstream Partners, LP, and DCP Searsport LLC, Searsport, Maine Application for Transfer and Minor Revision of DEP Permit No. L-25359 (filed Oct. 22, 2012).
- Ex. 3: Petitioners Letters of Nov. 1, 2012 and Nov. 6, 2012
- Ex. 4: DCP Searsport LLC and DCP Midstream Partners, LP, Letters of Nov. 5, 2012 with exhibits
- EX. C: Comments of *Thanks But No Tank* to Jim Beyer, Maine Department of Environmental Protection, regarding the Application for Transfer and Minor Revision Filed by DCP Searsport LLC and DCP Midstream Partners, LP on October 22, 2012, Permit No. L25359 (Nov. 30, 2012).