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September 3, 2010

Via Federal Express
Penny Reckards, Clerk
Knox County Superior Court
Knox County Courthouse
62 Union Street
Rockland, ME 04841

Re: Ronald Huber v. Bureau of Parks and Lands - Maine Department of Conservation
Docket No.: AP-10-002

Dear Ms. Reckards:

On behalf of the Intervenor, University of Maine System, enclosed for filing please find our Brief in Opposition to Petitioner's Rule 80C Petition for Review of Final Agency Action by the Maine Department of Conservation.

Thank you for your attention to this matter. Please don't hesitate to contact me should you have any questions.

Sincerely,

Jeffrey A. Thaler

JT/zpm
Enclosure
cc w/encl. (via E-Mail & U.S. Mail): Ronald Huber, Petitioner
Amy B. Mills, Assistant Attorney General

STATE OF MAINE
KNOX, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-10-02

RONALD HUBER, Petitioner v. BUREAU OF PARKS AND LANDS, OF MAINE DEPARTMENT OF CONSERVATION, Respondent and UNIVERSITY OF MAINE SYSTEM, Intervenor	)	RULE 80C BRIEF OF INTERVENOR UNIVERSITY OF MAINE SYSTEM OPPOSING PETITION FOR REVIEW

NOW COMES the Intervenor, the University of Maine System (hereinafter "the University"), and submits its brief in opposition to Petitioner's Rule 80C Petition for Review of Final Agency Action by the Maine Department of Conservation, and states as follows:

Introduction

The University submits this brief in support of the State's opposition to Petitioner's Rule 80C Petition for Review of Final Agency Action. The University adopts, and incorporates by reference herein, the State's arguments set forth in its brief on non-standing issues. Here we address only the narrow threshold issue of Petitioner Richard Huber's standing to petition this Court for relief from the decision of the Bureau of Parks and Lands to designate the Monhegan Offshore Wind Energy Test Area and the Maine Offshore Wind Research Center pursuant to 12 M.R.S.A. § 1868. Despite the Petitioner's assertion of aesthetic and religious interests in the

areas surrounding Monhegan Island, Petitioner has failed to allege sufficient facts to establish a particularized and direct injury necessary for standing under the Maine Administrative Procedure Act (hereafter "MAPA"), 5 M.R.S.A. 8001, *et seq.* Consequently, Mr. Huber's Petition must be dismissed.

Factual and Procedural Background

The University directs the Court to the detailed factual and procedural background set forth in the State's brief, and incorporates those facts herein. For the purpose of analyzing standing, the pertinent facts are those alleged in Mr. Huber's pleadings before this Court.

Argument

I. Standard of Review

"Standing of a party to maintain a legal action is a 'threshold issue' and our courts are only open to those who meet this basic requirement." Ricci v. Superintendent, Bureau of Banking, 485 A.2d 966, 968 (Me. 1984) (*quoting* Fletcher v. Feeney, 400 A.2d 1084, 1089 (Me. 1979)). "Because standing to sue in Maine is prudential, rather than of constitutional dimension, [the Court] may limit access to the courts to those best suited to assert a particular claim." Mortgage Electronic Registration Systems, Inc. v. Saunders, 2010 ME 79, ¶ 14, __A.2d __ (quotations and citations omitted). "A party's standing to bring a Rule 80C appeal is reviewed de novo." Lindemann v. Comm'n on Governmental Ethics & Election Practices, 2008 ME 187, ¶7, 961 A.2d 538, 541.

II. Petitioner Lacks Standing to Appeal the Bureau's Designation Under the Maine Administrative Procedure Act, 5 M.R.S.A. §§ 8001, et seq.

Mr. Huber appeals the December 14, 2009, decision by the Director of the Maine Bureau of Parks and Lands (hereafter the "Bureau"), made pursuant to 12 M.R.S.A. § 1868, to designate an area of submerged lands within state waters located approximately 2-3 miles south and seaward of Monhegan Island in Lincoln County as an Offshore Wind Energy Test Area and as the Maine Offshore Wind Research Center (hereafter collectively the "Monhegan Test Area"). Pursuant to 12 M.R.S.A. § 1868(4), the Bureau's designation constitutes final agency action. Mortgage Electronic Registration Systems, supra at ¶ 7.

"The right to appeal from an administrative decision is governed by statute. Whether a party has standing depends on the wording of the specific statute involved." Nelson v. Bayroot, LLC, 2008 ME 91, ¶ 9, 953 A.2d 378, 381 (*citing* Consumers for Affordable Health Care, Inc. v. Superintendent of Ins., 2002 ME 158, ¶ 15, 809 A.2d 1233, 1238). Other than to characterize the contested designation as "final agency action," 12 M.R.S.A. § 1868 does not expressly allow or preclude judicial review of the Bureau's actions. Therefore, the Maine Administrative Procedure Act ("MAPA") governs judicial review of the Bureau's final agency actions:

> 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.

5 M.R.S.A. § 11001(1). "'Aggrieved,' while not defined in MAPA, has been previously defined by [the Law] Court as requiring particularized injury—that is, the agency action must operate 'prejudicially and directly upon the party's property, pecuniary or personal rights.'" Lindemann, 2008 ME 187, ¶ 14, 961 A.2d at 543 (*quoting* Nelson, 2008 ME 91, ¶ 10, 953 A.2d at 382). In addition, particularized injury must be "distinct from any injury experienced by the public at

large." Id. Thus, in order to have standing to bring the instant appeal, Petitioner must demonstrate a distinct particularized injury to his property, pecuniary or personal rights.

Reading Mr. Huber's Petition and Brief broadly, Mr. Huber argues that he has standing to appeal the Bureau's designation based on two alleged injuries: an aesthetic injury in the alleged impact of designating the Monhegan Test Area on scenic vistas observable from portions of Monhegan Island, and an injury to Mr. Huber's Free Exercise right to practice his faith-based stewardship over wild places and wild marine life in the waters surrounding Monhegan Island. As set forth below, neither of Mr. Huber's alleged injuries meet the required standard of a direct particularized injury to Mr. Huber's property, pecuniary or personal rights. As such, Mr. Huber lacks standing to appeal the Bureau's designation, and Mr. Huber's Petition should be dismissed.

A. Designation of the Monhegan Test Area Caused Petitioner No Particularized Injury.

As a threshold matter, Petitioner misapprehends the legal effect of the Bureau's designation of the Monhegan Test Area, and therefore cannot show a particularized injury to his personal rights. Contrary to Petitioner's apprehensions,[1] as a matter of law, the Bureau's designation of the Monhegan Test Area did not operate to permit the construction or operation of any structures or wind energy demonstration projects in the Monhegan Test Area. Pursuant to 12 M.R.S.A. § 1868, the Bureau merely designated certain geographical areas of state-owned submerged lands, within which appropriate wind energy demonstration projects will be eligible to apply for a special permit. 12 M.R.S.A. § 1868(1) ("An offshore wind energy test area

[1] Petitioner alleges that "[t]he final agency action . . . will significantly and irrevocably degrade scenic and other landscape level conservation assets of state and national significance along the southern face of Monhegan." Petition for Review of Final Agency Action by the Maine Department of Conservation (hereafter the "Petition") at ¶ 3. In support of this allegation, Petitioner asserts that "The wind energy devices would be fully visible from Lobster Cove and the south-facing elevations of Monhegan Island by day, and would be lighted with blinking safety lights at night." Petitioner's Brief at 19. Petitioner presents no factual support for his assertion that wind energy devises would be "fully visible" from Monhegan Island.

identified under this subsection must be a geographic area on state-owned submerged lands suitable for offshore wind energy demonstration projects *constructed and operated in accordance with Title 38, section 480-HH.*") (emphasis added). Before any energy-related activities are initiated in the Monhegan Test Area, an applicant must apply for, and receive, a general permit for an offshore wind energy demonstration project pursuant to 38 M.R.S.A. § 480-HH. Consequently, contrary to Petitioner's argument, the Bureau's designation does **not** "significantly and irrevocably degrade scenic and other landscape level conservation assets" of Monhegan Island or disturb the wild marine life in the Monhegan Test Area.

As set forth in 38 M.R.S.A. § 480-HH(3), the application process for a general permit to construct and operate an offshore wind energy demonstration project in the Monhegan Test Area is extensive and includes ample opportunity for public comment and participation. See 38 M.R.S.A. § 480-HH(3)(H). Until such time as a general permit is granted for the construction and operation of an offshore wind energy demonstration project in the Monhegan Test Area, no harm can occur to Petitioner's asserted aesthetic and free exercise rights. The Bureau's action in designating the Monhegan Test Area, therefore, had no immediate and direct impact on Petitioner's asserted aesthetic and free exercise rights, and Petitioner has not alleged a particularized injury. See Collins v. State, 2000 ME 85, ¶ 7, 750 A.2d 1257, 1260 ("Being affected by a governmental action is insufficient to confer standing in the absence of any showing that the effect is an injury."); Madore v. Maine Land Use Regulatory Commission, 1998 ME 178, ¶ 13, 715 A.2d 157, 161 (requiring injury that is "actual or imminent, not conjectural or hypothetical") (*quoting* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). As a result, Petitioner lacks standing to appeal the Bureau's designation and his Petition should be dismissed.

B. Petitioner Has Failed to Demonstrate a Particularized Aesthetic Injury.

Petitioner first asserts standing based on his personal right to the use and enjoyment of Mohegan Island and its scenic vistas, alleging that he "is a user of the island's well known and heavily used public walkways," Petition for Review of Final Agency Action By the Maine Department of Conservation (hereafter the "Petition") at ¶ 2, and "enjoys the use of Monhegan Island, especially using the pedestrian trail to arrive at Lobster Cove with its scenic assets of state and national significance, specifically the complex and unspoiled vista of the central Gulf of Maine that has inspired generations of professional and amateur artists, sculptors and photographers."[2] Petitioner's Brief at 9. Even making all reasonable inferences in Petitioner's favor, Petitioner has failed to allege a particularized aesthetic injury sufficient to confer standing to challenge the Bureau's designation of the Monhegan Test Area.

1. Petitioner's Use of Monhegan Island Alone Is Insufficient to Confer Standing on Petitioner.

Petitioner relies on the Law Court's decision in Fitzgerald v. Baxter State Park Authority, 385 A.2d 189 (Me. 1978), to establish standing based on his aesthetic right to use and enjoy Monhegan Island. In Fitzgerald, five individuals asserted standing based on their past and prospective use of Baxter State Park to challenge a program for cleaning and restoring timber blowdowns in the Park. Fitzgerald, 385 A.2d at 191. There, the Law Court ruled that "the proposed cleanup would be violative of the obligation imposed by statute upon the [Baxter State Park] Authority" to satisfy the terms of the charitable trust created at the time the Park was granted to the State by Governor Baxter, and that the plaintiffs, as users of the Park, had "alleged sufficient direct and personal injury to give them standing to question the Authority's proposed

[2] There is nothing in the Certified Record in this proceeding documenting that any demonstration project in the Monhegan Test Area could even be seen from Lobster Cove. Moreover, Petitioner submitted no written comments during or as part of the State's exhaustive screening process concerning either Monhegan Island or any other possible test site.

activity." Id. at 196. Thus, while the Law Court recognized the individual's aesthetic rights could form the basis of a particularized injury, standing was closely tied to the special status of the Park under statutory and trust obligations to be held "for state forest, public park and public recreational purposes." Id. at 194.

In the instant appeal, Petitioner alleges standing based on his use of Monhegan Island and enjoyment of scenic ocean vistas that include the Monhegan Test Area. Petitioner does not allege an injury arising from his direct use of the property subject to the Bureau's designation—the Monhegan Test Area. Petitioner does not allege a personal use of the Monhegan Test Area for fishing, shellfish harvesting, recreation, or any other use. Nor has Petitioner alleged ownership of property on or in the neighborhood of Monhegan Island. Instead, Petitioner's alleged aesthetic injury is based solely on his ability to view the Monhegan Test Area while enjoying the use of Monhegan Island as a visiting member of the public (without even attempting to establish the annual frequency with which he visits the south end of Monhegan Island). In contrast to the situation in Fitzgerald, neither Monhegan Island nor the ocean vista is protected by statute or trust obligations. Petitioner has not established any personal right to an unobstructed view from Monhegan Island, and, therefore, an alleged degradation of the view does not rise to the level of a particularized injury to a personal right.

2. Petitioner's Alleged Aesthetic Injury Is Not Distinct.

"Users of affected property may have standing, . . . but the party's injury must be distinct from that suffered by the public at large." Friends of Lincoln Lakes v. Town of Lincoln, 2010 ME 78, ¶ 14, __ A.2d __ (citations omitted). As noted above, Petitioner is not a resident of Monhegan Island and does not use the Monhegan Test Area for pecuniary or recreational purposes. Petitioner's aesthetic enjoyment of the views from Monhegan Island is not unique.

Petitioner repeatedly refers to the extensive number of people using and enjoying the scenic beauty of Monhegan Island, including the residents of the island, the "generations of professional and amateur artists, sculptors and photographers," and the "thousands of tourists that visit Monhegan each year and those who have hedonic enjoyment of Monhegan from a distance." Petition at ¶¶ 2, 20; Petitioner's Brief at 9. As such, Petitioner's alleged aesthetic injury is no different from that which would be suffered by the public at large. Where a party has "neither claimed nor demonstrated any specific injury . . . particular to themselves . . . they have [not] demonstrated that they have suffered any 'particularized injury,' and thus do not have standing." Ricci, 485 A.2d at 647. See also Lindemann, 2008 ME 187, ¶ 16, 961 A.2d at 543 (finding no standing where the "injury is indistinguishable from any injury experienced by other Maine citizens"). Accordingly, Petitioner does not have standing and his Petition for Review of Final Agency Action should be dismissed.

C. Petitioner Has Failed to Demonstrate a Particularized Injury to His Right to Free Exercise of Religion.

In addition to his aesthetic injury, Petitioner asserts standing based on an alleged injury to his rights under the Free Exercise clause of the Maine Constitution, Article I, Section 3. Petitioner asserts that he has "exercised a faith-based stewardship over the wild places and wild marine life of Penobscot Bay" since 1992. Petition at ¶ 2.[3] The waters and submerged lands surrounding Monhegan Bay are within the geographical limits of Petitioner's "pastoral stewardship of Penobscot Bay." Id. Petitioner argues that "the final agency action will egregiously harm [Petitioner's] wild marine congregation of Penobscot Bay organisms . . . and violates Plaintiff's freedom to carry out the will of Almighty God." Id. at ¶ 4.

[3] The University notes that Mr. Huber's Petition has two paragraphs numbered "2." The paragraph quoted here is the second paragraph "2" in the Petition.

"To acquire standing to obtain judicial review of an administrative action, a person must demonstrate a particular injury therefrom. The agency's action must actually operate prejudicially and directly upon a party's property, pecuniary or personal rights." Storer v. Dep't. of Envtl. Protection, 656 A.2d 1191, 1192 (Me. 1995). In order to have standing based on a free exercise injury, Petitioner must first demonstrate a violation of the Free Exercise Clause.

Article I, Section 3 of the Maine Constitution provides in pertinent part:

> All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship.

Me. Const. art. I, § 3. "In order to challenge a governmental regulation of general applicability, the challenger must demonstrate:

> 1) That the activity burdened by the regulation is motivated by a sincerely held religious belief; and 2) that the challenged regulation restrains the free exercise of that religious belief. If the challenger makes those showings, the burden shifts and the State can prevail only by proving both: 3) that the challenged regulation is motivated by a compelling public interest; and 4) that no less restrictive means can adequately achieve that compelling public interest.

Fortin v. The Roman Catholic Bishop of Portland, 2005 ME 57, ¶56, 871 A.2d 1208, 1227-28 (*quoting* Blount v. Dep't of Educational & Cultural Services, 551 A.2d 1377, 1379 (Me. 1988)). However, a "statute that is neutral [toward religious practice] and of general applicability need not be justified by a compelling governmental interest, even if the law has the incidental effect of burdening a particular religious practice." Anderson v. Town of Durham, 2006 ME 39, ¶49, 895 A.2d 944, 958 (citation omitted).

In order to assert standing based on a violation of the Free Exercise Clause, Petitioner must, at a minimum, establish the first two prongs of the Blount analysis, in order to demonstrate

a particularized injury. Because Petitioner has failed to demonstrate that the Bureau's designation of the Monhegan Test Area restrains the free exercise of Petitioner's religious beliefs, he has failed to establish a particularized injury and lacks standing to bring this appeal.

1. Petitioner Has Failed to Identify a Specific Religious Activity That Will Be Burdened by Designation of the Monhegan Test Area.

The first prong of the Blount analysis requires Petitioner to show a specific activity "motivated by a sincerely held religious belief" that is burdened by challenged agency action. Blount, 551 A.2d at 1379. Petitioner states that he "has exercised a faith-based stewardship over the wild places and wild marine life of Penobscot Bay." Petition at ¶ 2. There is no basis at this stage of the proceeding to question the sincerity of Petitioner's religious belief. However, the Blount analysis requires more than a sincerely held religious belief—Petitioner must identify a specific religious activity that is burdened by the challenged agency action. See Fortin, 2005 ME 57, ¶ 58, 871 A.2d at 1228 (noting that the petitioner "has failed to identify a specific religious activity that will be burdened, as required by the first step of the Blount analysis). Petitioner has failed to make such a showing.

The Petitioner identifies a "religious duty since 1993 of protecting the wild inhabitants of Penobscot Bay," Petitioner's Brief at 7, and states that it is his "duty as shepherd of a threatened natural pastoral flock to forestall, by all ethical means necessary, what he determines to be an unjust state action that would be destructive in effect to those beings that he shepherds." Petitioner's Brief at 11. However, Petitioner makes no showing that the mere designation of the Monhegan Test Area will create a burden on his religious activities. While Petitioner has concluded that "the final agency action will egregiously harm [his] wild marine congregation of Penobscot Bay organisms," Petition at ¶ 4, Petitioner has not demonstrated that designation of the Monhegan Test Area will prevent him from performing any specific religious activities.

Moreover, Petitioner's alleged apprehension of harm to his marine congregation is misplaced. As discussed, *supra*, in Part A, designation of the Monhegan Test Area will not directly result in the construction or operation of any offshore wind energy demonstration projects in the Monhegan Test Area. Petitioner has not demonstrated how designation of the Monhegan Test Area will directly cause injury to his marine congregation, or, more to the point, how designation will burden his religious activities. Consequently, Petitioner has not established a cognizable violation of his Free Exercise rights under the Maine Constitution.

2. Petitioner Has Also Failed to Establish That Designation of the Monhegan Test Area Will Restrain Petitioner's Free Exercise of a Religious Belief.

"The Free Exercise Clause is violated only when laws actually conflict with a religion's specific doctrines and therefore impose penalties either for engaging in religiously motivated conduct or for refusing to engage in religiously prohibited conduct." Fortin, 2005 ME 57, ¶ 53, 871 A.2d at 1227 (citation and quotation omitted). Petitioner has not set forth any claim that designation of the Monhegan Test Area will restrain Petitioner's right to exercise his religious beliefs. Petitioner has not alleged that the Bureau's action will prohibit or compel any religiously motivated conduct, or that it will in any way restrict Petitioner from continuing to strive to protect the "wild places and wild marine life of Penobscot Bay." Petition at ¶ 2. To the extent that designation of the Monhegan Test Area will have any effect on Petitioner's right to free exercise of his religious beliefs, such effect can only be incidental. Thus, Petitioner has also failed to establish the second required prong of the Blount analysis.

"The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 448 (1988) (*quoting* Bowen v. Roy, 476 U.S. 693, 699-700 (1986)). In the present

case, the Petitioner has failed to demonstrate a violation of the Free Exercise clause of the Maine Constitution, Article I, Section 3, and therefore cannot establish a particularized injury based on his religious beliefs. Petitioner's appeal should, therefore, be dismissed for lack of standing.

D. Petitioner Was Not a Party In the Administrative Proceeding

In addition to showing a particularized harm, Petitioner must demonstrate his party status in the underlying administrative proceeding in order to have standing to appeal pursuant to the Maine Administrative Procedure Act ("MAPA"). Lindemann, 2008 ME 187, ¶ 17, n.9, 961 A.2d 538, 543 n.9 ("Party status is one, but not the only, requirement of standing under MAPA."); Hammond Lumber Co. v. Finance Authority of Maine, 521 A.2d 283, 286 n.5 (Me. 1987) ("Being a party during the proceedings before the agency is an essential criterion for standing.") Petitioner has not alleged, nor is there any evidence in the certified record, that Petitioner obtained party status during the proceedings before the Bureau of Parks and Lands. As such, Petitioner lacks a necessary element of standing under MAPA, and his Petition for Review of Final Agency Action should be dismissed.

CONCLUSION

As set forth above, Petitioner lacks standing to bring this appeal of final agency action pursuant to Rule 80C of the Maine Rules of Civil Procedure and 5 M.R.S.A. § 11001(1). In the absence of standing, Petitioner's appeal is non-justiciable and must be dismissed.

Dated at Portland, Maine this 3rd day of September, 2010.

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