STATE OF MAINE SUPERIOR COURT

KNOX, Civil Action Docket No. AP-10-002

Ronald C. Huber
Petitioner
v.
MAINE Department of Conservation
Bureau of Parks and Lands.
Defendant

**REPLY OF RONALD C. HUBER TO BRIEF IN OPPOSITION BY INTERVENOR UNIVERSITY OF MAINE**

NOW COMES the Petitioner, Ronald Huber (hereinafter "the Petitioner"), and submits his reply brief in opposition to Intervenor University of Maine's 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 Petitioner submits this brief in opposition to Intervenor University of Maine's (hereafter "Intervenor") Rule 80C Brief Opposing Petition for Review of September 3, 2010. The Brief asks the Court to dismiss Petitioner’s Rule 80C Petition for Review of Final Agency Action.

Petitioner rejects the Intervenor's reasonings and conclusions within its September 3, 2010 brief. Petitioner considers Intervenor's scope of review as not only simply incorrect in many respects, but also far too limited to satisfy the question of Petitioner's standing The petitioner also rejects the request for dismissal of his case b y Defendant's brief filed September 7, 2010

by Defendant Bureau of Parks and Lands (hereafter "Defendant"), and will respond to that brief 's substantive assertions separately.

Here we address only the threshold issue of my standing to petition this court for relief from the decision of the Bureau of Parks and Lands. The Intervenor has mistakenly limited its review of Petitioner's standing to "aesthetic and religious interests" and his participaton or not in administrative proceedings, when the petition and brief that Intervenor responds to also presents unequivocal evidence that standing based upon civic responsibilities and occupation are also acceptable to the Court. Even in its limited challenge to Petitioner's standing, Intervenor has failed to raise a successful challenge. Regardless of what degree the Intervenor's assertion that challenges Petitioner's aesthetic and religious interests in the areas surrounding Monhegan Island as insufficient to establish a particularized and direct injury necessary for standing under the Maine Administrative Procedure is given any weight by the court, intervenor has failed to challenge Petitioner's right and duty as a civic representative for the natural living marine and estuarine interests of the region under threat by Defendant's action to bring this challenge.

**Factual and Procedural Background**

The Petitioner directs the Court to the detailed factual and procedural background set forth in his petition, brief and motions, and those within 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, not solely the assertions advanced by the Intervenor.

**Argument 1. Standard of Review**

1. Petition has standing to Appeal the Bureau's Designation under the Maine Administrative Procedure Act, 5 MRSA Sec 8801, et eq. Petitioner has the right as a Maine citizen to appeal rulings by state agencies that threaten his life, liberty and pursuit of happiness. Petitioner holds that precedent set by Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 196-97 (Me. 1978is alone sufficient to grant him standing. However, he has further proofs. Petitioner's right to practice his marine nature-based religion without unreasonable interference, is constitutionally protected and would be harmed by the building and operation of a deepwater wind research facility that will take place unless the Bureau of Parks and Lands decision is reversed.

Maine Constitution's Article 1, Section 3. "Religious freedom; sects equal; religious tests prohibited; religious teachers."

2. His history of successful Penobscot Bay marine activism before Maine state agencies, carried out in pursuit of his religious/ conservation mandate.

3. The redressability by the Court of the issues raised by Petitioner

**A. Designation of the Monhegan Test Area Caused Petitioner Particularized injury.**

**B. Petitioner has Demonstrated a particular aesthete injury.**

1. Petitioner use of Monhegan Island Alone is Sufficient to Confer Standing.

2. **Petitioner's Alleged Aesthetic Injury is Distinct.** His evaluation of the need for pastoral interaction with his wild congregation is based on the place of worship being in beauty and balance, as perceived during overflights and during visits to the island and surrounding waters. The eye of this particular beholder sees more than the mundane movement of water and light when gazing upon the areas now within the Defendant's deepwater wind test area.

**C. Petitioner Has Demonstrated a Particularized Injury to his Right to Free Exercise of Religion**

1. Petitioner Has Identified A Specific Religious Activity that will be Burdened by Designation of the Monhegan Test Area.

Consider *Storer Vs Dept of Environmental Protection 656 A.2d*

*1191, 1192 (Me. 1995)*

"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*, Petitioner has demonstrated 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. 1, § 3.

In support of its argument, Intervenor cites *Fortin v. The Roman Catholic Bishop of Portland*, 2005 ME (Hereafter "Fortin") That case considers *"to what extent the constitutional guarantees of religious freedom contained int he Free Exercise Clause of the First Amendment to the United States Constitution and Article I, section 3 of the Maine Constitution limit the imposition of*

*negligent supervision liability against a religious organization based on tortious acts committed against a child by a member of its clergy."*

The precedent is not applicable in this circumstance. The focus of *Fortin* is on the state's response to the illegality of decisions and actions made by members and officials of a nongovernmental religious organization. This present case does not and cannot touch on the religious motives of the Bureau of Parks and Lands or its staff members in their official actions. *Fortin v. The Roman Catholic Bishop of Portland* is irrelevant to the court's examination of Petitioner's standing as protected by the United States Constitution and Article I, section 3 of the Maine Constitution. The Intervenor's assertions of the applicability of the two pronged religious test of *Blount v. Dep't of Educational & Cultural Services, 551 A.2d 1377, 1379 (Me. 1988))*, cited within *Fortin* , are thereby irrelevant to the present case as well. Even if they were relevant, Petitioner meets both test prongs: that the "*activity burdened by the regulation is motivated by a sincerely held religious belief"; and that "the challenged regulation restrains the free exercise of that religious belief."* As Intervenor states in its brief that *"[t]ere is no basis at this stage of the proceeding to question the sincerity of Petitioner's religious belief*." the court does not need to examine that prong

of Blount.

The second prong of Blunt requires consideration of whether *"the challenged regulation restrains the free exercise of that religious belief."* As petitioner has stated in his petition and brief, Petitioner exercises a faith-based stewardship over the wild places and wild marine life of Penobscot Bay, from the upper estuary to the waters surrounding Monhegan.

Petitioner noted that the location designated by the Defendant is precisely where Gulf of Maine coastal currents intermix with the freshwater plume of Penobscot River , guiding the diadromous fishes into and out of Penobscot Bay in their seasonal wanderings.

Petitioner noted that the waters and submerged lands at that critical natural locus define the outer limits of Petitioner's pastoral stewardship of Penobscot Bay, as the estuarine submerged lands waters around Sears Island define the inner limit.

There is no disagreement by Defendant or Intervenor that the final agency action under review here will if not modified or withdrawn degrade scenic and other landscape level conservation assets along and offshore the southern face of Monhegan. There is simply a disagreement in whether the impacts rise to a level of state or national significance or religious significance.

As Intervenor has stated that it does not question the sincerity of Petitioner's religious belief, the court needs to examine the religious beliefs of the Petitioner on their merits.

Petitioner has stated in his Petition and his Brief that egregious harm will occur to his wild marine congregation of Penobscot Bay organisms unless the decision by the Bureau of Parks and lands to designate the Monhegan offshore wind test area is rescinded or modified. The farm will occur when hundreds of kilowatts of wind energy are diverted from their traditional natural uses in the outer bay marine ecosystem to electricity generation.

This widely known physical impact of ocean windfarming causes significant and lasting shifts in coastal ocean surface currents. At least four currents are known by the Intervenor and the greater scientific community to collide at the site chosen by the Bureau of Parks and Lands as a deepwater wind research location. Such currents transport fish and lobster larvae and their prey and nutrients; if they are altered, the natural members of Petitioner's congregation will in fact be severely impacted.

**Argument 2. Petitioner has established that designation of the Monhegan Test area will restrain Petitioner's Free Exercise of a Religious Belief.**

It is a central tenet of petitioner's religion that Almighty God has directed him to minister to the wild Penobscot Bay flock. The perceived physical threat to his congregants impels him as a pastoral shepherd to do everything lawfully possible to protect

them from a well meaning but ill-conceived state decision. If the congregation is harmed and reduced in number and species by the Intervenor's activities flowing from the Defendant's action, Petitioner's ability to carry out his religious duties are similarly reduced and significantly impacted. One cannot minister to a destroyed congregation.

**Alternatives**

The Intervenor further claims that there is a compelling public interest in locating its Deepwater Wind test area off of Monhegan and that there are no reasonable alternatives when striving to achieve that compelling public interest.

Yet the Defendant has designated two other deepwater test sites along the Maine coast, one off Damariscove Island and located off Boone Island. Either location is considered by the Defendant to meet all necessary requirements for setting up a deepwater floating windpower research center. Neither site is under contract by other would-be deepwater wind test site developers. The Damariscove site is significantly closer to the presumed contractor that will construct the Intervenor's devices, Bath Iron Works.

Neither of those two sites have any known religious significance of any kind associated with them. Nor are they located at an ecological hydrological choke point where ocean currents meet, unlike the location off Monhegan. Nor do they have the aesthetic and scenic constituencies who would will be injured by the

Intervenor's proposed action in the site designated by the Defendant, that the Monhegan location has. Either of those two sites can easily adequately achieve the Intervenor's goals, by the Defendant's own designation of them as deepwater test sites

**D. Participation in Administrative Proceedings** Petitioner does not need to be a party in the administrative proceeding to being this case. Intervenor claims that because Petitioner did not take part in all outreach events held by the Defendant and Intervenor, and does not appear in the administrative record, he therefore lacks standing to appeal the decision by the Defendant.

Yet the plain language of the Act clearly shows that this is not the case. In *5 MRSA 11001 Right to review,* the Administrative Procedures Act states: "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."

That this does not necessarily apply to *would-be intervenors* to a case, as in the decision cited by Intervenor, is irrelevant to the present case, where the standing of the intervenor is not at question. There is no requirement in state law or statute for

appellants of an agency action to have taken part in the administrative process that led to that agency action.

**CONCLUSION**

As set forth above, Petitioner has 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. § 1l0O1(1). In the presence of standing, Petitioner's appeal is justiciable and must be considered on its merits.

Dated at Rockland this 17th day of September, 2010

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