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Admitted in: MA, ME

January 7, 2019

VIA ELECTRONIC MAIL

James W. Parker, Chair
Board of Environmental Protection
c/o Ruth Ann Burke
17 State House Station
Augusta, ME 04333-0017

Re: Whole Oceans, LLC, MEPDES Permit #ME0037478 and WDL #W009190-6F-A-N
Motion to Dismiss Appeal of Holly Faubel

Dear Chairman Parker:

On behalf of Whole Oceans, LLC, please find attached a Motion to Dismiss the appeal of Holly Faubel, filed December 17, 2018.

Thank you for your attention to this matter.

Sincerely,



Brian M. Rayback

Enclosure

cc: Service List

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF:

WHOLE OCEANS, LLC
BUCKSPORT, HANCOCK COUNTY, MAINE
LAND BASED AQUACULTURE
ME0037478
W009190-6F-A-N

MAINE POLLUTANT DISCHARGE
ELIMINATION SYSTEM PERMIT AND
WASTE DISCHARGE LICENSE
APPROVAL

MOTION TO DISMISS

Whole Oceans, LLC, hereby files this motion to dismiss the appeal filed by Holly Faubel because she is not an aggrieved person under the Department's rules and, therefore, lacks standing. *See* 06-096 CMR 2 § 24 (final license decisions may be appealed to the Board only by "persons who have standing as aggrieved persons"). As will be discussed below, Ms. Faubel 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. As a result, she does not have the necessary "particularized injury" to file an appeal.

BACKGROUND

Whole Oceans is proposing to build and operate a state-of-the-art Atlantic salmon recirculating aquaculture system in Bucksport at the site of the former Verso Paper mill on the Penobscot River. The project will raise Atlantic salmon from the egg life stage to market size fish in a land-based facility.

Whole Oceans applied for a permit from the Department to discharge wastewater from the facility to the Penobscot River. The Commissioner granted that permit, known as a Maine Pollutant Discharge Elimination System (MEPDES) Permit and Waste Discharge License (WDL), on November 21, 2018. *See* MEPDES Permit #ME0037478 & WDL #W009190-6F-A-

N. The permit authorizes an initial phase of production of up to 5,000 metric tons of fish per year and establishes, among other things, limits on flow, biochemical oxygen demand, total suspended solids; total nitrogen, and pH; requires significant monitoring and reporting on parameters such as total ammonia and total phosphorus and on ambient water quality in the river; and establishes requirements to control potential diseases and protect native Atlantic salmon through a containment management system.

During the comment period, a member of the public suggested that the impact of discharge from Whole Oceans should be combined with that of another proposed RAS system in Belfast, Nordic Aquafarms. In responding that the discharges are indeed evaluated both independently and collectively, the Department notes that there will be no measurable impact to water quality from the discharge at the southern tip of Verona Island, located just south of Bucksport in the Penobscot River. *See* Fact Sheet at 17.

Ms. Faubel filed an appeal with the Board on December 17, 2018, challenging the Commissioner's final licensing decision. In her appeal, she states that she resides at 1 Steamship Point, Belfast, on the shoreline of Belfast Bay. *See* Faubel Appeal at 4, 14. Based on a rough approximation using Google Earth, her house is approximately 14 miles, straight line distance, from the project site and approximately 12 miles, straight line distance, from the southern end of Verona Island. *See* Exhibits 1 & 2.¹ She also says that she swims in Belfast Bay and consumes produce from these waters, although she does not claim that she will have to limit these activities

¹ We believe the Board may take administrative notice of the images prepared with Google Earth that are included as Exhibits 1 and 2. To the extent needed, however, we offer them as supplemental evidence as they are relevant to the standing analysis and we are submitting them for the record at the first opportunity as there was not previously a reason to identify the location of Ms. Faubel's property in relation to the project site. *See* 06-096 CMR 2 § 24(D)(2). To be clear, by doing so, we are not waiving our right to object to Ms. Faubel's proposed supplemental evidence. If this Motion to Dismiss is not granted, we anticipate filing a separate motion to strike by the deadline identified in Ms. Bertocci's January 3, 2019, letter to participants.

as a result of the licensing decision. *See id.* at 5. She makes no other claim that she will be harmed by the permit.

ARGUMENT

Ms. Faubel does not have standing to file this appeal because she does not have the particularized injury that is necessary to demonstrate that she is aggrieved by the Commissioner's decision. As a result, the appeal should be dismissed.

The requirements for standing are well-established. The Department's rules begin by providing that one must be an "aggrieved person" to file an appeal to the Board. 06-096 CMR 2 § 24 ("Final license decisions of the Commissioner may be appealed to the Board by persons who have standing as aggrieved persons.") The rules go on to provide that the term "aggrieved person" means "[a]ny person whom the Board determines may suffer *particularized injury* as a result of a licensing or other decision." *Id.* § 1(B) (emphasis added). Further, "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." *Id.*

The Maine courts have 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, 740 (emphasis added). This occurs "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)). The courts also consistently hold that the person filing an appeal has the burden of providing that he or she is an aggrieved person. *Id.* at ¶ 14, 973 A.2d at 739. Thus, to have standing, Ms. Faubel must be able to show that the Commissioner's decision

to grant a wastewater permit to Whole Oceans directly, specifically, and adversely affects her interests in a way that is different from the general public.

To be sure, the courts have traditionally set a low bar for showing a particularized injury in cases where the appellant is an abutting landowner. *See e.g., Roop v. City of Belfast*, 2007 ME 32, ¶ 8, 915 A.2d 966, 968. The courts have even extended this liberal view of standing to those who own property in the same neighborhood as a proposed project. *See e.g., Singal v. City of Bangor*, 440 A.2d 1048, 1050 (Me. 1982). But in a recent decision, the Maine Law Court re-emphasized that the particularized injury standard requires more where, as with Ms. Faubel, the appellant does not own property in the vicinity of the project.

In *Nergaard v. Town of Westport Island*, the Town had proposed to upgrade a public boat launch. The local planning board approved the project. Two opponents, Nergaard and Stern, objected to the project, even though their properties were “neither directly abutting nor within close proximity to the site.”² *Nergaard*, 2009 ME 56, ¶ 4, 973 A.2d at 737. They argued, however, that they both regularly drove on the road that served the facility and that increased use due to the project would worsen traffic conditions and endanger their safety on the road. *Id.* On appeal, the Court summarily rejected their claim that this was enough to show a particularized injury:

Nergaard and Stern are not unique in their use of Route 144; 1638 vehicles pass by the boat ramp location each day during the summer months. There is no difference between the potential harm asserted by Nergaard and Stern and the potential harm to these 1638 drivers and to their passengers – members of the public – who use the same road on a daily basis. Nor is that harm “distinct” from the potential harm to every person who lives or visits Westport Island.

Id. at ¶ 20, 973 A.2d at 741.

² The exact location of their properties within the Town of Westport Island was never identified. They did, however, live on the Island itself and they did agree that their properties were not identified on the tax map depicting the site and about 40 surrounding properties. *Nergaard*, 2009 ME 56, ¶ 4, n.1, 973 A.2d at 737 n.1.

The same is true for Ms. Faubel. First, she does not claim to be an abutter or even to own property in the vicinity of the Whole Oceans site, and second, she does not even allege any specific harm to her interests. In fact, unlike the appellants in the *Nergaard* case, she doesn't even own property in the same municipality. Her property is in Belfast, *approximately 14 miles away* from the project site in Bucksport, measuring in a straight line.

Thus, Ms. Faubel is clearly not entitled to the liberal view of particularized injury afforded to those who are abutters or neighbors and she must instead show how she is "unique" from everyone else who uses the waters of the Penobscot River, Belfast Bay, and the rest of the Gulf of Maine. This is consistent with this Board's past decisions, which similarly recognize that the particularized injury standard cannot be stretched quite so far. For example, the Maine Law Court dismissed for lack of standing a similar appeal challenging the Canton Mountain wind project where the appellant lived approximately 7 miles from the project site. *See Barnett v. Board of Environmental Protection*, BEP-14-537 (Me. Jan. 29, 2015) (affirming Board's decision to dismiss for lack of standing). This Board also dismissed an appeal for lack of standing from an appellant who lived approximately 7 miles from the project. *See State of Maine, Public Benefit Determination, #S-020700-W5-AU-N* (dismissed for lack of standing where petitioner claimed he would be affected by trucking to and from the Juniper Ridge Landfill).

All Ms. Faubel contends is that she swims in the waters of the Bay and consumes produce from it. This is no different from the 1,638 drivers the Court referred to from a traffic perspective in *Nergaard*. Thousands (or more) of others likewise swim in these waters and consume products like shellfish that come from them. Others use the waters for recreational boating

and fishing, while still more earn their livings by working on the water, such as on fishing boats. Ms. Faubel's use of the waters of Belfast Bay is not "unique" from the use of the general public and thus her injury, if any, is not in any way distinct from that of everyone else who lives, works, or plays in the Penobscot River or Belfast Bay or, for that matter, the rest of the Gulf of Maine.

Further, although she says she uses these waters, she never says that her use will be somehow impacted by the decision to grant the permit, such as by claiming she would no longer be able to swim or eat shellfish from them. Nergaard and Stern at least asserted that the boat-launch in their case would threaten their safety by increasing traffic. Ms. Faubel says nothing about how she will be personally impacted. Moreover, the Department's own analysis indicates that there will be no measurable impact from the Whole Oceans' discharge below Verona Island, which is approximately 12 miles from Ms. Faubel's property.

In sum, Ms. Faubel fails to allege a specific harm to her interests, and, in any event, there is no difference between the potential harm to Ms. Faubel and the potential harm to the general public who also live, recreate, and work on these same waters. As a result, she does not have a particularized injury and cannot meet her burden of showing that she has been aggrieved by the Commissioner's decision.

CONCLUSION

We respectfully request that Ms. Faubel's appeal be dismissed because she lacks standing, as required by Section 24 of Chapter 2 of the Department's rules.

Dated: January 7, 2019



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Attorneys for Whole Oceans, LLC

Exhibit 1 – Approximate Distance from Faubel Property to Project Site
Whole Oceans – Proposed Supplemental Evidence
Google Earth, January 7, 2019

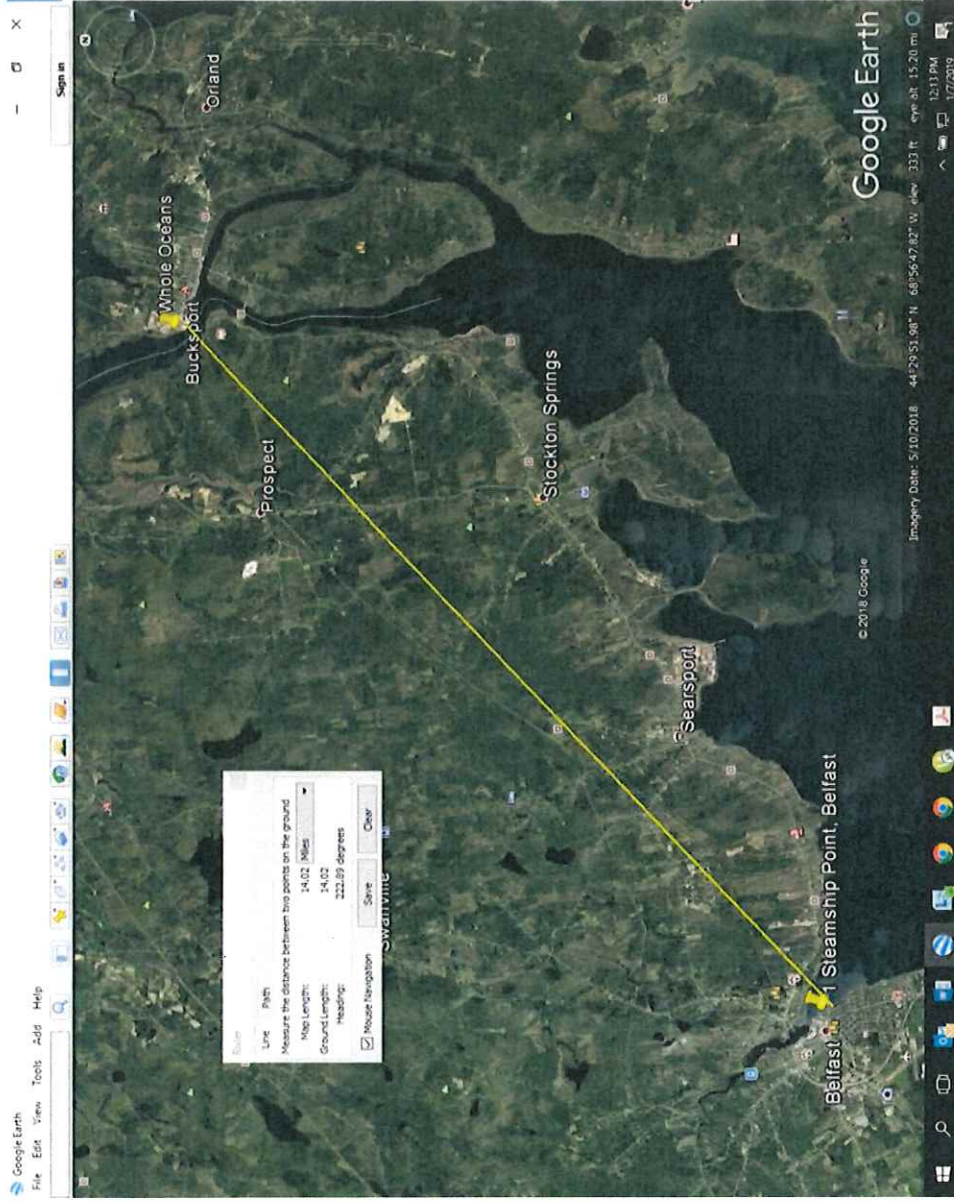


Exhibit 2 – Approximate Distance from Faubel Property to Verona Island
Whole Oceans – Proposed Supplemental Evidence
Google Earth, January 7, 2019

