

STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS  
GOVERNOR

Mark C. Draper, Chair

William F. Hinkel  
Executive Analyst

Ruth Ann Burke  
Board Clerk

August 12, 2021

**SENT VIA ELECTRONIC AND POSTAL MAIL**

Sarah Leighton  
Chapter Director  
Sierra Club Maine  
PO Box 1374  
Yarmouth, ME 04096  
[sarah.leighton@sierraclub.org](mailto:sarah.leighton@sierraclub.org)

**Re: Sierra Club Maine's appeal of Kingfish Maine's Waste Discharge License**

Dear Ms. Leighton:

On July 22, 2021, Sierra Club Maine filed with the Board of Environmental Protection (Board) a timely appeal of the June 25, 2021, Order of the Commissioner of the Department of Environmental Protection (Department) (combined Maine Pollutant Discharge Elimination System permit ME0037559 and Waste Discharge License W009238-6F-A-N) conditionally approving the discharge of up to 28.7 million gallons per day of treated wastewater associated with a land-based recirculating aquaculture system to Chandler Bay in Jonesport, Maine (Department Order).

On August 2, 2021, Board Chair Mark Draper authorized me to preside over this appeal proceeding.<sup>1</sup>

The requirements for filing an appeal of a Commissioner's licensing decision is governed by Chapter 2, § 24 of the Board's rules (*Rule Concerning the Processing of Applications and Other Administrative Matters*, 06-096 C.M.R. ch. 2.) Pursuant to Chapter 2, § 24(B)(1), the content of an appeal must include evidence demonstrating the appellant's standing as an aggrieved person. Chapter 2, § 1(B) defines "aggrieved person" as "any 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." The *DEP Information Sheet: Appealing a Department Licensing Decision* appended to the Department Order elaborates on this requirement, providing, "The appeal must explain how the appellant has standing to maintain an appeal. This requires an explanation of how the appellant may suffer a particularized injury as a result of the Commissioner's decision."

---

<sup>1</sup> Pursuant to 38 M.R.S. § 341-C(8), certain Board members, including Chair Draper, may not participate in the appeal of a Maine Pollutant Discharge Elimination System permit.

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” in a way “that is in fact distinct from the harm experienced by the public at large.” *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶¶ 14, 18, 973 A.2d 735 (quotation marks omitted); *see also Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378. The person filing the appeal has the burden of proving that they meet the definition of an aggrieved person. *Nergaard*, 2009 ME 56, ¶ 14, 973 A.2d 735. “As a general matter, ‘[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’” *Conservation L. Found., Inc. v. Town of Lincolnville*, 2001 WL 1736584, at \*6 (Me. Super. Feb. 28, 2001) (citing *Friends of the Earth, Inc. v. Laidlaw Env’t Svcs. Inc.*, 528 U.S. 167, 180 (2000)).

With regard to standing, Sierra Club Maine’s appeal states, “As the nation’s oldest environmental organization, Sierra Club amplifies the power of over 20,000 Sierra Club members and supporters in Maine along with the 31 Sierra Club members and supporters in Jonesport, Maine” and that “the decision to permit the discharge [of treated fish culture and process wastewater] affects everyone in Maine, from those who enjoy Maine’s waters to Maine’s lobster and fishing industry, because of the far reaching implications that the waste discharge could have.”

In consideration of the above, I conclude that Sierra Club Maine has not made the necessary showings that it has standing as an aggrieved person to appeal the Department Order to the Board. *See* Chapter 2, §§ 1(B), 24(B)(1). Sierra Club Maine has not identified any club member or person whose property, pecuniary, or personal rights would be adversely and directly affected by the activity approved by Department Order in a manner that is distinct from the harm that it alleges will be experienced by the public at large.

Although not determinative of standing, I also note that Sierra Club Maine did not participate in the underlying licensing proceeding. During the period of May 5, 2021, through June 7, 2021, the Department solicited comments on a proposed draft Department Order. The Response to Comments document associated with the Department Order (Fact Sheet section 9) provides a list of persons who submitted comments on the draft decision. Sierra Club Maine did not comment on the draft decision, nor did it at any time during the processing of the permit application between August 17, 2020, and June 25, 2021, submit comments to the Department for consideration.

Consequently, Sierra Club Maine’s appeal is dismissed for lack of standing and failure to comply with the Board’s requirements for the content of appeals. Pursuant to Chapter 2, § 24(A), this ruling is appealable to the full Board.

If you have any questions, you may contact Board Executive Analyst William F. Hinkel at [bill.hinkel@maine.gov](mailto:bill.hinkel@maine.gov) or (207) 314-1458 or Assistant Attorney General Laura Jensen at [laura.jensen@maine.gov](mailto:laura.jensen@maine.gov) or (207) 626-8868.

Respectfully,



Robert Duchesne, Presiding Officer  
Board of Environmental Protection

cc (via e-mail only): Megan Sorby, Kingfish Maine  
DEP Commissioner Loyzim  
Ruth Ann Burke, DEP  
Gregg Wood, DEP  
Cindy Dionne, DEP  
Laura Jensen, OAG

Interested Persons: Anastasia Fischer  
John Albertini  
Holly Faubel  
Richard Aishton  
Jim Merkel  
Robert Cotiaux