# STATE OF MAINE

## Inter-Departmental Memorandum

Date April 7, 1975

To William R. Adams, Jr., Chairman  Dept. Board of Environmental Protecti

From Joseph E. Brennan, Attorney General  Dept. Attorney General

Subject Power of Board of Environmental Protection to Permit Intervention During Pendency of Appeal

SYLLABUS: The Board of Environmental Protection may not entertain a motion to intervene which has been made after the Board has made its decision in the administrative proceeding and during the pendency of an appeal from that decision to the Law Court.

FACTS: On November 12, 1975, the Board of Environmental Protection granted to the Paris Utility District an approval with conditions for a proposed sludge disposal site to be located on Ryerson Hill, South Paris, Maine, pursuant to the Maine Site Location of Development Law, 38 M.R.S. §§481, et. seq. On December 12, 1975, the Ryerson Hill Association, intervenors in the proceedings before the Board, noticed its appeal to the Supreme Judicial Court, pursuant to 38 M.R.S. §487. On February 16, 1976, Lajos and Claire Matolcsy, owners of property abutting the approved site, and Charles and Judith Berg, owners of property nearby the approved site - all of whom had participated in the hearing extensively as members of the public - and members of the Ryerson Hill Association, moved the Board, pursuant to Rule 24, Me. R. Civ. P., to intervene in the appeal. Applicant - Appellee Paris Utility District objected to the intervention.

QUESTION: May the Board entertain such a motion either under its own rules or the Maine Rules of Civil Procedure?

ANSWER: No.

REASONING: It is first of all clear that the Board may not, under its rules, entertain a motion to intervene after its decision has been made. Under the Board's rules applicable at the time of the hearing on the matter in question, it could entertain a motion to intervene only if such motion were filed prior to the commencement of the hearing. Rule 20.12(a)(1) of the Board's Regulation for Hearings on Applications, adopted May 8, 1974. This rule has been further tightened by the applicable provision of the Board's Special Regulation for Hearings on Applications of Significant Public Interest,

which became effective September 11, 1975, after the hearing on the matter in question. Rule 30.5 of that Regulation requires that a person seeking to intervene in a Board hearing involving significant public interest file a petition to that effect with the Board within ten days of the Board's designation of the application as one involving such interest.* In either case, then, the Board could not entertain such a motion once the hearing had started and certainly not after the decision had been made.

The prospective intervenors urge, however, that since the case is now in court, the Maine Rules of Civil Procedure apply, Rule 24 of which authorizes such intervention. The response to this is, first of all, that regardless of whether the proposed intervention is permissive or as of right, the rule requires it may be granted only upon "timely application." Rule 24(a) and (b), Me. R. Civ. P. While the commentary to his language offered by Field, McKusick and Wroth contemplates the granting of at least intervention as of right after judgment, the only instance in Maine of such intervention being granted during the pendency of an appeal occured with none of the parties objecting, Gould v. Johnson, 156 Me. 445, 454 (1960); Field, McKusick & Wroth, Maine Civil Practice, §24.1 (2nd ed. 1970). In addition, intervention during the pendency of an appeal is rarely allowed under the identical provisions of the Federal Rules of Civil Procedure, particularly for persons who, like the prospective intervenors here, had ample opportunity to make their wishes known while the matter was pending before the trial court. Rule 24, Fed. R. Civ. P.; 3B Moore, Federal Practice, Paragraph 24.13[1]; 7A Wright and Miller, Federal Practice and Procedure, §1913 (1972). In any event, such intervention may only be allowed by the appellate court. United States v. Radice, 40 F.2d 445 (2nd Cir. 1930); Rolle v. New York City Housing Authority, 294 F. Supp. 574 (S.D.N.Y. 1969); American Brake Shoe and Foundry Company v. Interborough Rapid Transit Company, 3 F.R.D. 152 (S.D.N.Y. 1942). These principles have been applied by analogy to intervention in federal administrative proceedings. Buckner Trucking, Inc. v. United States, 354 F. Supp. 1210, 1219-21 (S.D. Tex. 1973).

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* The Board also adopted, effective September 11, 1975, a Regulation for Hearings on Applications (not involving significant public interest) which does not provide for formal intervention.

But even if authority for the intervention proposed here could somehow be found under Rule 24, it is far from clear that that rule applies at all. This is because the Maine Rules of Civil Procedure apply to the orders of the Board of Environmental Protection under the Site Selection Law only to a limited extent. Those limits are expressed in Rule 73(f) of the Rules, which makes applicable to the Board only those rules dealing with the taking of an appeal from the judgment of the Superior Court where there has been a direct appeal to the Law Court under the Site Law. Rule 24 is not such a rule. Thus it would not appear that it can be used to permit an intervention which is not otherwise authorized by the Board's rules or that portion of the Maine Rules of Civil Procedure dealing with Appeals.

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