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STATE OF MAINE

Inter-Departmental Memorandum

Date July 15, 1980

To Board of Environmental Protection Dept. Environmental Protection

From Gregory W. Sample, Assistant Dept. Attorney General

Subject Authority to Issue a Stay Pending Resolution of an Appeal.

QUESTION: Does the Board of Environmental Protection have authority or jurisdiction to issue a stay of a Board Order after an appeal of that order has been filed?

ANSWER: Yes.

DISCUSSION: The Natural Resources Council of Maine has filed a petition with the Board seeking a stay of the Board's action in granting an air emission license to the Martin Marietta Corporation. However, before that petition was filed, NRCM had filed an appeal in the Superior Court to obtain judicial review of the same Board action. The question presented is whether the filing of an appeal deprives the Board of jurisdiction to consider a petition for a stay of the order under appeal.

Unless specifically overridden by another State statute, every appeal to the courts of a state agency decision is governed by provisions of the Maine Administrative Procedure Act, 5 M.R.S.A. Sections 11001 et seq. Among those statutes is Section 11004 governing the stay of an administrative decision during the pendancy of a judicial review proceeding. That statute provides that

> Application for a stay of an agency decision shall ordinarily be made first to the agency, which may issue a stay upon issuing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public. A motion for such relief may be made to the Superior Court, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied,... or that the action of the agency did not afford the relief which the petitioner had requested.

On its face, it seems apparent that this statute requires that an application for a stay be made to the Board rather than to the Superior Court, regardless of whether an appeal has yet been taken.

This conclusion is reinforced by a review of the legislative history of Section 11004 and the associated law of stays pending appeal. The statement of fact on the bill enacting Section 11004 recites that the statute was based upon Rule 18 of the Federal Rules of Appellate Procedure (governing stays of decisions of federal agencies pending their review in the federal Courts of Appeals), and notes that the enactment of the section changes the prior law, under which a stay was available only from the Superior Court. Although no cases could be located discussing the jurisdiction of a federal agency under F.R. App. P.18, the official comments by the drafters of the rule state simply that Rule 18

> merely assimilates the procedure for obtaining stays in agency proceedings with that for obtaining stays an appeals from the district courts. The same considerations which justify the requirement of an initial application to the district court for a stay pending appeal support the requirement of an initial application to the agency pending review.
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> Advisory Committee Note to F.R. App. P.18.

The law developed by the federal courts under the parallel rule governing stays from district court judgments is quite clear that requests for stays are properly made to the District Court in the first instance, even after an appeal of the judgment has been taken. Smith v. American Shipbuilding, 22 F.R. Serv. 2d 538 (N.D. Ohio, 1976), Betts v. Coltes, 449 F.Supp. 751 (D Haw., 1978). Also see generally 9 Moore's Federal Practice, 2d ed., Sections 218.01 and 208.04. The theory set forth in these rules, as interpreted by the courts, is that the lower court or agency has no power to modify the judgment or order being appealed because that would alter the subject of the appeal and thus affect the jurisdiction of the appellate court. A petition for a stay however seeks no change in the order being appealed but merely seeks to preserve the status quo while the appeal is pending. Whether a stay is granted or denied, the appeal itself and the appellate court's jurisdiction over it are unaffected.

Two Maine Supreme Court cases in the last decade bear noting and discussion. Both Gagne v. Inhabitants of the City of Lewiston, 281 A.2d 579(Me. 1971) and Ethyl Corporation v. Adams, 375 A.2d 1065 (Me. 1977) have held that

> [T]he filing of an appeal removes the cause from the administrative tribunal to the Superior Court. We hold that the appeal terminates the authority of a tribunal to modify its decisions unless the court remands the matter to the tribunal for further action, thereby reviving its authority.
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> Gagne, supra, at 583.

See also a September 12, 1978 Attorney General's Opinion that the Board had no jurisdiction to act on a petition to reconsider a Board Order with respect to the Westbrook Sludge Composting Site.

In addition to the fact that these cases predate the Maine Administrative Procedure Act, they are not inconsistent with the provisions of 5 M.R.S.A. Section 11004. The court cases are clearly limited, in their language and by their facts, to situations where the agency is asked to modify the terms of the decision under appeal. Such a modification would alter the subject matter of the appeal and thus the jurisdiction of the appellate court. The issuance or denial of the stay has no such effect.

Consequently, in my opinion, Section 11004 provides the law

governing this question and confers jurisdiction upon the Board to consider and act upon a petition for stay of a Board Order, regardless of whether an appeal of that order is then pending.

The test for determining whether or not a stay should be issued in any particular case is by now well established in the law, and the criteria are set forth in Section 11004. First, the Board needs to consider what is called the "balance of the equities," weighing on the one hand the harm that may befall the petitioner if the stay is denied[1] against, on the other, the harm that will result to any adverse party if the stay is granted. A third factor, the interests of the public generally, must then be put into this balance on the appropriate side. Conducting this balance may be difficult or imprecise. Any or all of these three factors may be difficult to quantify. Frequently the test involves weighing one kind of harm against another completely different harm.

In order to obtain a stay, the petitioner must not only prevail in the balancing test, but also present a substantial question on appeal. It is clear from case law that this latter requirement need not amount to a probability that the appeal will succeed but rather merely a "substantial possibility of success." Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841, 844 (D.C. Cir., 1977), following Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738 (2d Cir. 1953). As the D.C. Circuit said in Holiday Tours,

> prior recourse to the intial decision maker would hardly be required as a general matter if it could properly grant interim relief only on the prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.

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[1]The statute and the usual formation of the test require a petitioner for a stay to show "irreparable injury" which will result from denial of the stay. This merely means that the harm, once suffered, will remain although the decision which brought it about may be reversed. Some losses may be fully restored or replaced, so that the harm is undone; others may not. The latter, whether great or small, are "irreparable".