



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

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**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

July 9, 2012

William J. Schneider, Attorney General  
State of Maine  
6 State House Station  
Augusta, Maine 04333

Dear Attorney General Schneider,

As you may know, EPA has recently been asked by two citizens' organizations in Maine to review the second paragraph of 12 M.R.S. § 6134 ("River herring passage; fishways on the St. Croix River") (effective April 9, 2008, and amended April 6, 2012), which directs the Commissioner of Marine Resources and the Commissioner of Inland Fisheries and Wildlife to ensure that the fishway on the Grand Falls Dam on the St. Croix River is configured or operated in a manner that prevents the passage of river herring, to determine whether this law effectively revised Maine's surface water quality standards.<sup>1</sup> We are aware that this statute has been the subject of some debate within Maine already, and that many stakeholders have worked diligently and in good faith to address the various concerns raised. Our review focuses on Section 6134(2)'s status with respect to Maine's water quality standards developed and approved pursuant to Section 303 of the federal Clean Water Act.

**12 MRS § 6134(2) Has the Effect of Revising Maine's Water Quality Standards**

Section 6134(2) effectively revised Maine's surface water quality standards and is therefore subject to EPA review and approval pursuant to Section 303(c)(2) of the Clean Water Act and 40 C.F.R. Part 131. Section 6134(2) constitutes a new or revised water quality standard that EPA has the authority and duty to approve or disapprove under Section 303(c)(3) of the Clean Water Act because it is legally binding upon the state, and because, for the Class A and AA reaches of the St. Croix River main stem and tributaries upstream of the Grand Falls Dam, it addresses water quality criteria by specifically calling out river herring, which are indigenous aquatic life species previously protected by Maine's narrative water quality criteria for Class A and AA waters. In brief, Section 6134(2) expresses a desired condition that natural indigenous species shall not be present in the St. Croix River upstream of the Grand Falls Dam. As explained in more detail below, this effectively constitutes a revision of a narrative water quality criterion applicable to Class A and AA segments throughout the St. Croix River watershed.

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<sup>1</sup> Maine defines "river herring" as *alosa pseudoharengus*, commonly known as alewife, and *alosa aestivalis*, commonly known as blueback herring. 12 M.R.S. § 6001(37-B). The two species are similar in size and function, although blueback herring spawn in Maine rivers a few weeks later than alewife.



Maine's water quality criteria for Class AA and A waters specify that "[t]he aquatic life ... shall be as naturally occurs." 38 M.R.S. §§ 465(1)(B), (2)(B) (emphasis added). "As naturally occurs" means "conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity." *Id.* § 466(2). These criteria protect Maine's designated uses for Class AA and A waters, which include "habitat for fish and other aquatic life," with the habitat being characterized as "free-flowing and natural" for Class AA waters and "natural" for Class A waters. 38 M.R.S. §§ 465(1)(A), (2)(A), 465-A(1)(A).

EPA's Clean Water Act regulations require that water quality criteria protect designated uses. See 40 C.F.R. § 131.11(a)(1). Anadromous river herring are naturally occurring and indigenous and were known to thrive in the St. Croix River Basin upstream of the Grand Falls Dam prior to the fish passage closure.<sup>2</sup> By requiring closure of the fish passage to river herring at Grand Falls Dam, Maine has effectively revised the above-cited criteria so that they now provide that the aquatic life in Class AA and A waters upstream of the Grand Falls Dam shall be as naturally occurs, except that river herring (as well as any other migratory species unable to pass the obstruction) shall not be present, due entirely to state-mandated human activity.<sup>3</sup> This alteration of the naturally occurring aquatic population has caused the habitat to be degraded by the artificial exclusion of fish species that would be present if the habitat were natural and which were present until 1995, when the Maine legislature first enacted the relevant fish-passage closure law.

## **12 MRS § 6134(2) Does Not Protect the Designated Use**

Designated uses are "those uses specified in water quality standards for each water body or segment, whether or not they are being attained." As mentioned above, designated uses for Class AA and A waters include "habitat for fish and other aquatic life," with the habitat being characterized as "free-flowing and natural" for Class AA waters and "natural" for Classes A waters. 38 M.R.S. §§ 465(1)(A), (2)(A), 465-A(1)(A). "Natural" means "living in, or as if in, a state of nature not measurably affected by human activity." *Id.* § 466(9). Because river herring are indigenous to the St. Croix River, the "natural" (and, for Class AA waters, "free-flowing") fish habitat designated uses include habitat for river herring.

Existing uses are "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water standards." 40 CFR § 131.3(e). Because the St. Croix River waters upstream of the Grand Falls Dam were habitat for thriving indigenous populations of river herring before the initial enactment of the fish-passage closure law in 1995, the uses of those waters as river herring habitat are also existing ones. Indeed, according to the Maine Department of Marine Resources ("DMR"), "[a]lewives and blueback herring have co-evolved and co-existed with other native fish and wildlife in Maine's streams, rivers, ponds and lakes for thousands of years."<sup>4</sup>

<sup>2</sup> Flagg, L.N., Historical and Current Distribution and Abundance of the Anadromous Alewife (*Alosa pseudoharengus*) in the St. Croix River. A Report to the State of Maine Atlantic Salmon Commission, 2007.

<sup>3</sup> The fish passage closure also affects aquatic life *downstream* of the Grand Falls Dam. Because river herring are unable to migrate past the dam and spawn upstream, the numbers returning to even the portions of the St. Croix River accessible to river herring have declined dramatically. Thus, the entire river system (including not just Class A and AA segments upstream of the Grand Falls Dam, but also Class A segments downstream of the Grand Falls Dam) has an artificially altered aquatic population.

<sup>4</sup> Maine DMR, "Maine River Herring Fact Sheet," at <http://www.maine.gov/dmr/searunfish/alewife/index.htm>.



Because the fish-passage law established a desired condition for aquatic life in the St. Croix River that directs the artificial exclusion of river herring from its natural habitat, it no longer protects the designated uses for Class AA and A waters.

#### **The Criteria Revision is Not Based on a Sound Scientific Rationale**

EPA is not aware of any sound scientific rationale for excluding indigenous river herring (or other migratory species) from the St. Croix River that could support a criteria revision of this kind.

In fact, the Maine DMR has described the integral function of alewives, in particular, as a critical component in Maine ecosystems and fisheries as follows:

Alewives are important to the ecology of freshwater, estuarine, and marine environments. They provide an alternative prey item for osprey, eagles, great blue heron, loons and other fish eating birds at the same time juvenile Atlantic salmon are migrating downriver. Alewives provide cover for upstream migrating adult salmon that may be preyed on by eagles or osprey, and for young salmon in the estuaries and open ocean that might be captured by seals. It is important to understand that alewives tie our ocean, rivers and lakes together, providing vital nutrients and forage needed to make healthy watersheds. Between and within those various habitats, everything eats alewives: striped bass, bluefish, tuna, cod, haddock, halibut, American eel, brook trout, rainbow trout, brown trout, lake trout, landlocked salmon, smallmouth bass, largemouth bass, pickerel, pike, white and yellow perch, seabirds, bald eagle, osprey, great blue heron, gulls, terns, cormorants, seals, whales, otter, mink, fox, raccoon, skunk, weasel, fisher, and turtles.

Adult alewives are preferred bait for the spring lobster fishery. There are 35 Maine municipalities that have commercial harvesting rights to alewives on 39 streams and rivers. These runs provide revenue to the towns, many of which lease their fishing privileges to independent fishermen. Many of the fishways built for alewife restoration on some of our small coastal streams were partially funded by these municipalities because they recognized the value of this native fish species.<sup>5</sup>

#### **EPA Actions**

For the reasons stated above, EPA finds that 12 M.R.S. § 6134(2) constitutes a de facto revision of the narrative criteria at 38 M.R.S. §§ 465(1)(B) and (2)(B). Therefore, Section 6134(2) is subject to EPA review in accordance with Section 303(c) of the Clean Water Act and EPA's implementing regulations at 40 C.F.R. Part 131.

This revision cannot be approved under the Clean Water Act and EPA regulations because the revision of the narrative criterion at 38 M.R.S. § 465(2)(B) is not accompanied by a sound scientific rationale and the revised criteria no longer support designated uses. *See* 40 C.F.R. § 131.11(a)(1).

Consequently, EPA hereby disapproves 12 M.R.S. § 6134(2). In the meantime, please note that 12 M.R.S. § 6134(2) is not effective for Clean Water Act purposes, as provided by 40 C.F.R. § 131.21(e).

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<sup>5</sup> "Maine River Herring Fact Sheet," *supra* note 4.

### Effect of Disapproval

To address EPA's disapproval and protect designated and existing uses, Maine should take appropriate action to authorize passage of river herring to the portions of the St. Croix River above the Grand Falls Dam. However, no changes are needed to Maine's previously approved water quality standards. Because EPA is disapproving 12 M.R.S. § 6134(2), the existing standards at 38 M.R.S. §§ 465(1)(B) and (2)(B) remain in effect for Clean Water Act purposes.

Please feel free to contact Ronald Fein of our Office of Regional Counsel at 617-918-1040 or [fein.ronald@epa.gov](mailto:fein.ronald@epa.gov) if you have any further questions.

Sincerely,



Stephen S. Perkins, Director  
Office of Ecosystem Protection

Cc: Patrick C. Keliher, Commissioner, Maine Dept. of Marine Resources  
Chandler E. Woodcock, Commissioner, Maine Dept. of Inland Fisheries and Wildlife  
Patricia Aho, Commissioner, Maine Dept. of Environmental Protection  
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William J. Schneider  
ATTORNEY GENERAL



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August 8, 2012

Stephen S. Perkins, Director  
Office of Ecosystem Protection  
U.S. Environmental Protection Agency, Region I  
Boston, MA 02109-3912

Dear Mr. Perkins:

I am writing in response to your July 9, 2012 letter in which EPA expresses the view that 12 M.R.S. § 6134(2) (the Alewife Law) effectively revised Maine's federally-approved water quality standards, and disapproves that provision for the purposes of the federal Clean Water Act ("CWA").

#### **State Regulatory Jurisdiction over the St. Croix River Watershed**

Before turning to your analysis and conclusions, your letter is an appropriate occasion to address EPA's apparent position that Maine's water quality standards do not apply to certain undefined and unidentified Tribal water bodies. In recent years EPA has refused to approve new and amended state water quality standards for "waters within Indian Territories and lands." EPA has never explained what waters it understands to be covered by that phrase, and instead has left the State, the Tribes, the regulated community and the public at large to wonder which water bodies are not, in the view of your agency, covered by these state laws of general application. EPA has also failed to explain what water quality standards, if any, apply to these unidentified water bodies, if it is indeed the agency's position that the State of Maine's standards do not. We are aware of no alternative source of water quality standards that would apply to such water bodies by default to fill the void that EPA's position creates. Moreover, as Maine has carried out its responsibilities in implementing the CWA for many years, EPA has never indicated that it should apply any standards to any water body other than the State's duly adopted standards. This too calls into question whether EPA means what it says when it takes the position that there is some set of unidentified water bodies within the State to which Maine's approved standards do not apply.

EPA's position on this issue is directly contrary to the Court's decision in *Maine v. Johnson*, 498 F.3d 37 (1<sup>st</sup> Cir. 2007). In *Johnson*, the First Circuit Court of Appeals vacated an EPA decision that carved out certain Tribal discharges from the scope of the agency's delegation of CWA permitting authority to Maine. In doing so the Court observed that the Maine Indian



Land Claims Settlement Act, and particularly the Maine Implementing Act at 30 M.R.S. § 6204, is “about as explicit ... as is possible” in conferring environmental regulatory authority on the State over Indian lands and waters. *Johnson*, 498 F.3d at 43. Maine challenged EPA’s action in the *Johnson* case in order to clarify this jurisdictional issue once and for all, and the Court’s decision could not have been more emphatic in providing that clarity. For EPA to continue to suggest that Maine’s regulatory jurisdiction does not reach “waters within Indian Territories and lands” following the *Johnson* decision is indefensible. It raises false expectations, creates confusion where none should exist, and generally does a great disservice to the State as it works in good faith to carry out its CWA responsibilities, as well as to all parties that must in some way order their lives around CWA compliance obligations in the vicinity of Indian Territory in Maine.

Your letter on the Alewife Law makes no mention of this jurisdictional issue despite the fact that the St. Croix River flows past portions of the Passamaquoddy Indian Reservation, 30 M.R.S. § 6203(5), and Passamaquoddy Indian Territory. 30 M.R.S. § 6205(1). The analysis set forth in your letter assumes State authority to adopt and apply water quality standards for federal CWA purposes in the St. Croix River Watershed. This is true because your conclusion that the Alewife Law conflicts with certain of Maine’s federally-approved water quality standards applicable to the St. Croix Watershed assumes that Maine had authority to adopt such standards in the first place. By reviewing and disapproving the Alewife Law, EPA has recognized Maine’s authority to adopt water quality standards governing the St. Croix Watershed for the purposes of the CWA. Therefore, at least as to this Watershed, we expect EPA will never suggest that Maine’s environmental regulatory jurisdiction is in question.

#### **EPA’s Disapproval of the Alewife Law for Federal Clean Water Act Purposes**

In its substance, your letter addresses unique circumstances in which, among other things: (1) a state statute requires affirmative actions to be taken to prevent the migration of a native, anadromous species past a dam to reach its historic spawning grounds, and (2) that species already has clear migratory access to the dam site and is actually present there in substantial numbers. You conclude that such a statute “constitutes a de facto revision of the narrative criteria at 38 M.R.S. §§ 465(1)(B)&(2)(B),” which specify that the aquatic life in this water body be “as naturally occurs,” because it affirmatively provides that alewives shall not be present. You disapprove the Alewife Law as insufficiently protective of a designated use within Maine’s federally approved water quality standards pursuant to EPA’s authority under Section 303(c) of the CWA and 40 CFR Part 131.

We note that EPA’s disapproval of the Alewife Law does not purport to render the statute invalid as a matter of State law. Instead, consistent with the limits on its authority, EPA has simply disapproved the Alewife Law for discrete federal CWA purposes. This means, for example, that the State may not apply the Alewife Law in the course of issuing CWA discharge permits. The State has always regarded the Alewife Law to be a fisheries management measure with meaning and effect only in that context; it has never considered the statute to be a CWA water quality standard. Therefore, it appears that EPA’s action merely prevents Maine from doing something that it has never done, has never tried to do, and has no intention of doing, which is to apply the Alewife Law for CWA purposes.

Your letter concludes by encouraging Maine to take "appropriate action to authorize passage of river herring to portions of the St. Croix River above the Grand Falls Dam." We have consulted with the Office of Governor Paul R. LePage, who has been engaged in discussions about this issue for many months with stakeholders. We have been informed that Governor LePage's Administration is committed to pursuing implementation of the Alewife Adaptive Management Plan that has been proposed to the International St. Croix Watershed Board. If EPA has policy-based concerns about that plan, it could share them with Administration officials, and could also participate in the legislative process that will likely occur in connection with that effort.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Will Schneider", written over the printed name.

WILLIAM J. SCHNEIDER  
Attorney General





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

5 Post Office Square, Suite 100  
Boston, MA 02109-3912

October 16, 2012

William J. Schneider, Attorney General  
State of Maine Office of Attorney General  
6 State House Station  
Augusta, Maine 04333-0006

Dear Attorney General Schneider:

Thank you for your letter of August 8, 2012 concerning 12 M.R.S. § 6134(2), the "Alewife Law," and my letter of July 9, 2012. I am writing to respond to two issues your office has raised about my July 9 letter.

**Maine Water Quality Standards and Indian Territories**

My letter of July 9, 2012 did not in any manner signal that EPA has changed its position on the applicability of Maine's water quality standards (WQS) to waters in tribal territories in Maine. EPA's policy is that states are not authorized to implement federally approved environmental programs, like the WQS program under the federal Clean Water Act (CWA), in the territories of federally recognized tribes unless and until EPA has made clear findings on the record approving the state standards to apply in Indian country. My July 9 letter made no mention of this point for the simple reason that the dam at issue is in waters outside tribal territories, and there are significant waters affected by the dispute over alewife passage outside tribal waters. The focus of my July 9 letter was the application of state WQS to waters where the state WQS program has been authorized. There was no need to mention the routine limitation EPA includes when it is newly approving state WQS outside Indian territories.

**Next Steps in River Herring Restoration**

We gladly accept your invitation to work with the Administration in the process of selecting and implementing an approach to reintroducing river herring to the St. Croix River watershed. We anticipate coordinating our participation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, as we did in developing the plan recommended in the attached April 19, 2012 letter to the International Joint Commission.

Please feel free to contact Ronald Fein of our Office of Regional Counsel (617-918-1040 or [fein.ronald@epa.gov](mailto:fein.ronald@epa.gov)) or Ellen Weitzler, our Water Quality Standards Coordinator (617-918-1582 or [weitzler.ellen@epa.gov](mailto:weitzler.ellen@epa.gov)) if you have any further questions.

Sincerely,

A handwritten signature in dark ink, appearing to read "Stephen S. Perkins", is written over a horizontal line.

Stephen S. Perkins, Director  
Office of Ecosystem Protection

Cc: Patrick C. Keliher, Commissioner, Maine Dept. of Marine Resources  
Chandler E. Woodcock, Commissioner, Maine Dept. of Inland Fisheries & Wildlife  
Patricia Aho, Commissioner, Maine Dept. of Environmental Protection  
David Courtemanch, Maine Dept. of Environmental Protection

Enclosure