

Mr. Stephen Silva
Office of Ecosystem Protection
US EPA Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

August 18, 2010

RE: St. Croix River

Dear Mr. Silva,

I wish to submit for consideration the following additional information as part of US EPA's review of my July 4, 2010 request regarding compliance of Maine's alewife ban laws on the St. Croix River with the U.S. Clean Water Act.

At issue is whether the 1995 and 2008 Maine laws prohibiting the passage of native alewives to their native habitat in the St. Croix River are subject to US EPA review as amendments or revisions to Maine's water quality standards and designated uses for the St. Croix River and its watershed.

It has been for many years the established policy and position of the Maine DEP that passage for native migratory fish species at hydroelectric dams on Maine rivers is integral to the attainment of narrative water quality standards and legally designated uses waters historically inhabited by these migratory fish species.

The best articulation of the Maine DEP's position on this issue is set forth in the May 1, 2003 water quality certification orders issued by Maine DEP for five hydroelectric dams on the Presumpscot River. The Order is titled: Department

Order, Maine Water Quality Program, Federal Clean Water Act, Water Quality Certification, Presumpscot River Hydro Projects, May 1, 2003:

The Order states at 10: "Historic conditions. Based on historical records, the Presumpscot River throughout the project areas supported self-sustaining populations of various anadromous fish species, including the Atlantic salmon, American shad, river herring (alewife and blueback herring), rainbow smelt and striped bass. Anadromous fish spawn in freshwater and return to the sea to grow to adulthood. Over time, all anadromous fish were extirpated from the river by the construction of dams that blocked passage and by pollution."

And at 18: "Anadromous Fish Passage. With respect to upstream and downstream anadromous fish passage, there is convincing evidence in the record that the Presumpscot River historically supported natural populations of American shad, blueback herring, alewife and Atlantic salmon throughout the project areas. State fisheries agencies are developing a plan to restore these species to the river. Once upstream passage is available at the Cumberland Mills Dam, which is located at the applicant's Westbrook paper mill, the phased installation of anadromous fish passage at each of the project dams will be *necessary* and appropriate to allow access for the target anadromous species to spawning and nursery habitat.

Therefore, in view of evidence in the record, the installation of upstream and downstream anadromous fish passage facilities at all five project dams will provide access to significant habitat for American shad, blueback herring and Atlantic salmon and is *necessary* to ensure that the project waters will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is reasonable assurance that the installation of upstream and downstream anadromous fish passage facilities, as set forth above, is *necessary* to ensure that the project waters will be suitable for their designated uses of fishing and habitat for fish and that the project waters will be of sufficient quality to

support *all species of fish* indigenous to these waters." (emphasis added).

In this 2003 Order, Maine DEP asserts that provision of upstream and downstream passage for anadromous fish species at the dams is "necessary to ensure that the project waters will meet applicable water quality standards" and "necessary to ensure that the project waters will be suitable for their designated uses of fishing and habitat for fish and that the project waters will be of sufficient quality to support *all species of fish* indigenous to these waters."

Here, Maine DEP establishes the nexus between provisions of passage for native migratory fish at hydroelectric dams and the attainment of water quality standards and legally designated uses of the waterbodies affected by those dams; and that without the provision of passage for native, migratory fish at these dams, the waterbody is in non-attainment of its water quality standards and legally designated uses for fishing and for fish habitat. The DEP further states that Maine's water quality standards require the waters affected by these dams be of sufficient quality to support *all species of fish* indigenous to these waters, not just a select few, and not just those species which do not require passage at dams to live in the river.

In spring 2003, this interpretation of Maine water quality laws was challenged by the S.D. Warren Company, owner of the dams, to the Maine Board of Environmental Protection. In its appeal, Warren asserted the Maine DEP's requirement for fish passage for native anadromous fish species at its dams was unlawful because passage for native anadromous fish at its dams is not germane to Maine's water quality standards. ["Because the project waters do support fish habitat and because the Department has no authority in a Section 401 proceeding to impose fish passage or fishery management conditions, the Board should remove this condition." Warren Appeal at 16.]

In its Sept. 2003 Order, the Maine BEP rejected Warren's claim and affirmed the Maine DEP's interpretation of Maine's water quality laws, stating:

"Nowhere, as appellant suggests, does the statute state that 'some' of the waters be suitable for the designated uses; that 'some' of the aquatic species indigenous to the waters be supported; or that 'some' of the habitat must be unimpaired or natural. On the contrary the terms 'receiving waters' and 'habitat' are unqualified and the statute specifically states that the water quality must be such to support 'all' indigenous aquatic species ... Appellant's contention that water quality standards are being attained as long as the designated uses of fish, fishing and aquatic habitat are present to any degree in any portion of the river is thus contrary to the language of the statute and to the Legislature's stated objective 'to restore and maintain the chemical, physical and biological integrity of the State's waters.' 38 MRSA Section 464(1)."

In its appeal, Warren further challenged the Maine DEP's requirement for fish passage for native migratory species at Warren's dams because, it said, the DEP's Order was based solely upon a draft fisheries management plan developed by state agencies which had not been subject to formal public hearing and comment; and that Maine DEP had no authority to place conditions in a Section 401 water quality certification for the sole purpose of forwarding the fisheries management goals of state fisheries agencies.

In its Sept. 2003 Order, the Maine BEP rejected this claim as well, stating:

"The draft plan, however, was not, as Warren contends, the "basis" on which the fish passage conditions were imposed. The plan was one piece of information, among others, that the Department considered in making its determination that

certain fish passage conditions were necessary to meet water quality standards. Moreover, to the extent that Warren implies that a final fishery management plan is necessary before the Department may impose fish passage conditions in a certification, it is not correct as a matter of law. There is nothing in the statute or regulation that limits the Department's authority to require fish passage in order to meet water quality standards to those instances where a final fisheries management plan has been adopted by the relevant state agency(s) through a public process. Indeed, over the years, many fishways have been required by the Department and constructed and operated by hydropower project owners on rivers where no formal fishery management plan has been adopted.

"Taking Warren's argument to its logical extension, no fishways could be required anywhere by DEP (or, by the state's own fisheries agencies) unless a final fishery management plan had been adopted, even though (1) the state's fisheries agencies are already charged under law with restoring sea-run fish to their historic habitat, and (2) the DEP is already charged under law with restoring the chemical, physical and biological integrity of the State's waters. Such an argument has no legal basis and could limit the restoration of sea-run fish to Maine's waters and the attainment of water quality standards in Maine's waters."

This finding shows Maine DEP has an independent regulatory duty under Maine's water quality laws and the U.S. Clean Water Act to ensure passage for native migratory fish species at hydroelectric dams regardless of the existence of any fisheries management plans promulgated by state fisheries agencies; or whether state fisheries agencies even have an interest in seeing migratory species restored and maintained in their native habitat in a waterbody. This Maine BEP finding completes the causative nexus between attainment of water quality standards and designated uses of a waterbody and the provision of passage at dams for migratory fish species native to that waterbody. The Maine BEP says in sum: "it doesn't matter how clean the water if the fish can't get to it."

It is well known that the primary and often the sole cause of the extirpation of native, migratory fish species from Maine's rivers was due to the erection of impassable dams on these rivers in the 18th, 19th and 20th centuries. Despite this fact, the U.S. Clean Water Act tends to focus, by language and emphasis, on the pollution of the nation's waters due to point discharges of treated and untreated sewage. This sewage-based focus is balanced by Section 401 of the CWA, which gives states the authority to review any federal license to determine if the proposed activity will violate applicable water standards for waterbodies affected by the proposed activity.

Section 401 gives the states wide latitude and authority to condition the operation of federally licensed hydroelectric dams and other federally licensed activities to ensure their compliance with state water quality standards and designated uses. Most states, including Maine, were slow to exercise their Section 401 authority upon enactment of the CWA. Maine did not begin to assert its Section 401 authority at federally licensed hydroelectric dams until the early 1990s. But since that time Maine has begun to vigorously assert its Section 401 authority and continues to do so today. In defending Maine's legal authority under Section 401 to condition federal licenses to ensure compliance with applicable state water quality standards, Maine DEP and Maine BEP have been forced, as in the S.D. Warren case, to explicitly define the meaning of Maine's water quality laws as they pertain to dams which completely bar the passage of native, migratory fish species to their native spawning and nursery habitat in Maine's rivers. Furthermore, Maine's courts have been repeatedly called upon to rule on the Maine DEP and BEP's interpretations of these laws.

For this reason, the issues raised on appeal by S.D. Warren on the Presumpscot River in 2003 are particularly germane to the St. Croix River. The most important issue is Maine's narrative water quality standards, which plainly state that all of

Maine's waterbodies must be of "sufficient quality to support all species of fish indigenous to [these] waters." Warren's position was that, for native alewife or Atlantic salmon, a waterbody can be deemed as having sufficient quality for alewives and salmon to live in, even if impassable dams completely prevent native alewives and salmon from ever living in that waterbody, and if its dams are the sole reason alewives and salmon cannot live in that waterbody.

In 2003, on the Presumpscot River, the Maine DEP, the Maine BEP, the Maine Superior Court and the Maine Supreme Court, found Warren's interpretation absurd. In rejecting Warren's claim, the Maine Supreme Court stated: "We also concluded, based upon the specificity of the designated uses at 38 MRSA §465, that the Legislature's purpose for the language "suitable for the designated uses" was "that the designated uses *actually* be present." (emphasis added).

This means in plain language that in order for the Maine DEP to declare a waterbody is 'suitable habitat' and is of 'sufficient quality' to support native alewives, there must be a mechanism by which native alewives can gain access to this habitat; and if they cannot due to impassable dams, the terms 'suitable habitat' and 'of sufficient quality to support all species of indigenous fish' are meaningless.

In this context, there is no question the 1995 and 2008 Maine alewife ban laws on the St. Croix River are material alterations to the water quality standards and designated uses previously assigned by the Maine Legislature to the St. Croix River. As the Maine BEP stated in 2003: "Nowhere, as appellant suggests, does the statute state that 'some' of the waters be suitable for the designated uses; that 'some' of the aquatic species indigenous to the waters be supported; or that 'some' of the habitat must be unimpaired or natural."

The plain language of the 1995 and 2008 St. Croix alewife ban laws shows that in passing these laws, the Maine Legislature suddenly decided that only ‘some’ rather than ‘all’ of the aquatic species indigenous to the St. Croix would be protected under Maine’s water quality laws, with native alewives given no protection at all. To effect this policy change, the Maine Legislature ordered the Maine Fisheries Commissioner to forcibly prevent all native alewives from gaining access to the St. Croix River above these dams by blocking their only available passage route -- the fishways at the Woodland and Grand Falls Dams -- so as to cause the species to become extinct above these dams.

As the Maine BEP stated on the Presumpscot River in 2003, “the terms 'receiving waters' and 'habitat' are unqualified and the statute specifically states that the water quality must be such to support 'all' indigenous aquatic species ...”

By enacting the 1995 and 2008 alewife ban laws, the Maine Legislature changed the term ‘all indigenous aquatic species’ in the water quality laws respecting the St. Croix River to ‘some species, but not the native alewife.’ All means all. Some means some. Changing ‘all’ to ‘some’ is a substantive legislative change. Changing ‘all indigenous species’ to ‘some indigenous species, but not alewives’ is a substantive legislative change, especially if you are a native St. Croix River alewife, or a bald eagle or osprey which depends on alewives to feed your babies.

In 2003, the Maine BEP and the Maine Supreme Court interpreted ‘all indigenous fish species’ to mean ‘all indigenous fish species’ as it regards Maine’s water quality laws. The Maine BEP and the Court recognized that ‘all indigenous fish species’ is distinct from ‘some, but not all, indigenous fish species.’ This is not a frivolous distinction. Some is some. All is all. Some is not all. All is not some.

The most relevant part of the Maine DEP and Maine BEP’s 2003 Orders for the

Presumpscot River are their repeated use of the word “necessary” to describe the nexus between fish passage at dams and the attainment of state water quality standards and designated uses. The May 1, 2003 Maine DEP Order states:

“Once upstream passage is available at the Cumberland Mills Dam, which is located at the applicant's Westbrook paper mill, the phased installation of anadromous fish passage at each of the project dams will be *necessary* and appropriate to allow access for the target anadromous species to spawning and nursery habitat.”

“Therefore, in view of evidence in the record, the installation of upstream and downstream anadromous fish passage facilities at all five project dams will provide access to significant habitat for American shad, blueback herring and Atlantic salmon and is *necessary* to ensure that the project waters will meet applicable water quality standards ...”

“Specifically, there is reasonable assurance that the installation of upstream and downstream anadromous fish passage facilities, as set forth above, is *necessary* to ensure that the project waters will be suitable for their designated uses of fishing and habitat for fish and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters.”

‘Necessary’ is defined by Merriam-Webster as: “**1 a** : of an inevitable nature : **inescapable** **b** (1) : logically unavoidable (2) : that cannot be denied without contradiction **c** : determined or produced by the previous condition of things.”

The Maine DEP and Maine BEP state that in order to ensure attainment of state water quality standards and designated uses on the Presumpscot River it is *necessary* that fish passage be provided for native alewives, shad, salmon and

other migratory fish species at the Presumpscot dams. By definition, this means that if fish passage is not provided at the dams, then state water quality standards and designated uses will not be attained.

The state water quality standards and designated uses for the Presumpscot River watershed as set forth at 38 MRSA §467 are identical to those established for the St. Croix River watershed. This means that if it is *necessary* to provide fish passage at dams on the Presumpscot River for native alewives to comply with state water quality standards, it is also *necessary* to do so on the dams of the St. Croix so as to comply with the *same* state water quality standards.

In 1995 and 2008, the Maine Legislature enacted statutes ordering the Maine Fisheries Commissioner to physically stop the passage of all native alewives at the St. Croix River dams so as to cause them to go extinct from the St. Croix River. The only plausible reading of these laws is that by enacting them the Maine Legislature declared that, on the St. Croix River, it is no longer *necessary* under the law for native alewives to gain access, and live in, their native habitat above the Grand Falls and Woodland dams; that the phrase ‘suitable habitat for all indigenous fish species’ in Maine water quality standards is no longer applicable to the St. Croix River; that the legally designated use of the St. Croix River for ‘fishing’ and as ‘fish habitat’ no longer applies to native alewives; and that the state’s anti-degradation law requiring the protection and maintenance of existing legally designated uses actually occurring on the waterbody on or after November 28, 1975 no longer applies to native alewives on the St. Croix River above the Woodland and Grand Falls Dams.¹

US EPA’s review duties for state water quality standards are set forth at 40 CFR

¹ Maine’s anti-degradation policy, set forth at 38 MRSA §464 (4)(F)(1)states: “The antidegradation policy of the State is governed by the following provisions. (1) Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-stream water uses are those uses which have actually occurred on or after November 28, 1975, in or on a water body whether or not the uses are included in the standard for classification of the particular water body. Determinations of what constitutes an existing in-stream water use on a particular water body must be made on a case-by-case basis by the department.”

§131.5:

§ 131.5 EPA authority

(a) Under section 303(c) of the Act, EPA is to review and to approve or disapprove State-adopted water quality standards. The review involves a determination of:

- (1) Whether the State has adopted water uses which are consistent with the requirements of the Clean Water Act;
- (2) Whether the State has adopted criteria that protect the designated water uses;
- (3) Whether the State has followed its legal procedures for revising or adopting standards;

The 1995 and 2008 alewife ban laws on the St. Croix clearly relate to the legally allowable “water uses” of the St. Croix within the meaning of 40 CFR §131.5(a). The laws do so by declaring that native alewives are no longer permitted to live in the St. Croix River watershed above the Woodland and Grand Falls Dams; and by directing the Maine Fisheries Commissioner to effect this change in policy by forcibly preventing any native alewives from passing through the fishways at these dams in perpetuity. The laws, in sum, state the waters of the St. Croix above these dams shall no longer be “used” by native alewives. A law which bans a previously legal use of a waterbody is a change to the ‘legal uses’ of the waterbody.

The CWA states at 40 CFR §131.2 that a water quality standard “defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.”

It is clear that the 1995 and 2008 alewife ban laws “define the water quality goals

of a water body, or portion thereof, by designating the use or uses to be made of the water.” They do this by declaring that, as a matter of law, native alewives shall not be allowed to be present in the St. Croix above the Woodland and Grand Falls Dams, and by directing the Maine Fisheries Commissioner to forcibly prevent any alewives from passing these dams so as to achieve this legislative goal. In passing these laws, the Legislature has clearly defined its “water quality goals” for the St. Croix River, ie. that alewives shall no longer live in the river. And the Legislature has clearly designated the “use or uses to be made of the water” by declaring that the use of the river by native alewives shall no longer be allowed above the Grand Falls and Woodland dams.

The CWA states at 40 CFR §131.10(h): “States may not remove designated uses if: (1) They are existing uses, as defined in §131.3, unless a use requiring more stringent criteria is added.” 40 CFR §131.3(e) states: “*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 quality standards.”

There is no question native alewives were an “existing use” of the St. Croix River above the Woodland and Grand Falls Dams which was “actually attained” on and after Nov. 28, 1975. And there is no question the sole intent and purpose of the 1995 and 2008 Maine alewife ban laws is to eliminate this existing use in perpetuity. The CWA at 40 CFR §131.10(h) explicitly prohibits such an action by the Maine Legislature.

Thank you for your time.

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