

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-13-41

Douglas H. Watts,
Petitioner.

v.

Patrick Keliher, Commissioner,
Maine Dept. of Marine Resources

Chandler Woodcock, Commissioner,
Maine Dept. of Inland Fisheries & Wildlife,
Respondents.

PLEADING OF DOUGLAS H. WATTS

In February 2012 the Petitioner and two other citizen parties asked defendant Fisheries Commissioners to initiate an adjudicatory fishway proceeding at the Gardiner Paperboard Dam on Cobbosseecontee Stream in Gardiner, Maine pursuant to their legal duty under Maine's Fishway Law. 12 MRS § 12760. A.R. 1, 2, 3.¹ The MDIFW Commissioner denied the request. A.R. 8. Under M.R. Civ. P. 80B and 80C, Petitioner Douglas H. Watts seeks review of the Commissioner's decision.²

AGENCY DECISION ON APPEAL

An email by Asst. AG Mark Randlett from June 6, 2012 lays out the factual and legal basis for the Commissioners' July 6, 2012 denial decision. A.R. 7. It states:

- A Commissioner decision to initiate a fishway proceeding is wholly discretionary pursuant to *Dumont v. Speers*, 245 A.2d 151 (1968).
- The next dam above the Gardiner Paperboard Dam is FERC-licensed with no standing requirements in its license to provide upstream fish passage for native fish.
- The situation at Cobbosseecontee Stream is factually distinguishable from that at the Cumberland Mills Dam on the Presumpscot River where the MDIFW Commissioner initiated a fishway proceeding by citizen request because the FERC-licensed dam immediately above the

¹ The other two requesting parties are the Atlantic Salmon Federation and its Maine Council, and Maine Rivers, a statewide river conservation organization.

² Petitioner is entitled to have the Commissioner's decision reviewed by this Court as a final agency action. *Friedman et al. v. Bd. of Environmental Protection* (2008). The Commissioner's decision is dispositive to all relevant legal and factual issues and the Petitioner has no other recourse, appeal, or review provided within the agency. *Id.*

Cumberland Mills Dam had a standing requirement in its federal license for upstream fish passage within two years of when fish passage at Cumberland Mills Dam was available.³

ARGUMENT

A. The State admits there is Sufficient Habitat in Cobbosseecontee Stream to support a Substantial Recreational and Commercial Fishery for Native Migratory Fish.

This admission is contained in the MDMR 2002 Draft Fishery Management Plan for Cobbosseecontee Stream which is repeated *verbatim* in a May 31, 2012 email from Michael Brown of MDIFW to the MDIFW Commissioner. A.R. 13; A.R. 4. Both record documents state Cobbosseecontee Stream has suitable habitat to produce a sea-run alewife population of over 3 million adults and a commercial fishery of 2.8 million adults annually. The Fishway Law states:

4. Initiation of fishway proceedings. The commissioner shall initiate proceedings to consider construction, repair or alteration of fishways in existing dams or other artificial obstructions whenever the commissioner determines that one or more of the following conditions may exist:

A. Fish passage at the dam or obstruction in issue, whether alone or in conjunction with fish passage at other upriver barriers, will improve access to sufficient and suitable habitat anywhere in the watershed to support a substantial commercial or recreational fishery for one or more species of anadromous or migratory fish ...

B. The construction, alteration, repair or maintenance of a fishway is necessary to protect or enhance rare, threatened or endangered fish species.

The Commissioners' stated reason for not initiating a fishway proceeding at Cobbosseecontee Stream is a novel claim that 12 MRS §12760(4)(A) legally constrains the Commissioners' zone of inquiry to only that small section of the stream between the Gardiner Paperboard Dam and the next upstream dam, the American Tissue Dam, and not to the entire Cobbosseecontee watershed or any other part of it. A.R. 7. Nothing in the plain language of Section 4(A) of the fishway law requires, suggests or implies the Legislature intended such an artificially narrow zone of inquiry. The plain language of Section 4(A) states the Commissioners' zone of inquiry must include suitable habitat 'anywhere' in the watershed -- regardless of whether that habitat is blocked by other upstream dams

³ In the Matter of Cumberland Mills Dam Fishway Proceeding, Findings of Fact and Order. MDIFW, June 29, 2009.

('alone or in conjunction with fish passage at other upstream barriers').⁴ The Commissioner's July 6, 2012 denial decision reads Section 4(A) directly opposite its plain language and reads into Section 4(A) severe legal constraints on his zone of inquiry where none in fact exist.

B. Petitioner is Being Held to an Unlawfully High Level of Initial Proof.

In its 2007-2009 fishway proceeding at the Cumberland Mills Dam on the Presumpscot River, MDIFW included in its zone of factual inquiry large expanses of aquatic habitat blocked by 2, 3 and 4 impassable FERC-licensed dams. A.R. 16.⁵ Four of these dams (Mallison Falls, Little Falls, Gambo Falls and Dundee Falls) have no legally binding, date-certain federal requirements for fish passage construction. Instead, their federal licenses only require upstream fish passage if and when certain numeric trigger numbers of river herring are counted at the dam below them (meaning that if these trigger numbers are not met, no fishways are required). Despite the very uncertain legal requirement for future fishways at these four FERC-licensed dams, the MDIFW included the aquatic habitat above all four dams in its factual analysis of whether to initiate a fishway proceeding at the Cumberland Mills Dam.⁶ A.R. 16. The MDIFW Commissioner's consideration of initial factual evidence at Cumberland Mills is far more expansive than that offered to the Petitioner.⁷ In its 2009 Final Findings of Fact and Order, MDIFW states it relied on data for migratory fish production in habitat above all *five* S.D. Warren Dams without limitation:⁸

4 The Legislature's specific use of the term 'anywhere in the watershed' in Section 4 sends a clear message that the Legislature did not intend the Commissioners to arbitrarily self-limit their zone of inquiry in such a way to deliberate constrain their authority to initiate a fishway proceeding and defeat the purpose of the fishway law.

5 In the Matter of Cumberland Mills Dam Fishway Proceeding, Findings of Fact and Decision, Finding of Facts and Order, Maine Dept. of Inland Fisheries & Wildlife, June 29, 2009.

6 By the State's reading of Section 4 here, the Commissioners could only have considered aquatic habitat directly above the first FERC-licensed dam above the Cumberland Mills Dam (ie. Saccarappa), since that is the only dam of the five which does not have a numeric trigger number to require upstream fish passage.

7 Citizen Petitioners in *Cumberland Mills* were Friends of the Presumpscot River and American Rivers, who formally requested the MDIFW Commissioner initiate a fishway proceeding at the Cumberland Mills dam by letter and evidentiary submissions on Oct. 19, 2006. A.R. 16 at 47.

8 MDIFW. In the Matter of Cumberland Mills Dam Fishway Proceeding, Findings of Fact and Decision, Finding of Facts and Order, June 29, 2009 at 9-10.

Dr. Wippelhauser testified as to her estimates of harvestable fish that can be produced in the habitat above the Cumberland Mills Dam. The estimates were provided for alewives and blueback herring separately. She arrived at the estimates by first determining the surface acres of the impoundment using GIS technology, and then multiplying the total by a unit production of fish. For alewife she used 235 fish per acre; and for blueback herring she used 600 fish per acre. She factored in spawning escapement and passage efficiency, and also took into consideration the DMR's experience in the Saco and Kennebec Rivers. Dr. Wippelhauser testified that the estimates were based on current river conditions, without stocking, and that the timeframe for reaching the estimated numbers of fish would be approximately 30 to 50 years. The timeframe would likely be shortened by a stocking program, as planned by DMR. Dr. Wippelhauser estimated that the existing habitat in the Cumberland Mills and Saccarappa impoundments can produce a run of 40,025 alewives and 145,823 by habitat in the Cumberland Mills, Saccarappa, Mallison Falls, Little Falls, Gambo and Dundee impoundments. When spawn escapements and passage efficiency is factored in, the estimates of harvestable alewives become 33,180 and 121,868, respectively. With regard to blueback herring, Dr. Wippelhauser estimated that the existing habitat in the Cumberland Mills and Saccarappa impoundments can produce a run of 102,191 blueback herring and 372,314 by habitat in the Cumberland Mills, Saccarappa, Mallison Falls, Little Falls, Gambo and Dundee impoundments. When spawning escapements and passage efficiency is factored in, the estimates of harvestable blueback herring become 84,591 and 310,716, respectively. Because the harvestable surplus will be a mix of river herring, the potential production range is between 33,180 and 84,591 that will be produced by the Cumberland Mills and Saccarappa impoundment habitat; and the harvestable surplus of river herring that will be produced in the six impoundments above the Cumberland Mills Dam is between 121,868 and 310,716 fish.⁹

C. The MDIFW Commissioner Never Raised this Issue of Law in Cumberland Mills.

Petitioner was directly involved in the MDIFW's fishway proceeding at the Cumberland Mills Dam from 2007 to 2009 and is very familiar with it.¹⁰ At no time in that lengthy proceeding did any party, including the MDIFW Commissioner, invoke or suggest the artificially narrow reading of Section 4 of the fishway law invoked by the Commissioner in this case. This is shown in the Jan. 10, 2007 Commissioner's letter to interested parties stating his decision to initiate a fishway proceeding. A.R. 15. Nor did the Commissioner invoke this reading of the law in his lengthy Findings of Facts and Order dated June 29, 2009. As reviewed above, had the Commissioner in Cumberland Mills adopted this novel interpretation of Section 4 *in sensu stricto*, he would have been unable to consider and accept factual evidence from Maine DMR regarding habitat production above the Mallison Falls, Little Falls,

⁹ Based on Dr. Wippelhauser's quantitative evidence regarding habitat above all five S.D. Warren dams, MDIFW Commissioner Martin ruled, "Based on the evidence, I find that alewife, blueback herring, and American shad can be restored in substantial numbers to the watershed by the construction of a fishway at Cumberland Mills Dam."

¹⁰ The Petitioner gathered and prepared most of the historic documentation, including the history of Maine's fishway laws, used by FOPR and AR in their extensive evidentiary submissions to the record in Cumberland Mills.

Gambo Falls and Dundee Falls dams, since the FERC licenses for those dams do not categorically require fishway construction, but instead only require fishways if and when certain substantial numeric triggers for river herring are met at the dams below them.

D. The Federal Relicensing Process at the American Tissue Dam Has Started.

The actual construction and provision of fish passage at an upstream FERC-licensed dam is not necessary for the Commissioners to initiate a state fishway proceeding at a lower dam under the State's direct control. A.R. 16. In Cumberland Mills, MDIFW began a fishway proceeding in 2007 and completed it in 2009 even though the next FERC dam just a mile upstream, at Saccarappa Falls in Westbrook, did not have upstream fish passage (and still does not have upstream fish passage).¹¹ Federal relicensing of the American Tissue Dam on Cobbosseecontee Stream began in earnest in March 2013. A.R. 15.¹² To the extent the Commissioners were concerned in spring 2012 that it was still too early to begin a state fishway proceeding at the Gardiner Paperboard Dam because the FERC relicensing process at American Tissue was still several years away, that concern has now become moot. A.R. 15. This winter the American Tissue Dam licensee must submit to the FERC, the State and other parties its official PAD (Pre-Application Document) for review and comment. A.R. 15. As such, the State will be commenting on this PAD at the same time this instant case is being reviewed by this Court, and if the State desires, it can use this comment period to inform the American Tissue Dam licensee that upstream passage for native fish is urgently needed at the dam.

E. The Commissioners' Interpretation of the Fishway Law Defeats its Legislative Purpose.

The Legislature's intent and purpose of the fishway law is stated at 12 MRS §12760(1):

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- 11 The FERC license for the Saccarappa Dam requires upstream fish passage be installed within two years of the completion of a fishway at the Cumberland Mills Dam. The MDIFW-ordered fishway at Cumberland Mills Dam became operational in May 2013. In January 2014, the Saccarappa Dam licensee, S.D. Warren, formally applied to FERC to surrender its license for the Saccarappa Dam and to remove it.
- 12 Under the Federal Power Act, licensees must submit to FERC a notice of intent to seek relicense and a pre-application document (PAD) 5 years before license expiration. FERC noticed the licensee of this deadline on March 8, 2013 and the licensee is now preparing its PAD for submission before April 2014. *Id.*

1. Commissioners' authority. In order to conserve, develop or restore anadromous or migratory fish resources, the commissioner and the Commissioner of Marine Resources jointly may require a fishway to be erected, maintained, repaired or altered by the owners, lessors or other persons in control of any dam or other artificial obstruction within inland waters frequented by alewives, shad, salmon, sturgeon or other anadromous or migratory fish species. (emphasis added)

Any novel or 'alternative' interpretation of Section 4 of the fishway law by the Commissioners must be supportive of the Legislature's intent and purpose to "conserve, develop or restore anadromous or migratory fish resources" of the State. 12 MRS § 12760(1). The Commissioners' interpretation of Section 4 defeats the Legislature's intent and purpose for the fishway law by arbitrarily narrowing their scope of inquiry to the very small section of river habitat between the Gardiner Paperboard dam and the American Tissue Dam and by removing the words 'anywhere in the watershed' and the words 'alone or in conjunction with fish passage at other upstream barriers' from the plain language of Section 4. The Commissioner's reading of Section 4 is not mere interpretation. It is a material revision of its plain language which can only be accomplished by omitting entire words and phrases from the law. See, *Handyman Equipment Rental Co., Inc. v. City of Portland*, 724 A.2d 605, 607-608 (Me. 1999) (words in statute must be given meaning and cannot be treated as meaningless and superfluous). Moreover, there is no need for the Commissioners to search outside or go beyond the plain language of Section 4 of the fishway law to elicit its intended meaning and Legislative purpose. In Cumberland Mills, MDIFW Commissioner Martin had no difficulty understanding and applying the plain language of Section 4 to the facts placed before him. A.R. 16. The sole purpose and practical effect of the Commissioners' novel reading of Section 4 in this proceeding has been to stall, delay and prevent official consideration of the need for fish passage at Cobbosseecontee Stream, all of which thwart and defeat the Legislature's stated purpose to "conserve, develop or restore anadromous or migratory fish resources" of the State. 12 MRS § 12760(1).

F. The Fishway Law Does Not Require a "Standing" Order for Fishways at Upstream Dams.

The Commissioners' July 6, 2012 decision denial twists the material facts in Cumberland Mills

into a sweeping, generalized interpretation of the Fishway Law itself. A.R. 7, 8. The Commissioners posit that because in Cumberland Mills there happened to be a 'standing' FERC order for fish passage at the Saccarappa Dam, this fact somehow means that the Fishway Law itself can only be exercised when and if such a standing order exists.¹³ The plain language of 12 MRS § 12760(4)(A) refutes this (ie. habitat 'anywhere' in the watershed). To be sure, the standing FERC license requirement at the Saccarappa Dam greatly helped to justify the MDIFW Commissioner's findings in that case -- both for the initiation of a fishway proceeding and the actual construction of a fishway. Also, in Cumberland Mills, MDIFW Commissioner Martin freely accepted and considered detailed quantitative evidence from the Maine DMR regarding habitat lying above four S.D. Warren dams. These dams have no 'standing' and automatic FERC requirement for fishways but instead have highly conditional fish passage requirements based solely on numeric triggers of river herring which may never be met.¹⁴

G. *Dumont v. Speers* Does Not Control.

As a threshold matter, the State asserts *Dumont v. Speers* controls, ie. that a decision by the Commissioners to not initiate a fishway proceeding for any reason has been left by the Legislature to the sole discretion of the Commissioners. A.R. 7, 12.¹⁵ This is incorrect as a matter of law and Legislative history. In 1983 the Maine Legislature repealed the state's entire 'Fishway Law' as it existed in 1968.¹⁶ As such, the fishway law examined by the Law Court in *Dumont v. Speers* in 1968 has not existed for 30 years. The modern fishway statute has been revised numerous times since 1983 and since 1991 has contained the language now in Section 4 which states (emphasis added):

4. Initiation of fishway proceedings. The commissioner shall initiate proceedings to consider construction, repair or alteration of fishways in existing dams or other artificial obstructions whenever the commissioner determines that one or more of the following conditions may exist:

13 The State's logical error here is identical to reasoning that because Cumberland Mills only dealt with the Presumpscot River, this means the Fishway Law itself only applies to the Presumpscot River -- and no other rivers.

14 Because the FERC licenses for these dams have no 're-openers' if the mandatory numeric river herring triggers are not achieved, it is quite possible these dams will never have fishways on them during their 40-year license terms.

15 *Dumont v. Speers*, 245 A.2d 151 (Me. 1968).

16 The fishway law discussed by the Law Court in *Dumont v. Speers* dates back to 1954, at R.S. c. 37, §13, 1954 as amended by P.L. 1965, Ch. 386. All of the 1954 law and subsequent revisions were repealed by the Legislature in 1983 and replaced with new and much different language. Public Laws 1983, c. 374 §1.

Title 1 MRS § 71(9-A) provides that the Legislature's use of the word “shall” in a statute indicates a “mandatory duty, action or requirement,” while the word “may” indicates “authorization or permission to act.” See, e.g., *Friedman et al. v. Bd. of Env'tl. Prot.* 256 A.2d. 97 (Me. 2008), citing to *Dumont v. Speers* (use of the word may in statute intends a permissive grant of authority rather than a mandatory duty to act). Here, unlike in *Friedman*, the Legislature specifically chose 'shall initiate ...' in Section 4 instead of 'may initiate ...' Also, the word 'whenever' in Section 4 connotes an imperative which is synonymous with "at all times" or "always" or "without exception" (ie. 'Close the door whenever you leave the house.'). This word only re-emphasizes the Legislature's use of 'shall' rather than 'may' in Section 4. Lastly, the Legislature's one use of the word 'may' in Section 4 specifically refers to the factual criteria at Section 4(A) and (B) which are to be used by the Commissioners for determining if sufficient initial evidence exists to warrant the initiation of a fishway proceeding. See, e.g., Cumberland Mills, A.R. 16 at 48 ('Based on our review of the available information, the Department has determined that either of these conditions may exist and, as such, is initiating fishway proceedings in accordance with its statutory authority.') A second reason *Dumont v. Speers* is inapt here is because that case principally dealt with whether the 1968 version of the fishway law required the Fisheries Commissioner to order the actual construction of a fishway after the completion of an administrative fishway proceeding.¹⁷ This is not the issue in this case. Section 6 of the modern fishway law still reserves discretionary authority to the Commissioner to not order the actual construction of a fishway upon the completion of an adjudicatory fishway proceeding, provided that the Commissioners' final written order states a period not to exceed five years when no fishway shall be required. *Id.*

Douglas H. Watts, Petitioner, Augusta, Maine.

¹⁷ In *Dumont v. Speers*, appellants alleged the Commissioners must at all times order the construction of a fishway upon completion of an administrative fishway proceeding. Petitioner here is not making this claim.