STATE OF MAINE
KENNEBEC, ss.

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

DOUGLAS H. WATTS, Petitioner v. PATRICK KELIHER, COMMISSIONER, MAINE DEPARTMENT OF MARINE RESOURCES and CHANDLER WOODCOCK, COMMISSIONER, MAINE DEPARTMENT OF INLAND FISHERIES AND WILDLIFE, Respondents	)	CERTIFICATION OF RECORD

Patrick C. Keliher, Commissioner of the Maine Department of Marine Resources, and Chandler Woodcock, Commissioner of the Maine Department of Inland Fisheries and Wildlife, do hereby attest and certify that we are the legal custodian of the records of the Department of Marine Resources and Department of Inland Fisheries and Wildlife, respectively, and that the documents enclosed herewith are true copies of the official record within our custody and constitute the full, complete and true record regarding the matter which is under review by this Court.

This Certification of Record is made pursuant to 5 M.R.S. §11005 and Rule 80C of the Maine Rules of Civil Procedure.

IN WITNESS WHEREOF, I have hereunto set my hand as a representative of the Department of Marine Resources at Hallowell, Maine, this 2nd day of December 2013.

DEPARMTENT OF MARINE RESOURCES

By: _____
PATRICK C. KELIHER
Commissioner

IN WITNESS WHEREOF, I have hereunto set my hand as a representative of the Department of Inland Fisheries and Wildlife at Augusta, Maine, this 2nd day of December 2013.

DEPARMTENT OF MARINE RESOURCES

By: _____
CHANDLER WOODCOCK
Commissioner

STATE OF MAINE
KENNEBEC, ss.

Sworn and subscribed to before me this 2nd day of December, 2013.

Before me,

_____ AAG
~~Notary Public~~ attorney at law
~~Commission Expires~~

Mark Randlett AAG
Print Name

STATE OF MAINE
KENNEBEC, ss.

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

DOUGLAS H. WATTS,

Petitioner

v.

PATRICK KELIHER, COMMISSIONER, MAINE DEPARTMENT OF MARINE RESOURCES
and
CHANDLER WOODCOCK, COMMISSIONER, MAINE DEPARTMENT OF INLAND FISHERIES AND WILDLIFE,

Respondents

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Kennebec Reborn, Inc.
131 Cony Street, Augusta, ME 04330
207-622-1003

Chandler E. Woodcock
Commissioner
Maine Dept. of Inland Fisheries & Wildlife
41 State House Station
Augusta, ME 04333-0041

Patrick Keliher
Commissioner
Maine Dept. of Marine Resources
21 State House Station
Augusta, ME 04333-0021

January 27, 2012

RE: Fish Passage at Gardiner Paperboard Dam, Cobbosseecontee Stream

Dear Commissioners:

We request you exercise your legal authority under Maine's fishway law, 12 MRSA §12760, to require passage for native migratory fish at the Gardiner Paperboard Dam, so-called, located at Cobbosseecontee Stream in Gardiner, Maine and owned by PaperRoute LLC of South Freeport, Maine.

This request is prompted by the dam owners' Nov. 8, 2011 reply to our group that they are not interested in providing fish passage at the dam using public or private conservation monies. Because PaperRoute LLC has had more than two years since acquiring the dam property to consider their fish passage options at the dam and have recently chosen to not provide any fish passage in the foreseeable future, we believe the Commissioners' consideration of this request at this time is necessary and proper.

Provision of fish passage at the Gardiner Paperboard Dam is essential to achievement of the stated goals of Maine DMR's draft fisheries restoration and management plan for the Cobbosseecontee Stream watershed, last revised in 2002 and attached. Recent conversations with MDMR scientific staff indicate the details, goals and biological basis of the 2002 MDMR Plan have not changed since it was last amended.

The biological data contained within the MDMR plan show that Commissioner action under Maine's fishway law is warranted because fish passage at the dam will result in the restoration of commercially and recreationally significant populations of native diadromous fish, including the restoration of one of largest river herring populations in Maine and New England.

The present dam owners' decline of a proffer by other parties to breach the dam at no cost to them constitutes the type of 'exhaustion of remedies' the Legislature intended to occur prior to the Commissioners' invoking their authority under the fishway law, especially at the first impassable dam at the mouth of a large coastal stream.

The exhaustion of remedies at Gardiner Paperboard Dam is similar to that at the Presumpscot River in Westbrook, Maine where in 2010 the MDIFW Commissioner exercised his legal authority under the State's fishway law to order the dam owner to install fish passage for native diadromous fish species by date certain. According to the 2002 MDMR restoration and management plan the number of diadromous fish which would be restored by provision of passage at the Gardiner Paperboard Dam is approx. 10-30 times that estimated by the Commissioners for provision of fish passage at the Cumberland Mills Dam.

Sincerely,

Douglas H. Watts
Kennebec Reborn, Inc.
131 Cony Street
Augusta, ME 04330
207-622-1003

att: MDMR 2002 Restoration and Management Plan for Cobbosseecontee Stream.

ATLANTIC SALMON FEDERATION

Fort Andross, Suite 406
14 Maine Street
Brunswick, ME 04011-2030

February 16, 2012

Commissioner Chandler E. Woodcock
Maine Dept. of Inland Fisheries and Wildlife
41 State House Station
Augusta, ME 04333

Commissioner Patrick Keliher
Maine Dept. of Marine Resources
21 State House Station
Augusta, ME 04333

RE: Fish Passage at the Gardiner Paperboard Dam

Dear Commissioners Woodcock and Keliher

The Atlantic Salmon Federation (ASF) and its Maine Council (MC-ASF) are writing in support of the recent petition filed by Kennebec Reborn, Inc. seeking fish passage at the Gardiner Paperboard Dam on Cobbosseecontee (Cobbossee) Stream in Gardiner, Maine.

Restoration of native migratory fish species to Cobbossee Stream is a long-standing priority of the State of Maine and the conservation community. ASF alone has invested hundreds of hours of time and tens of thousands of dollars in collaborative efforts aimed at removing the Gardiner Paperboard Dam over the past dozen years.

Cobbossee is one of the most important tributaries in the entire Kennebec drainage for alewives, and certainly the most important tributary entering the Kennebec below the head-of-tide. The Draft Fishery Management Plan for the Cobbossee Stream watershed estimates a total production of more than 3.1 million alewives for the system.

Other species, such as Atlantic salmon, American shad, American eel, blueback herring, brook trout, and sea lamprey would benefit from the establishment of fish passage at the Gardiner Paperboard Dam.

Sincerely,

John Burrows

John R.J. Burrows
Director of New England Programs

tel 207-725-2833 fax 207-725-2967

email john@asf.comcastbiz.net

www.asf.ca

Conservation for a Bright Future

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LIA MORRIS
SCOTT PHILLIPS
LAURA SEWALL
CLINTON B. TOWNSEND
SHARRI VENNO

ADVISORY BOARD

JOHN KAUFFMANN

February 17, 2012

Chandler E. Woodcock
Commissioner
Maine Dept. of Inland Fisheries and Wildlife
41 State House Station
Augusta, ME 04333

Patrick Keliher
Commissioner
Maine Dept. of Marine Resources
21 State House Station
Augusta, ME 04333

RE: Fish passage at the Gardiner Paperboard Dam, Cobbosseecontee Stream

Dear Commissioners,

We are writing to express our support for efforts to establish fish passage at the Gardiner Paperboard Dam on the Cobbosseecontee Stream in Gardiner, Maine. The Cobbosseecontee Stream has historically been home to native diadromous species including alewives, American shad, Atlantic salmon, blueback herring and rainbow smelt. We believe that establishing and maintaining fish passage on this waterway should be a priority because of its importance to restoration of these native species.

We note that fish passage at this site was a goal in the 2002 draft fisheries management plan for the watershed produced by Maine's Department of Marine Resources. We understand that the legal precedent for this action is established and provided by Maine's fishway law 12 MSA S12760.

Sincerely,

Landis Hudson

Landis Hudson
Executive Director

P.O. BOX 782, YARMOUTH, ME 04096 PHONE: 207-847-9277 WWW.MAINERIVERS.ORG

Orff, Becky

From: Brown, Michael
Sent: Thursday, May 31, 2012 9:40 AM
To: Woodcock, Chandler; Boland, John
Subject: Gardiner Paperboard Mill - Background info for entire drainage
Attachments: ChandlerCob.doc

Chandler, John,

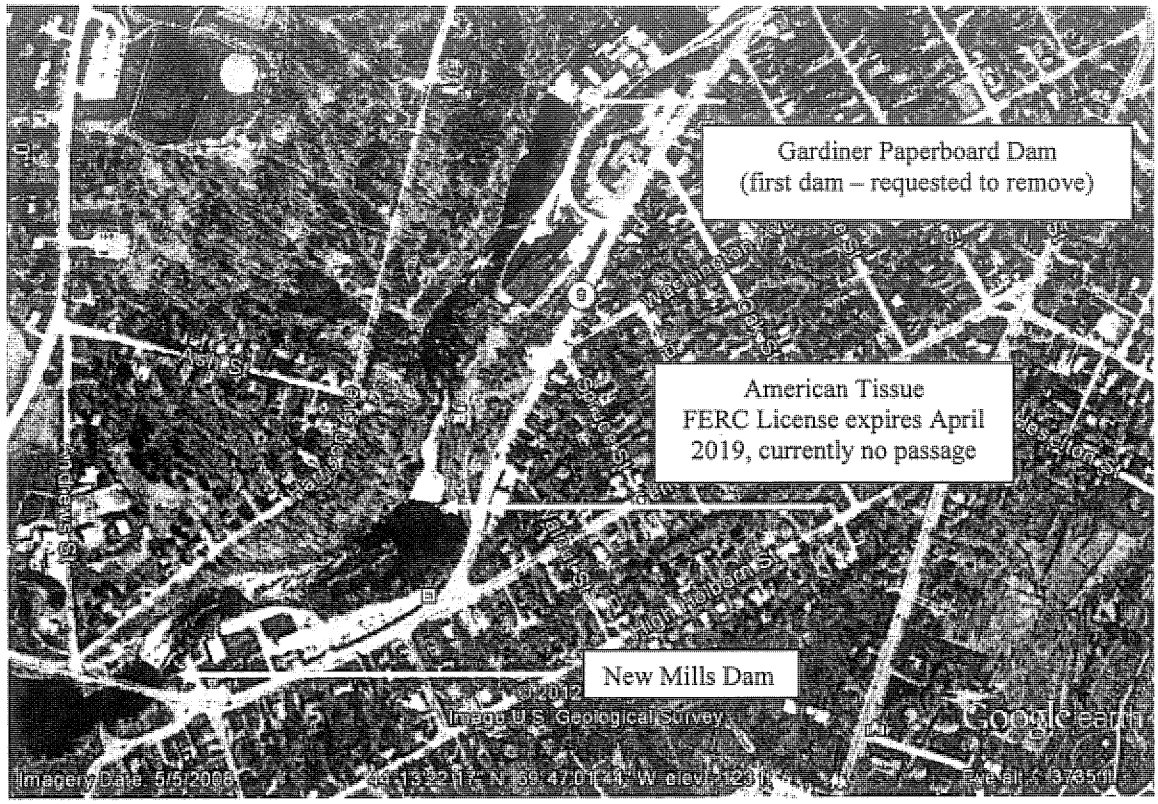
The area available to anadromous fish between the Gardiner Paperboard Dam and the American Tissue Dam is limited. There is no indication in the DMR plan that this stretch provides significant spawning or rearing habitat for anadromous fish. However, this is a migratory pathway to reach spawning habitat. There are no plans to provide upstream passage at the two dams above the GPM Dam at this time. American Tissue does not come up for FERC relicensing until 2019. Cost to provide effective upstream passage for all three dams is ~ 1 – 2 million or more. Removal of GPM dam is likely to run an estimated $300,000

Mike

Background Info on Watershed
The Cobbosseecontee Stream drainage encompasses an area of approximately 240 square miles, and spans 15 towns (Bowdoin, Farmingdale, Gardiner, Hallowell, Litchfield, Manchester, Mount Vernon, Monmouth, Readfield, Richmond, Sabattus, Wales, Wayne, West Gardiner, and Winthrop). Twenty-one lakes and ponds with a total surface area of 13,534 acres and 19 dams without fishways are located within the drainage.

In the 1985 plan DMR estimated the number of alewives that could be produced by nine lakes and ponds in the Cobbosseecontee drainage. In this plan, estimates of alewife production have been ...ded for an additional 11 lakes and ponds that were omitted from the 1985 plan. All estimates of alewife production are calculated by multiplying the surface area, measured in acres, by a unit production of 235 fish/acre. Total production for the drainage is estimated at 3,180,600 alewives

In order to maintain a run of alewives, approximately 15% of the adults imprinted to a particular lake or pond must be allowed to spawn each year. Total spawning escapement would be about 477,100 adult alewives if no dams existed in the drainage. However, fish will have to pass multiple dams to reach spawning habitat in this drainage, and fish passage facilities are never totally 100% efficient. Assuming 90% passage efficiency at each dam, total spawning escapement is approximately 700,000 adult alewives. The remaining 2.48 million fish could support a commercial harvest.


Gardiner Paperboard Dam
(first dam – requested to remove)
American Tissue
FERC License expires April
2019, currently no passage
New Mills Dam
Image U.S. Geological Survey
Google earth

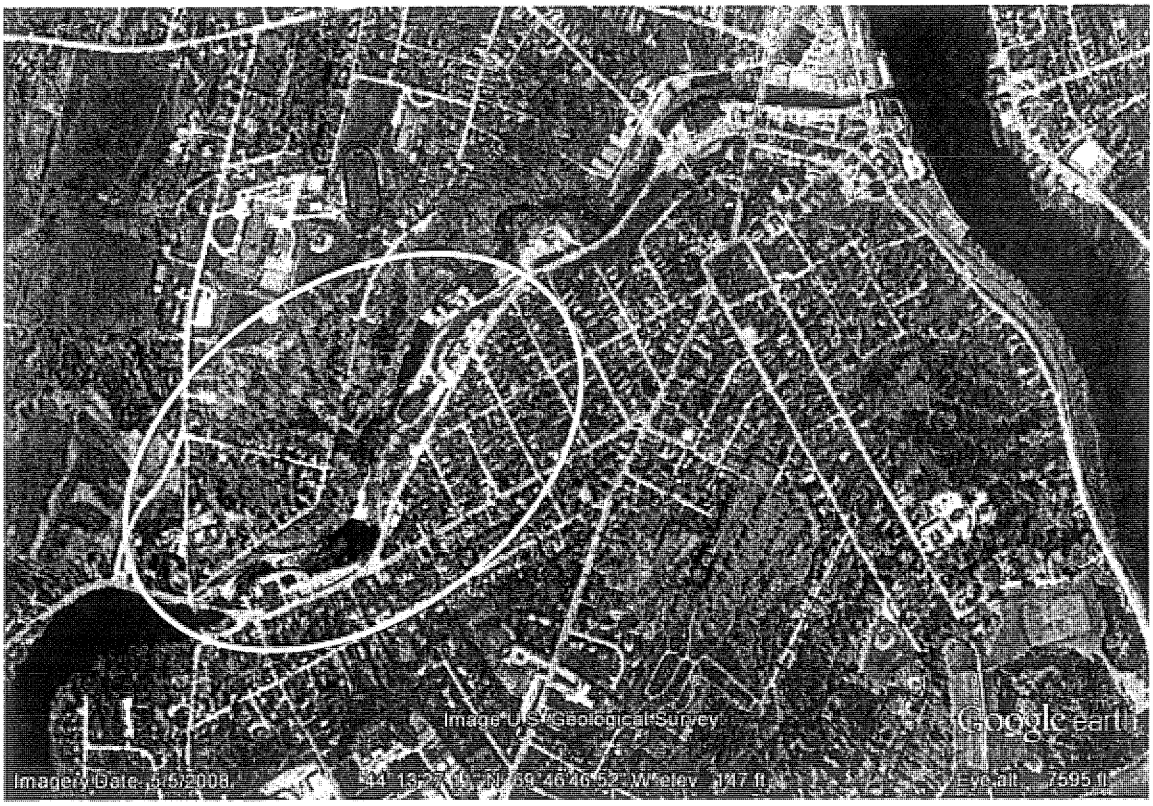


Image U.S. Geological Survey
Google earth

>-----Original Message-----
>From: Keliher, Patrick [mailto:Patrick.Keliher@maine.gov]
>Sent: Tuesday, June 5, 2012 06:06 PM
>To: info@dougwatts.com
>Cc: 'McKay, Jessica'
>Subject: Re: do we need negotiation here?
>
>You need to look at available habitat between the dams - not all upstream habitat as it is not available. That is how we look at the substantial fishery standard. Talk to Ron/Sean. We don't oppose passage. If you want to talk about funding passage talk to the owner. If you want to fight it go ahead - your call. I'm not debating this over email. I'm happy to discuss further. If you want to come to the office and discuss Jess will find some time.
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>From: info@dougwatts.com [mailto:info@dougwatts.com]
>Sent: Tuesday, June 05, 2012 05:49 PM
>To: Keliher, Patrick; info@dougwatts.com <info@dougwatts.com>; Gray, Nate; Wippelhauser, Gail
>Subject: do we need negotiation here?
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>DMR and IFW cannot plausibly oppose fish passage at a dam which both agencies fully supported removing from 1998-2004. It doesn't factually work. It's now not if, but when. Me and John Burrows and Landis Hudson are perfectly willing to sit down and discuss the when and who pays, etc. But the question of if and whether is now off the table. DMR put it off the table in 1998.

>I've been reading FOPR's Fishway Petition at Cumberland Mills on the Presumpscot and the facts in both cases are identical, as you know, but the numbers (of LYs) on Cobbossee are totally off the scale. It is the single largest alewife producer on the U.S. East Coast outside the St. Croix, Penobbie and Sebasticook.
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>You might want to closely read Ron and Sean's letter to Danny Martin about CMills before you let IF&W send me this Cobbossee letter they intend to send. I did all the historic research on it. And I have even more historic research on Cobbossee. Don't pick a fight you can't possibly win.
>
>Attached.
>
>Thanks,
>
>Doug
>
>
>

Keliher, Patrick

From: info@dougwatts.com
Sent: Tuesday, June 05, 2012 7:28 PM
To: Keliher, Patrick; info@dougwatts.com
Cc: McKay, Jessica
Subject: The fishway statute is inclusive to the entire watershed.

Pat, thanks a lot for responding. Please note:

The Maine Fishway Law (MRS 12 §12760) states at Sect. 4:

"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;"

This statutory language is explicitly and purposefully inclusive to the entire watershed, not to the small area immediately above the dam in question and below the next impassable barrier. Otherwise the law would be impossible to enforce, since at Cobbossee, there is another dam 1/3rd mile upstream and another dam 1/3rd mile above that.

Based upon your explication of the DIFW's decision to me, it appears that DIFW has completely mis-read the plain language of the statute, has turned it upside down, and has interpreted it exactly the opposite of that at Cumberland Mills (which like the situation at Cobbossee in Gardiner has an impassable FERC licensed dam only 1 mile or so above it).

If the sole basis for DIFW's denial of a fishway proceeding is based upon reading Section 4 of the law as to be not inclusive to the entire watershed but only to the section of water between the dam and the next dam above it, then the denial is based on a totally flawed reading of the law and stands opposite to DIFW's formal decision and order at Cumberland Mills.

So, anyways, as far as I can discern from what you've been polite enough to tell me, somebody at DIFW or MDMR or the Maine AG's office has massively screwed up in their interpretation of Sect. 4 of 12 MRS 12760. The interpretation is not legally or factually tenable and is exactly the opposite of that in the Cumberland Mills fishway proceeding. If this fishway proceeding is conducted in a manner legally consistent with that at Cumberland Mills, the same result must be produced: fish passage.

I would greatly not prefer to have to sue the state over something as mindlessly simple as a gross and obvious misinterpretation of the plain language of Section 4 as quoted above. It will just waste everyone's time and money and nerves. We should be spending our time on more productive things.

Thanks for taking the time on this.

Doug

Keliher, Patrick

From: Randlett, Mark
Sent: Wednesday, June 06, 2012 3:59 PM
To: Keliher, Patrick; Boland, John
Subject: RE: The fishway statute is inclusive to the entire watershed.

Thanks for the correction Pat. The restriction on the state's ability to obtain a fishway prescription from FERC on the first dam upstream, coupled with the limited habitat available between the first and second dams, should support the IFW's decision not to go forward. I would not characterize Mr. Watts' letter as a "petition" - rather, it is a letter requesting that the state initiate a fishway proceeding.

Mark.

-----Original Message-----
From: Keliher, Patrick
Sent: Wednesday, June 06, 2012 3:51 PM
To: Randlett, Mark; Boland, John
Subject: RE: The fishway statute is inclusive to the entire watershed.

Mark - thanks for looking into this. I have one minor correction; the 1st upstream dam is a FERC licensed facility, but has no fishway prescription included in the license. The state could ask for a reopener but those are rare. The 3rd dam in the system is not FERC licensed.

Based on this, and the fact there is not sufficient habitat between the first and second dam to support a substantial commercial or recreational fishery(s) DMR would support IF&W's rejection of the Watt's Petition.

Pat

Patrick Keliher, Commissioner
Maine Department of Marine Resources
State House Station 21
Augusta, Maine 04333
207.624.6553 phone
207.624.6024 fax

-----Original Message-----
From: Randlett, Mark
Sent: Wednesday, June 06, 2012 3:36 PM
To: Keliher, Patrick; Boland, John
Subject: RE: The fishway statute is inclusive to the entire watershed.

This is distinguishable from the situation at the Cumberland Mills Dam. In that case there were FERC orders for the upstream dams that included requirements for fish passage; and once passage was achieved at the Cumberland Mills Dam there would be additional passage upstream opening up that habitat. It is my understanding that, in this case, the upstream dams are not FERC licensed. Thus, there is no current requirement in place for passage at any of them and IFW fishway proceedings would be required for each dam upstream from the Gardiner Paperboard Dam. Even if that action is taken, there is no guarantee that fish passage would be ordered for any or all of those upstream dams. Whether committing agency resources to pursuing passage at each of these dams, or whether the value of the habitat between the Gardiner Paperboard Dam and the next one up if passage were installed at the GP Dam alone would support the findings outlined in the statute, appear to be valid considerations for the state.

The IFW commissioner's decision whether to initiate a fishway proceeding is discretionary. If he chooses to exercise his discretion to require a fishway he must do so by initiating a fishway proceeding in accordance with 12 MRS section 12760(4). That proceeding need not involve a public hearing unless the dam owner requests one or a petition signed by 50 or more residents requesting a hearing is filed. The petition referred to in 12760(5)(B)(1) appears only to apply once a fishway proceeding has been initiated by the commissioner and it relates to the public's ability to demand a hearing in connection with that proceeding. I don't see it as affecting the commissioner's discretion whether or not to initiate a proceeding in the first place.

I have attached a 1968 Maine Supreme Court decision holding that fishway proceedings are discretionary and that the public had no claim to force the initiation of a proceeding that the commissioner of IFW denied. While the particular statute involved in this case has since been amended, I don't see the statutory changes as affecting its discretionary nature.

If IFW has drafted a letter responding to Mr. Watts' request it may be helpful for me to review it before it gets sent.

Mark.

-----Original Message-----
From: Keliher, Patrick
Sent: Wednesday, June 06, 2012 10:54 AM
To: Randlett, Mark; Boland, John
Subject: FW: The fishway statute is inclusive to the entire watershed.
Importance: High

Mark - attached is the email from Watt's. John I am comfortable with our position but I would hold the letter until Mark responds.

Patrick Keliher, Commissioner
Maine Department of Marine Resources
State House Station 21
Augusta, Maine 04333
207.624.6553 phone
207.624.6024 fax
-----Original Message-----
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Sent: Tuesday, June 05, 2012 7:28 PM
To: Keliher, Patrick; info@dougwatts.com
Cc: McKay, Jessica
Subject: The fishway statute is inclusive to the entire watershed.

Pat, thanks a lot for responding. Please note:

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Based upon your explication of the DIFW's decision to me, it appears that DIFW has completely mis-read the plain language of the statute, has turned it upside down, and has interpreted it exactly the opposite of that at Cumberland Mills (which like the situation at Cobbossee in Gardiner has an impassable FERC licensed dam only 1 mile or so above it).

The sole basis for DIFW's denial of a fishway proceeding is based upon reading Section 4 of the law as to be not inclusive to the entire watershed but only to the section of water between the dam and the next dam above it, then the denial is based on a totally flawed reading of the law and stands opposite to DIFW's formal decision and order at Cumberland Mills.

So, anyways, as far as I can discern from what you've been polite enough to tell me, somebody at DIFW or MDMR or the Maine AG's office has massively screwed up in their interpretation of Sect. 4 of 12 MRS 12760. The interpretation is not legally or factually tenable and is exactly the opposite of that in the Cumberland Mills fishway proceeding. If this fishway proceeding is conducted in a manner legally consistent with that at Cumberland Mills, the same result must be produced: fish passage.

I would greatly not prefer to have to sue the state over something as mindlessly simple as a gross and obvious misinterpretation of the plain language of Section 4 as quoted above. It will just waste everyone's time and money and nerves. We should be spending our time on more productive things.

Thanks for taking the time on this.

Doug

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>To: Keliher, Patrick; info@dougwatts.com <info@dougwatts.com>; Gray, Nate; Wippelhauser, Gail
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STATE OF MAINE
DEPARTMENT OF INLAND FISHERIES & WILDLIFE
284 STATE STREET
41 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0041

Paul R. LePage
GOVERNOR

Chandler E. Woodcock
COMMISSIONER

July 6, 2012

Douglas Watts
Kennebec Reborn, Inc.
131 Coney Street
Augusta, Maine 04330

RE: 12 MRSA §12760 Gardiner Paperboard Dam

Dear Mr. Watts:

Fish passage at the Gardiner Paperboard Dam pursuant to 12 M.S.A. §12760 will not result in a substantial commercial or recreational fishery for anadromous fish species based on passage ordered at this site. Subsequent fish passage, or fish passage agreements, do not exist at any of the dams above the Gardiner Paperboard Dam including the American Tissue Hydropower Project, licensed by the Federal Energy Regulatory Commission (FERC No. 2809-ME).

The amount of habitat between the first and second impoundments is not sufficient to support significant populations of commercial or recreational fish species. The Draft Fishery Management Plan does not identify this section of the stream as a significant spawning or nursery area for alewife, blueback herring, American shad, striped bass or other anadromous fish species.

There is no evidence presented in the Draft Fishery Management Plan that construction of a fishway at the Gardiner Paperboard Dam is necessary to protect or enhance rare, threatened or endangered fish species.

Sincerely,

Chandler Woodcock
Commissioner

Pc: Patrick Keliher, Commissioner, DMR
John Boland, Director, Bureau of Resource Management
Mike Brown, Fisheries Division Director

Kennebec Reborn
131 Cony Street, Augusta, ME 04330
207-622-1003

Mr. Chandler E. Woodcock
Commissioner
Maine Dept. of Inland Fisheries & Wildlife
41 State House Station
Augusta, ME 04333-0041

July 11, 2012

Dear Commissioner Woodcock,

Thank you for your July 6, 2012 letter regarding fish passage at the Gardiner Paperboard Dam at Cobbosseecontee Stream in Gardiner. Your letter was in response to letters sent this winter by our organization and the Atlantic Salmon Federation and Maine Rivers requesting that MDIFW exercise its legal authority under the state's fishway law to initiate a fishway proceeding at the Gardiner Paperboard Dam.

Your July 6, 2012 letter states that MDIFW has made a factual finding that the short reach of Cobbosseecontee Stream between the Gardiner Paperboard Dam and the American Tissue Dam is not large enough to produce a significant commercial or recreational fishery via provision of fish passage at the Gardiner Paperboard Dam; and for this reason MDIFW has concluded the statutory threshold for MDIFW to initiate a fishway proceeding at dam is not met. This interpretation of 12 MRSA §12760 appears to be inconsistent with Section 4, which 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; or
> B. Fish passage at the dam or obstruction in issue is necessary to protect or enhance rare, threatened or endangered fish species.

Pursuant to your conclusions of law of July 6, 2012, our organization wishes to expand our January 2012 written request to also include the New Mills Dam in Gardiner, the Collins Mills Dam in West Gardiner and the Cobbosseecontee Lake outlet dam in Manchester. The inclusion of habitat above these dams would appear to satisfy MDIFW's stated concerns, since fish passage at these dams would open up nearly all of the Cobbosseecontee Stream watershed to native diadromous fish. We are also prepared to concurrently request through the FERC and

USFWS that upstream fish passage facilities be provided at the American Tissue Dam in Gardiner in conjunction with an MDIFW fishway proceeding at the Gardiner Paperboard, New Mills, Collins Mills and Cobbosseecontee Lake dams.

We did not select this 'four-dam' option in our January 2012 request because of our concern about the amount of staff time at MDIFW which would be required if MDIFW conducted four fishway proceedings at Cobbosseecontee Stream simultaneously. However, if this route is the only one which MDIFW believes will satisfy its interpretation of the state fishway law at Section 4, then we are willing to formally request this option. This option would be in concordance with MDMR's 2002 Diadromous Species Management and Restoration Plan for the Cobbosseecontee watershed and the State's overall diadromous fisheries restoration goals for the Kennebec River watershed.

In our January 2012 request we submitted as an appendix the MDMR Restoration and Management Plan for the Cobbosseecontee Stream watershed written by Dr. Gail Wippelhauser of MDMR in 2002. This is a well- researched scientific document and serves as a sound evidentiary basis for your department's factual analysis. We believe Dr. Wippelhauser's plan and report provides sufficient evidence to support a factual finding by MDIFW that concurrent fishway proceedings at Gardiner Paperboard dam, New Mills dam, Collins Mills dam and the Cobbosseecontee Lake outlet dam are warranted at this moment pursuant to the state's fishway law at Section 4. We are also attaching to this letter our full scientific and historic overview report on the Cobbosseecontee Stream watershed and ask that it be included as an evidentiary submission.

In conclusion, we wish by this letter to formally request that MDIFW initiate concurrent fishway proceedings pursuant to 12 MRSA §12760 at the Gardiner Paperboard dam, New Mills dam, Collins Mills dam, and the Cobbosseecontee Lake outlet dam.

Sincerely,

Douglas H. Watts, president
Kennebec Reborn, Inc.
131 Cony Street
Augusta, Maine 04330

Chandler E. Woodcock
Commissioner
Maine Dept. of Inland Fisheries & Wildlife
41 State House Station
Augusta, ME 04333-0041

July 12, 2012

RE: 60 DAY NOTICE OF INTENT TO SUE

Dear Commissioner Woodcock,

This letter is being sent to provide you with 60 days legal notice of my intent to sue you in your legal capacity as MDIFW Commissioner under the U.S. Endangered Species Act ("ESA") for violating the 'take prohibition' of the ESA at the Gardiner Paperboard Dam, so-called, located at the former Gardiner Paperboard mill facility at Water Street in Gardiner, Maine. This NOI specifically regards ESA-protected anadromous Atlantic salmon (*Salmo salar*), which are native to Cobbosseecontee Stream and seasonally inhabit and spawn in the lowermost, accessible part of the stream.

The take prohibition in the ESA is enforceable in the United States District Court by citizens. 16 U.S.C. 1538(a)(1)(B). The intent of this action is to secure appropriate relief for violations of the ESA's take prohibitions occurring at the Gardiner Paperboard Dam due to its lack of fish passage. The citizen suit provision of the ESA grants jurisdiction to United States District Courts to issue orders enjoining violations of the Act (such as the unauthorized taking of an endangered species) and authorizes an award of costs of litigation (including reasonable attorney and expert witness fees). 16 U.S.C. § 1540(g)(1) and (4).

In enacting the Endangered Species Act, Congress expressly found that species of fish, wildlife, and plants in danger of or threatened with extinction are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). Congress stated that the purposes of the ESA "are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered and threatened species..." 16 U.S.C. § 1531(b). By enacting the Endangered Species Act, Congress intended protection of endangered species to be afforded the highest of priorities. Under the ESA, an "endangered species" is a species of animal or plant (other than certain dangerous insect pests) which is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6).

In 2000, the Services issued a rule listing the Gulf of Maine Distinct Population Segment ("GOM DPS") of Atlantic salmon as "endangered" because it is in danger of becoming extinct. At that time, the Services included the salmon populations of seven rivers in Down East Maine in the description of the endangered GOM DPS, but did not include the Kennebec River salmon population in

this listing. In 2005, Friends of Merrymeeting Bay, Douglas Watts (a member of FOMB) and others filed a petition with the Services asking them to include Kennebec Atlantic salmon in the GOM DPS. Although a federal "biological review team" found that the Kennebec salmon population should be included in the GOM DPS, along with the Androscoggin and Penobscot River salmon populations, and published this finding in the "2006 Status Review for Anadromous Atlantic Salmon in the United States," by mid- 2008 the Services still had not ruled on the petition. On May 12, 2008, Mr. Watts, FOMB, and other conservation groups sued the Services to obtain a ruling on the petition. On September 3, 2008, the Services did rule on the petition, proposing to include the Kennebec, Androscoggin, and Penobscot River salmon populations in the GOM DPS. 73 Fed. Reg. 51,415 (September 3, 2008). On June 19, 2009, the Services issued a final rule including the salmon populations of all three rivers in the listed GOM DPS, thereby formally designating these populations as endangered under the ESA. 74 Fed. Reg. 29,344 (June 19, 2009). On that same day, NMFS issued a final rule designating "critical habitat" for the Kennebec, Androscoggin, and Penobscot salmon – i.e., habitat "essential to the conservation of the species" and "which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). The portion of the Kennebec River watershed where the Gardiner Paperboard dam is located are part of that critical habitat. 74 Fed. Reg. 29,300 (June 19, 2009).

In their decision to include the Kennebec River population of Atlantic salmon on the Endangered Species List, the Services found dams on that river play a major role in imperiling the salmon. The Services stated: "The National Research Council stated in 2004 that the greatest impediment to self-sustaining Atlantic salmon populations in Maine is obstructed fish passage and degraded habitat caused by dams ... Dams remain a direct and significant threat to Atlantic salmon." 74 Fed. Reg. at 29362. Similarly, the Services stated: "Dams are among the leading causes of both historical declines and contemporary low abundance of the GOM DPS of Atlantic salmon." The Services also stated that the "effects [of dams] have led to a situation where salmon abundance and distribution has been greatly reduced, and thus the species is more vulnerable to extinction ... Therefore, dams represent a significant threat to the survival and recovery of the GOM DPS." 74 Fed. Reg. at 29366-29367.

Section 9 of the ESA makes it unlawful for any person to "take" an endangered species unless authorized to do so by the federal government. 16 U.S.C. § 1538(a)(1)(b).

Under the ESA, the term "take" means "to harass, harm, pursue, hunt, shoot, kill, trap, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). By USFWS regulation:

Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. [and]

Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. 50 C.F.R. § 17.3.

A NMFS regulation further defines "harm" as including habitat modification where a causal link is established between such modification and injury or death of a listed species. 40 C.F.R. § 222.102.

Under Maine's state fishway law, 12 MRSA §12760, the MDIFW Commissioner has legal authority to require passage for Atlantic salmon and other native fish at the Gardiner Paperboard Dam. In January and February 2012 three local conservation organizations (Kennebec Reborn, Maine Rivers, Atlantic Salmon Federation) requested by letter that you initiate an adjudicatory fishway proceeding at the Gardiner Paperboard via your powers under 12 MRSA §12760. On July 6, 2012 you issued a final letter order on these requests, stating that you would not conduct a fishway proceeding. The sole reasoning for your decision was that the small area of Cobbosseecontee Stream between the first two dam impoundments on the stream is not sufficient to result in a substantial commercial or recreational fishery pursuant to Section 4(A) of the state fishway law. Section 4 of the state 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; or
>
> B. Fish passage at the dam or obstruction in issue is necessary to protect or enhance rare, threatened or endangered fish species.

The legal interpretation of the law made in your July 6, 2012 denial letter is opposite its plain language and intent. Section 4 of the fishway law directs you to include and consider in your factual analysis sufficient and suitable habitat 'anywhere' in the watershed, including habitat above other barriers above the dam in question. Your letter instead states your factual analysis was exclusively limited to the very short reach of Cobbosseecontee Stream between the Gardiner Paperboard Dam and the downstream toe of the next upstream barrier, the American Tissue Dam; and that you excluded from your analysis all of the habitat above the toe of the American Tissue Dam, which comprises nearly all of the Cobbosseecontee Stream watershed. Credible evidence supplied by MDMR scientists shows that the watershed as a whole has suitable habitat to sustain one of the largest native alewife popualtions in New England, ie. 2-3 million adults. This population size and potential is clearly sufficient to satisfy the plain language criteria at Section 4(A) of the state fishway law. If not for your interpretation of Section 4(A), the fundamental criteria authorizing you to initiate a fishway proceeding at the Gardiner Paperboard Dam are easily met. Your instant interpretation of Section 4(A) is opposite that of your immediate predecessor, Commissioner Roland Martin, at the Cumberland Mills Dam fishway proceeding on the Presumpscot River in Westbrook, Maine (*See*: In the Matter of Cumberland Mills Dam Fishway Proceeding, October 5, 2010, MDIFW, Roland Martin, Commissioner; Findings of Fact and Decision, June 29, 2009, MDIFW, Roland Martin, Commissioner.) Under your interpretation of Section 4(A), the MDIFW had no legal authority to conduct a fishway proceeding at Cumberland Mills dam in 2009-2010 and to require fish passage be installed at this dam, the completion of which is now well underway.

To offer a practical remedy to the legal concerns raised in your July 6, 2012 letter, on July 11, 2012 my organization, Kennebec Reborn, offered to amend its January 2012 request for initiation of fishway proceedings at the Gardiner Paperboard Dam to also include three upstream, non-hydro dams, the New Mills dam, the Collins Mills dam and the Cobbosseecontee Lake outlet dam. The addition of these three dams in a concurrent package of fishway proceedings would fully satisfy the criteria of Section 4(A) as you have legally interpreted it. However, this is not an ideal solution, since conducting

four simultaneous fishway proceedings would create a strain on MDIFW staff resources, which is why we did not recommend this option in the first place. The logical place to start, as specifically directed in Section 4(A) of the fishway law, is the first and lowermost barrier, the Gardiner Paperboard Dam. This was the exact approach adopted by MDIFW in the Cumberland Mills fishway proceeding on the Presumpscot River.

The Gardiner Paperboard dam and other dams on Cobbosseecontee Stream create a *prima facie* 'take' of Atlantic salmon under Section 9 of the ESA. The Maine Legislature has granted MDIFW legal authority to cause this unlawful take to cease through your delegated powers under the state fishway law to require fish passage at these dams. Your July 6, 2012 letter implies Section 4 of the state fishway legally *prevents* you from initiating a fishway proceeding at the Gardiner Paperboard Dam. I believe this legal barrier is imaginary, however, the proffer of Kennebec Reborn of July 11, 2012 to amend its original request to also include concurrent fishway proceedings at three upriver dams in the Cobbosseecontee Stream drainage resolves this issue by allowing your factual analysis to include nearly all of the Cobbosseecontee Stream watershed.

While the owners of the various dams on Cobbosseecontee, including the Gardiner Paperboard dam, bear an especial obligation to ensure full compliance with the US ESA at their dams, the MDIFW shares an equal obligation since the Maine Legislature has given to MDIFW the authorization and legal duty to abate and mitigate fish passage blockages on streams and rivers historically inhabited by endangered Atlantic salmon and other native fish species. This legal duty is amplified by the 2009 federal listing of Atlantic salmon as an endangered species in the Kennebec River and the designation of Cobbosseecontee Stream at the Gardiner Paperboard dam as critical habitat for the species. Nothing in your decision indicates that additional information or scientific data might cause you to amend your decision in the future, since it is based solely upon an interpretation of law. I believe your conclusion of law at Cobbosseecontee is incorrect and that the plain language of Section 4 of 12 MRSA §12760 directs you to initiate a fishway proceeding at the Gardiner Paperboard Dam for the same reasons of fact and law upon which the recent MDIFW Cumberland Mills dam proceeding was conducted and concluded under the same law.

The Legislature has granted you, as MDIFW Commissioner, the sole authority and power to require fish passage at non-hydro dams on Maine rivers above the head of tide. The technical and legal objections you raised pursuant to our original request are overcome by our July 11, 2012 request that MDIFW conduct concurrent fishway proceedings at the four dams mentioned. Nothing in 12 MRSA §12760 prohibits you from conducting four concurrent fishway proceedings at these four dams if such joint proceedings are necessary to satisfy the legal threshold you believe exists at Section 4(A) regarding the Gardiner Paperboard Dam alone.

The purpose of 60-day notice letters under the US ESA is to create a zone of opportunity for parties to work together to find resolutions which result in ESA compliance without litigation. The need for any litigation at Cobbosseecontee Stream would be removed by MDIFW initiating within 60 days an adjudicatory fish passage proceeding at the Gardiner Paperboard Dam pursuant to its duty and authority under 12 MRSA §12760.

If you believe any of the above information is in error, or if you require additional information, or if you have any questions concerning this letter or the described violations, please contact me as soon as possible.

Sincerely,

Douglas H. Watts
131 Cony Street
Augusta, ME 04330
207-622-1003
info@dougwatts.com

Kennebec Reborn
131 Cony Street, Augusta, ME 04330
207-622-1003

Mr. Patrick Keliher
Commissioner
Maine Dept. Marine Resources
21 State House Station
Augusta, ME 04333-0021

Mark Randlett
Maine Dept. of Attorney General
State House Station 6
Augusta, ME 04333-0006

January 8, 2013

RE: Cobbosseecontee Stream Fish Passage

Dear Commissioner Keliher and Mr. Randlett:

This letter seeks clarification of the State of Maine's interpretation of Maine's fishway law, 12 MRS §12760. On Jan. 27, 2012 our members requested the Commissioners of MDMR and MDIFW initiate an adjudicatory fishway proceeding at the Gardiner Paperboard Dam on Cobbosseecontee Stream in Gardiner, Maine. The MDMR Commissioner has legal authority to independently initiate such a proceeding. 12 MRS §12760 (2011). On July 6, 2012 we received a decision letter signed by the Commissioner of MDIFW who declared the very short reach of Cobbosseecontee Stream between the Gardiner Paperboard Dam and the American Tissue Dam is not large enough to produce a significant commercial or recreational fishery and for this reason he concluded the statutory threshold to initiate a fishway proceeding at the dam is not met. As we informed MDMR and MDIFW by letter on July 11, 2012, this interpretation of 12 MRSA §12760 is contrary to Section 4 of the fishway law, which 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;

We have informally learned in recent weeks that MDMR has made an internal decision to delay taking any action under the state's fishway law at the Gardiner Paperboard dam until the onset of federal re-licensing of the American Tissue Dam, for which initial application for

re-license is not required until 2017. If true, this internal decision does not square with the reasoning given by the MDIFW Commissioner on July 6, 2012.[1] The owners of the Gardiner Paperboard Dam have repeatedly declined our offers since 2009 to seek federal fisheries restoration monies to work cooperatively with them to breach and remove the dam or to construct fish passage at the dam. Nothing suggests these circumstances will change in the next 4-5 years.

If the goals of MDMR's 2002 Diadromous Fisheries Restoration Plan for the Cobbosseecontee watershed are to ever be achieved, passage at the Gardiner Paperboard Dam is a prerequisite since it is the lowermost dam on the stream. Under Sect. 4(A) of the state's fishway law, MDMR's 2002 Restoration Plan for the Cobbosseecontee Stream watershed provides sufficient probable cause to show that a formal fishway proceeding is necessary and warranted at the Gardiner Paperboard Dam at this time.[2] From this decision point, the fishway law calls for notice to the dam owner of the initiation of a fishway proceeding and notice to the public via publication in a newspaper of general circulation in the area. 12 MRS §12760(5). After collection of evidence and testimony, the law directs the Commissioner to issue a decision to order or not order fish passage. If a decision is made to not order fish passage, the law states that the Commissioner 'shall specify in that decision a period not to exceed 5 years subsequent to that decision during which a fishway may not be required to be constructed.' 12 MRS §12760(6). Even if the Commissioner ultimately decides to defer immediate action on fish passage *construction*, the fishway law requires such a decision be made as the result of an adjudicatory fishway proceeding, not in lieu of one.

In our view the reasoning of the MDIFW Commissioner of July 6, 2012 was based upon a clear error of law. We further note that MDMR and MDIFW have never responded to our amended request dated July 11, 2012 which fully satisfies the legal issue raised in Commissioner Woodcock's decision letter. For these reasons we believe MDMR and MDIFW now have the legal duty to initiate a formal fishway proceeding at the Gardiner Paperboard Dam pursuant to 12 MRS §12760. It would be appreciated if the MDMR could promptly inform us the procedural schedule it intends to follow regarding this issue in 2013.

Sincerely,

Douglas H. Watts
131 Cony Street
Augusta, Maine 04330

1 It now seems apparent the decision by the MDMR and MDIFW Commissioners against our Jan. 2012 request for a fishway proceeding was not for the reasons given but was due to an internal decision by MDMR to not pursue fish passage at the Gardiner Paperboard Dam until commencement of re-licensing of the American Tissue Dam in 2017.

2 It would be difficult to find a more thorough factual basis to justify the initiation of an adjudicatory fishway proceeding than already provided by MDMR in its 2002 Restoration Plan for the watershed.

JANET T. MILLS
ATTORNEY GENERAL

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TTY USERS CALL MAINE RELAY 711

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February 26, 2013

Douglas H. Watts
Kennebec Reborn
131 Cony Street
Augusta, Maine 04330

Re: **Cobbosseecontee Stream Fish Passage**

Dear Mr. Watts:

Thank you for your letter dated January 8, 2013, seeking the initiation of a fishway proceeding concerning the Gardiner Paperboard Dam on the Cobbosseecontee Stream in Gardiner, Maine. I am providing this response on DMR Commissioner Keliher's behalf, as well as my own.

Both the Department of Marine Resources and the Department of Inland Fisheries and Wildlife have the discretionary authority to require a fishway to be erected at any dam within Maine waters that are frequented by alewives, shad, salmon, sturgeon or other anadromous or migratory fish species. The DMR's authority is found at 12 M.R.S. § 6121 and applies in coastal waters; the IFW's authority is found at 12 M.R.S. § 12760 and applies in inland waters. The standard for the initiation of a proceeding to consider whether fish passage should be required is the same under both statutes. The Commissioners shall initiate such proceedings under their respective statutes whenever s/he determines:

> A. Fish passage at the dam or obstruction in issue, whether above 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 fishway for one or more species of anadromous [or migratory] fish; or
>
> B. Fish passage at the dam or obstruction in issue is necessary to protect or enhance rare, threatened or endangered fish species.

(12 M.R.S. § 6121(3); 12 M.R.S. § 12760(4)). Absent such a determination a fishway proceeding is without basis. No determination under either standard has been made and, therefore, a fishway proceeding is not ripe under the circumstances of this case.

In his letter to you dated July 6, 2012, Commissioner Woodcock noted that fish passage at the Gardiner Paperboard Dam would not result in a substantial commercial or recreational fishery for anadromous species. This is because fish passage does not exist at any of the dams above the Gardiner Paperboard Dam, most importantly the American Tissue Hydropower Project, which is the next dam in line.[1] Commissioner Woodcock's letter also noted that the amount of available habitat between the Gardiner Paperboard Dam and the American Tissue Hydropower Project's not sufficient to support significant populations of commercial or recreational fish species; that the DMR's Draft Fishery Management Plan did not identify this small section of the stream as a significant spawning or nursery area for alewife, blueback herring, American shad, striped bass or other anadromous fish species; and that there was no evidence in the Draft Fishery Management Plan that construction of a fishway at the Gardiner Paperboard Dam was necessary to protect or enhance rare, threatened or endangered fish species. These factors soundly support a decision not to move forward with a fishway proceeding at this time. Indeed, a decision to withhold from taking any action under the fishway law with respect to the Gardiner Paperboard Dam until such time as any issues with respect to fish passage at the American Tissue Hydropower Project may be resolved through a FERC re-licensing proceeding. is entirely reasonable.

Finally, I would note that in any event, the authority provided the Commissioners of DMR and IFW to initiate fishway proceedings and to order to installation of fish passage is discretionary. *See Dumont v. Speers*, 245 A.2d 151 (Me. 1968). Accordingly, your assertion that the DMR and IFW have a legal duty to initiate a formal fishway proceeding at the Gardiner Paperboard Dam pursuant to 12 M.R.S. § 12760 is incorrect.

Hopefully this provides the clarification you sought in your January 8, 2013 letter. However, please do not hesitate to let me know if you have further questions.

Sincerely,

Mark Randlett
Assistant Attorney General

cc: Commissioner Keliher (DMR)
Commissioner Woodcock (IFW)

[1] Even if passage were provided at the Gardiner Paperboard Dam, as well as every other dam beyond the American Tissue dam, it would not affect the determination in Commissioner Woodcock's July 6, 2012 letter, as fish would not be able to pass the American Tissue dam. The State does not have the authority to order fish passage at the American Tissue dam which is licensed by the Federal Energy Regulatory Commission (FERC).

Draft Fishery Management Plan

Cobbosseecontee Stream

Prepared by

Gail S. Wippelhauser
Maine Department of Marine Resources
State House Station #21
Augusta, ME 04333

December 2002

Table of Contents

Introduction

The Cobbosseecontee Stream drainage historically supported runs of at least seven species of native diadromous[1] fishes, which were reduced or extirpated by construction of dams without fishways. The American eel is still found throughout the drainage, but the first dam on the river prevents alewife, American shad, Atlantic salmon, blueback herring, rainbow smelt, and striped bass from migrating upstream. In 1997 the Department of Marine Resources (DMR) began stocking alewives in Pleasant Pond in order to restore a run to the drainage. Alewives are an important forage fish, and DMR anticipated that a run of alewives would attract sportfish to the mouth of Cobbosseecontee Stream. This strategy has proved successful. Striped bass congregate in the lower, free-flowing section of the stream in fall to feed on emigrating juvenile alewives, resulting in an exceptional fishery.

This draft plan is being developed to guide future decisions on fisheries management in the Cobbosseecontee Stream drainage. The goals contained in this plan reflect a desire to manage the fisheries within the physical and biological limits of available habitat. This management plan includes DMR's recommendations for fish passage issues that must be addressed for the successful attainment of stated management goals.

Description of Drainage

The Cobbosseecontee Stream drainage encompasses an area of approximately 240 square miles, and spans 15 towns (Bowdoin, Farmingdale, Gardiner, Hallowell, Litchfield, Manchester, Mount Vernon, Monmouth, Readfield, Richmond, Sabattus, Wales, Wayne, West Gardiner, and Winthrop). Twenty-one lakes and ponds with a total surface area of 13,534 acres and 19 dams without fishways are located within the drainage (Fig. 1; Table 1).

Water quality in the drainage is generally good. The Department of Environmental Protection has classified the mainstem of Cobbosseecontee Stream and its tributaries as Class B. All the lakes and ponds in the drainage are classified as GPA.

Each fall Cobbosseecontee Lake **(any others?)** is drawn down to improve or maintain water quality and to provide protection from ice or flood damage. This drawdown usually occurs during the first or second week of September, and often stimulates the downstream migration of American eels and alewives.

Fisheries Resources

Migratory fishes

Historically, the Cobbosseecontee Stream drainage supported runs of alewife, American shad, American eel, Atlantic salmon, blueback herring, rainbow smelt, and striped bass. Construction of a dam in Gardiner, documented as early as 1787, interfered with the upstream movement of alewife, shad, and salmon, and the runs dramatically declined in number. In 1867 the newly appointed Commissioners of Fisheries reported that the Town of Winthrop for several years had appointed a committee to obtain the opening of a fishway in the dam at Gardiner, but they were unsuccessful. By 1867 there were eight dams within one mile of the Kennebec River and 10 dams to the first lake.

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[1] A collective term referring to anadromous and catadromous fishes, i.e., fishes that migrate between the ocean and fresh water during their life cycle. Anadromous fishes spend most of their lives in the ocean, but spawn in fresh water; catadromous fishes spend most of their lives in fresh water, but spawn in the ocean. Alewife, American shad, Atlantic salmon, blueback herring, rainbow smelt, and striped bass are anadromous. The American eel is catadromous.

Despite the presence of numerous dams, American eels persisted throughout the drainage because of their unusual ability to leave the water for periods of time, and climb rough damp surfaces. The current population is sufficiently robust to support commercial fisheries. During the 1990s, upstream migrating juvenile eels were commercially harvested at the mouth of Cobbosseecontee Stream, and downstream migrating adults were harvested at the outlet of Cobbosseecontee Lake and Annabessacook Lake. The adult eel fishery harvested approximately 3000 eels per year.

Five species of native anadromous fishes currently utilize the short, free-flowing reach from the stream's confluence with the Kennebec River to the first dam. American shad, blueback herring, rainbow smelt, and alewife to some extent, spawn in this reach each spring. Striped bass appear in this area in the spring to feed on spawning adults and in the fall to feed on emigrating juveniles.

In 1985, DMR drafted The Strategic Plan for the Restoration of Shad and Alewives to the Kennebec River above Augusta (1985 Plan), which outlined restoration goals for important fishery resources that historically resided in the Kennebec River above Edwards Dam, located in Augusta. Following public hearings, the Strategic Plan was formally adopted in 1986. The plan contained minimal reference to the Cobbosseecontee Stream drainage, because it lies below Augusta, and was blocked by multiple dams without fish passage.

Eleven years after the 1985 Plan was adopted, DMR began stocking adult alewives into Pleasant Pond, Richmond, in order to reestablish a run in the Cobbosseecontee Stream drainage. Stocking has continued each year since 1997 (Table 2). This stocking program was initiated because alewives are an important source of food for many species of fish and wildlife, and DMR anticipated that a run of alewives would attract sportfish to the mouth of Cobbosseecontee Stream. This strategy has proved successful, and there is now an exceptional fishery for striped bass in both spring and fall. In addition to improving recreational fishing, the alewife run ultimately could support a commercial harvest.

Estimates of migratory fish populations

In the 1985 Plan, DMR estimated the number of alewives that could be produced by nine lakes and ponds in the Cobbosseecontee drainage. In this plan, estimates of alewife production have been included for an additional 11 lakes and ponds that were omitted from the 1985 Plan. All estimates of alewife production are calculated by multiplying the surface area, measured in acres, by a unit production of 235 fish/acre[2]. Total production for the drainage is estimated to be approximately 3,180,600 alewives (Table 3).

In order to maintain a run of alewives, approximately 15% of the adults imprinted to a particular lake or pond must be allowed to spawn each year. Total spawning escapement would be about 477,100 adult alewives if no dams existed in the drainage (Table 3). However, fish will have to pass multiple dams to reach spawning habitat in this drainage, and fish passage facilities are never totally 100% efficient. Assuming 90% passage efficiency at each dam, total spawning escapement is approximately 700,000 adult alewives. The remaining 2.48 million fish could support a commercial harvest.

Fish passage

Successful restoration and enhancement of diadromous species currently is hampered by the lack of upstream and downstream fish passage at 16 of the dams within the Cobbosseecontee Stream drainage. Gardiner Paperboard, Incorporated owns the first dam (furthest downstream). The function of this dam

[2] This unit production value was developed from the commercial harvest in six Maine watersheds for the years 1971-1983. On the basis of these data, commercial yield was assumed to be 100-pounds/surface acre of ponded habitat. Assuming a weight of 0.5 pounds per adult, the commercial yield equals 200-adults/surface acre. The commercial harvest was assumed to represent an exploitation rate of 85%, because most alewife runs are harvested six days per week. Exploitation rates on the Damariscotta River, for example, ranged from 85-97% for the years 1979-1982. When commercial yield is adjusted for the 15% escapement rate, the total production is 235 adult alewives/acre.

was to create an impoundment, from which process water and fire protection water could be removed. The company ceased operations at the mill in 2000. Friends of the Kennebec Salmon, a non-profit environmental organization, in collaboration with Gardiner Paperboard have obtained funding and the necessary permits to remove the dam, anticipated to occur in the summer of 2003.

The second dam on the river, the American Tissue Dam, is a hydropower project, licensed by the Federal Energy Regulatory Commission (FERC) in 1979. The Project's license currently does not contain any requirements for the construction of upstream and downstream fish passage facilities. However, following a fish kill in 2002, DMR agreed to develop a fisheries management plan, and FERC agreed to reopen the license and incorporate fish passage requirements following consultation between the owner and state and federal resource agencies.

The remaining dams within the drainage are not hydropower facilities, and, therefore, are not FERC jurisdictional dams. This plan recommends the installation of upstream and downstream passage facilities at these dams, which are privately owned or owned by municipalities, in a sequential fashion with installation occurring in a specific year or four years after stocking of alewives in upstream spawning habitat. DMR has assisted dam owners in obtaining funds for constructing fish passage for more than 30 years, and intends to continue that tradition in the Cobbosseecontee drainage.

Commercial harvest/sorting

Need some DMR discussion about this

Resident species

Resident fish are those species that are able to fulfill their life history requirements within the river and its tributaries. The species listed below are known resident inhabitants of the Cobbosseecontee drainage. Waiting for info from B. Woodward.

Management Goals, Objectives, and Strategies

The overall goal of the draft fishery management plan is to manage the diadromous fishes of the Cobbosseecontee Stream drainage for optimum habitat utilization, abundance and public benefit. Management objectives (numbers) and strategies (letters) supporting this goal are listed by reach below:

Reach 1: Mouth of Cobbosseecontee Stream to American Tissue Dam

1. Manage Reach 1 as a migratory pathway for alewife, American eel, American shad, blueback herring, striped bass, and rainbow smelt.

Gardiner Paperboard Dam

a. Remove Gardiner Paperboard Dam (anticipated to occur in the summer of 2003).

American Tissue Dam

b. Beginning in 2002, provide interim downstream passage between September 1 (or when flushing flows arrive from upstream, whichever comes first) and November 15 for American eel at the American Tissue Dam by installing a metal exclusion plate along the bottom of the trashracks, and opening the deep gate furthest from the intake eight inches (8"). If eel mortalities or injuries continue to be observed, reduce generation in 25% increments to the point of total shutdown from dusk to dawn.

c. Beginning in 2002, provide interim downstream passage between September 1 (or when flushing flows arrive from upstream, whichever comes first) and November 30 for alewife by opening a 3' wide notch in the flashboards of the American Tissue dam, and installing a plywood and steel plunge pool below the notch. If alewife mortalities or injuries continue to be observed, reduce generation in 25% increments to the point of total shutdown during daylight hours.

d. Provide permanent upstream and downstream passage for American eel at the American Tissue Dam beginning in 2005. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 (or when flushing flows arrive from upstream, whichever comes first) and November 15.

e. Provide permanent upstream and downstream passage for alewife at the American Tissue Dam beginning in 2005. The upstream passage facility should be operational by May 1, have a trapping/sorting/counting facility, and should be capable of passing at least 627,200 alewives. Downstream passage should be operational between June 1 and November 30.

2. Manage Reach 1 for sustained production of diadromous species consistent with habitat capabilities.

3. Manage species in accordance with the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fisheries Management Plan for Striped Bass, Interstate Fisheries Management Plan for American shad and river herring, and Interstate Fisheries Management Plan for American eel.

    a. Implement all regulations, assessment, and reporting requirements found in ASMFC management plans.

4. Promote existing and potential commercial fisheries for alewife and American eel.

5. Promote existing and potential recreational angling opportunities for American shad and striped bass.

Reach 2. American Tissue Dam to Cobbosseecontee Lake Dam and Tacoma Lakes Dam

1. Manage Reach 2 as a migratory pathway for alewife and American eel.

New Mills Dam

a. Provide permanent upstream and downstream passage for American eel at New Mills Dam beginning in 2005. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

b. Provide permanent upstream and downstream passage for alewife at New Mills Dam beginning in 2005. Upstream passage should be operational by May 1, and should be capable of passing at least 564,500 alewives. Downstream passage should be operational from June 1 through November 30.

Collins Dam

c. Provide permanent upstream and downstream passage for American eel at Collins Dam beginning in 2008. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

d. Provide permanent upstream and downstream passage for alewife at Collins Dam beginning in 2008. Upstream passage should be operational by May 1, and should be capable of passing at least 470,600 alewives. Downstream passage should be operational from June 1 through November 30.

Cobbosseecontee Lake Dam

e. Provide permanent upstream and downstream passage for American eel at Cobbosseecontee Lake Dam beginning in 2009. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

f. Provide permanent upstream and downstream passage for alewife at Cobbosseecontee Lake Dam beginning in 2009. Upstream passage should be operational by May 1, and should be capable of passing at least 416,300 alewives. Downstream passage should be operational from June 1 through November 30.

Gilman Dam and Tacoma Lakes Dam

g. Provide permanent upstream and downstream passage for American eel at Gilman Dam and Tacoma Lakes Dam concurrent with alewife passage. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

h. Provide permanent upstream and downstream passage for alewife at Gilman Dam and Tacoma Lakes Dam after four consecutive years of alewife stocking in Woodbury Pond, Sand Pond, Buker Pond, Jimmy Pond, and/or Little Purgatory Pond. Upstream passage at Gilman Dam should be capable of passing at least 37,400 alewives and at Tacoma Lakes Dam should be capable of passing at least 33,700 alewives. Both upstream facilities should be operational by May 1. Downstream passage should be operational from June 1 through November 30.

2. Manage Reach 3 for sustained production of resident and diadromous species consistent with habitat capabilities.

3. Manage species in accordance with the ASMFC Interstate Fisheries Management Plan for American shad and river herring and the Interstate Fisheries Management Plan for American eel.

a. Implement all regulations, assessment, and reporting requirements found in ASMFC management plans.

4. Promote existing and potential commercial fisheries for alewife and American eel.

Reach 3. Cobbosseecontee Lake Dam to Annabessacook Dam

1. Manage Reach 3 as a migratory pathway for alewife and American eel.

Annabessacook Dam

a. Provide permanent upstream and downstream passage for American eel at Annabessacook Dam beginning in 2010. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

b. Provide permanent upstream and downstream passage for alewife at Annabessacook Dam after four consecutive years of alewife stocking in Annabessacook Lake. Upstream passage should be operation by May 1, and should be capable of passing at least 216,900 alewives. Downstream passage should be operational from June 1 through November 30.

2. Manage Reach 3 for sustained production of resident and diadromous species consistent with habitat capabilities.

3. Manage species in accordance with the ASMFC Interstate Fisheries Management Plan for American shad and river herring and the Interstate Fisheries Management Plan for American eel.

a. Implement all regulations, assessment, and reporting requirements found in ASMFC management plans.

4. Promote existing and potential commercial fisheries for alewife and American eel.

Reach 4. Annabessacook Dam to Marranacook Lake Upper Dam, Cochnewagan Dam, Wilson Pond Dam, and Apple Valley Dam

1. Manage Reach 4 as a migratory pathway for alewife and American eel.

Marranacook Lake Upper Dam

a. Provide permanent upstream and downstream passage for American eel at Marranacook Lake Upper Dam beginning in 2011. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

b. Provide permanent upstream and downstream passage for alewife at Marranacook Lake Upper Dam after four consecutive years of alewife stocking in Marranacook Lake. Upstream passage should be operational by May 1, and should be capable of passing at least 89,100 alewives. Downstream passage should be operational from June 1 through November 30.

Cochnewagan Dam

c. Provide permanent upstream and downstream passage for American eel at Cocknewagan Dam concurrent with alewife passage. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

d. Provide permanent upstream and downstream passage for alewife at Cocknewagan Dam after four consecutive years of alewife stocking in Cocknewagan Lake. Upstream passage should be operational by May 1, and should be capable of passing at least 13,600 alewives. Downstream passage should be operational from June 1 through November 30.

Lower Dam-Wilson Stream and Wilson Pond Dam

e. Provide permanent upstream and downstream passage for American eel at Lower Dam-Wilson Stream and Wilson Pond Dam concurrent with alewife passage. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

f. Provide permanent upstream and downstream passage for alewife at Lower Dam-Wilson Stream and Wilson Pond Dam after four consecutive years of alewife stocking in Wilson Pond, Dexter Pond, and/or Berry Pond. Upstream passages should be operational by May 1; the facility at Lower Dam-Wilson Stream should be capable of passing at least 33,800 alewives, and the facility at Wilson Pond Dam should be capable of passing at least 30,500 alewives. Downstream passage should be operational from June 1 through November 30.

Apple Valley Dam

g. Provide permanent upstream and downstream passage for American eel at Apple Valley Dam concurrent with alewife passage. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

h. Provide permanent upstream and downstream passage for alewife at Apple Valley Dam after four consecutive years of alewife stocking in Apple Valley Lake. Upstream passage should be operational by May 1, and should be capable of passing at least 3,552 alewives. Downstream passage should be operational from June 1 through November 30.

Carleton Pond

i. Provide permanent upstream and downstream passage for American eel at Carleton Pond Dam concurrent with alewife passage. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

j. Provide permanent upstream and downstream passage for alewife at Carleton Pond Dam after four consecutive years of alewife stocking in Carleton Pond. Upstream passage should be operational by May 1, and should be capable of passing at least 7,866 alewives. Downstream passage should be operational from June 1 through November 30.

2. Manage Reach 4 for sustained production of resident and diadromous species consistent with habitat capabilities.

3. Manage species in accordance with the ASMFC Interstate Fisheries Management Plan for American shad and river herring and the Interstate Fisheries Management Plan for American eel.

a. Implement all regulations, assessment, and reporting requirements found in ASMFC management plans.

4. Promote existing and potential commercial fisheries for alewife and American eel.

Reach 5. Marranacook Lake Dam to Torsey Lake Dam

1. Manage Reach 5 as a migratory pathway for alewife and American eel.

Grist Mill Pond Dam and Torsey Lake Dam

a. Provide permanent upstream and downstream for American eel passage at Grist Mill Pond Dam and Torsey Lake Dam concurrent with alewife passage. Upstream passage should be operational by May 1, and downstream passage should be operational from dusk to dawn between September 1 and November 15.

b. Provide permanent upstream and downstream passage for alewife at Grist Mill Pond Dam and Torsey Lake Dam after four consecutive years of alewife stocking in Torsey Lake. Upstream passages should be operational by May 1; the facility at Grist Mill Pond Dam should be capable of passing at least 30,200 alewives, and the facility at Torsey Lake Dam should be capable of passing at least 27,100 alewives. Downstream passage should be operational from June 1 through November 30.

2. Manage Reach 5 for sustained production of resident and diadromous species consistent with habitat capabilities.

3. Manage species in accordance with the ASMFC Interstate Fisheries Management Plan for American shad and river herring and the Interstate Fisheries Management Plan for American eel.

a. Implement all regulations, assessment, and reporting requirements found in ASMFC management plans.

4. Promote existing and potential commercial fisheries for alewife and American eel.

Table 1. Location and description of dams in Cobbosseecontee Stream drainage, and number of alewives to be passed at each dam.

Map code	Name of dam	Number of fish to pass	Location	Built	Length (ft)	Height (ft)
1	Gardiner Paper Company Dam		Gardiner			
2	American Tissue Dam	627,200	Gardiner	1911	430	24
3	New Mills Dam	564,500	Gardiner	1885	200	13
4	Collins Dam	470,600	Gardiner	1900	200	15
5	Cobbosseecontee Lake Dam	416,300	Gardiner	1900	191	14
6	Mill Pond Dam	0	Winthrop	1850	240	14
7	Gilman Dam	37,400	Litchfield	1900	120	14
8	Tacoma Lakes Dam	33,700	Litchfield	1900	130	12
9	Annabessacook Dam	216,900	Monmouth	1900	195	11
10	Marranacook Lake Upper Dam	89,100	Winthrop	1820	95	10
11	Grist Mill Pond Dam	30,200	Readfield	1900	125	15
12	Torsey Lake Dam	27,100	Readfield	1944	520	11
13	Carleton Pond Dam	7,900	Monmouth	1904	1800	10
14	Mill Pond Dam	0	Litchfield	1850	110	17
15	Cochnewagan Dam	13,600	Monmouth	1900	40	9
16	Lower Dam-Wilson Stream	33,800	Monmouth	1890	135	16
17	Wilson Pond Dam	30,500	Monmouth	1900	110	14
19	Apple Valley Lake	3,600	N. Monmouth	1970	220	20

Table 2. Alewife stocking in Pleasant Pond.

Year	Alewives stocked
1997	4,540
1998	4,572
1999	4,724
2000	4,517
2001	3,514
2002	4,559
Total	26,426

Table 3. Estimate of total alewife production, minimum escapement, and stocking requirements for Cobbosseecontee Stream drainage.

Pond	Surface area (acres)	Total production	Minimum escapement	Stocking (6/acre)
Annabessacook Lake	1420	333,700	50,055	8,520
Apple Valley Lake	101	23,679	3,552	605
Berry Pond	170	39,950	5,993	1,020
Buker Pond	75	17,625	2,644	450
Carleton Pond	223	52,372	7,856	1,337
Cobbosseecontee Lake	5543	1,302,605	195,391	33,258
Cochnewagan Lake	385	90,475	13,571	2,310
Dexter Pond	120	28,200	4,230	720
Hutchinson Pond	100	23,500	3,525	600
Jimmie Pond	107	25,145	3,772	642
Jimmy Pond	44	10,340	1,551	264
Little Cobbosseecontee Lake	74	17,390	2,609	444
Little Purgatory Pond	223	52,372	7,856	1,337
Marranacook Lake	1673	393,155	58,973	10,038
Narrows Pond	537	126,195	18,929	3,222
Pleasant Pond	746	175,310	26,297	4,476
Sand Pond	177	41,595	6,239	1,062
Shed Pond	37	8,695	1,304	222
Torsey Pond	770	180,950	27,143	4,620
Wilson Pond	574	134,890	20,234	3,444
Woodbury (Purgatory) Pond	436	102,460	15,369	2,616
Total	13,534	3,180,602	477,090	81,207

Table 4. Summary of dates or events that trigger fish passage.

Map code	Name of dam	Trigger date or event for passage
1	Gardiner Paper Company Dam	removal expected in 2003
2	American Tissue Dam	2005
3	New Mills Dam	2005
4	Collins Dam	2008
5	Cobbosseecontee Lake Dam	2009
6	Mill Pond Dam	n/a
7	Gilman Dam	4 consecutive years alewife stocking Woodbury[3]
8	Tacoma Lakes Dam	4 consecutive years alewife stocking Woodbury[4]
9	Annabessacook Dam	2010 (eels) 4 consecutive years alewife stocking Annabessacook Lake
10	Marranacook Lake Upper Dam	2011 (eels) 4 consecutive years alewife stocking Marranacook Lake
11	Grist Mill Pond Dam	4 consecutive years alewife stocking Torsey Lake
12	Torsey Lake Dam	4 consecutive years alewife stocking Torsey Lake
13	Carleton Pond Dam	4 consecutive years alewife stocking Carleton Pond
14	Mill Pond Dam	n/a
15	Cochnewagan Dam	4 consecutive years alewife stocking Cochnewagan Lake
16	Lower Dam-Wilson Stream	4 consecutive years alewife stocking Wilson Pond
17	Wilson Pond Dam	4 consecutive years alewife stocking Wilson Pond
19	Apple Valley Lake	4 consecutive years alewife stocking Apple Valley Lake

[3] Woodbury Pond, Sand Pond, Buker Pond, Jimmy Pond, and/or Little Purgatory Pond.
[4] Ibid.

UNITED STATES OF AMERICA 105 FERC ¶ 62,030
FEDERAL ENERGY REGULATORY COMMISSION

Ridgewood Maine Hydro Partners, L.P. Project No. 2809 - 015

ORDER MODIFYING AND APPROVING PERMANENT DOWNSTREAM FISH PASSAGE MEASURES

(Issued October 16, 2003)

On August 1, 2003, CHI Operations, Inc. filed, on behalf of Ridgewood Maine Hydro Partners, L.P (licensee), plans for permanent downstream fish passage measures at the American Tissue Dam Project.[1] The proposed measures would enable the project to pass downstream-migrating juvenile alewife and American eel. The project is located on the Cobbosseecontee Stream in Kennebec County, Maine.

BACKGROUND

In early October 2001, a fish kill involving substantial numbers of juvenile alewife and American eel occurred at the American Tissue Project. Alewives were injured or killed passing over the dam and impacting hard surfaces below. Eels were killed passing though the project turbines, particularly at night. These impacts were significantly reduced during the remainder of the fall of 2001 and again in the fall of 2002 through a series of interim fish passage measures coordinated with state resource agencies. To help protect outmigrating eels, the licensee installed "blinding plates" to block eel entrainment into deeper sections of the intake, and opened a deep release gate in the dam to allow downstream passage. Project operation was reduced or stopped during some periods. To help protect juvenile alewives, the licensee increased surface spill, opened a flashboard notch, and installed a temporary plunge pool "drop box" below the dam.

In an October 21, 2002 teleconference involving representatives of the licensee, CHI, state and federal resource agencies, and the Commission, interim and permanent downstream fish passage measures, and conceptual upstream planning, were discussed.[2]

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1 7 FERC & 61,146 (1979).

2 See Commission letters dated May 31, 2002, July 30 2002, November 8 and 21, 2002, December 31, 2202, and June 15, 2003. Teleconference participants included representatives of the licensee, Maine Department of Marine Resources, Maine

During the teleconference, the importance of a State fisheries restoration plan for Cobbosseecontee Stream was discussed relative to appropriate fish passage planning. It was agreed that, within 90 days of receipt of a draft river restoration plan from the State, the licensee would file with the Maine Department of Marine Resources (MDMR), Maine Department of Environmental Protection (MDEP), and U.S. Fish and Wildlife Service (FWS) draft plans for constructing, operating, and maintaining permanent downstream fish passage measures, and conceptual plans for future upstream fish passage for review and comment. The plans would be consistent with the goals of the State's plan. The agencies agreed to deliver their comments on the passage plans to the licensee within 30 days. The licensee therefore agreed to file the plans with the Commission, for approval, and include copies of all agency comments, 60 days after the agency comment period. The licensee's filing would indicate how any agency comments were addressed.

During the fall period of September 1 through November 15, 2003, the licensee would again using the same interim methods to pass American eel and juvenile alewife.

LICENSEE'S PLANS FOR PERMANENT DOWNSTREAM FISH PASSAGE

In CHI's August 1, 2003 filing on behalf of the licensee (both hereafter referred to as licensee), the licensee allows that planning of permanent downstream and upstream fish passage was to be dependent on possession of a draft State fisheries restoration plan for Cobbosseecontee Stream. However, a restoration plan has not yet been released. The licensee notes that its ability to develop passage measures is constrained due to the lack of a draft State plan, because of an inability to fully anticipate elements included in the plan, such as arrival times and numbers of migrating fish and management goals. However, the licensee chooses to propose permanent downstream passage measures in its filing, based on successful interim measures that have been employed.

The licensee has not filed conceptual plans for upstream fish passage, due to the need for a draft river restoration plan from the state. This issue will therefore be treated in a separate proceeding.

The licensee's proposed permanent downstream passage measures were developed from the successful temporary measures that have been employed since the October 2001 fish kill. For protection and passage of American eel, the licensee proposes to open the project's deep gate furthest from the intake area at least 8 inches from September 1

Department of Environmental Protection, Maine Atlantic Salmon Commission, U.S. Fish and Wildlife Service, and Commission staff.

through November 15 of each year. "Blinding plates," approximately 30 inches in height, would be installed along the base of the project trashracks during the same period.

The licensee proposes to provide downstream passage for juvenile alewife by removing a section of the project flashboards, and installing a plunge pool "drop box" constructed of angle steel and three-quarter-inch plywood on the downstream face of the dam. Annual timing of installation and operation of these measures for alewife would be based on anticipation of the natural and artificial flushing flows these fish use to migrate, with the assistance of enhanced communication with the operators of upstream impoundments. When alewives are observed in the project reservoir, or by September 1, the licensee would maintain a surface-oriented egress for the fish through removal of a 1-foot by 3-foot section of the dam's flashboards, at a location chosen to most effectively convey fish to the plunge pool at the base of the dam. Effective flow through the removed section would be maintained through November 15, dependent on available inflow. The side panels of the box would be removed to avoid damage during the off-season.

The licensee indicates that, if injured or killed alewives or eels are observed and determined to have been impacted by turbine passage, generation will be reduced immediately as necessary to protect these fisheries. Likewise, if dead or injured fish are observed in the project bypass reach or tailrace, the MDMR would be contacted as soon as possible. If any eel entrainment is determined during the eel passage period, the licensee would cease project operation each night for the duration of the passage period. The duration of any such periods would be determined using local sunrise-sunset tables.

RESOURCE AGENCY COMMENTS

The licensee provided copies of its proposed permanent measures to the MDEP, MDMR, and the FWS, dated May 22, 2003.

MDEP Comments

The MDEP responded in a letter dated June 18, 2003. The MDEP noted that annual shutdown should be considered as part of the plan to protect outmigrating eels and that the licensee should consult with the MDMR regarding a specific plan detailing how the project will be monitored to determine whether eels are being entrained. The licensee provided a response in its August 1, 2003 filing, noting that it believes that the attraction flow from the open deep gate should be sufficient to prevent eel entrainment. The licensee also indicated that it plans to investigate the use of blinding plates greater than 30 inches in height to increase eel protection. The licensee pointed out that, during the period of September 1 through November 15, nighttime operation would be ceased if any

eel entrainment is noted. Regarding the detection of eel entrainment, the licensee proposes to conduct visual monitoring of the tailrace area at least once a day during the September 1 through November 15 period.

The MDEP recommended that the licensee consult with the MDMR on the minimum flow needed to effectively pass alewife and develop and implement a plan to maintain the needed flow. The agency also recommended consultation with MDMR on plans for monitoring and removing debris from the spillway area, and determining whether alewife are being effectively passed downstream. The licensee responded that the interim passage, on which the proposed permanent passage is based, was developed with the MDMR, and that the resulting flow of approximately 10 cubic feet per second had been observed by the MDMR to be effective. The licensee added that the project is operated in a run-of-river mode. Regarding removal of debris and flow monitoring, the licensee indicated that it would ensure that the spillway notch was free of debris at least once a day during the monitoring period and that, concurrently, inspections would be made of the impoundment, flashboard notch, and plunge-pool area, and that daily records of these visual assessments would be made in the operator's logbook.

FWS Comments

The FWS responded to the licensee's proposal in a letter dated July 3, 2003. The FWS indicated that substantial eel entrainment will likely occur during night time operation, even with the licensee's proposed permanent protection measures. The FWS recommended the installation of overlays screens or the cessation of night time generation during the migration period. In response, the licensee stated that it believes its passage measures should prevent eel entrainment, and that should eel entrainment occur in any year, it would cease night time operation for the remainder of that annual passage period. The licensee further noted that the installation of a overlays would prevent debris removal and trashrack cleaning.

Regarding passage of alewife, the FWS said that, based upon experience at similar Maine projects, the licensee's proposal would result in unacceptable levels of entrainment at the project during periods of generation and no spill. The FWS noted that permanent passage measures at similar projects include a trashrack overlay screen and an adjacent surface bypass facility. The FWS recommended that a chute be incorporated on the downstream side of the flashboard notch to convey fish to the plunge pool. The licensee responded by noting that the American Tissue Dam Project is unique because it has much lower intake velocities than most projects, allowing fish to successfully use the notch bypass, and that the method had been developed and implemented with concurrence of the State in interim-year usage. The licensee said that trashrack overlays were unnecessary, and could actually increase intake velocities, causing attraction of fish. The

licensee further noted that installation of a chute would require it passing through the existing headworks/intake structure due to project configuration.

MDMR Comments

The MDMR responded to the licensee's proposal in a July 15, 2003 letter, raising essentially the same issues as the FWS on eel passage. Regarding downstream passage of alewife, the MDMR asserted that the proposed permanent passage measures, similar to those used in interim years, would not adequately protect out-migrating fish in the long term. MDMR noted that the proposed time frame for passage operation does not address the out-migration of adult alewife, which typically begins in June. Therefore, MDMR recommended that the downstream bypass facility be operational when adult migrants are observed, or by June 15, annually. The MDMR also recommended that the licensee establish a daily monitoring and maintenance schedule to prevent debris accummulation that hinder alewife passage. The licensee indicated that the MDMR eel passage issues were addressed in its response to the FWS, and that the issue of debris was addressed in its response to the MDEP. The licensee stated that its proposal does not address downstream passage of adult alewife because no adults have ever been observed to require passage at the project, and that it is difficult to predict when adult alewife would begin to require downstream passage, since a fisheries restoration plan for the Cobbosseecontee has not been developed. However, the licensee noted that, if adult alewives are observed at the project, the resource agencies would be consulted regarding downstream passage measures.

DISCUSSION AND CONCLUSIONS

The licensee's August 1, 2003 proposed permanent measures for downstream passage of American eel and juvenile alewife is based on successful interim passage of these species at the project. However, if a draft State fisheries restoration plan for the Cobbosseecontee Stream becomes available, the licensee should review the project's downstream passage measures for any revisions necessary to meet the goals of the draft plan. If deemed necessary by the licensee, or if requested by a resource agency, the licensee should reinitiate consultation on downstream fish passage measures with the MDEP, MDMR, and FWS and notify the Commission within 30 days. Similarly, the licensee should initiate consultation with the agencies and notify the Commission if any adult alewife are observed at the project.

The licensee appears to have adequately responded to most of the specific comments provided by the resource agencies and provided modifications to the downstream fish passage plan accordingly. These modifications should be made part of the licensee's plan.

In response to agency comments, the licensee proposes to inspect the reservoir, flashboard notch, flow through the notch, and plunge-pool area at least once a day starting with the annual initiation of passage operations through November 15, and record these daily assessments. The licensee should include in the daily records measurements of reservoir water level, upon which sufficient spill at the flashboard notch depends, and ensure that the records are available for resource agency and Commission inspection.

The agencies indicated some concern regarding the adequacy of the licensee's proposed permanent downstream passage measures. So that the agencies and the Commission can monitor downstream fish passage success, the licensee should file a report with the MDEP, MDMR, FWS, and the Commission by December 31of each year indicating the periods for which downstream passage was operated, detailing any problems that occurred. The first report should be filed by December 31, 2003, and should include details and a schedule for the licensee's plans to investigate the use of blinding plates greater than 30 inches in height to further protect eels from entrainment, as mentioned in response to MDEP's comments.

If significant impacts to downstream migrants occur at any time after initiation of the proposed downstream passage measures, the licensee should contact the MDEP, MDMR, and FWS within 24 hours, and the Commission within 10 days. Consultation on the adequacy of the passage measures should then be reinitiated with the MDEP, MDMR, and FWS within 30 days. The Commission reserves the right to require further downstream fish passage measures at the American Tissue Dam Project if required to protect fisheries.

Implementation of the licensee's August 1, 2003 plan, to include the actions proposed in response to resource agency concerns, and with the above modifications, should protect downstream-migrating American eel and juvenile alewife at the American Tissue Project, and should be approved.

The Director orders:

(A) The licensee's plans for permanent downstream fish passage measures, filed August 1, 2003, including the actions proposed in response to resource agency concerns, and as modified in paragraphs B through E below, are approved.

(B) If a draft State fisheries restoration plan becomes available, the licensee shall review the project's downstream passage measures for any revisions necessary to meet the goals of the draft plan. If deemed necessary by the licensee, or if requested by a resource agency, the licensee shall reinitiate consultation on downstream fish passage

measures with the MDEP, MDMR, and FWS and notify the Commission within 30 days. Similarly, the licensee shall initiate consultation with the agencies and notify the Commission if any adult alewife are observed at the project.

(C) The licensee shall include measurements of reservoir water level, upon which sufficient spill at the flashboard notch depends, in the daily observation records during the fish passage season. The licensee shall ensure that the records are available for resource agency and Commission inspection.

(D) The licensee shall file a report with the MDEP, MDMR, FWS, and the Commission by December 31 of each year, indicating the periods for which the approved passage was operated, detailing any problems that occurred. The first report, to be filed by December 31, 2003, shall include details and a schedule for the licensee's plans to investigate the use of blinding plates greater than 30 inches in height to further protect eels from entrainment.

(E) If significant impacts to downstream migrants occur at any time after initiation of the approved downstream passage measures, the licensee shall contact the MDEP, MDMR, and FWS within 24 hours, and the Commission within 10 days. Consultation on the adequacy of the passage measures shall then be reinitiated with the MDEP, MDMR, and FWS within 30 days. The Commission reserves the right to require further downstream fish passage measures at the American Tissue Dam Project if required to protect fisheries.

(F) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 CFR ' 385.713.

George H. Taylor
Chief, Biological Resources Branch
Division of Hydropower Administration
and Compliance

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426
March 8, 2013

OFFICE OF ENERGY PROJECTS

Project No. 2809-001 – Maine
American Tissue Hydroelectric Project
KEI (USA) Power Management Inc.

Lewis C. Loon
Manager, Operations and Maintenance - USA
KEI (USA) Power Management Inc.
37 Alfred Plourde Parkway, Suite 2
Lewiston, ME 04240

Re: Advance Notice of License Expiration

Dear Mr. Loon:

According to our records, your license for the American Tissue Hydroelectric Project will expire on April 30, 2019. This letter gives you advance notice of license expiration and explains the steps necessary for you to take prior to the expiration date of your license.

Between five years and five and one-half years, before your existing license expires, you need to notify the Commission whether or not you intend to file an application for a new license.[1] Simultaneously, with the filing of your notice of intent (NOI) to relicense the project, you will need to file a Pre-Application Document (PAD) with the Commission and distribute the PAD to the appropriate federal, state, and interstate resource agencies, Indian tribes, local governments, and members of the public likely to be interested in the proceeding.[2] The PAD must include: (1) a process plan and schedule; (2) a description of the project location, facilities, and operations; (3) a description of the existing environment

[1] Please refer to Section 15(b)(1) of the Federal Power Act and 18 C.F.R. § 5.5 of the Commission's regulations.

[2] To aid in your preparation of a distribution list, a list of federal and state agencies can be viewed at: http://www.ferc.gov/industries/hydropower/enviro/consultlist.aspx.

and resource impacts; (4) a preliminary issues and studies list; and (5) a summary of contacts.[3]

Furthermore, if you are interested in using either the Traditional or Alternative Licensing Processes in lieu of the Integrated License Process, you need to file this request with the Commission along with your NOI and PAD.[4] A matrix comparing the three licensing processes is available at http://www.ferc.gov/industries/hydropower/gen-info/licensing/matrix.asp#skipnav.

You may register online at http://www.ferc.gov/docs-filing/esubscription.asp to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll-free at 1-866-208-3676, or TTY, (202) 502-8659.

If you have any questions regarding this letter or the procedures for filing an NOI and PAD, please contact John Baummer at (202) 502-6837.

Sincerely,

Bob Easton, Chief
New England Branch
Division of Hydropower Licensing

cc: Public Files
Mailing List

[3] The specific requirements of the PAD can be found at 18 C.F.R. § 5.6 of the Commission's regulations.

[4] Please refer to 18 C.F.R. § 5.3 of the Commission's regulations.

STATE OF MAINE
DEPARTMENT OF
INLAND FISHERIES AND WILDLIFE
284 STATE STREET
41 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0041

JOHN ELIAS BALDACCI
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January 10, 2007

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Dear Sirs:

By letter dated October 19, 2006, counsel for the Friends of the Presumpscot River and American Rivers (hereafter referred to as "Friends") requested that the Commissioner of the Maine Department of Inland Fisheries and Wildlife (hereafter the "Department") initiate proceedings for the construction of fish passage at the Cumberland Mills Dam, located on the Presumpscot River in Westbrook, and owned by S.D. Warren Company. Letters in support of this request were filed by the Maine Department of Environmental Protection, the Maine Department of Marine Resources and the Maine Atlantic Salmon Commission. A letter in support was also received from several legislators from Cumberland County. Sappi responded to the request by letter dated December 7, 2006. The Department has carefully considered the issues raised in these letters in reaching a decision.

Pursuant to 12 M.R.S.A. §12760(4), the Department shall initiate proceedings to consider the construction, repair or alteration of fishways in existing dams or other artificial obstructions whenever it 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; or

B. Fish passage at the dam or obstruction in issue is necessary to protect or enhance rare, threatened or endangered fish species.

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. This will be an adjudicatory proceeding held in accordance with the provisions of the Maine Administrative Procedures Act.

The factors leading to this determination include, inter alia:

- Cumberland Mills Dam is located 9.6 miles upstream of Casco Bay and is currently the lowermost dam on the Presumpscot River.

- There is evidence that the river historically supported self-sustaining populations of several anadromous fish species, including Atlantic salmon, American shad, alewives, blueback herring, rainbow smelt and striped bass.

- Since the removal of the Smelt Hill Dam in 2002, there has been evidence of alewives and American eel present in the river well above the location of the former dam.

- In 2003 the Maine Department of Environmental Protection approved water quality certification for the continued operation of S.D. Warren's five Presumpscot River Hydro Projects (Dundee, Gambo, Little Falls, Mallison Falls and Saccarappa), all of which are located upstream of the Cumberland Falls Dam. In its order approving the water quality certifications the DEP found that the Presumpscot River has the potential to produce significant numbers of blueback herring, alewife, American shad and Atlantic salmon, annually. The DEP also determined that, once fish passage was available at the Cumberland Mills Dam, the installation of fish passage at each of the upstream dams was necessary to ensure that the river was suitable to fishing and as a habitat for fish, and that the river would be of sufficient quality to support all species of fish indigenous to the river.

- The DEP's water quality certification and the hydropower licenses approved by the Federal Energy Regulatory Commission (FERC) require the phased installation of fish passage at each of the dams upstream of the Cumberland Mills Dam.

- In 2001, the Department of Inland Fisheries and Wildlife, the Department of Marine Resources and the Atlantic Salmon Commission developed a

draft comprehensive fishery management plan for the Presumpscot River that includes recommendations for fish passage among the issues to be addressed in order to meet the State's fishery management goals for the river.

Title 12 M.R.S.A. §12760 provides that a hearing may be requested in a fishway proceeding by interested members of the public or by the dam owner, lessee or other person in control of the dam. Because Sappi has so requested, a public hearing will be scheduled in this matter. The Department will notify you of the hearing date within the next 30 days.

As a preliminary step in this process the Department intends to hold at least one pre-hearing conference with the parties. The purpose of the pre-hearing conference(s) will be to review the hearing procedures and resolve any issues that can be addressed in advance of hearing in order to help the process go as smoothly as possible. The Department will contact you by a separate letter to schedule a conference date.

Please realize that, although the Department has decided to initiate these proceedings, including the requested hearing, all parties are free to continue to pursue a negotiated settlement on their own. In fact, we believe that this should always be considered as a possible productive route. However, the occurrence of any settlement negotiations will not delay the proceedings, which will proceed along a parallel course.

Thank you all for your attention to this important matter.

Sincerely,

Roland D. Martin
Commissioner

cc: United States Environmental Protection Agency
Commissioner, Department of Environmental Protection
Commissioner, Department of Marine Resources
Executive Director, Atlantic Salmon Commission
Karin Tilberg, Dick Davies, Governor's Office
Senator Philip Bartlett
Senator Karl Turner
Representative Mark Bryant
Representative Boyd Marley
Representative John Brautigam
Representative Tim Driscoll
Mark Randlett, Attorney General's Office