IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY, DOUGLAS WATTS, and KATHLEEN McGEE, *Plaintiffs*, v. PATRICK KELIHER and CHANDLER WOODCOCK, in their official capacities, *Defendants.*	C.A. No. 1:11-cv-00167-JAW

PLAINTIFFS' SURREPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

I. A "PRELIMINARY VIEW" FROM AN EPA ASSISTANT REGIONAL COUNSEL ON WHETHER THE ALEWIFE LAW IS A WATER QUALITY STANDARD SHOULD NOT BE CONSIDERED, OR AT LEAST GIVEN NO WEIGHT.

Defendants introduce new arguments and three related exhibits for the first time in their Reply. Defendants cite (and attach as an exhibit to their Reply Brief, with no affidavit to authenticate it) a November 8, 2010 email from an Assistant Regional Counsel at the U.S. Environmental Protection Agency's Region 1 office expressing a preliminary view that the Alewife Law is not a water quality standard change. Reply Motion ("Reply") Exh. A. That same Assistant Regional Counsel on August 10, 2011 (six days after Plaintiffs filed their opposition) wrote an email stating, "the preliminary views expressed in the November 8, 2010 e-mail message are undergoing further review and, therefore, do not represent the agency's final decisions on this issue." He indicated EPA would take a "fresh look" at the issue. Defendants attached the August 10, 2010 email as Exhibit B to their Reply.

Preliminary opinions of an agency, such as the November 8 email, are hearsay and not admissible under the Fed. R. Civ. P. 803(8) hearsay exception for public records and reports. *Smith v. Isuzu Motors Limited*, 137 F.3d 859, 862-863 (5th Cir. 1998) (and cases cited therein) (rejecting the admissibility of a preliminary National Highway Traffic Safety Administration ["NHTSA"] memoranda prepared by NHTSA staff opining on the instability of a vehicle). *Compare, Pelletier v. Magnusson*, 195 F. Supp. 2d 214, 217-219 (D. Me. 2002) (finding report by a state official on deaths at state prison "final" and thus admissible under Fed. R. Evid. 803(8)). There certainly are no indicia of reliability for the November 8 email. Defendants lay no foundation as to what the Assistant Regional Counsel examined (if anything) before writing the email. *Compare, Pelletier*, 195 F. Supp. 2d at 217-218 (report explained investigative work conducted on deaths at state prison). And, the opinion expressed in the email was retracted. *Smith*, 137 F.3d at 862 (memoranda of staff opinions and findings not admissible where NHTSA rejected them).[1]

Moreover, Defendants did not lay a foundation that the November 8 email was "by" EPA. There is no evidence the Assistant Regional Counsel was responsible for rendering an opinion on the Alewife Law (or on any particular subject, for that matter), or that he had authority to speak for the agency. *Compare, Pelletier*, 195 F. Supp. 2d at 217-218 (report was "by" Department of Corrections where evidence showed it was written by an official responsible

[1] Contrary to Defendants' assertion, Plaintiffs did not attempt to leave the "misimpression that the EPA is unaware of the Alewife Law." Reply at 1, n 1. The (now retracted) informal opinion does not bear on the question of whether the Alewife Law is a water quality standards change, however, Plaintiffs did bring their prior communications with the EPA to the Court's attention in their summary judgment filing. Declaration of Douglas H. Watts In Support of Plaintiffs' Motion For Summary Judgment, Dkt. 13-5 at ¶ 6. (Declaring that he informed the EPA Region 1 Administrator that Maine never submitted the Alewife Law to EPA for approval as required by the Clean Water Act, that he engaged in communications over several weeks with the EPA about the Alewife Law, including conversations with an Assistant Regional Counsel, that these communications confirmed that Maine never submitted the Alewife Law's water quality standards change or any of the related analysis that would be required to the EPA, and that in fact Maine has never received approval from the EPA for the change).

for investigating the subject matter, and where her supervisor directed her to conduct the investigation).

Defendants cite cases stating that letter decisions by agencies can be considered on a motion to dismiss, but here the November 8 email is not an EPA "letter decision" or "opinion letter" of agency counsel, so those cases are irrelevant.[2]

In addition to being inadmissible hearsay, the EPA emails do not respond to "new matters" raised in Plaintiffs' Opposition, Local Rule 7(c), and present "matters outside the pleadings" that should be excluded from consideration by the court pursuant to Fed. R. Civ. P. 12(d). Moreover, while a trial court judge may have the discretion to consider evidence outside the complaint, where a Rule 12(b)(6) motion goes beyond the issue of the sufficiency of the Complaint to address the merits of Plaintiffs' claims and introduces matters outside the pleadings, the motion is more closely aligned to a summary judgment motion under Rule 56 and should be converted to one consistent with Fed. R. Civ. P. 12(d). *See* Wright, Miller & Kane, 5 C Fed. Prac. & Proc. § 1366, at 491 (1990); *see also Kulwicki v. Dawson*, 969 F.2d 1454, 1462 (3d Cir. 1992), *citing Carter v. Stanton*, 405 U.S. 669, 671, 92 S.Ct. 1232, 1234, 31 L.Ed.2d 569 (1972) (per curiam) (where matters outside the pleadings are "presented and not excluded by the court," motion to dismiss should be treated as one for summary judgment). Here, the briefing is comprehensive and would enable this Court to make a decision on the merits under Rule 56.

Even if the November 8 email is considered in this motion, it should be given no weight since its author has disavowed it and, as set forth in Plaintiffs opposition to the motion to dismiss, the opinion expressed in it is contrary to law.[3]

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[2] *See* cases cited at Reply 1, n.1: *Jackson v. City of Columbus*, 194 F. 3d 737, 745 (6th Cir. 1999), *abrogated on other grounds, Swierkiewicz v. Sorema*, N.A., 534 U.S. 506 (2002); *Pension Ben. Guar. Corp. v. White Consol. Industries, Inc.*, 998 F.2d 1192, 1197 (3rd Cir. 1993); *Miller v. Cadmus Communications*, 2010 WL 762312, *2 (E.D. Pa. 2010); *Helter v. AK Steel Corp*., 1997 WL 34703718, *20 (S.D. Ohio 1997).

CONCLUSION

For the reasons set forth above, Defendants' arguments relating to the EPA electronic mails and all three related exhibits should be excluded from this Court's consideration. As demonstrated in their Opposition, Plaintiffs have met the standard to survive Defendants' motion to dismiss and the motion should be denied. Alternatively, in denying Defendants' Fed. R. of Civ. P. 12(b)(6) motion this Court should convert it into a motion for summary judgment, as provided in Fed. R. Civ. P. 12(d), and enter summary judgment for Plaintiffs.

Respectfully submitted this 18th day of August, 2011.

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[3] Defendants also for the first time in their Reply cite to a snippet of legislative history relating to a predecessor law to the Alewife Law enacted in 1995 (Reply Exh. C), not the Alewife Law passed in 2008. This legislative history was apparently included in Defendants' reply in part as an effort to rebut Plaintiffs' argument that the statement in Defendants' Motion Memorandum that the Alewife Law is an attempt to balance competing fish populations is a *post hoc* rationalization by Counsel. The Exhibit, however, does not change that fact that Defendants themselves opposed the 1995 law because it made no biological sense, that *after* 1995 State-sponsored studies showed there is no evidence that alewives adversely affect the smallmouth bass population, or that there is no evidence demonstrating the Alewife Law was an attempt to balance competing fish populations.

CERTIFICATE OF SERVICE

I hereby certify that on this, the 18th day of August, 2011, I electronically filed the above document with the Clerk of Court using the CM/ECF system which will send notification of such filing to attorneys of record in this matter. To my knowledge, there are no non-registered parties or attorneys participating in this case.

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