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

August 16, 2010

RE: St. Croix River

Dear Mr. Silva,

Thank you for your reply letter of August 9 to mine of July 4. Because your letter states Region 1 US EPA intends to respond to my letter more specifically in the near future, I would like to use this opportunity to supplement its themes.

The Maine Legislature has never submitted the 1995 or 2008 St. Croix River alewife ban laws to US EPA for review and approval under the U.S. Clean Water Act because (it appears) the Maine Legislature believes these two laws do not materially change the water quality standards or legally designated uses of the St. Croix River watershed. Instead, it appears Maine considers these laws to address a localized 'fishery management' issue which has no nexus to state water quality standards or legally designated uses under the CWA.

The Maine Supreme Court has been asked twice in recent years whether the passage of native fish at a hydroelectric dam is germane to the attainment of water quality standards and designated uses in a waterbody affected by a dam. (*Bangor Hydroelectric v. Maine BEP*, 595 A.2d at 442; *S.D. Warren v. Maine BEP*, 2005 ME 27). In both cases the Court ruled in the affirmative. In *S.D. Warren*, the Court wrote at ¶21:

"Maine's law is settled in this area. In *Bangor Hydro-Electric Co.*, 595 A.2d at 442 n.4, we concluded that narrative criteria at 38 M.R.S.A. §465 (2001 & Supp. 2004), which requires waters "of sufficient quality to support all indigenous fish species," was intended to be an integral part of the water quality standards for the BEP to consider. We also concluded, based upon the specificity of the designated

uses at 38 M.R.S.A. §465, that the Legislature's purpose for the language "suitable for the designated uses" was "that the designated uses actually be present." We stated that when those uses are not presently being achieved, the Legislature intended the quality of the water be enhanced so that the uses are achieved."

Because of these two Maine Supreme Court decisions, it is settled law in Maine that the passage of native fish species at a hydroelectric dam is germane and 'integral' to the attainment of legally assigned water quality standards and designated uses of a waterbody affected by the dam. As such, there is a direct, causative nexus between the 1995 and 2008 alewive ban laws and the water quality standards and designated uses assigned by the Maine Legislature to those waterbodies in the St. Croix River affected by these two laws.

While Maine's water quality standards do not allow the deliberate extirpation of a native species by the State denying them passage at a dam, Maine's water quality standards do allow another method of deliberate, State-mandated fish extirpation: the introduction of chemical poisons into a waterbody by state agencies to kill an invasive fish species. 38 MRSA §464(4)(A)(3) states:

"(3) Any discharge into a tributary of GPA waters that by itself or in combination with other activities causes water quality degradation that would impair the characteristics and designated uses of downstream GPA waters or causes an increase in the trophic state of those GPA waters except for aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species in the GPA waters or a tributary to the GPA waters;"

The Maine Legislature clearly intended the 1995 and 2008 Maine alewife ban laws to achieve the same effect as the chemical treatment of a pond to remove an undesired fish species. In the case of the alewife, the Legislature determined it was much easier to remove alewives from the St. Croix River by barring their passage at dams rather than applying a toxic chemical to kill them. But there is no question that the intent and purpose of the two methods are identical: to completely extirpate a fish species from an entire watershed because the species is 'undesired' by the Legislature.

In 38 MRSA §464(4)(A)(3), the Legislature sets clear and narrow bars on the use of chemicals to extirpate fish from a waterbody. The purpose of the extirpation

effort must be to remove an "invasive species" and must be for the purpose of "restoring biological communities affected by an invasive species." The extirpation effort mandated and set into motion by the 1995 and 2008 alewife ban laws on the St. Croix fails on both of these accounts.

First, the alewife cannot be termed an "invasive species" to the St. Croix watershed since it is a native species of the St. Croix watershed. To say the alewife is an 'invasive species' to the St. Croix would be to say that all aquatic life native to the St. Croix are also 'invasive species' to the St. Croix.

Because a native species of a waterbody cannot be an 'invasive' species to that waterbody, the forcible extirpation of a native species cannot be said to be conducted for the purpose of 'restoring biological communities affected by an invasive species,' since it is the native species assemblage of a waterbody that the chemical treatment allowed in 38 MRSA §464(4)(A)(3) seeks to restore *from* the effects of an invasive species.

The 1995 and 2008 laws have the same intent and purpose as a chemical poisoning effort. Maine's water quality laws do not allow State-led efforts to extirpate a native aquatic species living in its native habitat. This would contravene the State's express purpose for enacting its water quality laws pursuant to the U.S. Clean Water Act. As to chemical poison treatments, Maine law only allows these treatments against a non-native, invasive species for the sole purpose of restoring the native biota and community of that waterbody. The 1995 and 2008 Maine alewife ban laws turn Maine's water quality standards on their head by ordering the complete extirpation of a native fish species, the alewife, from its native habitat in the St. Croix River, in favor of a non-native, invasive fish species, the smallmouth bass.[1]

The narrow exemption for chemical reclamation of ponds in 38 MRSA §464 gives no mention, weight or consideration to the "fisheries management objectives" of state fish and game agencies, whatever these might be from time to time. For example, a State-led chemical reclamation effort to kill all of the native brook trout from a lake in favor of non-native and introduced rainbow trout is illegal under §464(4)(A)(3) even if state fish and game agencies do so to service the wishes of local anglers who would rather catch non-native, stocked rainbow trout instead of the lake's native brook trout. Maine's water quality laws clearly state a directed extirpation effort may be undertaken by the State only to remove an

[1] The 2010 IJC draft St. Croix Adaptive Management Plan correctly notes there is no scientific evidence from the St. Croix River or anywhere else which shows native, anadromous alewives have any negative impact on non-native smallmouth bass sharing the same waterbody. As such, the Maine Legislature's sole justification for its 1995 and 2008 alewife ban laws on the St. Croix River -- to 'protect' smallmouth bass from native alewives -- has no factual foundation.

invasive, non-native species from a waterbody because of its harmful effect on the native aquatic biota of the waterbody. In 1995 and 2008 the Maine Legislature ordered the Maine Fisheries Commissioner to conduct a campaign of total extirpation against a native fish species, the alewife, based solely upon the scientifically bankrupt folk tale that native alewives in the St. Croix negatively impact non-native, exotic smallmouth bass. That the Maine Legislature has directed this extirpation of native alewives be effected by denying them passage at dams under the State's control, rather than by chemically poisoning them, is immaterial. What is material is the State's intent when passing these laws and whether this intent comports with the goals and intent of the U.S. Clean Water Act.

The extirpation of native alewives from their existing habitat in the St. Croix River is not an inadvertent, unforeseen consequence of the 1995 and 2008 laws. This extirpation is the laws' sole and express purpose. Nothing in the CWA or Maine's water quality laws suggest that such a directive by the Maine Legislature is consonant with the goals of the CWA and Maine's water quality statutes: to restore the biological, physical, chemical and radiological integrity of the nation's waters. Because the 1995 and 2008 Maine alewife ban laws are so discordant and hostile to the goals and intent of the Clean Water Act and Maine's water quality laws, US EPA must find the 1995 and 2008 Maine laws are what they are: a wholesale re-write of Maine water quality laws as they respect the St. Croix River.

The root question before Region 1 US EPA is:

What would US EPA do if the statutory language of the 1995 and 2008 Maine alewife ban laws were included as amendments to the legally assigned water quality classification and standards and designated uses set forth for the St. Croix watershed under 38 MRSA §467?

a) Would the Maine Legislature be required to submit these statutory changes to US EPA for review and approval pursuant to the CWA?

b) Would the US EPA be required to invalidate these changes pursuant to the CWA?

The answer is yes to both questions. If these statutory changes were enacted as amendments to the legal water classification for the St. Croix under 38 MRSA §467, the CWA would require Maine to submit them to US EPA for review within 30 days of enactment; and due to the extreme nature of the amendments,

the US EPA would have no choice but to invalidate them for violating the CWA. The Maine Legislature's placement of these laws in a different section of Maine law (Title 12) than Maine's water quality standards (Title 38) does not, in and of itself, create a bar upon US EPA review of these laws for CWA compliance, nor does Maine's failure to submit these laws to US EPA for review. While I do not believe the Maine Legislature intended to evade US EPA review of the 1995 and 2008 alewife ban laws by placing them in Title 12 rather than Title 38, this misplacement has had that effect.The only extant questions are whether, after formal review, the US EPA finds the 1995 and 2008 Maine alewife ban laws germane to water quality standards and designated uses; whether it finds these laws are material changes to these standards and designated uses; and whether it finds these two laws and the changes to water quality standards and designated uses are compliant with the CWA.

US EPA has a unique and crucial role in this matter because the St. Croix River dams subject to the 1995 and 2008 alewife ban laws are not under the jurisdiction of the Federal Energy Regulatory Commission via the Federal Power Act, but were instead constructed and authorized by an act of Congress well prior to enactment of the FPA.[2] For this reason, the dams are not required to be licensed by FERC and unlike FERC-licensed dams they are not subject to periodic regulatory review of their operations. Because the dams are not FERC-licensed, the Maine DEP has no authority under section 401 of the U.S. Clean Water Act to issue water quality certification orders for the dams to ensure their operation does not violate applicable state water quality standards.[3] Due to this regulatory loophole, US EPA Region 1 is the sole arbiter of whether the operations of these dams, as directed by the Maine Legislature, comport with the goals and intent of the U.S. Clean Water Act.

By this and my July 4, 2010 letter I hope to impress upon Region 1 US EPA:

1. The sole and explicit purpose of the 1995 and 2008 Maine alewife ban laws is to forcibly extirpate a native fish species, the alewife, from its native and existing habitat in the St. Croix River watershed. As recent alewife population data from

[2] If the St. Croix River dams in question were FERC-licensed, the 1995 and 2008 Maine alewife ban laws would be rendered invalid and inoperative by the supremacy clause of the U.S. Constitution *unless* they were intended as alterations and amendments to the state's water quality standards and legally designated uses of the St. Croix River.

[3] If the Maine DEP were to issue water quality certifications for the St. Croix River dams under sect. 401 of the CWA , they would have to certify the operations of the dams do not violate any applicable state water quality standards or designated uses. Since Maine water quality standards require the passage of native migratory fish species at hydroelectric dams so as to ensure attainment of narrative standards and legally designated uses (see: *S.D. Warren v. Maine BEP*) , Maine DEP would have to order the fishways at the dams be operated to pass native alewives, despite the Maine Legislature's 1995 and 2008 edicts prohibiting alewife passage. Or, the Maine DEP's certification orders would have to heed to the Maine Legislature, and in doing so give imprimatur to the 1995 and 2008 alewife ban laws as valid amendments and alterations to Maine's water quality standards and legally designated uses for the St. Croix River.

the St. Croix watershed shows, these two laws have achieved their intended and mandated effect.

2. These two laws materially alter the legal water quality standards and designated uses of the St. Croix River and its watershed by directing State of Maine fisheries officials to enact a complete and perpetual extirpation of a native fish species, the alewife, from its native habitat in the St. Croix watershed.

3. Because of the specific nature and intent of these laws, the State of Maine is required by the CWA to submit these laws to US EPA for compliance with the U.S. Clean Water Act.

4. Maine has never submitted these two laws to US EPA for review and approval.

5. Maine's Supreme Court has repeatedly ruled that the passage of native fish at a hydroelectric dam is 'integral' to the question of attainment of water quality standards and legally designated uses of a waterbody affected by said dam; and has rejected appellant claims that water quality standards and designated uses are limited to 'chemical' parameters such as dissolved oxygen, turbidity or temperature.

6. Except for mode of extirpation, the 1995 and 2008 alewife ban laws are no different in intent and purpose than a state law directing the use of chemical poisons to extirpate native alewives from their existing habitat in the St. Croix River watershed.

7. Maine's water quality standards create a very narrow exception for the chemical treatment of a waterbody to extirpate an aquatic species; and only if the targeted species is 'invasive' and if the sole purpose of the treatment is to restore the 'biological communities affected by the invasive species.' 38 MRSA §464(4)(A)(3).

8. Native alewives in the St. Croix River cannot be called an 'invasive species' to the St. Croix River since alewives are native to the St. Croix River; nor can extirpation of native alewives from the St. Croix be said to restore the 'biological communities affected by the invasive species.'

9. If the Maine Legislature had directed chemical treatment of the St. Croix to extirpate alewives, it would be in violation of Maine water quality standards at 38 MRSA §464(4)(A)(3).

10. If the language of the 1995 and 2008 laws were included within the legally assigned standards and designated uses of the St. Croix River watershed, this language would have to be submitted to US EPA for review and approval.

11. Maine's placement of the 1995 and 2008 alewife ban laws into Title 12 rather than Title 38 creates no bar upon US EPA to review these laws for CWA compliance; nor does this novel placement relieve Maine of its responsibility to submit these laws to US EPA for review for CWA compliance.

12. The fact that Maine and US EPA have for many years believed the 1995 and 2008 alewife ban laws are outside the purview of US EPA and the CWA compliance is immaterial. The issue has now been raised. Because these laws remain operative and are clearly germane to water quality standards and designated uses of the St. Croix River watershed, US EPA now has a non-discretionary duty to review these laws for CWA compliance. There is no middle course in the matter.

Thank you for your time.

Sincerely,

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