

**UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF MAINE**

FRIENDS OF MERRYMEETING BAY, *et al.*,

Plaintiffs,

v.

NORMAN H. OLSEN, in his official capacity  
as Commissioner of the Maine Department of  
Marine Resources, *et al.*,

Defendants.

CIVIL ACTION NO.: 11-cv-00167-JAW

**DEFENDANTS' MOTION TO EXTEND TIME TO RESPOND  
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P.6(b), the defendants move to extend the time by which they must respond to plaintiffs' summary judgment motion. Presently pending before the Court is defendants' motion to dismiss. That motion, if granted, will dispose of the case and moot plaintiffs' summary judgment motion. If the motion is denied, the Court's ruling will likely resolve key legal issues and will expedite any further proceedings, including resolution of the summary judgment motion. Thus, it would be expedient to essentially stay the summary judgment motion while the motion to dismiss is pending. Accordingly, defendants respectfully request that the deadline for them to respond to plaintiffs' summary judgment motion be extended to 21 days following a ruling on defendants' motion to dismiss.<sup>1</sup> In further support, defendants rely upon the following Memorandum of Law:

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<sup>1</sup> Prior to the filing of this motion, counsel for the parties conferred, and it is undersigned counsel's understanding that plaintiffs intend to oppose this motion.

## **Memorandum of Law**

### ***Background***

Plaintiffs allege that a Maine law requiring that alewives be prevented from reaching upper portions of the St. Croix river (ostensibly to protect smallmouth bass populations) is “preempted” by the federal Clean Water Act (“CWA”). The CWA requires States to enact their own water quality standards and, for the standards to become effective under federal law, States must comply with certain CWA requirements. Plaintiffs claim that the alewife law is effectively an amendment to Maine’s water quality standards and is invalid because Maine failed to comply with the applicable CWA requirements.

On June 30, 2011, defendants filed a motion to dismiss. The defendants argued that the alewife law is not preempted by the CWA because the CWA explicitly authorizes States to enact and amend water quality standards. Defendants further argued that, in any event, the CWA does not apply here because the law blocking alewife access is not an amendment to a water quality standard but rather a fisheries management directive. Finally, defendants argued that even if the State did fail to comply with the CWA’s requirements, plaintiffs have no private cause of action to enforce those requirements. Rather, it is the federal Environmental Protection Agency (“EPA”) that is charged with ensuring that States properly promulgate water quality standards, and, to the extent plaintiffs have any cause of action, it would be one against the EPA for allegedly failing to properly exercise its oversight duties.

Later on the same day that defendants filed their motion to dismiss, plaintiffs filed a summary judgment motion. Plaintiffs argued that the alewife law is an amendment to Maine’s water quality standards and that it is invalid because Maine failed to comply with the CWA’s requirements. Plaintiffs’ motion is supported by a 67-paragraph statement of allegedly material

facts, four affidavits, and fifteen exhibits. For the most part, the alleged facts fall into two broad categories. The majority of facts relate to alewives, including the current and historical status of alewife populations in the St. Croix river, the value of alewives to the overall ecosystem, and the alleged lack of any negative impact alewives would have on smallmouth bass populations if they were allowed access to the upper portions of the St. Croix river. Plaintiffs' Statement of Material Facts, ¶¶ 4-43. The remaining facts relate to the alleged interest plaintiffs have in giving alewives access to the upper portions of the St. Croix, and are proffered in an attempt to demonstrate that plaintiffs have standing to bring this lawsuit. *Id.*, ¶¶ 44-67.

### *Argument*

Pursuant to Fed. R. Civ. P. 56(c)(1)(A), “a party may move for summary judgment at any time until 30 days after the close of all discovery.” Nevertheless, “in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Fed. R. Civ. P. 56, Advisory Committee Notes (2010 Amendment); *see also* 10A Charles Alan Wright, *et al.*, Federal Practice and Procedure § 2717 (3<sup>rd</sup> ed. 2007) (“when the claimant seeks summary judgment at a very early stage in the litigation, the court may be reluctant to grant the motion, despite its technical timeliness under Rule 56(a)”). When a summary judgment motion “seems premature,” Fed. R. Civ. P. 6(b) “allow[s] the court to extend the time to respond.” Fed. R. Civ. P. 56, Advisory Committee Notes (2009 Amendment). Federal courts often find that summary judgment motions are premature when motions to dismiss are pending. *See, e.g., Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 216 n.3 (5<sup>th</sup> Cir. 2001) (noting that lower court had stayed plaintiffs' summary judgment motion pending ruling on defendant's motion to dismiss); *Nwogugu v. Painewebber Inc.*, 1997 WL 608616, \*1 (1<sup>st</sup> Cir. 1997) (“However, the district court properly deferred ruling on [summary judgment and other]

motions pending its decision on the motion to dismiss, and the dismissal obviated the need to explicitly address them.”) (unpublished decision); *Samuel v. Woodford*, 2011 WL 1361533, \*1 (C.D. Cal. 2011) (court issued order deeming plaintiff’s summary judgment motion “premature in light of Defendants’ pending Motion to Dismiss”); *Williams v. Washington*, 1997 WL 201579, \*1 (N.D. Ill. 1997); *Odom v. Calero*, 2007 WL 4191752, \*1 (S.D. N.Y. 2007).

Here, plaintiffs’ motion for summary judgment is premature given that the defendants have filed a motion to dismiss, and the Court should thus stay the summary judgment motion until it has ruled on the motion to dismiss. The motion to dismiss raises dispositive legal issues which, if decided in defendants’ favor, would obviate the need to reach plaintiffs’ motion. For example, if the Court agrees that the law restricting alewife access is not an amendment to Maine’s water quality standards, the case must be dismissed regardless of whether the facts submitted by plaintiffs regarding alewives are true. Similarly, there would be no need to address whether the facts regarding plaintiffs’ alleged standing are true. This would both reduce the number of briefs that must be filed and obviate the need for any discovery.<sup>2</sup> Further, among the issues the defendants’ motion raises is whether plaintiffs even have a private cause of action to enforce the relevant provisions of the CWA. It would make sense to resolve that preliminary issue before turning to the arguments raised in plaintiffs’ summary judgment motion. Finally, even if the Court were to deny defendants’ motion, the Court’s rulings on the legal issues will almost certainly streamline any further proceedings, including resolution of plaintiffs’ summary judgment motion. For instance, if the Court rules that the alewife law is an amendment to

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<sup>2</sup> At this point, the defendants do not anticipate a need to conduct discovery regarding the facts alleged by plaintiffs relating to alewives. The defendants have not yet determined, however, whether discovery, such as depositions, may be necessary to evaluate the facts proffered by plaintiffs relating to their alleged standing.

Maine's water quality standards, very few facts will be relevant to the issue of whether the law complies with the CWA's requirements for such amendments.

**Conclusion**

For the reasons set forth above, the defendants respectfully request that they not be required to respond to plaintiffs' summary judgment motion until 21 days after the Court rules on defendants' motion to dismiss.

DATED: July 6, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this, the 6th day of July, 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 the following:

- ROGER FLEMING  
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- DAVID A. NICHOLAS  
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To my knowledge, there are no non-registered parties or attorneys participating in this case.

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