UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY, *et al.*, Plaintiffs, v. PATRICK KELIHER, in his official capacity as Acting Commissioner of the Maine Department of Marine Resources, *et al.*, Defendants.	CIVIL ACTION NO.: 11-cv-00167-JAW

DEFENDANTS' REPLY IN SUPPORT OF MOTION
TO DISMISS FIRST AMENDED COMPLAINT

The Alewife Law Does Not Amend Maine's Water Quality Standards.

A dispositive issue is whether the Alewife Law is an amendment to Maine's water quality standards. If it is not, the Court need go no further and can dismiss the case. On this point, it is worth noting that Assistant Regional Counsel for the EPA has expressed the preliminary view that the Alewife Law is not a revision to Maine's water quality standards. *See* Exhibit A.[1] While that preliminary view is undergoing further review by the EPA, *see* Exhibit B, it nevertheless is worthy of consideration.

[1] In ruling on a motion to dismiss, courts may consider "letter decisions" of federal agencies. *See, e.g., 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). While the communication from EPA's counsel is not an official decision of the EPA itself, defendants submit that the Court may nevertheless consider it because rather than containing facts beyond the Amended Complaint, it essentially is legal authority on the issue of whether the Alewife Law is an amendment to Maine's water quality standards. *See Helter v. AK Steel Corp*., 1997 WL 34703718, *20 (S.D. Ohio 1997) (court considered opinion from state agency "as being in the nature of persuasive legal authority, inasmuch as it addresses the agency's interpretation of a provision of law"). The communication also corrects any misimpression that the EPA is unaware of the Alewife Law. *See, e.g.*, Opposition Brief, 24.

The EPA's counsel is undoubtedly correct, and plaintiffs' argument to the contrary is based on a misunderstanding of how water quality standards operate under the CWA. Water quality standards typically address and protect a wide variety of uses of the water, including fishing, recreation, aquatic habitat, hydroelectric generation and agriculture. *See, e.g.*, 38 M.R.S. § 465. These standards are then applied when states and the EPA carry out their functions under those sections of the CWA that refer to water quality standards. 40 C.F.R. §131.21(d). The fact that water quality standards may protect these uses for the purposes of the CWA does not preclude states from independently regulating those same uses to address any number of matters of traditional state concern. Instead, such state laws simply do not have legal status as "applicable water quality standards" within the discrete framework of the CWA.

EPA's regulations explain exactly what this means:

> Applicable water quality standards for purposes of the Act are the minimum standards which must be used when the CWA and regulations implementing the CWA refer to water quality standards, for example, in identifying impaired waters and calculating TMDLs under section 303(d), developing NPDES permit limitations under section 301(b)(1)(C), evaluating proposed discharges of dredged or fill material under section 404, and in issuing certifications under section 401 of the Act.

40 C.F.R. § 131.21(d). For example, under Section 401, a person seeking a federal permit to conduct an activity which may result in a discharge into navigable waters must obtain a certification from the appropriate state that any such discharge will comply with applicable water quality standards. 33 U.S.C. § 1341. If such a certification were sought for waters above the Grand Falls dam, the Alewife Law would play no role whatsoever. Instead, the State would apply the water quality standards set forth in 38 M.R.S. § 365. And, under these standards, the State would not issue a certification if it determined that the discharge would result in the water not being of such quality as to be suitable habitat for fish and other aquatic life (including

alewives). There is no conceivable scenario under which the Alewife Law would be applied in the course of Maine carrying out its CWA duties.

By authorizing the EPA to review and approve "applicable water quality standards," Congress retained for the federal government ultimate control over the substantive standards that apply when the EPA and states are carrying out their responsibilities under the CWA. However, the CWA never states or implies that its terms preempt, and therefore render unenforceable, as a matter of state law, any state statute that does not receive approval from EPA. To the contrary, the CWA specifies the limited consequences of EPA's failure to approve a state's change to its water quality standard. 33 U.S.C. § 1313(c)(3); 40 C.F.R. §§ 131.21(a)(2) & 131.22.[2] Unless and until the EPA approves a new standard or promulgates its own standard, the prior standard remains the applicable standard. 40 C.F.R. §§ 131.21(e). So, for example, if Maine amended the standard for Class A waters to specify that such waters must be of such quality that they are suitable as habitat for all fish and aquatic life other than alewives, and the EPA did not approve the amendment, the water quality standard would remain unchanged. Thus, if a person sought a Section 401 certification for discharges into Class A Waters, the prior standard would still apply.

A different example illustrates plaintiffs' flawed understanding of water quality standards. Swimming and fishing are activities that are both commonly protected under EPA-approved water quality standards and also extensively regulated under a variety of state laws unconnected with the CWA. Applicable water quality standards may identify swimming and

[2] Plaintiffs suggest the State's position in this case is at odds with its brief in *FPL Energy Maine Hydro LLC v. Dep't Envtl. Protection*, 2007 ME 97, 926 A.2d 1197. Opposition Brief, 16. This is incorrect. Both in that case and this one the State readily agreed that only EPA-approved water quality standards are legally effective for the purposes of the CWA. But that premise does not lead to the conclusion that the CWA preempts unapproved state statutes from being effective for other purposes.

fishing as "designated uses" in a particular river segment, and if so, a state may not remove those uses from its water quality standards without complying with the CWA's procedural requirements. 33 U.S.C. § 1313(c)(2)(A). When a state issues discharge permits on that river segment, it must include conditions that are protective of swimming and fishing as uses of the river. 33 U.S.C. § 1342. All of this occurs within the CWA's well-established framework. However, even where swimming and fishing are "designated uses" of a river segment for the purposes of the CWA, states are free to exercise their traditional police powers to regulate those activities. A state law banning those activities on that river segment based on public safety or wildlife management considerations would not require EPA approval to avoid federal preemption, and no one would seriously suggest that it does.[3] For the same reason the Alewife Law, which is a fisheries management measure[4] existing outside the CWA's discrete framework, is fully effective as a matter of Maine law without the need for EPA approval.[5]

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[3] Plaintiffs unconvincingly claim that their argument would not lead to the absurd result of the State needing to obtain EPA approval to restrict boating or fishing because such restrictions do not interfere with the CWA's purpose of restoring and maintaining the "chemical, physical, and biological integrity of the Nation's waters." Opposition Brief, 9-10 (quoting 33 U.S.C. § 1251(a)). Even if so, this is not a relevant distinction. According to plaintiffs, the Alewife Law requires EPA approval because it removes the designated uses of fishing, recreation and fish habitation. Opposition Brief, 11. It is simply impossible for plaintiffs to reconcile their argument that prohibiting alewife access equates to removal of the designated use of fish habitation, but prohibiting recreational activities does not equate to removal of the designated use of recreation.

[4] Plaintiffs suggest that because the defendants allegedly oppose blocking alewives and do not believe that alewives adversely affect the smallmouth bass population, the law is not a legitimate exercise of the State's power to manage its wildlife, and that any claim to the contrary is a "whole-cloth post-hoc rationalization by counsel without any support and must be rejected." Opposition Brief, 10-11. It is not the defendants that passed the law, however, but the Legislature, and, in doing so, the Legislature considered all of the evidence and testimony submitted to it and the views of all interested persons. And, when the Legislature first blocked alewife passage at the Grand Falls and Woodland dams in 1995, it explicitly found that "alewives and bass compete for the same food source" and that "competition could significantly affect the bass fishery," which is "extremely valuable to the economy of the State." *See* Emergency Preamble to Pub Laws 1995, ch. 48, attached hereto as Exhibit C. Thus, far from being a "post-hoc rationalization," striking a balance between competing fish populations was the express reason that the Legislature blocked alewife passage beyond the lower portion of the St. Croix.

[5] A final hypothetical situation illustrates the fallacy of plaintiffs' argument. If a landowner stretched a net across the St. Croix that blocked all fish from continuing upstream, it obviously would not be an amendment to Maine's water quality standard, nor would it even violate the CWA (although it would violate state law). Essentially, the

The position defendants take here is not inconsistent with the State's positions and courts' rulings in other cases that dams must sometimes provide fish passage in order to comply with Maine's water quality standards. Opposition Brief, 7-8. In those cases, the State was applying its water quality standards in the context of carrying out its duties under the CWA. As explained above, nothing prevents the State from ensuring that designated uses are protected while nevertheless restricting or otherwise regulating those uses. [6]

Even If the Alewife Law Is an Amendment to Maine's Water Quality Standards, Plaintiffs Have Not Stated a Preemption Claim and, in Any Event, the Alewife Law Is Not Preempted.

In their initial brief, the defendants argued that regardless of whether the Alewife Law is an amendment to Maine's water quality standards, plaintiffs are not stating a true preemption claim. Rather, they are claiming that the State violated the procedural requirements set forth in the CWA that states must follow when amending their water quality standards, and the CWA does not give plaintiffs a cause of action to bring such a claim. Defendants further argued that even if plaintiffs have stated a preemption claim, the Alewife Law is not preempted.

In response, plaintiffs incorrectly claim that a four-justice plurality held in *Pliva, Inc. v. Demahy*, 131 S. Ct. 2567 (2011) that "courts cannot apply a presumption against finding conflict preemption." Opposition Brief, 21 n.12. As the four-justice dissent noted, while the theory the plurality adopted has ramifications for the "longstanding presumption against pre-emption," the plurality did not specifically address the matter. *Id*. at 2591 & n.4 (Sotomayor, J., dissenting).

State has stretched a net that selectively blocks alewives. This no more amends the State's water quality standards than does the landowner's net.

[6] Maine has sometimes required that dams provide recreational access in order to ensure that the waters are of such quality as to be suitable for recreation in and on the water. *See, e.g.,* Exhibit A to Opposition Brief, at 2, 8. It would not be inconsistent, however, for Maine to later prohibit swimming or motorized watercraft on those waters.

So, with apologies to Mark Twain, plaintiffs' reports of the death of the presumption are greatly exaggerated.

Second, in response to defendants' argument that plaintiffs have not stated a true preemption claim, plaintiffs cite to a Ninth Circuit case. Opposition Brief, 19 (discussing *Pac. Merch. Shipping Ass'n v. Goldstone*, 517 F.3d 1108 (9th Cir. 2008)). There, the court held that a state emissions regulation was preempted by the Clean Air Act because it had not been submitted to, or approved by, the EPA. *Goldstone*, 517 F.3d at 1115. It appears, though, that the court simply assumed that the plaintiff could bring its challenge in the form of a preemption claim and that no party ever challenged that assumption. The decision is thus of limited import.

Plaintiffs argue that they cannot sue the EPA to require it to review the Alewife Law because the EPA has no duty to review water quality standards that a state has not submitted to it. The Eleventh Circuit, though, explicitly held that even if a state did not submit a law to the EPA for approval, the EPA nevertheless could have a mandatory duty to review the law if, in fact, it constituted an amendment to the state's water quality standards. *Miccosukee Tribe of Indians of Florida v. EPA*, 105 F.3d 599, 602-03 (11th Cir. 1997). The court explained that if the rule were otherwise, a state could "circumvent the purposes of the CWA" by simply not submitting to the EPA new or revised water quality standards. *Id*. at 602.[7]

Plaintiffs' alternate argument that that they cannot sue the EPA because it would be "far-fetched" for them to argue that the EPA must "continually scour the laws of the 50 states and

[7] Plaintiffs misread the court's decision in *Northwest Environmental Advocates v. EPA*, 268 F.Supp.2d 1255, 1261 (D. Or. 2003). There, plaintiffs were, in part, challenging Oregon's existing temperature criterion for the Columbia River. The court held that because Oregon had not submitted any revised criterion to the EPA (because there was no revised criterion), the EPA had no duty to review the existing criterion. In other words, the EPA had no duty not because Oregon revised a criterion and did not submit it to the EPA, but because Oregon had not revised the criterion at all.

territories . . . to determine whether a revised water quality standard was not submitted to EPA for review" is itself far-fetched. Opposition Brief, 24. Obviously, the first step would be for plaintiffs to bring the law to the attention of the EPA, and, in fact, the plaintiffs took this first step at least ten months ago. *See* Exhibit A.

Finally, plaintiffs claim that the Alewife Law is "not anything like a 'traditional' wildlife management law," which, according to plaintiffs, is one that either regulates the taking of animals by humans or protects private property. Opposition Brief, 8-9. There is also, however, a tradition of wildlife management laws that impair one species in order to benefit another. *See, e.g., West v. State Board of Game*, 248 P.3d 689, 691 (Alaska 2010) (referring to the practice of controlling predator populations to increase prey populations as having a "long and sometimes controversial history in Alaska").[8] The Alewife Law is just such a law.

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Respectfully submitted,

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[8] Plaintiffs' engage in hyperbole when they claim that the Alewife Law results in the "100 percent eradication of an indigenous species of fish from 98 percent of its habitat." Opposition Brief, 8-9. While the Law does significantly reduce the alewife population in the St. Croix river, there is no allegation that the law has any effect on alewives in Maine's other rivers. Also, it is important to note that while not native to Maine, the smallmouth bass is, like the alewife, an indigenous species under Maine's water quality standards. 38 M.R.S. § 466(8) ("'Indigenous' means supported in a reach of water or known to have been supported").

CERTIFICATE OF SERVICE

I hereby certify that on this, the 12th 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 the following:

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To my knowledge, there are no non-registered parties or attorneys participating in this case.

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