UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED

July 9, 2012

William J. Schneider, Attorney General
State of Maine
6 State House Station
Augusta, Maine 04333

Dear Attorney General Schneider,

As you may know, EPA has recently been asked by two citizens' organizations in Maine to review the second paragraph of 12 M.R.S. § 6134 ("River herring passage; fishways on the St. Croix River") (effective April 9, 2008, and amended April 6, 2012), which directs the Commissioner of Marine Resources and the Commissioner of Inland Fisheries and Wildlife to ensure that the fishway on the Grand Falls Dam on the St. Croix River is configured or operated in a manner that prevents the passage of river herring, to determine whether this law effectively revised Maine's surface water quality standards.[1] We are aware that this statute has been the subject of some debate within Maine already, and that many stakeholders have worked diligently and in good faith to address the various concerns raised. Our review focuses on Section 6134(2)'s status with respect to Maine's water quality standards developed and approved pursuant to Section 303 of the federal Clean Water Act.

12 MRS § 6134(2) Has the Effect of Revising Maine's Water Quality Standards

Section 6134(2) effectively revised Maine's surface water quality standards and is therefore subject to EPA review and approval pursuant to Section 303(c)(2) of the Clean Water Act and 40 C.F.R. Part 131. Section 6134(2) constitutes a new or revised water quality standard that EPA has the authority and duty to approve or disapprove under Section 303(c)(3) of the Clean Water Act because it is legally binding upon the state, and because, for the Class A and AA reaches of the St. Croix River main stem and tributaries upstream of the Grand Falls Dam, it addresses water quality criteria by specifically calling out river herring, which are indigenous aquatic life species previously protected by Maine's narrative water quality criteria for Class A and AA waters. In brief, Section 6134(2) expresses a desired condition that natural indigenous species shall not be present in the St. Croix River upstream of the Grand Falls Dam. As explained in more detail below, this effectively constitutes a revision of a narrative water quality criterion applicable to Class A and AA segments throughout the St. Croix River watershed.

[1] Maine defines "river herring" as *alosa pseudoharengus,* commonly known as alewife, and *alosa aestivalis,* commonly known as blueback herring. 12 M.R.S. § 6001(37-B). The two species are similar in size and function, although blueback herring spawn in Maine rivers a few weeks later than alewife.

Maine's water quality criteria for Class AA and A waters specify that "[t]he *aquatic life ... shall be as naturally occurs.*" 38 M.R.S. §§ 465(1)(B), (2)(B) (emphasis added). "As naturally occurs" means "conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity." *Id.* § 466(2). These criteria protect Maine's designated uses for Class AA and A waters, which include "habitat for fish and other aquatic life," with the habitat being characterized as "free-flowing and natural" for Class AA waters and "natural" for Class A waters. 38 M.R.S. §§ 465(1)(A), (2)(A), 465-A(1)(A).

EPA's Clean Water Act regulations require that water quality criteria protect designated uses. *See* 40 C.F.R. § 131.11(a)(1). Anadromous river herring are naturally occurring and indigenous and were known to thrive in the St. Croix River Basin upstream of the Grand Falls Dam prior to the fish passage closure.[2] By requiring closure of the fish passage to river herring at Grand Falls Dam, Maine has effectively revised the above-cited criteria so that they now provide that the aquatic life in Class AA and A waters upstream of the Grand Falls Dam shall be as naturally occurs, except that river herring (as well as any other migratory species unable to pass the obstruction) shall not be present, due entirely to state-mandated human activity.[3] This alteration of the naturally occurring aquatic population has caused the habitat to be degraded by the artificial exclusion of fish species that would be present if the habitat were natural and which were present until 1995, when the Maine legislature first enacted the relevant fish-passage closure law.

12 MRS § 6134(2) Does Not Protect the Designated Use

Designated uses are "those uses specified in water quality standards for each water body or segment, whether or not they are being attained." As mentioned above, designated uses for Class AA and A waters include "habitat for fish and other aquatic life," with the habitat being characterized as "free-flowing and natural" for Class AA waters and "natural" for Classes A waters. 38 M.R.S. §§ 465(1)(A), (2)(A), 465-A(1)(A). "Natural" means "living in, or as if in, a state of nature not measurably affected by human activity." *Id.* § 466(9). Because river herring are indigenous to the St. Croix River, the "natural" (and, for Class AA waters, "free-flowing") fish habitat designated uses include habitat for river herring.

Existing uses are "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water standards." 40 CFR § 131.3(e). Because the St. Croix River waters upstream of the Grand Falls Dam were habitat for thriving indigenous populations of river herring before the initial enactment of the fish-passage closure law in 1995, the uses of those waters as river herring habitat are also existing ones. Indeed, according to the Maine Department of Marine Resources ("DMR"), "[a]lewives and blueback herring have co-evolved and co-existed with other native fish and wildlife in Maine's streams, rivers, ponds and lakes for thousands of years."[4]

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[2] Flagg, L.N., Historical and Current Distribution and Abundance of the Anadromous Alewife (*Alosa pseudoharengus*) in the St. Croix River. A Report to the State of Maine Atlantic Salmon Commission, 2007.

[3] The fish passage closure also affects aquatic life *downstream* of the Grand Falls Dam. Because river herring are unable to migrate past the dam and spawn upstream, the numbers returning to even the portions of the St. Croix River accessible to river herring have declined dramatically. Thus, the entire river system (including not just Class A and AA segments upstream of the Grand Falls Dam, but also Class A segments downstream of the Grand Falls Dam) has an artificially altered aquatic population.

[4] Maine DMR, "Maine River Herring Fact Sheet," at http://www.maine.gov/dmr/searunfish/alewife/index.htm.

Because the fish-passage law established a desired condition for aquatic life in the St. Croix River that directs the artificial exclusion of river herring from its natural habitat, it no longer protects the designated uses for Class AA and A waters.

The Criteria Revision is Not Based on a Sound Scientific Rationale

EPA is not aware of any sound scientific rationale for excluding indigenous river herring (or other migratory species) from the St. Croix River that could support a criteria revision of this kind.

In fact, the Maine DMR has described the integral function of alewives, in particular, as a critical component in Maine ecosystems and fisheries as follows:

> Alewives are important to the ecology of freshwater, estuarine, and marine environments. They provide an alternative prey item for osprey, eagles, great blue heron, loons and other fish eating birds at the same time juvenile Atlantic salmon are migrating downriver. Alewives provide cover for upstream migrating adult salmon that may be preyed on by eagles or osprey, and for young salmon in the estuaries and open ocean that might be captured by seals. It is important to understand that alewives tie our ocean, rivers and lakes together, providing vital nutrients and forage needed to make healthy watersheds. Between and within those various habitats, everything eats alewives: striped bass, bluefish, tuna, cod, haddock, halibut, American eel, brook trout, rainbow trout, brown trout, lake trout, landlocked salmon, smallmouth bass, largemouth bass, pickerel, pike, white and yellow perch, seabirds, bald eagle, osprey, great blue heron, gulls, terns, cormorants, seals, whales, otter, mink, fox, raccoon, skunk, weasel, fisher, and turtles.
>
> Adult alewives are preferred bait for the spring lobster fishery. There are 35 Maine municipalities that have commercial harvesting rights to alewives on 39 streams and rivers. These runs provide revenue to the towns, many of which lease their fishing privileges to independent fishermen. Many of the fishways built for alewife restoration on some of our small coastal streams were partially funded by these municipalities because they recognized the value of this native fish species.[5]

EPA Actions

For the reasons stated above, EPA finds that 12 M.R.S. § 6134(2) constitutes a de facto revision of the narrative criteria at 38 M.R.S. §§ 465(1)(B) and (2)(B). Therefore, Section 6134(2) is subject to EPA review in accordance with Section 303(c) of the Clean Water Act and EPA's implementing regulations at 40 C.F.R Part 131.

This revision cannot be approved under the Clean Water Act and EPA regulations because the revision of the narrative criterion at 38 M.R.S. § 465(2)(B) is not accompanied by a sound scientific rationale and the revised criteria no longer support designated uses. *See* 40 C.F.R. § 131.11(a)(1).

Consequently, EPA hereby disapproves 12 M.R.S. § 6134(2). In the meantime, please note that 12 M.R.S. § 6134(2) is not effective for Clean Water Act purposes, as provided by 40 C.F.R. § 131.21(e).

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[5] "Maine River Herring Fact Sheet," *supra* note 4.

Effect of Disapproval

To address EPA's disapproval and protect designated and existing uses, Maine should take appropriate action to authorize passage of river herring to the portions of the St. Croix River above the Grand Falls Dam. However, no changes are needed to Maine's previously approved water quality standards. Because EPA is disapproving 12 M.R.S. § 6134(2), the existing standards at 38 M.R.S. §§ 465(1)(B) and (2)(B) remain in effect for Clean Water Act purposes.

Please feel free to contact Ronald Fein of our Office of Regional Counsel at 617-918-1040 or fein.ronald@epa.gov if you have any further questions.

Sincerely,

Stephen S. Perkins, Director
Office of Ecosystem Protection

Cc: Patrick C. Keliher, Commissioner, Maine Dept. of Marine Resources
Chandler E. Woodcock, Commissioner, Maine Dept. of Inland Fisheries and Wildlife
Patricia Aho, Commissioner, Maine Dept. of Environmental Protection
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