

# **Why the 1995 and 2008 St. Croix Alewife Prohibition laws violate the U.S. Clean Water Act and Maine law.**

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## **I. Introduction**

The 1995 and 2008 St. Croix alewife prohibition laws alter the legally designated uses of the St. Croix River and its tributary waterbodies by prohibiting an indigenous fish species, the alewife, from living in its indigenous habitat in the St. Croix River watershed.<sup>1</sup> These laws create a sub-category of Maine water quality standards which purposefully prevent the St. Croix River from being suitable habitat for one of its most common indigenous fish. The U.S. Clean Water Act dictates how Maine can amend the designated uses of its waterbodies. This process is explained by the Maine Supreme Court in *FPL v. Maine BEP*, 2007 ME 97:

"Pursuant to the Clean Water Act and its implementing regulations, states are required to designate uses of waterbodies within their borders. 33 U.S.C.S. § 1313 (2001); 40 C.F.R. § 131.10 (2006). Once such designated uses have been established and approved by the EPA, states are permitted to adopt subcategories of use for specific waterbodies, requiring less stringent criteria, provided they conduct a UAA and obtain EPA approval of any subcategory. 40 C.F.R. §§ 131.10(g), (j), 131.20(c) (2006). Class C is Maine's minimum EPA-approved water quality standard for hydropower impoundments and, therefore, under federal law, Maine is not permitted to apply a less stringent standard than Class C

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<sup>1</sup> "'Designated use' means the use specified in water quality standards for each water body or segment under sections 465 to 465-C and sections 467 to 470 whether or not that use is being attained. A designated use includes its associated habitat characteristic under sections 465 to 465-C." 38 MRSA §464 (2-A)(F). For highly migratory fish such as alewives, salmon and eels, associated habitat characteristics include provision of safe passage at dams. *S.D. Warren v. Maine BEP*, 2005 ME 27, 868 A.2d 210 (2005), *aff'd*, 547 U.S. 370 (2006); *Bangor Hydro-Electric v. Maine BEP*, 595 A.2d 438 (Me. 1991).

to a hydropower impoundment unless a UAA has been conducted and EPA approval has been obtained. See 38 M.R.S.A. § 464(9) (Supp. 1992); 38 M.R.S.A. § 465(4)(C); 33 U.S.C.S. § 1313; 40 C.F.R. §§ 131.10(g), (j), 131.20(c)."

## **II. The 1995 and 2008 St. Croix alewife prohibition laws violate the U.S. Clean Water Act.**

The U.S. Clean Water Act prohibits a State from removing a designated use of a waterbody if the designated use is an existing use of the waterbody, unless a use requiring a *more stringent* water quality criteria is added.<sup>2</sup> An existing use of a waterbody is defined in Maine and federal law as:

“Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-stream water uses are those uses which have actually occurred on or after November 28, 1975, in or on a water body whether or not the uses are included in the standard for classification of the particular water body.” 38 MRSA §464 (4)(F)(1).<sup>3</sup>

Alewives were documented throughout their indigenous habitat in the St. Croix River watershed above the Woodland and Grand Falls dams on and after November 28, 1975 (Flagg 2007) and therefore meet the definition of an “existing in-stream water use” of the St. Croix River under 38 MRSA §464(4)(F)(1). The 1995 and 2008 St. Croix alewife prohibition laws prevent alewives from living in their indigenous habitat in the St. Croix River above the Grand Falls dam, where they were documented to be living on and after Nov. 28, 1975. These laws remove an existing in-stream water use of the St. Croix River watershed above the

<sup>2</sup> 40 C.F.R. §131.10 (h): “States may not remove designated uses if: (1) They are existing uses, as defined in §131.3, unless a use requiring more stringent criteria is added; or (2) Such uses will be attained by implementing effluent limits required under sections 301(b) and 306 of the Act and by implementing cost-effective and reasonable best management practices for nonpoint source control.”

<sup>3</sup> 40 C.F.R. 131.3 (e): “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 quality standards.”

Grand Falls dam from the legally designated uses of the St. Croix River. This is prohibited by the U.S. Clean Water Act. 33 U.S.C.S. § 1313. 40 C.F.R. §131.10 (h).

**III. The 1995 and 2008 St. Croix alewife prohibition laws are unlawful because the State of Maine failed to conduct a Use Attainability Analysis prior to their enactment.**

The U.S. Clean Water Act requires the State of Maine to conduct a Use Attainability Analysis prior to enacting any changes in the designated uses of a waterbody that result in less stringent water quality criteria. The State of Maine in 1995 and 2008 failed to conduct a Use Attainability Analysis for the St. Croix River as required by the U.S. Clean Water Act.<sup>4</sup>

**IV. The 1995 and 2008 St. Croix alewife prohibition laws are unlawful because the State of Maine has not submitted them to the U.S. EPA for approval and the U.S. EPA has not approved them.**

The U.S. Clean Water Act requires that any changes in designated uses of a waterbody resulting in less stringent water quality criteria must be submitted to

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<sup>4</sup> 40 C.F.R. §131.10 (e): “Prior to adding or removing any use, or establishing sub-categories of a use, the State shall provide notice and an opportunity for a public hearing under §131.20(b) of this regulation; (j) A State must conduct a use attainability analysis as described in §131.3(g) whenever: (1) The State designates or has designated uses that do not include the uses specified in section 101(a)(2) of the Act, or (2) The State wishes to remove a designated use that is specified in section 101(a)(2) of the Act or to adopt subcategories of uses specified in section 101(a)(2) of the Act which require less stringent criteria.” See also *FPL v. Maine BEP* at ¶30-31: “In March 1992, the Legislature amended the water classification laws by enacting 38 M.R.S.A. § 464(9) (Supp. 1992) to provide that Maine’s hydropower impoundments comply with the certification standards if “[t]he existing impounded waters are able to support all species of fish indigenous to those waters and the structure and function of the resident biological community in the impounded waters is maintained.” P.L. 1991, ch. 813, § A-1 (effective June 30, 1992) .... On January 14, 1993, the EPA formally disapproved of 38 M.R.S.A. § 464(9) as amended, explaining that it is inconsistent with federal requirements because it attempts to create a new subcategory without requiring a UAA and providing for public participation.”

the U.S. EPA *and* approved by the U.S. EPA. The Maine Legislature has never submitted the 1995 St. Croix alewife prohibition law to the U.S. EPA for approval, nor has the 1995 law ever been approved by U.S. EPA.<sup>5</sup>

## **V. The 1995 and 2008 St. Croix alewife prohibition laws violate Maine Class C, B, A and GPA water quality standards.**

Maine's Class C water classification is Maine's minimum water quality classification. All waterbodies in Maine must at least meet Class C standards. Class C standards require that waterbodies are suitable habitat for all indigenous aquatic species: "Discharges to Class C waters may cause some changes to aquatic life, provided that the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community." 38 M.R.S.A. §465(4)(C).

Maine law defines "indigenous" as follows: "'Indigenous' means supported in a reach of water or known to have been supported according to historical records compiled by State and Federal agencies or published scientific literature." 38 M.R.S.A. §466 (8). The alewife meets the legal definition of a fish species indigenous to the St. Croix River watershed above the dams affected by the 1995 and 2008 St. Croix alewife prohibition laws.<sup>6</sup>

The 1995 St. Croix alewife law causes the St. Croix River and tributary waters to

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<sup>5</sup> 40 C.F.R. §131.20 (c): "Submittal to EPA. The State shall submit the results of the review, any supporting analysis for the use attainability analysis, the methodologies used for site-specific criteria development, any general policies applicable to water quality standards and any revisions of the standards to the Regional Administrator for review and approval, within 30 days of the final State action to adopt and certify the revised standard, or if no revisions are made as a result of the review, within 30 days of the completion of the review."

<sup>6</sup> Extensive historic evidence is provided in Watts (2005) , Historic Documents Related to the Anadromous Fisheries of the St. Croix River, Maine and Canada, prepared for Maine Rivers, Inc.; and Flagg (2007), Historical and Current Distribution and Abundance of the Anadromous Alewife (*Alosa pseudoharengus*) in the St Croix River, prepared for the Maine Atlantic Salmon Commission.

be in violation of Class C water quality standards by prohibiting the alewife from living in their indigenous habitat above the Woodland and Grand Falls dams. The 2008 St. Croix alewife law will cause the St. Croix River and tributary waters to be in violation of Class C water quality standards by prohibiting the indigenous alewife from living in their indigenous habitat above the Grand Falls Dam. The 1995 and 2008 St. Croix alewife laws are *de facto* amendments to Maine's water quality laws, amendments to Class A, B and C and GPA water quality standards, and are substantial alterations to the legally designated uses of all of the waterbodies of the St. Croix River watershed above the Woodland and Grand Falls dams where alewives are indigenous.<sup>7</sup>

## **VI. The 1995 and 2008 St. Croix alewife prohibition laws violate the procedures set forth in Maine's own water quality classification laws.**

Maine's Water Classification Law (38 M.R.S.A. §464, ¶2-A) describes the procedure for removing or altering legally designated uses of a waterbody:

**2-A. Removal of designated uses; creation of subcategories of designated uses.** Removal of designated uses and creation of subcategories of designated uses are governed by the provisions of this subsection and 40 Code of Federal Regulations, Part 131, as amended.

A. The board must conduct a use attainability analysis:

- (1) Prior to proposing to the Legislature a designated use of a specific water body that does not include the uses specified in the Federal Water Pollution Control Act, Public Law 92-500, Section 101(a)(2), as amended; or
- (2) Prior to proposing to the Legislature the removal of a designated use or the adoption of a subcategory of such a designated use that requires less stringent criteria.

B. The board may not recommend to the Legislature the removal of a designated use or the establishment of a subcategory of the use, if:

- (1) It is an existing use as defined in section 464, subsection 4, paragraph F, subparagraph (1), unless another designated use is adopted requiring more stringent criteria;
- (2) The use can be attained by implementing effluent limits required under the Federal Water Pollution Control Act, Public Law 92-500, Sections 301(b) and 306, as amended and by

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<sup>7</sup> Maine Courts have repeatedly held that Maine water quality standards require fish passage at dams which prevent fish from occupying their indigenous habitat in Maine rivers. See *S.D. Warren v. Maine BEP*, 2005 ME 27, 868 A.2d 210 (2005), *aff'd*, 547 U.S. 370 (2006); *Bangor Hydro-Electric v. Maine BEP*, 595 A.2d 438 (Me. 1991).

implementing cost-effective and reasonable best management practices for nonpoint source control;

(3) The water body in question is currently attaining the designated use; or

(4) Adoption of the recommendation allows the introduction of a new discharge or the expansion of an existing discharge into the water body in question that is not attaining the designated use.

C. The board may adopt any recommendation under this subsection only after holding a public hearing in the affected area or adjacent to the affected area. Conduct of the public hearing and the board's subsequent decision are governed by Title 5, chapter 375, subchapter IV.

D. A finding by the board that attainment of a designated use is not feasible must be supported by a demonstration that the conditions of 40 Code of Federal Regulations 131.10(g) are met.

E. If the board adopts a proposal to enact a designated use under paragraph A, subparagraph (1) or to remove a designated use or adopt a subcategory of a designated use under paragraph A, subparagraph (2), it shall forward that proposal to the joint standing committee of the Legislature having jurisdiction over natural resources matters at the next regular session of the Legislature. The board may not forward any other recommendation to the Legislature under this subsection. The Legislature has sole authority to make changes in the designated uses of the waters of the State, including the creation of a subcategory of a designated use.

F. For the purposes of this subsection, "designated use" means the use specified in water quality standards for each water body or segment under sections 465 to 465-C and sections 467 to 470 whether or not that use is being attained. A designated use includes its associated habitat characteristic under sections 465 to 465-C.

The Maine Legislature (or its agency designee) has never undertaken any of the above procedural steps prior to promulgation and approval of the 1995 St. Croix alewife prohibition laws and promulgation of the 2008 alewife prohibition law. While the Maine Legislature has "sole authority" to make changes in the designated uses of a waterbody, the U.S. Clean Water Act and Maine law requires the Maine Legislature or its agency designee to conduct a Use Attainability Analysis, and after a UAA has been conducted, to submit any legal changes to the U.S. EPA for approval. This was not done with the 1995 alewife prohibition law and has not been done with the 2008 alewife prohibition law. Both the 1995 and 2008 alewife prohibition laws violate mandatory federal procedures under the U.S. Clean Water Act and mandatory state procedures under the Maine Water Quality Classification Program.

## **VII. Conclusion.**

Any state law barring indigenous alewives from living in their indigenous habitat in the St. Croix River is prohibited by the U.S. Clean Water Act and Maine water quality law. U.S. and Maine law requires the State of Maine to conduct a Use Attainability Analysis whenever it removes a legally designated use from a waterbody. The State of Maine has not done this. U.S. and Maine law requires the State of Maine to submit any changes to the legally designated uses of a waterbody to the U.S. EPA for approval. The State of Maine has not done this. The 1995 and 2008 St. Croix Alewife Prohibition laws are null and void because they violate the U.S. Clean Water Act.

## **VIII. References.**

Flagg, Lewis. 2007. Historical and Current Distribution and Abundance of the Anadromous Alewife (*Alosa pseudoharengus*) in the St Croix River, prepared for the Maine Atlantic Salmon Commission, Augusta, Maine.

Watts, Douglas. 2005. Historic Documents Related to the Anadromous Fisheries of the St.Croix River, Maine and Canada, prepared for Maine Rivers, Inc., Hallowell, Maine.