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Saving the alewives in the St. Croix

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The St. Croix River

by **Christopher Bouchard**

PORLAND – Several environmentalists are fighting the state of Maine in hopes of overturning a law that would nearly eliminate alewives, a fish native to Maine, from the St. Croix River. Doug Watts, Ted Ames and Kathleen McGee have joined Friends of Merrymeeting Bay in a lawsuit against the state.

According to Watts, the law they are fighting has a history that goes back to the late 1980s. It all started when some fishermen noticed that the population of smallmouth bass in Spednic Lake (part of the St. Croix River) was dwindling. At this time, the government had been working to restore the alewife population in the river. The fishermen came to the conclusion that the recent abundance of alewives was causing the smallmouth bass population to shrink.

“Basically, they put two and two together and got five,” says Watts. “They decided, on their own, that alewives were somehow responsible for reducing the smallmouth bass population. Mainly by eating them, I guess. I’m not really sure how they came up with it, but they started rattling cages.”

These few fishermen then urged their state representatives to pass a law that would completely rid the St. Croix of alewives and, in 1995, they succeeded. The law was passed through emergency legislation, and alewives were thoroughly blocked off from entering the river.

Watts didn’t find out about this until 1996, when he was writing for the Maine Sportsman magazine. While he was conducting research for the article, he learned, through talking to members of the Department of Marine Resources, that there may have been another explanation for the decline in the smallmouth bass population.

“I learned that a dam on Spednic Lake was owned and controlled by Georgia Pacific,” says Watts. “That dam doesn’t generate hydropower. So in the late 1980s they had to draw down the lake by 10 feet in order to generate any electricity during the winter. Several thousand acres of the lake’s shallow areas froze up as a result of this. Biologists believed this was really what was killing wildlife in the lake, but the fishermen were incorrectly blaming this on alewives.”

The law stayed in place for 13 years. It was changed slightly in 2008 when the Maine Legislature passed “An Act To Restore Diadromous Fish in the St. Croix River.” The new law made the following changes to the original: “By May 1, 2008, the commissioner and the Commissioner of Inland Fisheries and Wildlife (IFW) shall ensure that the fishway on the Woodland Dam is configured or operated in a manner that allows the passage of alewives.” Also, “The commissioner and the Commissioner of Inland Fisheries and Wildlife shall ensure that the fishway on the Grand Falls Dam is configured or operated in a manner that prevents the passage of alewives.”

Though alewives can pass through the Woodland Dam, stop logs had to be placed in the Grand Falls Dam to prevent them from passing. Alewives are still blocked off from 98 percent of their native habitat.

According to Ed Friedman, head of Friends of Merrymeeting Bay, the 2008 law was initially meant to allow alewives free passage throughout the St. Croix, but a Passamaquoddy governor threatened the joint committees with violence.

“The governor said that the Indians would get their ammunition if this law were passed,” says Friedman. “So, everyone caved.”

“Last summer, when I saw that this plan was almost as bad as the original, I started talking to some people about a way to get the original law overturned,” says Watts. “I talked to an attorney from Massachusetts (David Nicholas), and he said that we might be able to present a case in U.S. District Court that this law is in complete conflict with the Supremacy Clause of the Constitution. We got Roger Fleming from Earthjustice, and they decided to be the lead group for the case. Friends of Merrymeeting Bay joined, too, as this is an issue that affects the lives of sea creatures in the Gulf of Maine.”

Watts, Earthjustice, Friends of Merrymeeting Bay, Ames and McGee joined together and sent a complaint to the state through the U.S. District Court. Though they technically are suing the Maine Legislature, the lawsuit is directly aimed at the Department of Marine Resources and the Maine Department of Inland Fisheries and Wildlife. Or, more specifically, Norman Olsen and Chandler Woodcock, the respective commissioners of these two organizations.

The complaint states that the 2008 law is in direct violation of the U.S. Constitution's Supremacy Clause. The Supremacy Clause asserts that when state laws clash with federal laws, the federal laws take precedence. In this case, the federal law is the Clean Water Act, and the plaintiffs cite examples of it clashing with the Alewife Law in their 28-page complaint.

Maine's response to this was a motion to dismiss the case. According to the document, the dismissal was on the grounds that the Clean Water Act was in fact not being violated at all.

Here's an excerpt: "Plaintiffs' claim should be dismissed. The CWA (Clean Water Act) explicitly authorizes States to amend their water quality standards, so such amendments cannot be preempted by the CWA. A claim that a State, in amending its standards, did not comply with applicable CWA requirements is not a preemption claim, and none of the three 'forms' of preemption applies here. At best, plaintiffs are simply claiming that the State has not complied with the CWA's procedural requirements. The law restricting alewife access does not trigger the requirements of the CWA, however, because it is not a water quality standard. The law is simply one of countless examples of a State's routine exercise of its police powers over its wildlife and natural resources, and there is no legal support for the proposition that such laws must be approved by the EPA."

Nothing was mentioned about whether or not the presence of alewives was factually proven to be detrimental to the smallmouth bass population. However, the initial complaint, while it did provide evidence to the contrary, primarily criticized the 2008 law as being unconstitutional. Thus, the defendant's response exclusively addressed that point.

"They're using a very technical loophole in the court procedure to knock it out," says Watts. "That's about all we've seen. Their argument basically boils down to, 'Plaintiffs' filed this on the wrong color form.' All I've seen from them so far is a very technical argument that only a lawyer could understand. They have not challenged the substance of what we're saying."

Though the Department of Marine Resources is defending the 2008 alewife law in this case, its website affirms that, not only are alewives essential to the ecosystem of Maine's waters, but also that there is no evidence that their presence has any consequence on the smallmouth bass population.

A section of the DMR website dedicated to alewives briefly references a recent study conducted by Dr. Theo Willis, a research scientist at the University of Southern Maine. Willis used 10 lakes throughout Maine for this study, and rigorously tested the interaction

between alewives and smallmouth bass. His conclusion was that they had absolutely no effect on the bass population.

Regardless, the DMR is still defending the alewife law.

“It seems like there's an anti-intellectualism pact in certain areas of legislation,” says Watts. “The more you know, the less attention you're given. When you have someone with a Ph.D. in Fishery Science say it's their professional opinion, it basically counts against them.”

According to Watts, the next motion in this case will likely occur within two weeks.

Patrick Keliher, acting commissioner of the DMR, was not available for an interview. Keliher said in an e-mail that he was having a very busy afternoon, and, over the phone, his secretary confirmed that he was attending many meetings and would most likely not be available.

Both Watts and Friedman believe that they have a strong chance of winning this case.

“I like to have people think of rivers as arteries,” says Friedman. “The migratory fish in them are like oxygen and other vital components. If we block enough of those, we know what happens; we keel over. But we have the potential to bring the St. Croix back to life.”