IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY, DOUGLAS H. WATTS, and KATHLEEN McGEE, *Plaintiffs*, v. NORMAN H. OLSEN, in his official capacity as Commissioner of the Maine Department of Marine Resources, and CHANDLER E. WOODCOCK, in his official capacity as Commissioner of the Maine Department of Inland Fisheries and Wildlife *Defendants*.	Civil No. 1:11-cv-167-JAW

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

Pursuant to this Court's July 7, 2011 Order, Plaintiffs hereby file their opposition to Defendants' motion to extend the time by which they must reply to Plaintiff's motion for summary judgment. *See* Dkt. 14 ("Def. Mot. To Delay") at 1.

On June 30, 2011 Plaintiffs moved for summary judgment seeking an order declaring that Paragraph two of ME Pub. Law Ch. 587, 123rd Legislature; 12 M.R.S.A. §6134(2) (2008) (the "Alewife Law") is invalid because it violates the Supremacy Clause of the United States Constitution, and prohibiting Defendants from implementing the law. *See* Dkt. 13 ("Pl. MSJ") at 1. Also on June 30, 2011 Defendants filed a motion to dismiss. *See* Dkt. 12 ("Def. MTD") at 1. Defendants provide no support for their assertion that Plaintiffs' motion is premature, or that

delaying briefing will lead to a more expedient resolution of the case. To the contrary, because the only relevant issues raised by Defendants in their motion to dismiss go to the merits of Plaintiffs' claim, it would be far more efficient for the court if the parties either briefed the filings as cross motions, or simply briefed Plaintiffs' motion for summary judgment. Further support for Plaintiffs' opposition is set forth below.

I. Delaying Briefing on Plaintiffs' Summary Judgment Motion Would Be Unfair Because Plaintiffs' Plainly State a Claim for Which Relief Can Be Granted and Defendants' Motion To Dismiss Makes Merits, Not True 12(b)(6), Arguments.

Defendants argue that it would be more "expedient" to delay further briefing on Plaintiffs' motion for summary judgment because doing so would allow the Court to resolve the issues they raise in their motion to dismiss. *See* Def. Mot. to Delay at 1, 4. However, Defendants make *merits arguments* in their motion instead of appropriately stated defenses under Fed. R. Civ. P. 12(b)(6). It would be unfair and less expedient for the Court to resolve Defendants' merits arguments and delay, or not address at all, the merits arguments Plaintiffs make in their summary judgment motion.

In their motion, Defendants do not contend Plaintiffs cannot assert a preemption claim. Nor could they make such a contention. *E.g.*, *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 641-644 (2002); *Local Union No. 12004 USW v. Massachusetts*, 377 F.3d 64, 72-75 (1st Cir. 2004). Instead, most of the motion to dismiss argues that the Alewife Law is not preempted. Def. MTD at 7-14 (under the heading, "The 2008 Alewife Law Is Not 'Preempted' by the CWA."); *see also*, Mot. to Delay at 2. Such a plainly merit-based argument is appropriately made in support of, or opposition to, a motion for judgment, such as in response to Plaintiffs' summary judgment motion. Wright & Miller, 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.) ("Whether the plaintiff ultimately can prevail on the

merits is a matter properly determined on the basis of proof, which means on a summary judgment motion or at trial by the judge or a jury, and not merely on the face of the pleadings.") Plaintiffs address the very same issue in the motion they filed—from the opposite side of course, arguing that the CWA does preempt the Alewife Law. Pl. MSJ 12-17.

Defendants' motion to dismiss also argues that the Alewife Law is not an amendment to Maine's water quality standards. Def. MTD at 13-14. This argument similarly goes directly to the merits of Plaintiffs' preemption claim, not whether Plaintiffs have stated a claim for which relief can be granted. *See* Def. MSJ at 7-11. Again, Plaintiffs addressed the very same issue in their motion for summary judgment. Pl. MSJ 7-11. Delaying consideration of Plaintiffs' summary judgment in order to address this question through Defendants motion to dismiss would be unfair to Plaintiffs because it would deprive the Court of the benefit of the material facts that directly bear on this question. *See* Dkt. 13-1 ("Mat. Facts") at ¶¶ 4-43 (describing, e.g., St. Croix Alewife populations and their ecological niche in St. Croix River water quality, Maine's Alewife Law, scientific information related to the law, Maine's actions to implement the law and thus eliminate Alewives from the St. Croix River, and Maine's failures to analyze its impacts and gain federally mandated approval for such actions).[1]

Defendants attempt to downplay the importance of these facts by summarily stating they are merely facts "that relate to alewives." Def. Mot. to Delay at 3. It is a bold assertion to suggest that material facts are of no importance to the court in determining whether Maine's Alewife Law unlawfully lowers Maine's existing water quality standards. These standards require that the St. Croix River waters be of such quality that they are suitable as habitat for fish,

[1] As indicated in Plaintiffs' motion for summary judgment, all of these facts are supported by government documents, including State of Maine documents, that have been authenticated and would be admissible as evidence consistent with Fed. R. Civ. P. 56(c). Pl. MSJ at 4, fn 2.

for fishing and recreation, and be natural and unimpaired. 38 M.R.S.A. § 465(2)(A), (3)(A); 465-A(1)(A). The Court must consider the material facts in determining, as it must, that Maine's Alewife Law lowered the water quality standards for the St. Croix River basin.

While Defendants' remaining asserted defense might appear to be a properly presented defense under Fed. R. Civ. P. 12(b)(6), it is in fact equally specious as it argues that Plaintiffs' lack a private right of action to enforce the Clean Water Act against Maine. *See* Def. Mot. to Delay at 4; Def. MTD at 14-17. Plaintiffs, however, are not bringing a Clean Water Act claim and Defendants blatantly misstate Plaintiffs' well-pleaded claim, which in fact arises under the Constitution, that the Maine Alewife law is preempted by the Clean Water Act. Dkt. 11 ("Complaint") at 22-26. Defendants' suggestion that a statutorily created private right of action is necessary to bring a preemption claim is without support. *E.g., Verizon Maryland, Inc.*, 535 U.S. at 641-644.

Given that Defendants' motion to dismiss is primarily a merits argument and does not present any arguments that might be considered a properly presented defense under Fed. R. Civ. P. 12(b)(6), to delay briefing on Plaintiffs' summary judgment motion in order to consider Defendants' motion would serve no purpose other than, delay. This would unnecessarily harm Plaintiffs' interests. The most expedient and efficient way for the Court to resolve the case is for Defendants to brief Plaintiffs' motion for summary judgment now. Because Defendants' merits arguments directly overlap with Plaintiffs' arguments, the Court can either order the parties to also brief the issues raised in Defendants' motion to dismiss as a cross motion, or simply order Defendants to brief them in response to Plaintiffs summary judgment motion. Either approach will enable the parties to avoid the inefficient and repetitive briefing likely to occur if the motion to dismiss and summary judgment motions are briefed sequentially.

II. Plaintiffs' Motion for Summary Judgment is Timely.

In 2009, the Federal Rules were amended to remove the restriction that a party must wait 20 days from the commencement of an action to file for summary judgment. Fed. R. Civ. P. 56(b) now states that a party can move for summary judgment at any time up until 30 days after the close of discovery.[2] Even under the old rule, courts consistently held that parties may file for summary judgment at any time after expiration of 20 days from the commencement of the action. *E.g Alholm v. American Steamship Co.*, 144 F.3d 1172, 1177(8th Cir. 1998) (noting that Rule 56 does not require that discovery be closed before motion can be heard); *G & G Fire Sprinklers, Inc. v. Bradshaw*, 136 F.3d 587 (9th Cir. 1998), *amended and superseded on other grounds*, 156 F.3d 893 (9th Cir. 1998), *vacated on other grounds, Bradshaw v. G & G Fire Sprinklers, Inc,*.526 U.S. 1061 (1999)(rejecting defendants argument that plaintiff's motion was premature when it was filed more than 20 days after lawsuit was commenced and no motion under Rule 56(f)was pending). The Advisory Committee Notes to the new Fed. R. Civ. P. 56, in fact, make clear that old timing provisions, including the requirement that a claimant wait 20 days from the commencement of suit to file were "outmoded." Advisory Committee Notes (2009 Amendments) (Further stating, "[t]he new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action."). Thus, it is clear the rules themselves provide no reason justifying delaying briefing on Plaintiffs' motion for summary judgment.

Defendants cite to an Advisory Committee Note stating that a court may find that in many cases a summary judgment motion will be "premature *until* the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had." Advisory Committee

[2] Defendants incorrectly cite to Fed. R. Civ. P. 56(c)(1)(A) on this point, which appears to be a reference to the now expired rules. Def. Mot. To Delay at 3.

Notes (2010 Amendments) (emphasis added). This concern is simply inapplicable in this case because Defendants have not only already filed a responsive pleading, which came after this Court granted an extension of time to do so without objection from Plaintiffs, but they also conferred with counsel for Plaintiffs more than a month prior to that filing regarding Plaintiffs' recommendation that the parties file cross-motions for summary judgment.[3] Even if Plaintiffs had not waited until Defendants filed a responsive pleading to file their summary judgment motion, a responsive pleading is not a prerequisite to the consideration of a motion for summary judgment. *See e.g., H.S. Resources Inc. v. Wingate*, 327 F.3d 432, 440 (5th Cir. 2003).

Moreover, caselaw Defendants cite in support of their proposition that "summary judgment motions are premature when motions to dismiss are pending" is hardly persuasive. Def. Mot. To Delay at 3. *Public Citizen, Inc. v. Bomer*, 274 F.3d 212 (5th Cir. 2001), says nothing about "prematurity." Moreover, *Public Citizen* was filed a decade before the recent Federal Rule changes and, while it refers to a previous order staying a response to a summary judgment motion filed after a motion to dismiss was filed, there is no explanation of that previous order. *Id.* at 216, n.3. Defendants then look to *Nwogugu v. Painewebber Inc.*, 1997 WL 608616 (1st Cir. 1997)(an unpublished opinion) for support, claiming in a parenthetical, that "the district court properly deferred ruling on [summary judgment and other] motions pending its decision on the motion to dismiss...." Def. Mot. to Delay at 3-4. This characterization is misleading, however, as Defendants fail to point out that the rationale for deferring a ruling on the *plaintiffs'* summary judgment motion was that the plaintiff had agreed to be bound by arbitration. *Nwogugu v. Painewebber Inc.* 1997 WL 608616, *at* *1 ("Having concluded that

[3] During prior conferences with Counsel for Defendants regarding their motion to extend the time by which they would file a responsive pleading to Plaintiffs' complaint, Dkt. 7 at ¶ 4, Counsel for Plaintiffs recommended that it would be more appropriate and efficient to agree to file cross-motions for summary judgment since it was apparent Defendants wished to make these merits arguments in a motion to dismiss. Defendants, however, declined.

Nwogugu agreed to arbitrate his dispute, the district court appropriately refrained from reaching the merits of Nwogugu's motion for summary judgment."). In *Samuel v. Woodford*, 2011 WL 1361533 (C.D. Cal. 2011), prematurity was not an issue discussed in the opinion, but rather a notation in a laundry list of prior motions filed in the case where a minute order deems the plaintiffs' summary judgment motion premature because the court already had received extensive briefing, including the defendants' motion to dismiss, the plaintiffs' court-ordered opposition, and the defendants' reply to the opposition. *Id.*, at *1 (C.D. Cal. 2011). Defendants cite two additional cases, with entirely different procedural postures than the circumstances here, that similarly provide no support for the premise that it would be premature for Plaintiffs to file a summary judgment motion at this time. In *Williams v. Washington*, the court granted the defendant's motion to stay where the plaintiff, seeking damages rather than declaratory or injunctive relief, filed his response and his summary judgment at the same time. *Williams v. Washington*, 1997 WL 201579, *1 (N.D. Ill. 1997). *Odom v. Calero* is no more than a court order denying a plaintiff's summary judgment motion where a motion to dismiss is pending and discovery is ongoing. *Odom v. Calero*, 2007 WL 4191752, *1 (S.D.N.Y. 2007). None of these cases show that Plaintiffs' motion for summary judgment is premature where Plaintiffs' constitutional claim can be decided as a matter of law, the parties are not in the middle of court ordered briefing, and no discovery has been requested or is required.

Further, Defendants suffer no harm as a result of Plaintiffs' motion for summary judgment. As noted, Plaintiffs requested that Defendants decide the case on cross motions for summary judgment and it appears that Defendants simply elected to style their dispositive motion as a motion to dismiss. Should this Court elect to allow the parties to proceed with briefing as scheduled on these cross motions the result will be to put all issues, procedural and

merits, before the court at the same time. Moreover, Defendants have had ample time to initiate discovery, yet have not done so. Def. Mot. to Delay at 4, fn.2. *Coregis Ins. Co. v. McCollum*, 961 F.Supp. 1572 (M.D. Fla. 1997) (Plaintiff's motion for summary judgment was not premature, even though plaintiff served it four days before defendants filed an answer, affirmative defenses, and counterclaims; defendant had ample time to conduct discovery).

III. Because of the Sensitive Environmental Issue Involved, Time is of the Essence.

Finally, because this case addresses a sensitive environmental issue, namely the blocking of the St. Croix Alewife migration to their spawning habitat, unnecessary delay must be avoided. Each year the alewives are blocked can have devastating impacts on the eventual recovery of alewives to the St. Croix River and affects the larger Gulf of Maine ecosystem. Dragging out briefing by dealing with each party's motions sequentially threatens to ruin another annual alewife migration and puts restoration of the species at risk.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for summary judgment is timely and there is no reason to delay briefing on its merits. Contrary to the assertion by Defendants, the Court should address both parties' arguments either through briefing on Plaintiffs' motion for summary judgment, or as cross motions. To the extent Defendants raise relevant arguments in their motion to dismiss, such arguments plainly go to the merits of Plaintiffs' preemption claims. Thus addressing them in one of these two ways would be more expedient and efficient for the court than delaying the case and addressing the arguments sequentially.

Respectfully submitted this 11th day of July, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 11th 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 attorneys of record in this matter. To my knowledge, there are no non-registered parties or attorneys participating in this case.

/s/ Roger Fleming
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