



May 12, 2012

**Certified Mail – Return Receipt Requested**

Lisa Jackson  
EPA Administrator  
Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**RE: 60-Day Notice of Intent to File Suit under the Clean Water Act**

Dear Administrator Jackson:

We are writing on behalf of Friends of Merrymeeting Bay (“FOMB”) and its members, Douglas H. Watts, and Kathleen McGee, to notify you of the EPA’s failure to perform a non-discretionary duty under section 505(a) of the Clean Water Act (“CWA”).<sup>1</sup> Specifically, the EPA has failed to review *An Act to Restore Diadromous Fish in the St. Croix River* (“2008 Alewife Law”),<sup>2</sup> an act aimed at extirpating alewives<sup>3</sup> from their native habitat in the Saint Croix River. Because the 2008 Alewife Law cripples the application of water quality standards for the St. Croix River that require support of indigenous aquatic life, the law constitutes a change to Maine’s water quality

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<sup>1</sup> On April 22, 2011 FOMB, Douglas H. Watts, and Kathleen McGee filed suit in the U.S. district court for the District of Maine seeking: 1) a declaratory judgment that the 2008 Alewife law is preempted by the Clean Water Act, and 2) an injunction ordering immediate removal of the barrier at the Grand Falls Dam and prohibiting further implementation of the Alewife Law. *See Friends of Merrymeeting Bay v. Olsen*, No. 1:11-cv-00167 (D. Me. 2011). On March 15, 2012 the district court granted Defendants’ motion to dismiss finding that although “[t]he Alewife Law may well effect a change in the water quality standards, and this revision may trigger EPA review of the Alewife Law, [] it does not support a cause of action against the state for conflict preemption.” Order at 14. In her decision, Justice Torreson stated, “The CWA is structured to provide an administrative process for working out any conflicts between a state law and the CWA, and the citizen suit provision provides a safety net for correcting any administrative missteps that might occur along the way. This process must be given a chance to work. The CWA provides a clear way forward, and the Plaintiffs are required to follow it.” Order at 16.

<sup>2</sup> Maine Pub. Law Ch. 587, 123rd Legislature; 12 M.R.S.A. § 6134(2) (effective April 9, 2008).

<sup>3</sup> Alewives (*Alosa pseudoharengus*) and blueback herring (*Alosa aestivalis*) are visually indistinguishable but are two distinct species native to the coastal rivers of the Gulf of Maine and the Atlantic seaboard, including the Saint Croix River. In executing the 2008 Alewife Law, fishway operators do not, and cannot, distinguish blueback herring from alewives, nor does the barrier itself distinguish between these species of river herring and other migratory (i.e. sea lamprey, American shad, striped bass, American eel, alewife floater (*Anodonta implicata*) or local species that may need to pass (the barrier is designed so only Atlantic salmon *may* be able to pass, if they are able to leap over it). By extirpating native alewives from the Saint Croix, the Maine Legislature also extirpated the rivers’ native population of blueback herring and adversely impacted any other species that might attempt to pass while the blockade is in effect.

standards and EPA must approve or disapprove this change to the State of Maine's water quality standards as required under section 303(c) of the CWA. *See* 16 U.S.C. § 1313(c)(2), (c)(3). This letter is provided pursuant to the 60 day notice requirement in the citizen suit provision of the CWA. *See* 33 U.S.C. § 1365(a)(2). As set forth below, FOMB, Mr. Watts, and Ms. McGee intend to file suit to obtain injunctive and declaratory relief, as well as any other appropriate relief, including recovery of attorney' fees and costs of litigation.

## **I. Statutory Background**

Congress declared that the objective of the Clean Water Act (CWA) "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Consistent with this objective it set a "national goal" of achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). In order to fulfill the objective and achieve the national goals, states are required to adopt narrative and numerical water quality standards and to review them at least every three years. *See* 33 U.S.C. § 1313(c)(1), (c)(2)(A). States must submit all new and revised water quality standards to the EPA for review. 33 U.S.C. § 1313(c)(2)(A). These water quality standards must include: (1) the designated use of the waterways (e.g., the protection of aquatic life and recreational uses); (2) water quality criteria expressed as either narrative or numeric standards; and (3) an antidegradation policy that protects existing uses. *See id.* § 1313(c)(2)(A), (d)(4)(B); 40 C.F.R. § 131.10-12.

Congress set a high bar for state actions that change water quality standards or degrade water quality from an existing condition. Any change to an existing water quality standard must be consistent with the state's antidegradation policy and submitted to the EPA for review. *See* 33 U.S.C. § 1313(c)(2)(A), (d)(4)(B).<sup>4</sup> Upon review, the EPA has a non-discretionary duty to either approve or disapprove the revisions. *See id.* § 1313(c)(3). In reviewing the revised water quality standards, the EPA must consider, among other things, "whether the state has adopted criteria that protect the designated water uses" and "[w]hether the State has followed its legal procedures for revising or adopting standards." 40 C.F.R. § 131.5. If the EPA approves the revised standard, the EPA must notify the state of its approval within 60 days. *See* 33 U.S.C. § 1313(c)(3). If the EPA disapproves the standard, the EPA must notify the state of the changes required to correct the inconsistency within 90 days. *See id.* If the state fails to adopt such changes, the EPA must "promptly" promulgate new standards consistent with the CWA. *See id.* § 1313(c)(4).

In order to comply with section 303(c) of the CWA, Maine established comprehensive water quality standards and classifies each individual waterbody. Under Maine law natural lakes and ponds are classified as GPA, and freshwater rivers, brooks, and streams are classified as Class AA, A, B, or C waters. *See* 38 M.R.S.A. §§ 465, 465-A. Maine's water quality standards for each class contain: (1) a list of designated uses; (2) a set of numerical criteria (pollutant limits necessary to protect designated uses); and (3) a set of narrative criteria. *Id.* at 465(4)(A). All of Maine's waterbody classification categories contain narrative criteria which require the

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<sup>4</sup> *See also* EPA Water Quality Handbook § 4.4.2 ("[n]o activity is allowable under the anti-degradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards.").

waterbody be of suitable quality to support all aquatic life indigenous to that waterbody.<sup>5</sup> See 38 M.R.S.A. §465 and 465-A. In addition, Maine enacted an antidegradation policy which requires that “[e]xisting in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected.” 38 M.R.S.A. § 464(4)(F)(1).

Although it must ensure compliance with the CWA, only the Maine legislature can change the classification of waters in the state, remove a designated use for a waterbody, or adopt a subcategory that requires less stringent criteria. See 38 M.R.S.A. § 464(2). And although the Maine Board of Environmental Protection (“BEP”) can recommend the removal of a designated use or the establishment of a subcategory of the use to the legislature, it can only do so “if .... [t]he water body in question is currently attaining the designated use.” 38 M.R.S.A. § 464(2-A)(B)(3).

The 2008 Alewife Law, 12 M.R.S.A. § 6134 (effective April 9, 2008), states:

§ 6134. Alewives passage; fishways on the St. Croix River

This section governs the passage of alewives on the Woodland Dam and the Grand Falls Dam located on the St. Croix River.

1. Woodland Dam. By May 1, 2008, the commissioner and the Commissioner of Inland Fisheries and Wildlife shall ensure that the fishway on the Woodland Dam is configured or operated in a manner that allows the passage of alewives.
2. Grand Falls Dam. 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.

Under the Federal Power Act, the Federal Energy Regulatory Commission (“FERC”) is the licensing authority for at least three dams above the Grand Falls Dam. See 16 U.S.C. 797(e)(in deciding whether to license, FERC “shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.”). The Federal Power Act also states that FERC “shall require the construction, maintenance, and operation by a licensee at its own expenses of such...fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce.” 16 U.S.C. § 811. As a prerequisite to a FERC license, the State of Maine must certify compliance with its water quality standards under § 401 of the CWA (“Section 401 Certification”). See 33 U.S.C. § 1341(a)(1). Once certification rights vest in a state, any conditions that the state imposes must become conditions of the federal license. *Id.* at §

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<sup>5</sup> 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). Even Maine’s lowest water quality standard, Class C, requires (as do AA, A, and B) there shall be no detrimental changes in the resident biological community. See 38 M.R.S.A. §465(C). “Detrimental changes” is defined as “no significant loss of species or excessive dominance by any species or group of species attributable to human activity.” See 38 M.R.S.A. §466(12). The narrative water quality standard for Class GPA waters (i.e., natural lakes and ponds) states the habitat must be characterized as natural. 38 M.R.S.A. §465-A (1)(A). “Natural” is defined as “living in, or as if in, a state of nature not measurably affected by human activity.” See 38 M.R.S.A. §466(9).

1341(d); *see also id.* at § 1313 (states are authorized to establish water quality standards). State agencies, such as Maine’s Department of Environmental Protection (“DEP”) and the Board of Environmental Protection (“BEP”), also provide consultation with FERC as part of its decision-making. *See* 16 U.S.C. § 803(j).

## II. Factual Background

Alewives<sup>6</sup> are indigenous to the Saint Croix watershed and require habitat that allows migration upstream and downstream. The main stem of the St. Croix River serves as the border between Maine and New Brunswick, Canada and it contains a number of dams that would inhibit the migration of alewives in the absence of fishways. Modern fishways constructed in 1964 on the Woodland (downstream of Grand Falls) and Grand Falls<sup>7</sup> dams, and in 1981 at the Milltown dam (downstream of Woodland), greatly improved alewife and other diadromous fish passage on the St. Croix and resulted in population resurgence (between 1981 and 1987 annual alewife returns increased from 169,000 to 2,625,000). This alewife resurgence, however, coincided with a decline in the non-native smallmouth bass population in Spednic Lake, located in the headwaters of the St. Croix in Maine. Some sport fishermen raised concerns that the increased alewife population might be adversely affecting smallmouth bass (although recent scientific studies confirm the earlier conclusions of scientists that alewives in fact pose no threat to the non-native bass). As a result, alewives were blocked from Spednic Lake in May 1987 and then temporarily blocked at the Grand Falls dam in 1991. In 1995, the State of Maine enacted legislation to close both the Woodland dam and the Grand Falls fishways to migrating alewives.<sup>8</sup> After these closings, and as a direct and foreseeable result of this legislation, the St. Croix alewife population plummeted from a high of 2.6 million fish in 1987 to a low of only 900 returning adults in 2002.

Beginning in 2002, the Canadian Department of Fisheries & Oceans began trucking alewives captured in the Milltown fishway, which had not been closed in the 1995 legislation, 10 miles upstream beyond the Woodland dam where they were released to spawn. This effort allowed the St. Croix alewife population to rebound to about 12,000 in 2006 and has preserved a remnant population. In March of 2008, in response to advocacy by FOMB and others, the Maine Legislature considered legislation to overturn the 1995 state law. While the original bill would have provided restored access to all upstream alewife spawning habitat, an amended bill was passed (the 2008 Alewife Law) that opened fish passage only at the Woodland Dam and directed Maine fisheries commissioners to operate the Grand Falls fishway so as to ensure that no alewives are allowed to pass.<sup>9</sup> Thus, access to 98 percent of native alewives spawning and nursery habitat has been denied.

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<sup>6</sup> Alewives are anadromous fish that spawn in fresh water but spend the majority of their life in salt water where they are critical components of the Atlantic coastal ecosystem. They serve as forage for numerous species of fish, birds, and mammals from the Carolinas to Maritime Canada. Atlantic coast populations have declined by more than 90% since 1985, largely as a result of (1) habitat destruction and (2) bycatch in trawl fisheries. Although some progress has been made to restore habitat and improve fish passage at dams, significant exceptions remain, enough that the species is currently being considered for listing under the Endangered Species Act.

<sup>7</sup> The 1916 Grand Falls Dam was built with federal funding, as was its 1964 fishway which was apportioned by Congress to the United States Fish and Wildlife Service (“USFWS”) for alewife and sea-run fish passage.

<sup>8</sup> *See* 12 M.R.S.A. § 6134.

<sup>9</sup> *See* FB Env’tl., Int’l Joint Comm’n, *St. Croix River: State of the Watershed Report* 18 (2008).

Maine's water quality standards for the St. Croix River basin above the Grand Falls Dam are primarily classified as Class A, B, and GPA depending upon the particular waterbody. *See* 38 M.R.S.A. § 467(13). The narrative criteria for these pristine waters require that the habitat be characterized as natural and unimpaired. Natural is defined as "in, or as if in, a state not measurably affected by human activity." 38 M.R.S.A. § 466(9). Unimpaired is defined as "without a diminished capacity to support aquatic life." 38 M.R.S.A. § 466(11). The stringency of this standard is reinforced by the requirement that waters "must be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community" even when there are discharges into the waters. 38 M.R.S.A. § 465(3).

Section 2 of the 2008 Alewife Law<sup>10</sup> states: "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." 12 M.R.S.A. § 6134(2) (underline added). The Grand Falls fishway, located on the Maine side of the St. Croix River, is the only method by which native alewives can migrate from the ocean to their spawning grounds in the St. Croix River watershed. The St. Croix River above the Grand Falls dam can no longer provide suitable habitat for all indigenous aquatic species, as required by Maine's water quality standards. This represents a material change to Maine's water quality standards and the designated uses of the waterbodies in the St. Croix watershed.

Although the EPA has been on notice of this change at least since July 2010 when contacted by FOMB and its members, and was likely aware of the 2008 Alewife Law earlier, Maine has not submitted the 2008 Alewife law for review to the EPA, nor has the EPA reviewed it. Mr. Watts, a member of FOMB made his first request that the EPA review this law for compliance with the CWA on July 9, 2010. Ed Friedman, President of FOMB, made a similar request of the EPA on July 19, 2010.<sup>11</sup> In its response, an EPA Region 1 staff member stated that a formal response would arrive in the "near future."<sup>12</sup> On November 8, 2010, Mr. Watts sought input for a second time on the issue of whether the 2008 Alewife Law had the effect of amending Maine's water quality standards and the legally designated uses of the St. Croix River. This time he was told by Ron Fein, legal counsel for Region 1 EPA, by email that the "EPA does not view 12 MRS 6134 as a water quality revision."<sup>13</sup> In response, FOMB and other concerned citizens filed suit in the federal district court for the District of Maine on a federal pre-emption claim, referenced in footnote 1. Late in 2011, during the district courts' consideration of the federal pre-emption lawsuit, the parties were notified by Region 1 EPA that it intended to take a "fresh look" at the question.<sup>14</sup> However, in an email to counsel for both parties dated January 10, 2012, legal

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<sup>10</sup> The 2008 Alewife Law is implemented by installing a "stop log" at the Grand Falls Dam which blocks access to the fishway during a three month period of time beginning April 1st of each year when alewives seek to migrate upstream. *See Memorandum of Understanding blocking access of sea-run alewives into the Grand Falls Flowage at the Grand Falls Dam fishway: A joint agreement of the State of Maine Department of Inland Fisheries and Wildlife, the State of Maine Department of Marine Resources Bureau of Sea-Run Fisheries and Habitats, and Domtar (2010).*

<sup>11</sup> *See* July 19, 2010 Letter from Ed Friedman to Mr. Curt Spaulding.

<sup>12</sup> *See* August 9, 2010 Letter from Stephen Silva (EPA) to Mr. Friedman.

<sup>13</sup> Nov. 8, 2010 3:27 email from Ron Fein to Douglas Watts re: St. Croix river alewife issue. *See Friends of Merrymeeting Bay v. Olsen*, No. 1:11-cv-00167 (D. Me. 2011), Doc. No. 22-1 (Exhibit A).

<sup>14</sup> *See Friends of Merrymeeting Bay v. Olsen*, No. 1:11-cv-00167 (D. Me. 2011), Doc. No. 29 (Report of Telephone Conference), filed Dec. 21, 2011.

counsel for Region 1 EPA stated: “the agency has no formal administrative process or timeline involved for reviewing or responding to the [an earlier] NOI. We do not anticipate reaching any final conclusions in the near future.” The NOI referred to in Mr. Fein’s email was a 60-day NOI, filed separately on July 29, 2011, by the Conservation Law Foundation for EPA’s failure to review the 2008 Alewife Law under its nondiscretionary duties. To date, the EPA has failed to review the 2008 Alewife Law and has not indicated whether it intends to review it.

There are three federally licensed storage dams on the St. Croix River directly above the Grand Falls Dam - West Grand Lake (FERC No. 2618); Spednic Lake (FERC No. 2492) and East Grand Lake (FERC No. 2660). All three of these storage dams are undergoing FERC re-licensing and subject to Sect. 401 water quality certification by the State of Maine. *See* <http://www.ferc.gov/industries/hydropower.asp>; *see also* Letter of MDEP to FERC (March 14, 2011); Comment letter of Douglas H. Watts to MDEP (Jan. 11, 2011). All Section 401 Certifications must comply with applicable provisions of the CWA and with Maine’s state water quality standards (which as outlined above require that the waters support all indigenous species, thus passage above the dam would be a necessary “condition” of the license). *See* 16 U.S.C. § 1341(a)(2).

### **III. The 2008 Alewife Law Changed Maine’s Water Quality Standards**

By passing the 2008 Alewife Law - explicitly aimed at preventing alewives (a naturally occurring species) from accessing 98 percent of their natural habitat in the St. Croix River - the Maine legislature has intentionally and effectively removed existing and designated uses of the watershed above the Grand Falls dam for habitat, recreation, and fishing for alewives. Whereas Maine’s designated uses for the St. Croix River require water quality conditions that support the actual presence of native alewives, the 2008 Alewife Law makes it impossible for that designated use to be present. These changes in the water quality standards have: 1) downgraded that section of the St. Croix River above the dam that still has the capacity to support alewives but because of blocked passage the alewives cannot access that habitat; and 2) altered the naturally occurring, physical characteristics of the river above the dam by blocking alewife migration. These changes result in a *de facto* change in Maine’s water quality standards. *See Miccosukee Tribe of Indians of Fla. v. United States*, 1998 WL 1805539, at \*16 (S.D. Fla. Sept. 14, 1998) (finding a Florida law that created an exemption from state water quality standards created a *de facto* change in water quality standards); *Miccosukee Tribe of Indians of Fla. v. United States*, 2008 WL 2967654, at \*12 (S.D. Fla. July 29, 2008).

These changes are inconsistent with settled law regarding the meaning and intent of Maine’s water quality classification program as it applies to native, indigenous fish. In 1991 the Supreme Judicial Court of Maine held that Maine’s narrative criteria, 38 M.R.S.A. § 465, requiring waters “of sufficient quality to support all indigenous fish species,” are an integral part of its water quality standards. *See Bangor Hydro-Electric v. Maine BEP*, 595 A.2d 438, 442-43 (Me. 1991). The Court also concluded that “suitable for designated uses” means that if the designated uses aren’t already present, the Legislature intended the quality of the water to be enhanced so that the designated uses will actually be present in the future. *See id.* In 2005, the Court opined on the meaning of water quality standards as they apply to native alewives and other sea-run fish at five impassable dams owned by the S.D. Warren Company. *See S.D. Warren v. Maine BEP*, 868

A.2d 210 (Me. 2005), *affirmed* 547 U.S. 370 (2006). S.D. Warren argued during its appeal of a BEP ruling that: 1) Maine's Class GPA, A, B and C standards for indigenous fish and fish habitat are deemed met even if the indigenous fish in question cannot live in the receiving waters above the dam due to lack of passage at the dam (so long as the waters *could* support them if they had access); and 2) the designated use requirement is met so long as the waters above the dam are suitable to support *any* fish species. This was in response to BEP's ruling that the statute does not say that "some" of the waters be suitable for the designated uses or that "some" of the aquatic species indigenous to the waters be supported or that "some" of the habitat must be unimpaired or natural. On the contrary, the terms receiving water and habitat were unqualified and the statute specifically stated that the water quality must be such as to support "all" indigenous aquatic species. *See BEP, In the Matter of S.D. Warren Company Presumpscot River Hydro Projects Water Quality Certification, Findings of Fact and Order on Appeal, p. 9 (October 2, 2003)*. The Court ruled in BEP's favor on this issue holding that BEP's interpretation of the CWA was entitled to great deference. *See S.D. Warren*, 868 A.2d at 214. These same water quality standards (Class GPA, A, B, and C) are assigned to the waterbodies in the St. Croix River above the Grand Falls Dam – thus, any application of the 2008 Alewife Law which prevents passage for all indigenous fish creates new water quality standards that have not been reviewed by EPA.

#### 1. The 2008 Alewife Law Created a Less Protective Sub-Category of Designated Uses

Under the CWA, States must designate uses of all the waterbodies within their borders. *See* 33 U.S.C. § 1313 (2001). Maine adopted water quality standards for the St. Croix River basin above the Grand Falls Dam that were approved by the EPA. *See* 38 M.R.S.A. § 467(13). Maine's water quality classification standards require that they be suitable as fish habitat for all indigenous aquatic species. *See id.* § 465(2); 465-A. Once a designated use is established as a state water quality standard (and approved by the EPA), a less protective "sub-category" of that use may not be created in that specific waterbody unless and until a Use Attainability Analysis ("UAA") is performed and its conclusion approved by EPA. *See* 40 C.F.R. §§ 131.10(g)-(j). Further, if a designated use is an existing use (as defined in 40 C.F.R. §131.3) for a particular water body, the existing use cannot be removed unless a use requiring more stringent criteria is added. *See* 40 C.F.R. §131.10(g), (h).<sup>15</sup>

Native alewives are indigenous to virtually the entire St. Croix River watershed and are an "existing instream use" of the River under Maine's anti-degradation provision that must be "protected and maintained." 38 M.R.S.A. § 464(4)(F)(1). The Grand Falls Dam blocks native alewife access to 98 percent of their spawning habitat and thus the intent and effect of the law is to carve out a sub-category of designated uses within Maine's water quality standards specific to

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<sup>15</sup> In addition, the EPA's Water Quality Handbook, § 2.7.3, states: "[a] State may change activities within a specific use category but may not change to a use that requires less stringent criteria, unless the State can demonstrate that the designated use cannot be attained."

the Saint Croix watershed that specifically excludes protection for the native alewives.<sup>16</sup>

## 2. Maine Failed to Conduct a UAA

The CWA requires that prior to a state legislature creating a new sub-category of designated uses with less stringent criteria, a UAA must be conducted by the state and submitted to the EPA for review and approval. A UAA is the mandatory federal process through which water quality standards may be relaxed for a specific waterbody but only if attainment of the standards is not feasible. *See* 40 C.F.R. § 131.10(g)-(j). For instance, if “habitat for fish and other aquatic life” is a designated use of a particular waterbody in an EPA approved state water quality standard, that designated use cannot lawfully be removed from the standards, or weakened through the creation of a less protective sub-category of that use or classification, without complying with the UAA process and receiving EPA approval. UAAs cannot be used to remove an existing use of a waterbody; their purpose is to show why a legally designated use cannot be achieved. 40 CFR § 131.10(g), (h); 38 M.R.S.A. § 464(2-A)(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.”). Maine failed to conduct a UAA prior to making these legislative changes and failed to submit its UAA to the EPA for review and approval.<sup>17</sup> *See FPL Energy Me. Hydro LLC v. Dept. of Env'tl. Prot.*, 926 A.2d 1197, 1204 (Me. 2007) (Maine could not apply a less stringent standard for hydropower impoundments than the EPA-approved Class C standard without conducting a UAA and obtaining EPA approval).<sup>18</sup>

## 3. The 2008 Alewife Law Violated Maine's Anti-Degradation Provision

The CWA requires all states, including Maine, to include an antidegradation clause in their state water quality statutes. *See* 38 M.R.S.A. § 464(4)(F)(1); 40 C.F.R. § 131.12. Maine included an antidegradation clause in its general water quality standards which the EPA approved:

The antidegradation policy of the State is governed by the following provisions. (1) Existing instream 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

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<sup>16</sup> Maine avoided its duty to submit this change to the EPA, among other ways, by placing the 2008 Alewife Law in a section of the statute reserved to describing the duties of its state Fisheries Commissioners (Title 12), rather than the section devoted to water quality standards (Title 38). This novel placement does not relieve the State of Maine or the EPA from its mandatory duties under the CWA. If this were true, states could materially amend and change their water quality standards at will to avoid EPA review of these changes simply by placing them into a section of law separate from their water quality standards.

<sup>17</sup> Even if Maine had performed a UAA, the EPA could not have approved the change because: (1) the waters above the Grand Falls dam fully attained their designated use as habitat for alewives decades prior to the passage of the 2008 Alewife Law and would do so again but for the actions by the State; and (2) the elimination of alewives and their habitat as an existing and designated use of these waters would violate Class C standards, the minimum allowed by the CWA, because the waters would no longer be suitable habitat for all indigenous fish. *See* 38 M.R.S.A. § 465(4).

<sup>18</sup> EPA may not approve the removal of a designated use or the application of less stringent criteria unless the State demonstrates that “attaining the designated use is not feasible” as a result of one or more of six factors. *See* 40 C.F.R. § 131.10(g)(1)–(6). If EPA were to require Maine to conduct a UAA for the St. Croix, the State would be unable to show that the Class A standards (“aquatic life...shall be as naturally occurs”) are unattainable. By unblocking the Grand Falls Dam and allowing for fish passage, the designated uses of the River would be attained.

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. Determinations of what constitutes an existing in-stream water use on a particular water body must be made on a case by- case basis by the department.

38 M.R.S.A. §464(4)(F)(1). EPA guidelines define an existing use:

[a]n ‘existing use’ can be established by demonstrating that: fishing, swimming, or other uses have actually occurred since November 28, 1975; or that the water quality is suitable to allow the use to be attained -- unless there: are physical problems, such as substrate or flow that prevent the use from being attained.

EPA interpretive guidelines available at:

[http://water.epa.gov/scitech/guidance/standards/upload/2006\\_12\\_01\\_standards\\_existinguseinterp.pdf](http://water.epa.gov/scitech/guidance/standards/upload/2006_12_01_standards_existinguseinterp.pdf); *See also* 40 C.F.R. § 131.3(e). Further, the US EPA Water Quality Handbook at Section 4.4.2 states:

“No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards ... Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed.”

Native alewives in the Saint Croix River watershed are an “existing in-stream use” under Maine's anti-degradation provision, as they are well documented to have lived throughout the Saint Croix River watershed on and after Nov. 28, 1975. Maine is not licensed to create physical problems that prevent an existing use from being maintained. *Compare* 40 C.F.R. § 131.12(a)(1), above. The express purpose and effect of the 2008 Alewife Law has been to eliminate this species from its native and existing habitat in the waterbodies of the Saint Croix River which it has occupied on and after Nov. 28, 1975, by mandating the installation of a physical problem that prevents an existing use from being maintained. As a result, it has violated Maine's anti-degradation provision with respect to the Saint Croix River watershed. Even if the EPA were now to belatedly review these legislative changes they would have to be invalidated because they fail to comply with the CWA's mandatory state anti-degradation provisions and the requirement that existing uses be maintained and protected.

#### **IV. The EPA Failed to Perform a Non-discretionary Duty Required by the CWA**

Under the CWA, Maine must submit any material changes to its water quality standards and designated uses to the EPA for approval within 30 days of their enactment. *See* 33 U.S.C. § 1313(c). Although the states promulgate water quality standards, the EPA has a duty to ensure that new and revised standards contain the designated uses of the waters involved and water quality criteria to maintain those uses. 33 U.S.C. 1313(c). The EPA’s duty to review revised water quality standards is non-discretionary. *See Northwest Env’tl Advocates v. EPA*, 2012 WL 653757, \*8 (9th Cir. 2012) (concluding that the EPA’s construction of the statute regarding its non-discretionary duty to review water quality standards was not permissible stating: “[t]he EPA

cannot choose to review and approve water quality standards while ignoring separate provisions which have the potential to cripple the application of those standards. If the EPA is required to determine whether proposed water quality criteria are “sufficient to protect the designated uses” it would undermine the purposes of the Act to not require a review of provisions promulgated that may enable or disable the attainment of that criteria.”); *see also Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1080 (11th Cir. 2004) (finding that if *in effect* the new regulation results in new or revised water quality standards the EPA has a nondiscretionary duty to review); *see also Miccosukee Tribe of Indians of Fla. v. United States*, 105 F.3d 599, 602 (11th Cir. 1997). The EPA was informed of the State of Maine’s failure to submit these changes in water quality standards and designated uses by concerned citizens on or before July 4, 2010. However, thus far, the EPA has refused to take any action to address this failure.

A state cannot circumvent the purposes of the CWA, including the EPA’s obligation to review water quality standards revisions, by styling water quality standard changes as something else, or by failing to submit such changes to the EPA for review. *See Friends of Merrymeeting Bay v. Olsen*, No. 1:11-cv-00167 (D. Me. 2011) (“The Alewife Law may well effect a change in the water quality standards, and this revision may trigger EPA review . . . In *Miccosukee*, the Eleventh Circuit held that the EPA has a mandatory duty to evaluate laws that effectively amend existing state water quality standards even when the state has neither submitted the law to the EPA as an amendment to water quality standards nor styled the law as a water quality standards amendment.”); *see also Northwest Env’tl Advocates*, 2012 WL at \*8; *Miccosukee Tribe of Indians of Fla.*, 105 F.3d at 602. Thus, “[e]ven if a state fails to submit new or revised standards, a change in state water quality standards could invoke the mandatory duty imposed on the [EPA] to review new or revised standards.” *Miccosukee* at 602; *see also Fla. Pub. Interest*, 386 F.3d at 1089. In determining whether such a duty applies, it is the *effect* of the action in question that determines whether the standards have changed. *See Northwest Env’tl Advocates*, 2012 WL at \*9; *Miccosukee Tribe of Indians of Fla.*, 105 F.3d at 603. Even if Maine failed to submit the 2008 Alewife Law to the EPA (explicitly aimed at extirpating an indigenous species from its habitat), it had a duty to review the law when it was on notice that the law had the effect of lowering water quality standards by eliminating designated and existing uses of the watershed without a UAA in violation of the CWA.

Finally, a State’s failure to follow the procedural requirements for amending its water quality standards does not absolve the EPA of its non-discretionary duty to review those revisions. *Fla. Pub. Interest*, 386 F.3d at 1089. Instead, it is one of the relevant factors that the EPA must consider when it reviews revised standards. *See* 40 C.F.R. § 131.5(a)(3) (requiring the EPA to review “[w]hether the State has followed its legal procedures for revising or adopting standards”). Thus, the fact that the 2008 Alewife Law, which changed the St. Croix River’s water quality standard, was not based on a UAA is cause for the EPA to disapprove the change. Moreover, the fact that the change was not effectuated by a change to the Maine statute setting water quality standards, but instead through a separate statute, does not limit the EPA’s obligation to review the change. What remains relevant is that the 2008 Alewife Law changed the St. Croix River’s water quality standards and it was not reviewed for approval or disapproval by the EPA.

## V. The 2008 Alewife Law Impacts Section 401 Certification of FERC-Licensed Dams

There are three federally licensed dams on the St. Croix River directly above the Grand Falls Dam,<sup>19</sup> at West Grand Lake (FERC No. 2618); Spednic Lake (FERC No. 2492) and East Grand Lake (FERC No. 2660) that are undergoing FERC re-licensing and are subject to Section 401 Certification by the State of Maine. See <http://www.ferc.gov/industries/hydropower.asp>.

As shown above, the Class A, B and GPA Maine water quality standards assigned to the waters of the St. Croix River above these three FERC-licensed storage dams require them to be suitable habitat for, and to actually support, the river's native, indigenous alewives. The blockage of alewife passage at the Grand Falls Dam fundamentally prevents these waters from being in attainment of their statutory criteria and designated uses; and in doing so prevents the DEP from carrying out its legal duty under Section 401 to certify (or not certify) the dams as ensuring attainment of water quality standards in and above the dams' receiving waters. While the DEP has authority and is required to ensure passage at these dams for native fish, including alewives, in its Section 401 Certifications, such legal act will have no effect because the Legislature has blocked alewives from ever reaching the dams. Thus, the 2008 Alewife Law removes DEP's ability to properly issue and enforce Section 401 Certifications at these three storage dams, and in doing so, in fact prevents it from issuing Section 401 Certifications that ensure these waters in the St. Croix River attain their habitat related criteria and designated uses for native, indigenous fish populations.

The 2008 Alewife Law also prevents Maine citizens like Mr. Watts, who petitioned to participate in the ongoing Section 401 Certification process in order to ensure passage for alewives at these dams, from exercising their right to meaningfully participate in the relicensing of the West Grand, Spednic and East Grand Lake dams. Even if Mr. Watts were to successfully challenge the Section 401 Certifications at these dams for not providing alewife passage, such an outcome would have no effect because no alewives can reach the dams to be passed. And even if the DEP required alewife passage as part of its Section 401 Certification, the requirement would be ineffectual, since no alewives can reach the dams to be passed. This makes the participation of citizens such as Mr. Watts in the relicensing proceedings utterly meaningless.

Contrary to EPA's unofficial assertions in 2010 to Mr. Watts, the 2008 Alewife Law has a debilitating effect not just on the waters immediately above the Grand Falls Dam (which is exempt from Section 401 review), but has an equally debilitating effect on the receiving waters of three FERC-licensed dams which are now undergoing Section 401 review. This debilitating effect goes beyond the State of Maine's Section 401 authority under the Clean Water Act at these three storage dams. It also cripples the legal authority of the FERC and the U.S. Fish & Wildlife Service ("USFWS") under the Federal Power Act to prescribe fishways and other devices at

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<sup>19</sup> EPA has previously taken the position that the Grand Falls dam is exempt from FERC licensing and Section 401 Certification because it was authorized by Congress and built prior to 1920 (the reach of the Federal Power Act of 1920), thus a conflict with the 2008 Alewife Law has been avoided. However, if the Grand Falls dam became structurally unsound and required a spillway replacement, the replacement would trigger a Section 401 Certification by DEP (Section 404 permits from the Army Corps of Engineers require Section 401 Certification for in-water work below the natural high water mark of the river), and a conflict of law would exist.

these federally licensed dams necessary to protect, maintain, restore and benefit native, indigenous fish species, including native anadromous alewives.

## **Conclusion**

The 2008 Alewife Law is a *de facto* amendment to the water quality standards for the St. Croix River. Maine did not conduct a UAA and it violates Maine's antidegradation policy for existing, legally designated uses. The EPA has a non-discretionary duty to review revised water quality standards for the St. Croix River under section 303(c) of the CWA, which it has not done. Unless EPA performs its duty and reviews the 2008 Alewife Law for compliance with the CWA, and takes immediate steps to remedy this ongoing violation, Friends Of Merrymeeting Bay, Mr. Watts and Ms. McGee intend to file suit at the close of the 60-day notice period pursuant to 33 U.S.C. § 1365(a) and will seek appropriate injunctive and declaratory relief, as well as a recovery of attorney fees and litigation costs as provided under the law.

This notice is provided on behalf of the Friends of Merrymeeting Bay, P.O. Box 233, Richmond Maine, 04357, Douglas H. Watts, Augusta, Maine, and Kathleen McGee, Bowdoinham, Maine. We are acting as counsel to FOMB, Mr. Watts, and Ms. McGee in this matter, and ask that all communications regarding this matter be directed to the undersigned at the following e-mail addresses: [rfleming@earthjustice.org](mailto:rfleming@earthjustice.org) and [efuller@earthjustice.org](mailto:efuller@earthjustice.org).

If you wish to discuss this matter, please contact Roger Fleming at (978) 846-0612.

Sincerely,

/s/ Roger Fleming  
Roger Fleming, Attorney  
Erica Fuller, Attorney  
Earthjustice  
Washington, D.C.

Cc: U.S. Attorney General Eric Holder  
Region 1 Administrator Curt Spalding