

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

<hr/>		)
FRIENDS OF MERRYMEETING BAY,	)	)
DOUGLAS H. WATTS, and	)	)
KATHLEEN McGEE,	)	)
	)	)
Plaintiffs,	)	Civil No. 1:11-167-JAW
	)	)
v.	)	)
	)	)
NORMAN H. OLSEN, in his official capacity as	)	)
Commissioner of the Maine Department of Marine	)	)
Resources	)	)
21 State House Station	)	)
Augusta, ME 04333-0021	)	)
	)	)
CHANDLER E. WOODCOCK, in his official	)	)
capacity as Commissioner of the Maine	)	)
Department of Inland Fisheries and Wildlife	)	)
41 State House Station	)	)
Augusta, ME 04333-0041	)	)
	)	)
Defendants.	)	)
<hr/>		)

**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiffs Friends of Merrymeeting Bay, Douglas H. Watts, and Kathleen McGee challenge as unconstitutional paragraph two of the Maine law titled An Act to Restore Diadromous Fish in the St. Croix River. ME Pub. Law Ch. 587, 123rd Legislature; 12 M.R.S.A. §6134(2) (2008) (“2008 Alewife Law”). The 2008 Alewife Law directs Defendants Norman H. Olsen, in his capacity as Commissioner of the Maine Department of Marine Resources (“DMR”), and Chandler E. Woodcock, in his capacity as Commissioner of the Maine Department of Inland Fisheries and Wildlife (“IFW”), to eradicate alewives and blueback herring

(collectively, “alewives”) from their historic spawning and nursery habitat in the St. Croix River basin in Maine. Under the Supremacy Clause of United States Constitution, the 2008 Alewife Law is preempted by the Federal Water Pollution Control Act (“Clean Water Act” or “CWA”). The actions by Defendants to implement the 2008 Maine law are, therefore, also unlawful.

2. Alewives are ecologically, economically, historically, and culturally important to the St. Croix River basin and the entire Gulf of Maine ecosystem. The St. Croix River once produced the largest population of alewives in New England. Today, however, only a small fraction of that former population is found in a short section of the St. Croix River. Alewives play a keystone role in the river and coastal ocean ecosystem, serving as food for many other species of fish, marine mammals, and birds. They are fished for by commercial and recreational fishermen, and are valuable to fisherman and related coastal economies as bait for lobster and recreational fishermen, and as forage for commercially valuable species like cod, halibut, and tuna.

3. Although the title of the 2008 Alewife Law suggests its purpose is to restore diadromous fish (fish that travel between salt and fresh water), by its terms the 2008 Alewife Law requires the opposite. Paragraph two of the law directs the DMR and IFW Commissioners to “ensure that the fishway on the Grand Falls Dam is configured or operated in a manner that prevents the passage of alewives.” As a result of the 2008 Alewife Law, alewives are blocked from approximately 98 percent of their natural spawning and nursery habitat in the St. Croix River watershed. By blocking alewives from so much of their natural habitat, the Law has dramatically reduced alewife populations.

4. But for the change included in paragraph two of the 2008 Alewife law, Maine’s water quality standards for the St. Croix River basin require alewives and their habitat to be

protected. The 2008 Alewife Law downgraded the water quality standards for the St. Croix River basin by extirpating alewives from their natural habitat in nearly the entire St. Croix River basin.

5. The CWA and U.S. Environmental Protection Agency (“EPA”) regulations implementing the CWA set forth a detailed set of substantive and procedural requirements for states to follow in establishing and revising water quality standards. Enactment of paragraph two of the 2008 Alewife Law resulted in a change in Maine’s water quality standards for the St. Croix River basin that is preempted by these federal statutory and regulatory provisions and violates the Supremacy Clause of the United States Constitution.

6. Plaintiffs are a Maine conservation group and two Maine residents who use the St. Croix River and coastal Gulf of Maine waters, rely upon abundant and sustainable populations of alewives, and who are harmed when the St. Croix River fails to meet or exceed Maine’s lawfully established water quality standards, including the standards that provide for the continued presence of indigenous alewife populations throughout their historic freshwater and saltwater range. Plaintiffs seek: (1) a declaration that paragraph two of the 2008 Alewife Law is preempted by the CWA and is unconstitutional under the Supremacy Clause, and (2) an injunction prohibiting the responsible State officials from implementing this provision of the Law.

#### **JURISDICTION AND VENUE**

7. Plaintiffs bring this case under the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2.

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), which grants the district courts “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” A federal question exists

in this case because Plaintiffs claim that paragraph two of the 2008 Alewife Law is preempted by the CWA and EPA's implementing regulations, and thus violates the Supremacy Clause of the U.S. Constitution.

9. Venue lies in the District of Maine pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this District.

### **DESCRIPTION OF THE PARTIES**

10. Plaintiff Friends of Merrymeeting Bay ("FOMB") is a non-profit Maine corporation with over 400 members. FOMB undertakes research, advocacy, land conservation, education, and litigation activities in order to preserve the ecological, aesthetic, historical, recreational, and commercial values of Merrymeeting Bay, its watershed, and the Gulf of Maine (the part of the Northwest Atlantic Ocean where Merrymeeting Bay is located). FOMB has members who live near, own property near, and recreate on and near Merrymeeting Bay and the rivers that flow into the Bay. Among other activities, FOMB members kayak and canoe, recreationally fish, hike, photograph, and observe aquatic life and wildlife in and around Merrymeeting Bay and its watershed. FOMB members receive economic value from Merrymeeting Bay through, among other activities, commercial fishing and guiding. FOMB members are interested in maintaining the natural biodiversity of the Merrymeeting Bay watershed and the Gulf of Maine. FOMB has long recognized the important connections between Maine's rivers and the Gulf of Maine. FOMB's Healthy Rivers, Healthy Gulf Program is devoted to educating the public and policy makers about these connections.

11. The 2008 Alewife Law harms the natural biodiversity of Merrymeeting Bay and its watershed. Alewives are prey for many fish species, birds, and other animals in the Merrymeeting Bay watershed. Removal of the significantly productive alewife spawning and

nursery habitat in the St. Croix River by the 2008 Alewife Law harms those species because there is less prey available. FOMB members' enjoyment of canoeing, kayaking, recreational fishing, photographing, and nature observing are diminished because of this decrease in the natural biodiversity. The Merrymeeting Bay populations of some species that feed on alewives, such as striped bass and endangered Atlantic salmon, are extremely low. Their recovery is hindered by the reduction of alewives due to the 2008 Alewife Law. If the populations of these species were to recover in the Bay, economic opportunities for FOMB members would increase because they would be able to guide more trips on the Bay and commercially fish for more species in the Bay.

12. FOMB members also travel specifically to the St. Croix River to carry out their work, kayak and canoe, recreationally fish, hike, photograph, and observe aquatic life and wildlife, and have advocated to reopen alewife passage at Grand Falls dam, but to no avail. Unless the relief sought in this Complaint is granted and the 2008 Alewife Law is invalidated, the 2008 Alewife Law will continue to adversely affect FOMB members' interests, as described above.

13. Plaintiff Douglas H. Watts lives in Augusta, Maine. Mr. Watts is a professional photographer who specializes in photographing native fish and wildlife in Maine and New England, including alewives. His work, including photographs of alewives, is displayed in museums, appears in periodicals and on websites, and is used by federal and state fish and wildlife agencies and non-governmental conservation organizations. An example of an alewife photograph taken by Mr. Watts can be seen at the United States Fish and Wildlife Service website page on Maine alewives, at <http://www.fws.gov/GOMCP/pdfs/alewife%20fact%20sheet.pdf>. Mr. Watts uses special equipment to photograph and video fish, including alewives, underwater. Mr. Watts wants to

photograph alewives in the St. Croix watershed above Grand Falls dam, but cannot because their access to the watershed is blocked at the dam. As a result, his ability to pursue his profession is harmed. If the 2008 Alewife Law was invalidated and alewives were allowed to migrate past Grand Falls dam, Mr. Watts would photograph alewives in the St. Croix watershed upstream of the dam.

14. Mr. Watts is also an outdoors writer who has written about alewives for the popular press. In addition, he has authored a research paper using previously unknown historic documents related to alewives on the Saint Croix River, Historic Documents Related to the Anadromous Fisheries of the St. Croix River, Maine and Canada (Maine Rivers 2005), which has been incorporated into a larger work, A Documentary History of the Alewife in Maine and New England (Watts 2011, in press).

15. Mr. Watts has fished for native lake-dwelling Atlantic salmon in the Saint Croix River watershed above Grand Falls dam, at Grand Lake Stream below the outlet of West Grand Lake. However, he now considers that area to be in a sadly unnatural state due to the eradication of alewives, and is not interested in fishing there. Mr. Watts would return to fish in the St. Croix River watershed above Grand Falls dam if the 2008 Alewife Law were invalidated and alewives were allowed to migrate past Grand Falls dam.

16. Plaintiff Kathleen McGee resides in Bowdoinham, Maine. Ms. McGee is an artist, political consultant, and coordinator for the Friends of Merrymeeting Bay Healthy Rivers, Healthy Gulf Program. Ms. McGee has spent many hours kayaking and canoeing on the St. Croix River, and relies on this activity as part of the scientific basis for her work, and for artistic inspiration. Ms. McGee is committed personally and professionally to protecting fresh water, estuarine, and marine ecosystems and the species that depend upon them. Ms. McGee has

worked to ensure the successful passage of many species of fish that migrate up Maine rivers to spawn – including alewives on the St. Croix River.

17. In addition to time spent on the St. Croix River, Ms. McGee has also spent many hours on the Gulf of Maine observing its wildlife and fishing. Alewives are a keystone source of prey for many marine mammals, seabirds, and fish populations in the Gulf of Maine, including bluefish which she seeks to catch. In order for bluefish and many other Gulf of Maine fish populations to be brought back to historic levels of abundance and to be maintained at sustainable levels, alewives on the St. Croix must be able to get to their native spawning and nursery habitat. Without the link in the food web provided by alewives, Ms. McGee's ability to observe wildlife and fish in the Gulf of Maine is adversely affected, as is her ability to otherwise use and enjoy the St. Croix River and Gulf of Maine. The illegal actions by Maine in enacting the 2008 Alewife Law and by the Commissioners of DMR and IFW to block alewife passage at the Grand Falls dam have caused personal harm to Ms. McGee, and harmed her professional work as an artist and her efforts to reestablish a healthy St. Croix River and a healthy Gulf of Maine. Moreover, unless the relief sought in this complaint is granted, Ms. McGee's interests in healthy and sustainable populations of alewives, along with bluefish and other species that depend upon alewives as prey, will continue to be adversely affected and irreparably harmed by the 2008 Alewife Law and Defendants' unlawful implementation of that law.

18. Defendant Norman H. Olsen is currently the Commissioner of Marine Resources for Maine and is jointly responsible for implementing the 2008 Alewife Law. He is sued in his official capacity

19. Defendant Chandler E. Woodcock is currently the Commissioner of the Maine Department of Inland Fisheries and Wildlife and is jointly responsible for implementing the 2008 Alewife Law. He is sued in his official capacity.

20. Under the doctrine of ex Parte Young, 209 U.S. 123 (1908), a suit may be brought in federal court seeking declaratory and prospective injunctive relief against a state official in his official capacity for acting in violation of federal law. Plaintiffs seek such declaratory and injunctive relief and do not seek monetary damages.

## **STATUTORY AND REGULATORY BACKGROUND**

### **U.S. CONSTITUTION**

21. The Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

22. Under the Supremacy Clause, a federal law or regulation may preempt, and thus invalidate, state law. Generally, there are three recognized categories of preemption. Express preemption results from language in a statute revealing an explicit congressional intent to preempt state law. Field preemption occurs when Congress implicitly preempts a state law by creating a pervasive scheme of regulation. Conflict preemption occurs when state law actually conflicts with federal law - that is, when compliance with both state and federal law is impossible - or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

23. Pursuant to powers vested in Congress through the Commerce Clause of the U.S. Constitution, U.S. CONST. art. I, sec. 8, cl. 3, Congress passed the Clean Water Act establishing a comprehensive set of goals, policies, standards, and other requirements for a comprehensive program of protection for all of the nations waters. 33 U.S.C. §§ 1251 et seq. (1972).

24. The U.S. Constitution grants Congress the further power “[t]o make all Laws which shall be necessary and proper” for executing its enumerated powers and all other powers vested by the Constitution in the U.S. Government. U.S. CONST. art. I, sec. 8, cl. 18.

## **CLEAN WATER ACT**

### **Water Quality Standards**

25. Congress declared that the objective of the Clean Water Act “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA sets a “national goal” to achieve “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).

26. States are required to adopt water quality standards that “protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA].” 33 U.S.C. § 1313(c)(2)(A).

27. State water quality standards must consist of designated uses of its waters (such as habitat for fish or other aquatic life) and criteria to protect such uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.2.

28. State water quality standards must also include an “antidegradation” policy to ensure that “existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12.

29. An “existing use” is defined as “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.” 40 C.F.R. § 131.3(e). “An ‘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 guideline, *available at:*

[http://water.epa.gov/scitech/swguidance/standards/upload/2006\\_12\\_01\\_standards\\_existinguseinterpret.pdf](http://water.epa.gov/scitech/swguidance/standards/upload/2006_12_01_standards_existinguseinterpret.pdf).

30. The U.S. EPA Water Quality Handbook at § 4.4 states:

Section 131.12(a)(1) provides the absolute floor of water quality in all waters of the United States. This paragraph applies a minimum level of protection to all waters .... If a planned activity will foreseeably lower water quality to the extent that it no longer is sufficient to protect and maintain the existing uses in that water body, such an activity is inconsistent with EPA's antidegradation policy, which requires that existing uses are to be maintained. In such a circumstance, the planned activity must be avoided or adequate mitigation or preventive measures must be taken to ensure that the existing uses and the water quality to protect them will be maintained.

The Handbook further states that “[n]o 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.” U.S. EPA Water Quality Handbook at Section 4.4.2.

31. At least once every three years, each state must submit its water quality standards to the U.S. EPA, including the narrative and numeric water quality criteria. 33 U.S.C. §

1313(c)(1), (2)(B); 40 C.F.R. § 131.11. New or revised water quality standards must also be submitted for review. 33 U.S.C. § 1313(c)(2).

### **Revising Water Quality Standards**

32. Consistent with the CWA's goal to “restore,” not degrade, the Nation's waters, Congress set a high bar for state actions authorizing activities or changing water quality standards that would cause water quality to become degraded from an existing condition. The CWA and its implementing regulations set forth mandatory procedural and substantive requirements for revising a state water quality standard. First, state water quality standards and any amendments to them must be approved by EPA before they become effective. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.21. Any state law or regulatory action that directly, or constructively, amends water quality standards but that fails to receive EPA approval, cannot have legal effect.

33. Second, once a designated use is established in state water quality standards and approved by 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. 40 C.F.R. § 131.10(g)-(j). A UAA is the mandatory federal process through which water quality standards may be relaxed for a specific waterbody if attainment of the standards is not feasible. Id. For instance, if “habitat for fish and other aquatic life” is a designated use of a particular waterbody in federally approved state water quality standards, 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. A UAA considers a variety of factors, such as whether there are physical conditions or naturally occurring pollutant

concentrations that preclude attainment of water quality standards. 40 C.F.R. § 131.10(g).

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.”).

34. Third, under 33 U.S.C. § 1313(d)(4)(B) and 40 CFR § 131.12, where waters are meeting their designated uses, water quality standards can be revised only in compliance with the anti-degradation policy. The regulations implementing the CWA’s anti-degradation policy provide, in relevant part: “(1) existing instream water uses and levels of water quality necessary to protect the existing uses shall be maintained and protected;” and “(2) where the quality of waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless a state finds, through a process that involves public participation, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.” 40 C.F.R. § 131.12(a)(1), (2).

### **Maine’s Water Quality Standards**

35. In response to the CWA’s requirements, Maine established comprehensive water quality standards, referred to in Maine statutes as a “Water Classification Program,” in order to “restore and maintain the chemical, physical, and biological integrity for the State’s waters and to preserve certain pristine state waters.” 38 M.R.S.A. § 464(1). Where standards are not being met, it is the intent of the law to “enhance water quality” in order to attain such standards. *Id.*

36. Maine’s water quality standards classify individual waterbodies into four classes for freshwater rivers (“AA”, “A”, “B”, and “C”), three classes for marine and estuarine waters

(“SA”, “SB”, and “SC”), and one class for lakes and ponds (“GPA”), 38 M.R.S.A. §§ 467-470. The law establishes standards for each classification, 38 M.R.S.A. §§ 465, 465-B. While there are some differences, all classes of Maine waters must be suitable for, among other things, the designated uses of fishing, recreation, and as habitat for fish and other aquatic life. Id. A classification is “intended to direct the State’s management of that water body in order to achieve at least that minimum level of water quality” specified in the classification. 38 M.R.S.A. § 464(1).

37. As required by the CWA, Maine’s water quality standards also contain an anti-degradation policy that, consistent with the requirements of the CWA, protect the existing uses of Maine waters and the water quality necessary to protect such uses. 38 M.R.S.A. § 464(4)(F)(1).

38. Only the Maine legislature can make changes to the classification of waters in the state. 38 M.R.S.A. § 464(2). Only the Maine legislature can remove a designated use for a waterbody or adopt a subcategory that requires less stringent criteria. 38 M.R.S.A. § 464(2)(D) and (2-A)(E). Maine’s water classification laws also provide that “[r]emoval 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.” 38 M.R.S.A. § 464(2-A). The Maine Board of Environmental Protection can recommend to the Legislature the removal of a designated use or the establishment of a subcategory of the use, but only “if .... [t]he water body in question is currently attaining the designated use.” 38 M.R.S.A. § 464(2-A)(B)(3).

39. 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 on the particular

waterbody. 38 M.R.S.A. § 467(13). All of these classifications require that the waters be of such quality that they are suitable for the legally designated uses of fish habitat and for the human uses of recreation and fishing. *Id.* §§ 465(2), (3); 465-A.

40. The waters of the St. Croix River basin above Grand Falls Dam are among the most pristine and unspoiled in Maine, and many have been given the highly protective water quality standards of Class A and GPA. *Id.* §§ 465(2), 465-A, 467(13). The narrative criteria for these waters require that the habitat be characterized as “natural,” *id.*, which is defined in statute as “in, or as if in, a state not measurably affected by human activity.” 38 M.R.S.A. § 466(9). For waters in Class B, the habitat must be “unimpaired,” 38 M.R.S.A. § 465(3), which is defined by statute as “without a diminished capacity to support aquatic life,” 38 M.R.S.A. § 466(11). The stringency of this standard is evidenced by the requirement that Class B 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). These water quality standards do not allow only “some” of the waters to be suitable for their designated purposes, or only “some” of the habitat to be unimpaired or natural, or only “some” of the aquatic species indigenous to the waters to be supported.

## **FACTUAL BACKGROUND**

### **The Importance Of Alewives And Blueback Herring**

41. The alewife, *Alosa pseudoharengus*, and the blueback herring, *Alosa aestivalis*, are anadromous fish that spend the majority of their life at sea but return to freshwater to spawn. “River herring” is the collective term commonly used to describe both species; however, under

Maine law, “alewives” is defined to mean both alewives and blueback herring. 12 M.R.S.A. § 6001(1-A).

42. Alewives and blueback herring are native to Maine rivers and have coevolved and co-existed with other native fish and wildlife in Maine’s streams, rivers, ponds and lakes for thousands of years. DMR, “River Herring Fact Sheet,” (“River Herring Fact Sheet”), available at: <http://www.maine.gov/dmr/searunfish/alewife/index.htm>. Alewives existed (and thrived) in the St. Croix River above Grand Falls Dam after November 28, 1975 (see supra at ¶ 31).

43. According to DMR and the United States Fish and Wildlife Service (“USFWS”), “[a]lewives have been central to the web of life in Maine for millennia.” DMR, Maine Rivers, USFWS, “All About Maine Alewives” fact sheet, (“Maine Alewives Fact Sheet”), available at: [http://www.fws.gov/northeast/gulfofmaine/downloads/fact\\_sheets/alewife%20fact%20sheet.pdf](http://www.fws.gov/northeast/gulfofmaine/downloads/fact_sheets/alewife%20fact%20sheet.pdf) As DMR has stated, “[I]t is important to understand that alewives tie our ocean, rivers and lakes together, providing vital nutrients and forage needed to make healthy watersheds.” River Herring Fact Sheet. A large variety of fish, birds, sea mammals, and land mammals eat alewives. Id. Alewives also provide cover for upstream migrating endangered Atlantic salmon that could be preyed on by eagles or osprey. Id.

44. Historically, of all the migratory fish that came up Maine’s rivers, alewives were the most abundant. Maine Alewives Fact Sheet. Native Americans and European settlers depended on the bounty brought to inland waters by spring migrations. Id. Through the 1800s, the bulk of the alewife harvest was for human consumption. River Herring Fact Sheet. Beginning in the 20th century, the bulk of the river herring harvest has been for lobster bait. Id. DMR considers alewives to be commercially important and, as commercial harvesting rights are leased by municipalities, an important source of revenue to towns. Id.

45. The river herring population in Maine has plummeted during the last two centuries. Maine Alewives Fact Sheet. As DMR and USFWS have stated, “[d]ams, pollution, and overfishing have taken their toll.” *Id.* The National Marine Fisheries Service (“NMFS”) considers both the alewife and the blueback herring a “Species of Concern.” NMFS, “Species of Concern - River Herring,” [http://www.nmfs.noaa.gov/pr/pdfs/species/riverherring\\_detailed.pdf](http://www.nmfs.noaa.gov/pr/pdfs/species/riverherring_detailed.pdf). DMR and USFWS consider it important to restore the alewife population in Maine:

If we give alewives a chance by helping restore them to their ancestral spawning grounds, alewives will once again play an important role in bringing our rivers, lakes, estuaries and oceans back to life. In return, we will be treated to exuberance and bounty in Maine’s watersheds, in a way that none of us have fully experienced in our lifetimes.

Maine Alewives Fact Sheet.

### **Grand Falls Dam**

46. In 1909 the United States and Canada entered into the 1909 Boundary Water Treaty. This treaty established the International Joint Commission (“IJC”) to investigate, resolve, and prevent boundary water disputes between the two countries. The IJC authorized the construction of Grand Falls dam, which was built in 1915 by the St. Croix Water Power Company and the Spragues Falls Manufacturing Company. On August 25, 1916, the United States Congress authorized “the maintenance, use, and operation” of Grand Falls dam, and another dam at Baileyville, by the two companies. An Act To Authorize The Maintenance And Operation Of Dams Across The Saint Croix River At Baileyville And Grand Falls, Maine, ch. 407, 39 Stat. 534(1916) (“Grand Falls Dam Act”). The Grand Falls Dam Act also stated that the Grand Falls Dam and the Baileyville Dam “are hereby declared to be lawful structures,” provided that the IJC authorized their construction (which it already had). *Id.* Sections 2 and 3 of the Grand Falls Dam Act provide:

*Be it enacted that...*

Sec. 2 That the dams herein authorized, and their maintenance and operations, shall be subject to and in accordance with all the pertinent provisions of the laws of the United States now in force, or which may hereafter be enacted by Congress to regulate and govern the construction of dams across navigable waters.

Sec. 3. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

47. Grand Falls dam has had a number of owners over the years. It is currently owned by Woodland Pulp LLC, a subsidiary of International Grand Investment Corp., which is itself owned by Guangzhou Dinson Engineering and Trading Ltd. The immediately preceding owner was Domtar Corporation.

#### **Fishways On The St. Croix River And At Grand Falls Dam**

48. The IJC has found that “[a]lewife management strategies in the watershed historically have been geared toward the design, construction, and maintenance of fishways to allow passage around dams.” St. Croix River: State of the Watershed Report, p. 38, prepared by the International St. Croix River Watershed Board of the Canada and United States International Joint Commission (2008), [http://www.ijc.org/rel/boards/saint/watershed\\_report.pdf](http://www.ijc.org/rel/boards/saint/watershed_report.pdf) (“State of St. Croix Watershed Report”).

49. In the late 1880s a fishway was constructed at Milltown dam, the lowest dam on the St. Croix, which allowed only limited passage of alewives.

50. In 1964, a fishway was constructed at Grand Falls dam, using federal money, for the purpose of passing alewives and other fish. See Kelly Hoffman, The Maine Legislature’s Bill: An Act to Stop the Alewives Restoration Program in the St. Croix River – Have the Canadians and the Biologists Gone Berserk?, 13 Ocean & Coastal L.J. 309, 325 FN 95 (2008). This fishway, together with a fishway built at Woodland dam in 1964 and the modernization of the fishway at Milltown dam in 1981, greatly improved alewife passage on the St. Croix and

resulted in a resurgence of the anadromous alewife population. State of St. Croix Watershed Report at 38 (citing Flagg, Historical and Current Distribution and Abundance of the Anadromous Alewife in the St. Croix River [2007]). Between 1981 and 1987, alewife returns increased dramatically from 169,000 to 2,625,000 fish. Id.

### **The 1995 Law Prohibiting Alewife Passage At Grand Falls Dam**

51. Responding to requests from Maine sport-fishing guides who became convinced that the mid-1980s decline in the number of smallmouth bass caught in Spednick Lake, a large lake located in the upper portions of the St. Croix watershed, was related to the recent increase in alewives, the Maine House of Representatives introduced a bill that would have prevented DMR and IFW from initiating new alewife restoration programs on the St. Croix River. Hoffman, 13 Ocean & Coastal L.J. at 316-17. This bill would not have stopped existing alewife restoration efforts such as the fishway at Grand Falls dam. DMR opposed the bill, emphasizing that alewives are a valuable resource for commercial fishermen and an important forage species for ospreys, eagles, herons, freshwater gamefish, and estuarine fisheries. 13 Ocean & Coastal L.J. at 320-22. IFW also opposed the bill, indicating, with DMR, that alewives had not had a detrimental effect on freshwater species in numerous other Maine rivers, and that it needed to alewives in the St. Croix River to study the effects on smallmouth bass, if any. Id. at 323-24. A scientific report was submitted to the Committee on Inland Fisheries and Wildlife indicating uncertainty surrounding the reasons for the bass fishery population decline. Id. at 324.

52. The Committee on Inland Fisheries and Wildlife substantially amended the bill to ban alewife passage at Grand Falls dam and Woodland dam (located just downstream of Grand Falls dam), and on April 27, 1995, the Maine legislature passed “An Act to Stop the Alewives Restoration Program in the St. Croix River,” as emergency legislation (the “1995 Alewife Law”).

[Ch. 48, L.D. 520, 117<sup>th</sup> Legis. (Me. 1995) (original draft presented before the House of Representatives on Feb. 14, 1995; codified as amended by Comm. Amend. A on Apr. 27, 1995). The law provided that “[b]y May 1, 1995, the Commissioner [of DMR] and the Commissioner of Inland Fisheries and Wildlife shall ensure that fishways on the Woodland Dam and the Grand Falls Dam, both located on the lower reaches of the St. Croix River, are configured or operated in a manner that prevents the passage of alewives.” *Id.* There was no opportunity provided for the public to comment on the new legislation before it was enacted. 13 Ocean & Coastal L.J. at 318.

53. Thereafter, DMR and IFW entered into an agreement with the owner of the Grand Falls dam, specifying how alewives are to be prevented from using the dam’s fishway: a “stop log” was installed to block access to the fishway during an approximately three month period beginning April 1st of each year that alewives seek to migrate upstream.

54. The 1995 Alewife Law caused a precipitous decline in the St. Croix River alewife population. As DMR has stated,

...in 1995 the Maine Legislature passed legislation to block migrating alewives from ascending state-controlled fishways on the St. Croix to reach their spawning grounds. Restricted access to spawning grounds is accepted to be the primary cause of a precipitous decline in the St. Croix alewife population from hundreds of thousands of fish in the mid-1990s to just 900 fish in 2002.

River Herring Fact Sheet.

### **Scientific Studies Show Alewives Do Not Negatively Impact Smallmouth Bass**

55. In the 1990s, a 10-year collaborative study conducted by DMR, IF&W, and the Maine Department of Environmental Protection (“DEP”) at Lake George concluded that alewives had no negative impacts to the overall water quality, zooplankton, or recreational

fisheries of Lake George. River Herring Fact Sheet. DMR has posted the report of the study, Kercheis, et al., Analysis of Impacts Related to the Introduction of Anadromous Alewives Into a Small Freshwater Lake in Central Maine, USA (2002, revised 2004), at <http://www.maine.gov/dmr/searunfish/reports/lakegeorge04.pdf>, and Plaintiffs incorporate by reference herein this study.

56. A study published in 2006 by Dr. Theo V. Willis, a research scientist at the University of Southern Maine,

... found no evidence from available historic data for Downeast Maine lakes that the presence of alewives systematically harmed smallmouth bass in terms of length, condition or growth...Alewives were not significant predators on smallmouth bass...Based on one year's data, therefore, competition for food between the two species does not appear to be important...Smallmouth bass tournament returns in the past few years were similar in lakes with and lakes without alewives, suggesting that the quality of sport fishing for bass does not differ systematically between lakes with and lakes without anadromous alewives.

Id. DMR has posted this study at

<http://www.maine.gov/dmr/searunfish/reports/stcroixalewifebass06.pdf>, and Plaintiffs incorporate it by reference herein.

### **The 2008 Alewife Law**

57. In March of 2008, in response to advocacy by Plaintiffs and others, the Maine Legislature considered "LD 1957," an act to repeal the 1995 state law closing fishways at the Woodland and Grand Falls Dam to anadromous alewives. The bill would have provided access to 52 percent of the alewives' natural spawning habitat available in the 1980s.

58. An amended bill was passed, however, opening fish passage at Woodland dam only, and directing Maine fisheries commissioners to operate the Grand Falls fishway so as to ensure that no alewives are allowed to pass.

The law in its entirety states:

Sec. 1. 12 M.R.S.A. §6134, as enacted by PL 1995, c. 48, §1, is repealed and the following enacted in its place:

§ 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.

Public Law, 2007, c. 587, § 1;12 M.R.S.A. § 6134.

59. The 2008 Alewife Law is being implemented by the Commissioners of DMR and IFW. DMR and IFW entered into an agreement with the owner of Grand Falls dam, Domtar, specifying how alewives are to be prevented from using the dam's fishway: a "stop log" is installed to block access to the fishway during an approximately three month period beginning April 1st of each year that 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). Attached as Ex. 1. This method of implementing the 2008 Alewife Law is both crude and comprehensive (blockage using stop logs), and is not selective for alewives; therefore the actions of Defendants prevent all migratory fish species from accessing their natural habitat during the months it is in place. The Memorandum of Understanding is in force today with the current owners of Grand Falls dam.

60. In addition, because dams upstream from Grand Falls Dam are subject to re-licensing by the Federal Energy Regulatory Commission (“FERC”), under the CWA the Maine DEP must be able to 'certify' during relicensing that such dams do not cause or contribute to any violations of state water quality standards. 33 U.S.C. § 1341. The 2008 Alewife law prevents the Maine DEP from issuing a certification for any upstream dam capable of ensuring attainment of water quality standards for the waterbodies above such dam. It also prevents expert agencies such as Maine DMR and U.S. Fish & Wildlife Service from effectively participating in and carrying out their legal duties related to such relicensing and certification.

61. The 2008 Alewife Law downgraded the water quality standards for the St. Croix River basin by eliminating 98 percent of alewives’ spawning and nursery habitat in that River basin.

### **CAUSE OF ACTION**

#### **THE 2008 ALEWIFE LAW AND THE ACTIONS BY THE COMMISSIONERS OF DMR AND IFW TO IMPLEMENT THAT LAW ARE PREEMPTED BY THE CWA AND ITS IMPLEMENTING REGULATIONS**

62. Plaintiffs reallege and incorporate by reference paragraphs 1 through 61 in this Cause of Action.

63. Under the Supremacy Clause of the U.S. Constitution, a federal law or regulation may preempt, and thus invalidate, state law in one of three ways: (1) when language in a statute reveals an explicit congressional intent to preempt state law, (2) when statutory language creates a scheme of regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or (3) when the state law actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law

stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. U.S. CONST. art. VI, cl. 2.

64. Pursuant to the Commerce Clause of the U.S. Constitution, Congress mandated that the nation's waters be managed consistent with the requirements of the Clean Water Act. U.S. CONST. art. I, sec. 8, cl. 3; 33 U.S.C. §1251 et. seq.; 40 C.F.R. § Part 131.

65. Pursuant to the CWA and its implementing regulations, Maine adopted water quality standards for the St. Croix River Basin above the Grand Falls Dam that were approved by the EPA. 38 M.R.S.A. §467(13). These standards establish for all such waters the designated uses as fish habitat and for the human uses of recreation and fishing, id. § 465(2), (3); 465-A, and narrative criteria that require that the habitat be characterized as either "natural," or "unimpaired." Id.

66. Pursuant to the CWA, Maine water quality standards also include an anti-degradation policy that protects existing in-stream uses and the water quality necessary to protect such uses. 38 M.R.S.A. § 464(4)(F)(1).

67. The CWA and its implementing regulations set forth mandatory procedural and substantive requirements for revising a state water quality standard, including that: (1) water quality standards and any amendments to them must be approved by EPA before they become effective, 33 U.S.C. § 1313; 40 C.F.R. § 131.21; (2) once a designated use is established in state water quality standards and approved by EPA, a less protective "sub-category" of that use for a specific waterbody may not be created unless and until a Use Attainability Analysis ("UAA") is performed and its conclusion, showing that the designated use is not achievable, is approved by EPA, 40 C.F.R. § 131.10(g), and; (3) where waters are meeting their designated uses, water

quality standards can be revised only in compliance with the anti-degradation policy. 33 U.S.C. 1313(d)(4)(B) and 40 CFR § 131.12.

68. Pursuant to the CWA, its implementing regulations, and under Maine's Water Quality Classification System, alewives and their habitat are designated as existing in-stream uses of the St. Croix River above the Grand Falls Dam. By blocking passage of alewives at Grand Falls dam and removing that keystone species from 98 percent of its habitat, the 2008 Alewife Law and the actions by Defendants to implement it lowered water quality standards and removed these designated and existing uses for the St. Croix River basin above Grand Falls dam. Concomitantly, designated uses of those waters for recreation and fishing have also been removed. In addition, as a result of the 2008 Alewife Law, the habitat of the Class A and GPA waters above the dam can no longer be characterized as natural, and the habitat of the Class B waters above the dam can no longer be characterized as unimpaired. The 2008 Alewife Law was never submitted to U.S. EPA for review and approval (and in fact has never been approved by EPA) as a change of water quality standards or a removal of designated uses.

69. The 2008 Alewife Law also impermissibly creates a less protective sub-category of the Class A, GPA, and B water quality standards for the St. Croix River Basin waters above the Grand Falls dam. The 2008 Alewife Law creates a subcategory of "natural except for alewives and alewife habitat" and "unimpaired without alewives and alewife habitat." Maine did not perform a UAA for creation of such a sub-category of waters or submit the results of a UAA to the U.S. EPA for approval. 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 for decades prior to the passage of the 2008 Alewife Law and would easily do so again but for the law and actions by Defendants; 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. 38 M.R.S.A. §465(4).

70. The 2008 Alewife Law violates the anti-degradation policy because it weakens the in-stream use of the waters above Grand Falls dam as fish habitat for indigenous alewives, and other species that depend upon the presence of alewives.

71. Under the Supremacy Clause of the U.S. Constitution, a federal law or regulation may preempt, and thus invalidate, state law when language in a statute reveals an express congressional intent to preempt state law. U.S. CONST. art. VI, cl. 2. The CWA preempts Maine's 2008 Alewife Law and the actions by Defendants to implement the law because the CWA and its implementing regulations require that water quality standards restore, maintain, and enhance the quality of the Nation's waters, and explicitly prohibits revisions to Maine's water quality standards unless such revisions are made pursuant to a rigorous review and approval process by the U.S. EPA.

72. Under the Supremacy Clause of the U.S. Constitution, a federal law or regulation may preempt, and thus invalidate, state law when Congress creates a scheme of regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. U.S. CONST. art. VI, cl. 2. The CWA and its implementing regulations preempt Maine's 2008 Alewife Law and the actions by Defendants to implement that law because the CWA establishes a comprehensive and detailed regulatory scheme for establishing and changing water quality standards, and the 2008 Alewife Law seeks to establish new (lower) water quality standards through actions taken entirely outside of the CWA's regulatory scheme.

73. Under the Supremacy Clause of the U.S. Constitution, U.S. CONST. art. VI., cl. 2, a federal law or regulation may preempt, and thus invalidate, state law when the state law actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The 2008 Alewife Law and the actions by Defendants to implement it impermissibly conflict with the fundamental CWA objectives to attain and maintain state water quality standards, and the high bar Congress set for revising such water quality standards through mandatory procedural and substantive requirements, because the law: (1) revised water quality standards for the St. Croix River basin without prior submission to, and approval from, the EPA; (2) changed designated use of the St. Croix River basin set forth in the water quality standards without a UAA, and; (3) violated the CWA's anti-degradation policy, which prohibits elimination of existing uses and the weakening of water quality standards.

74. Section 1, Paragraph two of Maine's 2008 Alewife Law, 12 M.R.S.A. §6134(2), and the actions by the Maine Commissioners of Marine Resources and Inland Fisheries and Wildlife to implement this law are pre-empted by the federal Clean Water Act and its implementing regulations and violate the Supremacy Clause of the U.S. CONST. art. VI, cl. 2.

**RELIEF REQUESTED**

Plaintiffs respectfully request that this Court enter judgment granting the following relief:

1. A declaration that Section 1, Paragraph two of Maine's 2008 Alewife Law, 12 M.R.S.A. §6134(2) is pre-empted by the federal Clean Water Act, and invalid under the Supremacy Clause of the United States Constitution;

2. An injunction prohibiting the Maine Commissioner of Marine Resources and the Maine Commissioner of Inland Fisheries and Wildlife from implementing Section 1, Paragraph two of Maine's 2008 Alewife Law, 12 M.R.S.A. 6134(2);

3. An injunction ordering the Maine Commissioner of Marine Resources and the Maine Commissioner of Inland Fisheries and Wildlife to remove all existing barriers to alewife passage located on the St. Croix River;

4. Such other and further relief as this Court may find to be just and proper.

5. Award Plaintiffs reasonable attorney fees, costs, and expenses to the extent permitted by law.

DATED: June 22, 2011

Respectfully submitted,

/s/ Roger Fleming  
ROGER FLEMING  
Maine Bar No. 8905  
STEPHEN E. ROADY  
D.C. Bar. No. 926477  
EARTHJUSTICE  
1625 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
202-667-4500 Telephone  
202-667-2356 Fax  
E-mail: [rfleming@earthjustice.org](mailto:rfleming@earthjustice.org)  
[sroady@earthjustice.org](mailto:sroady@earthjustice.org)

/s/ David A. Nicholas  
David A. Nicholas, Esq.  
Maine Bar No. 010049  
20 Whitney Road  
Newton, Massachusetts 02460  
617-964-1548 Telephone  
617-663-6233 Fax  
E-mail: [dnicholas@verizon.net](mailto:dnicholas@verizon.net)

Counsel for the Plaintiffs