IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY, DOUGLAS WATTS, and KATHLEEN McGEE,

Plaintiffs,

v.

NORMAN H. OLSEN and CHANDLER WOODCOCK, in their official capacities,

Defendants.

C.A. No. 1:11-cv-00167-JAW

OPPOSITION TO MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs oppose Defendants' motion to dismiss. The grounds are set forth below.[1]

INTRODUCTION

Alewives and blueback herring are ecologically, economically, historically, and culturally important to the St. Croix River basin and the entire Gulf of Maine ecosystem. First Amended Complaint ("Am. Comp.") ¶¶ 2, 41-45. However, in 2008, Maine enacted ME Pub. Law Ch. 587, 123rd Legislature; 12 M.R.S.A. §6134(2) (2008) (the "Alewife Law") directing the Commissioner of the Department of Marine Resources ("DMR") and the Commissioner of the Department of Inland Fisheries and Wildlife ("IFW") to eradicate alewives and blueback herring (collectively, "alewives") from 98 percent of their historic spawning and nursery habitat in the St. Croix River basin. Plaintiffs claim that by enacting the Alewife Law and eradicating an

[1] Norman H. Olsen resigned from his office and has been replaced by Patrick Keliher as Acting Commissioner of the Maine Department of Marine Resources. Pursuant to Fed. R. Civ. P. 25(d), Mr. Keliher is automatically substituted as a party to this action, though Plaintiffs assume Defendants will file a notice of substitution.

indigenous fish, Maine unlawfully downgraded state water quality standards for the St. Croix River basin.

The Alewife Law is invalid under the Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI cl. 2, because it is preempted by the federal Water Pollution Control Act ("Clean Water Act" or "CWA" or the "Act"), 33 U.S.C. § 1252, *et seq.*, and its implementing regulations, which set forth mandatory procedural and substantive requirements for revising state water quality standards. Changes in water quality standards must be submitted to and approved by the United States Environmental Protection Agency ("EPA") before they can become effective. Maine did not submit the Alewife Law to EPA for review, let alone receive approval for the water quality standard change from that agency. Moreover, except in the narrowest of circumstances, states are prohibited by the CWA's "antidegradation policy" from revising water quality standards to allow their waters to be degraded. Maine acted unilaterally to do precisely that when it enacted the Alewife Law.

In their motion to dismiss, Defendants do not dispute that revisions to water quality standards must be approved by EPA and must not degrade water quality. Instead, they make three unavailing arguments. Defendants argue the Alewife Law is not a change to a water quality standard. Given that the Alewife Law eradicates an indigenous species of fish from a river, this argument is absurd. The CWA, Maine water quality standards, and Maine's Department and Board of Environmental Protection (the state agencies responsible for administering water quality laws) uniformly contradict this argument.

Defendants also argue that assuming the Alewife Law is a change in water quality standards, it is not preempted because the CWA authorizes states to amend water quality standards. This argument lacks any merit because EPA has veto power over revisions to water

quality standards and the CWA flatly prohibits any revisions from taking effect absent EPA approval. Further, Defendants' argument completely ignores the requirement that states comply with the CWA's antidegradation policy.

Lastly, Defendants argue Plaintiffs cannot sue because the CWA does not provide a private right of action to bring their claim against Defendants under the CWA. However, Plaintiffs are not suing under the CWA. They are bringing a Supremacy Clause claim which is an established, independent cause of action. Defendants do not contend that Plaintiffs are unable to assert a preemption claim. Nor could they make such a contention.

Plaintiffs are a conservation group and two individuals who use the St. Croix River and coastal Gulf of Maine waters. They have been aesthetically and economically harmed by the extirpation of alewives above the Grand Falls Dam that is mandated by the Alewife Law, and by the related decrease in the Gulf of Maine population of alewives. They seek an order declaring the Alewife Law unconstitutional under the Supremacy Clause and prohibiting the Commissioners of DMR and IFW from implementing the law.

STATEMENT OF FACTS

Maine enacted the Alewife Law in 2008. Paragraph two of the law directs the DMR and IFW Commissioners to "ensure that the fishway on the Grand Falls Dam [on the St. Croix River] is configured or operated in a manner that prevents the passage of alewives."[2] Defendants, the current Commissioners of the two agencies, are implementing the Alewife Law.

Other facts are set forth Plaintiffs' Complaint and summarized in Defendants' brief and are not repeated here. A key, and undisputed, fact is that by preventing the passage of alewives, the Alewife Law completely eliminates them from virtually all of the St. Croix River watershed.

[2] "Alewives" is defined by law to mean both alewives, *Alosa pseudoharengus,* and blueback herring, *Alosa aestivalis.* 12 M.R.S.A. § 6001(1-A).

CWA PROVISIONS ON REVISING STATE WATER QUALITY STANDARDS

The CWA and its implementing regulations set forth specific 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 submitted to and approved by EPA before they become effective, 33 U.S.C. § 1313(c)(2)(A); 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-categor[y]" 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.

STANDARD OF REVIEW

In deciding a Fed. R. Civ. P. 12(b)(6) motion, a court will "accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in the plaintiff's favor, and determine whether the complaint, so read, sets forth facts sufficient to justify recovery on any cognizable theory." *TAG/ICIB Serv., Inc. v. Pan Am. Grain Co.*, 215 F.3d 172, 175 (1st Cir. 2000); *Banknorth, N.A. v. BJ's Wholesale Club*, 394 F. Supp. 2d 283, 284 (D. Me. 2005) (same); *see also Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir. 2008). In order to survive a motion to dismiss, a complaint does not need detailed factual allegations, rather it must allege "a plausible entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 US. 544, 559 (2007). Moreover, a case cannot be dismissed under Fed. R. Civ. P. 12(b)(6) unless "it appears to a certainty that the plaintiffs would be unable to recover under any set of facts."

Roma Constr. Co. v. Arusso, 96 F.3d 566, 569 (1st Cir. 1996). Plaintiffs can show plausible entitlement to relief in this case; therefore, the motion to dismiss must be denied.

ARGUMENT

I. THE ALEWIFE LAW AMENDS WATER QUALITY STANDARDS.

Defendants claim that even taking all the allegations in the Complaint as true, the Alewife Law cannot be considered a law that changes water quality standards, but instead is merely a law about "management of wildlife." Motion to Dismiss ("MTD") 8; *see also* MTD 14 (Alewife Law is an exercise in the State's power to "regulate wildlife" and is "classic state wildlife management"). From this thoroughly unsupportable premise, Defendants argue (1) wildlife management is a field of traditional state regulation, and there is a presumption against preemption of laws involving areas of traditional state regulation (MTD 8), and (2) since the Alewife Law is not a law revising a water quality standard, the CWA provisions governing water quality standards are inapplicable and could not possibly have a preemptive effect (MTD 13-14). These arguments are wholly without substance.

A. The Ability Of A Water Body To Support Indigenous Fish Goes To The Heart Of Water Quality Standards.

The Clean Water Act, Maine water quality laws, and the Maine Department and Board of Environmental Protection are unequivocal that the presence of indigenous fish, and safe passage past dams to support indigenous fish, are an integral part of water quality standards. Congress declared that the objective of the CWA "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). To further the objective and goal of the CWA, Congress required states 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). 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. The ability of the St. Croix River to provide for the protection and propagation of an indigenous fish species such as the alewife thus clearly goes to the heart of the CWA and water quality standards.

In Maine, the Legislature sets water quality standards. 38 M.R.S.A. § 464(1) and (2). Consistent with the CWA mandate, Maine water quality standards for waters classified as A, B and GPA (such as waters in the St. Croix River basin above Grand Falls dam, *see* 38 M.R.S.A. § 467(13)), require the waters to be of a quality suitable for the legally designated uses of fish habitat and for the human uses of recreation and fishing. 38 M.R.S.A. §§ 465(2)(A), (3)(A); 465-A(1)(A). In addition, for waters that are classified as A and GPA, "[t]he habitat must be characterized as natural." 38 M.R.S.A. §§ 465(2)(A); 465-A(1)(A). "Natural" is defined by statute as meaning "in, or as if in, a state not measurably affected by human activity." 38 M.R.S.A. § 466(9). For waters that are classified as B, the habitat must be "unimpaired." 38 M.R.S.A. § 465(3)(A). "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 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). The Alewife Law directs officials to prevent the passage of alewives into nearly all of the St. Croix River, plainly assuring that such waters are not natural, unimpaired, or able to support indigenous fish. Thus, the law clearly and directly contravenes the CWA and state water quality standards.

The Maine Board of Environmental Protection ("BEP") has made it unequivocally clear that the presence of indigenous fish in a water body is a water quality issue. For instance, in one ruling the BEP held water quality statutes "specifically state[] that the water quality must be such as to support 'all' indigenous aquatic species." *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)(a copy of this order is attached as Exh. 1).[3] More specifically, the BEP considers fish passage to be a water quality issue because it is fundamental to the ability of a water body to support indigenous fish. The BEP regularly requires hydroelectric dams to provide passage for indigenous fish in order to assure attainment of the designated uses contained in water quality standards. *E.g., S.D. Warren Company v. Maine Dep't of Envtl. Prot.,* 2004 Me. Super. LEXIS 115, at *10-14 (Cumberland 2004), *aff'd,* 2005 ME 27, 868 A.2d 210 (Me. 2005), *aff'd,* 547 U.S. 370 (2006) (fish passage required at Presumpscot River dams); *Save Our Sebasticook, Inc. v. Bd. of Envtl. Prot.*, 2007 ME 102, 928 A.2d 736, 739 (Me. 2007) (fish passage required at Sebasticook River dam).[4] Similarly, when compiling CWA-required reports on the quality of the state's waters, the Department of Environmental Protection ("DEP") may declare a water body "impaired" due to lack of fish passage at a dam. *DEP, 2010 Integrated Water Quality Monitoring and Assessment Report*, pp. 17-18 (2010), available at

[3] This BEP ruling was affirmed by the Superior Court, Maine Supreme Judicial Court, and the United States Supreme Court. *See S.D. Warren Co. v. Me. Dept. of Envtl. Prot.* Cite, *supra.*

[4] Under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, hydroelectric dams must obtain a state "water quality certification" before they may obtain a license to operate from the Federal Energy Regulatory Commission ("FERC"). A water quality certification must contain provisions that ensure the licensed activity will not violate or prevent attainment of water quality standards or other state water quality requirements. *S.D. Warren v Maine Bd. of Envt'l Prot.*, 547 U.S. 370 (2006) (note that Grand Falls dam is not FERC-licensed because it is so old). Many other states also require fish passage in water quality certifications for dams to assure attainment of water quality standards. *E.g., Pub. Serv. Co. of NH*, 2007 FERC LEXIS 914, at *131-132 (May 18, 2007) (New Hampshire requiring Merrimack River dam to provide fish passage); *Holyoke Gas & Elec. Dept., et al.*, 2005 FERC LEXIS 1013, at *134-146 (April 19, 2005) (Massachusetts requiring Connecticut River dam to provide fish passage).

http://www.maine.gov/dep/blwq/docmonitoring/305b/2010/report.pdf (failure of Androscoggin River dam to provide shad passage caused water quality of river to be impaired).

Courts have also held that fish passage "'clearly bear[s] on the attainment of the designated uses of fishing, recreation, and fish habitat,'" and thus is integral to water quality standards. *S.D. Warren Company v. Maine Dep't of Envtl. Prot.,* 2004 Me. Super. LEXIS 115, at *10 (Cumberland) (quoting *Bangor Hydro-Electric Co. v. Board of Envtl. Prot.* 595 A.2d 438, 443 (Me. 1991)).

In an effort to avoid this settled law, Defendants claim that the Alewife Law falls under Maine's historic police power related to the "management of wildlife," and in turn assert a presumption against preemption and that, in any event, the Alewife law is not really an amendment to its water quality standards. MTD at 7-8; 14. These contentions must fail, however, because the Alewife Law not anything like a "traditional" wildlife management law.

In contrast to the water quality laws discussed above, traditional wildlife laws (such as those at issue in the cases cited by Defendants at MTD 8) focus on regulating activities such as the human harvest and use of fish and wildlife taken by fishing and hunting, or in some circumstances to protect private property such as livestock.[5] Such traditional wildlife management laws bear no relation to a statute like the Alewife Law, which instead mandates the

[5] *Geer v. Conn.* 161 U.S. 519, 521 (1896)(regulation of game bird hunting); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 385-86 (1978)(regulation of elk hunting; *stating* state control was not absolute in the face of federal regulation and federally protected interests); *Kleppe v. New Mexico* 426 U.S. 529, 545 (1976)(regulation of wild horses and burros roaming onto private land; *stating* ". . . as *Geer v. Connecticut* cautions, [police] powers [over wild animals within their jurisdictions] exist only 'in so far as (their) exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.' [citation omitted] 'No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of (wildlife), but it does not follow that its authority is exclusive of paramount powers.'"); *Lacoste v. Dept. of Conservation of State of Louisiana*, 263 U.S. 545, 546, (1924)(regulating taxes imposed on hides, skins and furs of wild fur bearing animals and alligators); *Wyoming v. U.S.*, 279 F.3d 1214, 1227 (10th Cir. 2002)(holding federal management preempts state management of wildlife; the 10th Amendment does not reserve to the State the right to vaccinate elk in a national refuge); *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1010, (9th Cir. 1994)(upholding regulation banning private ownership and exchange of several species of wildlife).

100 percent eradication of an indigenous species of fish from 98 percent of its habitat by physically depriving it of access to the river, for the (scientifically disproven) purpose of protecting a non-native species of fish.[6] The Alewife Law appears to be entirely unique in Maine, other state, and federal law; Plaintiffs have located no other law that mandates destruction of an entire population of indigenous fish from a river. Thus, the Alewife Law is far from a traditional wildlife management law as Defendants' suggest.

Moreover, where it is the "clear and manifest purpose of Congress" to supersede historic police power of states then the presumption Maine invokes here, if it exists, is overcome. *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947). As discussed above, the CWA demonstrates the "clear and manifest purpose" of Congress to supersede historic state police power to ensure that rigorous water quality standards are established and that the Nation's waters are not allowed to be degraded. *See also, Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)("The purpose of Congress is the ultimate touchstone in every preemption case.")(citation omitted).

Lastly, Defendants argue that if its "routine exercise" of police powers in enacting the Alewife Law were interpreted as a change in water quality standards it would lead to absurd results because the state would be unable to post a no-fishing sign, prohibit the use of jet skis on a water body, or regulate agricultural irrigation withdrawals without submitting such actions to the EPA for approval as a water quality standards change. MTD 14. This argument is preposterous. The CWA, through EPA-approved water quality standards, is designed "to restore and maintain the *chemical, physical, and biological integrity* of the Nation's waters." 33 U.S.C.

[6] State agencies using toxic chemicals to wholly extirpate fish species from a waterbody are tightly regulated under the CWA and Maine's water quality standards, and such activity is only allowed for the specific approved purpose of removing non-native, invasive species so as to protect native species. 38 M.R.S.A. 464(4)(A)(1)(c); *see also e.g.*, 33 U.S.C. § 1314(a)(b)(c)(CWA water quality criteria, effluent limitation guidelines, and pollution discharge elimination procedures); 33 U.S.C. § 1313(c)(2)(A)(EPA approval of state water quality standards).. This fact demonstrates that even Maine law recognizes that the forcible extirpation of a native fish species from a waterbody is not a 'traditional' fish and game management activity beyond federal purview.

§ 1251(a) (emphasis added); *see also* 38 M.R.S.A. 464(1) (Maine Legislative declaration regarding its water quality standards "that it is the State's objective to restore and maintain the chemical, physical and biological integrity of the State's waters"). Consistent with this mandate, Maine water quality standards for waters classified as A, B and GPA require the waters to be of a quality "*suitable"* or "*sufficient*" for the legally designated uses. 38 M.R.S.A. §§ 465(2),(3), 465-A(1)(A). The Alewife Law is easily distinguishable from a jet ski or fishing regulation because the Alewife Law is plainly designed to change the chemical, physical, and biological integrity of St. Croix River waters and their ability to serve as habitat for alewives by extirpating alewives from them. Defendants' fears that they will be unable to regulate jet skis or fishing are unfounded; so long as the chemical, physical, and biological integrity of the waters are maintained, Maine's ability to regulate, or not regulate, such activities is unaffected. Declaring the Alewife Law preempted would in no way affect the ability of Maine to enact and implement laws and regulations that do not adversely affect water quality standards.

Defendants also assert, without any support, that the "Alewife Law is an effort to achieve a balance between particular competing fish populations, which is a classic state wildlife management prerogative." MTD 14. This suggestion by counsel is equally preposterous. A law that entirely eradicates indigenous fish in favor of a non-native species can hardly be considered a balanced classic wildlife management prerogative. In any event, Defendants themselves could not possibly believe their own argument: earlier DMR and IFW commissioners *opposed* the predecessor law to the Alewife Law, Am. Comp. ¶ 51, and their departments collaborated on studies that proved alewives do not negatively impact smallmouth bass, the species supposedly harmed by alewives. Am. Comp. 55-56. Defendants' claim that the law is designed to balance competing fish populations is a whole-cloth *post-hoc* rationalization by counsel without any

support and must be rejected. *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 50 (1983) (courts may not accept counsel's post hoc rationalizations for agency action).

B. The Alewife Law Lowers Water Quality Standards.

There is no question that the Alewife Law lowers the water quality standards of the St. Croix River basin. First, the Alewife Law negatively changes the narrative criteria for Class A, GPA, and B waters. By requiring the Grand Falls dam to block the passage of alewives and eradicating the species from 98 percent of the spawning and rearing habitat in the river basin, the Legislature required the river basin to (1) be "measurably affected by human activity" (thus lowering the class of A and GPA waters) and (2) have a "diminished capacity to support aquatic life" (thus lowering the class of B waters). *See Miccosukee Tribe of Indians of Florida v. United States of America*, 1998 U.S. Dist. LEXIS 15838, at *47-49 (S.D. Fla. 1998) (where a state statute authorizes actions that directly violate an existing state water quality standard, a change in water quality standards has occurred). The fact that the Legislature did not call the Alewife Law a water quality standard change is irrelevant. As the Eleventh Circuit held, it is the *effect* of a law that determines whether a change in water quality standards occurs, not how that law is described by a state or what procedures were used to enact it. *Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA.*, 386 F.3d 1070, 1089-1090 (11th Cir. 2004).

Second, by requiring alewife passage to be eliminated at Grand Falls dam, the Legislature decided that the designated uses of fishing, recreation and fish habitat need not be attained, which constitutes a lowering of water quality standards. *S.D. Warren Company v. Maine Dep't of Envtl. Prot.*, 2004 Me. Super. LEXIS 115, at *10 (fish passage "'clearly bear[s] on the attainment of the designated uses of fishing, recreation, and fish habitat.' [Citation omitted]."

Third, in requiring alewives to be eradicated from almost all of the St. Croix River basin, the Legislature decided that those waters must no longer support all indigenous species, and that the resident biological community must be changed so as to be void of the keystone aquatic species. This means that the Legislature has lowered the water quality standard to a classification below Class C. *S.D. Warren v. Dept. of Envt'l Prot.,* 2004 Me. Super. LEXIS 115, at * 13-14 ("Class B and C waters also must 'be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community.' [Statutory cites omitted]."); 38 M.R.S.A. § 465(4)(C) (Class C standards).[7]

The fact that fish species other than alewives are present above Grand Falls dam does not mean the designated uses and criteria to protect these uses are being attained. As the Maine Board of Environmental Protection ("BEP") found in rejecting an administrative appeal by S.D. Warren Company of water quality certifications issued for the company's dams on the Presumpscot River:

> Nowhere, as appellant [S.D. Warren] suggests, does the [water quality] statute state that "some" of the waters be suitable for the designated uses; 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 waters" and "habitat" are unqualified and the statute specifically states that the water quality must be such as to support "all" indigenous aquatic species.

BEP, In the Matter of S.D. Warren Company, p. 9 (October 2, 2003) (Ex. 1).

Fourth, the waters above Grand Falls dam are degraded under the "antidegradation policy" set forth in EPA regulations. Under the CWA, the antidegradation policy requires state water quality standards 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.

[7] Though the "indigenous" language is not used in the statute setting forth Class A and GPA standards, the A and GPA standards are higher and more protective water quality standards, and the waters in those higher classes must be "natural," 38 M.R.S.A. §§ 465(2)(A); 465-A(1)(A), which necessarily means that the waters must also support indigenous aquatic life.

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/adeg.cfm. Partially or completely eliminating any existing use is not allowed under the antidegradation policy. U.S. EPA, *Water Quality Handbook*, 4.4.2. Maine's water quality standards contain an antidegradation policy that, consistent with the requirement 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).

The Alewife Law violates the federal antidegradation policy because it weakens the instream use of the waters above Grand Falls dam as fish habitat for indigenous alewives, and other species that depend upon the presence of alewives. *Miccosukee Tribe v. U.S.*, 1998 U.S. Dist. LEXIS 15838, at *53-54 (holding that a change in narrative water quality standards for the Everglades is invalid because it violated the antidegradation policy).[8]

The Alewife Law can also be viewed as unlawfully creating a less protective subcategory of the Class A, GPA, and B water quality standards applicable to these waters without undertaking mandatory procedural steps including performance of a UAA and approval of its conclusion by EPA, 40 C.F.R. § 131.10(g). The Alewife Law creates a subcategory of use, only applicable to the St. Croix River basin above Grand Falls, of "natural except for alewives and alewife habitat." Water quality standards require that in all waters of the State, indigenous

[8] Alewives migrated past Grand Falls dam and populated the St. Croix River basin above the dam after November 28, 1975, Am. Comp. ¶ 50, and thus the designated uses relating to the presence of alewives there are "existing uses."

species must be protected. As a result of the Alewife Law, only in the St. Croix River basin must an indigenous species be eradicated. *See generally, FPL Energy Maine Hydro LLC v. Dept. of Envtl. Prot*., 2007 ME 97, 926 A.2d 1197, 1207(Me. 2007) (discussing EPA disapproval of Maine Legislature's resolve to treat dam impoundments different from natural lakes on the ground that the Legislature created a subcategory without following CWA-required procedures and receiving EPA approval). This situation plainly is unlawful.

II. THE CLEAN WATER ACT PREEMPTS THE ALEWIFE LAW.

Defendants argue that even assuming the Alewife Law revises water quality standards for the St. Croix River, it is not preempted by the CWA. As a matter of law, Defendants are wrong.

The Supremacy Clause provides that the laws of the United Sates "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const., art. VI, clause. 2. This gives Congress the power to preempt state laws. Federal agency action, including agency regulations, can also preempt state laws. *FitzGerald v. Harris*, 549 F.3d 46, 55 (1st Cir. 2008); *see e.g. Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (Department of Transportation motor vehicle safety standard preempts state "no airbag" law); *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) ("'[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation'…" [quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-269 (1986)]).

"Preemption may be express or implied." *Equal Employment Opportunity Comm'n v. Commonwealth of Massachusetts*, 987 F.2d 64, 67 (1st Cir. 1993). Express preemption "results from language in a statute revealing an explicit congressional intent to preempt state law. *Weaver's Cove Energy, LLC. v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458, 472 (1st Cir. 2009). There are two types of implied preemption. One is conflict preemption,

where either (1) the state law "stands as an obstacle to the accomplishment and execution of the full purposes of and objectives of Congress," or (2) "compliance with both state and federal law is impossible." *Id.* at 472. The other is field preemption, where Congress implicitly preempts a state law by creating a pervasive scheme of regulation. *Id.* at 472-73.

"[T]he analysis of express and implied preemption may overlap." *Jalbert Leasing v. Mass. Port Auth.*, 2005 U.S. Dist. LEXIS 10421, at *9 (May 18, 2005 D. Mass.). Here, under either an express or implied preemption analysis, the CWA preempts the Alewife Law. A state law that is preempted is "a nullity," *Massachusetts Association of Health Maintenance Organizations v. Ruthardt*, 194 F.3d 176, 178 (1st Cir. 1999), and "unenforceable," *New York v. FCC*, 486 U.S. at 64. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) ("state law that conflicts with federal law is 'without effect'")(citation omitted).

A. The CWA And Its Implementing Regulations Expressly Preempt The Alewife Law.

Under the Supremacy Clause of the U.S. Constitution, a federal law or regulation may expressly preempt, and thus invalidate, state law when language in a statute reveals an explicit congressional intent to preempt state law. *Weaver's Cove*, 589 F.3d at 472 (citing *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31, (1996)). When a federal statute "unambiguously forbids the States" from taking certain actions, courts need not look beyond the plain language of the federal statute to determine that the state law is preempted. *E.g., Aloha Airlines Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 (1983) (state gross receipts tax on air transportation expressly preempted because a federal statute prohibited such taxes); *Mendes v. Medtronic*, 18 F.3d 13, 16 (1st Cir. 1994) (claims under state law expressly preempted by Medical Device Amendments to the federal Food, Drug and Cosmetic Act, which barred state requirements for medical devices that differ from the federal law's requirements).

Here, the CWA and its implementing regulations unambiguously prohibit states from enacting changes to water quality standards without EPA review and approval. The CWA provides that "[w]henever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator [for review and approval]." 33 U.S.C. § 1313(c)(2)(A) and (3); 40 C.F.R. § 13121(e) (providing that water quality standards do not become effective "until EPA approves a change, deletion or addition to that water quality…"). Congress provided: "If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard *shall thereafter* be the water quality standard for the applicable waters of the State." (Emphasis added). 33 U.S.C. §1313(c)(3).

The State of Maine does not dispute that EPA must approve state water quality standards. Indeed, it has explicitly conceded this point elsewhere. As the Department of Environment Protection said in a brief to the Maine Supreme Judicial Court in *FPL Energy Maine DEP* (in which it prevailed):

> …state 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; see also NRDC v. EPA, 279 F.3d 1180, 1183 (9th Cir. 2002).* Therefore, any state law or regulatory action that amends or has the effect of amending water quality standards but that fails to receive EPA approval, is not legally effective..

Brief of Maine Dep't of Envtl. Prot. in FPL Energy v. BEP, LEXSEE 2006 Me S. Ct. Briefs 6365, at *6 (September 11, 2006) (emphasis in original). Defendants' suggestion that an unapproved water quality revision may still be enforceable as a matter of State law, MTD 10-11, is, accordingly, demonstrably incorrect and is at odds with its previous position.

Thus, if the Alewife Law is a change in water quality standards, it is preempted because EPA did not approve the change. In fact, Maine never so much as submitted the Alewife Law to EPA for approval.[9]

Equally explicit and unambiguous are the CWA and its implementing regulations prohibiting creation of a less protective "subcategory" of designated use for a specific waterbody unless and until a 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). Here, no UAA was performed and approved, so to the extent the Alewife Law is considered to create a water quality standard subcategory, it is expressly preempted.

The CWA is also explicit and unambiguous in prohibiting revisions to water quality standards that violate the antidegradation policy. The Act provides that for waters meeting or exceeding "levels necessary to protect the designated use for such waters…any water quality standard…may be revised *only* if such revision is subject to and consistent with the antidegradation policy." 33 U.S.C. 1313(d)(4)(B); *see also* 40 C.F.R § 131.12. If the Alewife Law does not comply with the antidegradation policy, then it is preempted.[10]

The plain language of the CWA explicitly and unambiguously demonstrates that Congress did not intend to allow states to re-write and implement water quality standards without such changes first meeting the Act's detailed procedural and substantive requirements for analysis and approval. The CWA plainly and expressly preempts Maine's Alewife Law.

[9] It is impermissible for Maine to attempt to avoid the CWA's preemptive authority by enacting a law with the constructive effect of lowering water quality standards, while styling the law as something different and filing it in a less conspicuous section of code. *See Aloha Airlines*, 464 U.S. at 13 (finding it unpersuasive that Hawaii's legislature styled a law as a property tax measured by gross receipts rather than a straightforward gross receipts tax).

[10] Similarly, Congress not only required that changes to water quality standards must receive EPA approval, but also unambiguously stated that "[s]uch standards shall be such as to protect the public health or welfare, *enhance* the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A) (emphasis added). As discussed above, there is no question that the Alewife Law has the substantive effect of degrading, not enhancing, the quality of Maine's waters and thus must be preempted for this reason as well.

B. The Alewife Law And The Actions By Defendants To Implement It Unlawfully Conflict With The CWA And Are Preempted.

Even if the Court decides the CWA does not expressly preempt the Alewife Law, a conflict preemption analysis shows the Alewife Law is preempted. Under conflict preemption principles, when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" it is preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67, 74 (1941) (finding that the Pennsylvania Alien Registration Act's registration requirement was unenforceable where it stood as an obstacle to the full purposes and objectives regarding immigration that Congress had already provided in the Federal Alien Act); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-373 (2000); *Grant's Dairy Maine, LLC v. Comm'r of Maine Dept. of Ag., Food & Rural Resources*, 232 F.3d 8, 15 (1st Cir. 2000).

As stated by the Supreme Court, to achieve the "ambitious goals" of the CWA set forth in 33 U.S.C. § 1251(a) ("to restore and maintain the chemical, physical, and biological integrity" of waters and to attain water quality which provides for protection and propagation of fish, shellfish, and wildlife), the Act "establishes distinct roles for the Federal and State Governments." *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology,* 511 U.S. 700, 704 (1994). *See also Raymond Proffitt Foundation v. U.S. EPA*, 930 F. Supp. 1088, 1098 (D. Penn. 1996) ("The Act, and § 1313 in particular, sets forth state and federal responsibilities concerning promulgation of a water quality standard."). "Section 303 of the Act…requires each State, *subject to federal approval*, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. [33 U.S.C.] §§ 1311(b)(1)(C), 1313.". *PUD No. 1* 511 U.S. at 704 (emphasis added). If a state does not satisfy federal minimum requirements in establishing a water quality standard, EPA must reject it. 33 U.S.C. § 1313(c)(3); *see generally, PUD No. 1*, 511 U.S. at 704-705 (state water quality standards must comply with requirements in

33 U.S.C. § 1251(a)(2) and the antidegradation policy). Also under the Act, a state can create a less protective subcategory of a designated use for a waterbody, but only if an extensive UAA is conducted pursuant to 40 C.F.R. § 131.10(g).

Thus, assuming the Alewife Law is a change in water quality standards, Maine subverted the water quality standard scheme that was carefully crafted by Congress, and the Alewife Law is an obstacle to the "accomplishment and execution" of Congress' purpose and objective.

This case is essentially identical to *Pac. Merch. Shipping Ass'n v. Goldstene*, 517 F.3d 1108 (9th Cir. 2008), in which the Ninth Circuit found that a California air regulation was preempted by the federal Clean Air Act ("CAA") because the state did not submit the rule to EPA for approval.[11] At issue in *Pac. Merch.* was the preemptive effect of CAA Section 209(e)(2)(A), 42 U.S.C. § 7543(e)(2)(A). That CAA section provided, in pertinent part, that any California emissions rule regarding non-new nonroad vehicles, including ocean-going vessels, had to be authorized by EPA after notice and opportunity for public hearing. The California Air Resources Board ("CARB") promulgated such a rule but "neither sought nor obtained § 209(e)(2) authorization from the EPA." *Id.* at 1111. CARB did not believe its rule was the type of rule that required § 209(e)(2) authorization from EPA.

A shipping group sued to invalidate the rule on preemption grounds because CARB "failed to obtain the EPA authorization required by the Clean Air Act." *Id.* at 1112. The Ninth Circuit held that § 209(e)(2) "creates a sphere of implied preemption surrounding those regulations for which California must obtain authorization." *Id.* at 1113. The court found that the rule at issue did require authorization from EPA, and held that since it did not receive such authorization, the CAA preempted the rule. *Id.* at 1115.

[11] "The Clean Air and Clean Water Acts are *in pari materia* with one another." *United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1187 (6th Cir. 1982)(emphasis added).

In addition, Plaintiffs' case is the mirror image of *FitzGerald v. Harris*, 549 F.3d 46 (1st Cir. 2008), where the First Circuit held a Maine law regarding management of the Allagash Wilderness Waterway ("AWW") was not preempted by the Wild and Scenic Rivers Act ("WSRA"). Under the WSRA, Maine is responsible for managing the AWW, which is a wild river in the Wild and Scenic Rivers System. The State enacted a law regarding access to the AWW that Plaintiffs argued was preempted by the WSRA under "stands as an obstacle" conflict preemption. The First Circuit rejected that argument, finding that the WSRA did not "mandate" "any specific standard" for the State to meet in managing the wild river, and that "the WSRA defines a limited role for the federal government, a role primarily of cooperation with and assistance to that states… ." *Id.* at 55. By contrast, the CWA sets specific standards for states to meet in revising water quality standards, and defines an extremely prominent role (indeed, a veto power role) for the federal government in the revision of water quality standards – EPA must approve them or they do not go into effect.

C. The Clean Water Act and Its Implementing Regulations Contain a Comprehensive Regulatory Scheme for Establishing Water Quality Standards That Preempts Maine's Alewife Law.

Under the Supremacy Clause, a federal law or regulation preempts, and thus invalidates, a state law when Congress creates a scheme of regulation so pervasive as to make reasonable the inference that it left no room for the states to supplement it. *Weaver's Cove*, 589 F.3d at 472 (citing *Fitzgerald*, 549 F.3d at 52). Similar to express preemption, "field preemption" involves an express or dominant federal interest, but involves an implied intent to "occupy the field" rather than the express prohibition of state activity.

As described *supra* in section I.A., the CWA and its implementing regulations provide a comprehensive and extremely detailed scheme for how water quality standards can be revised.

These provisions leave no room for states to create their own procedures or substantive criteria regarding water quality standard revisions, or to bypass the CWA's procedures and criteria to simply lower water quality standards. Thus, not only do the CWA's procedural requirements expressly preempt the Alewife Law, but they also establish a comprehensive scheme for establishing and revising water quality standards that make clear Congress' intent that there is no room for Maine to unilaterally lower its water quality standards for the St. Croix River.[12]

III. PLAINTIFFS HAVE A CAUSE OF ACTION TO INVALIDATE THE ALEWIFE LAW UNDER THE SUPREMACY CLAUSE.

Defendants argue this case must be dismissed because the CWA does not permit a claim against Maine for violations of the CWA's requirements. This argument is a "red herring" and completely misses the mark. Plaintiffs are simply not asserting a CWA claim; rather, they are asserting a Supremacy Clause claim, and under well-established law are permitted to do so.

[12] Defendants' argument that there is a presumption against preemption is undercut by cases that post-date cases cited by Defendants. A plurality in *Pliva, Inc. v. Demahy*, 131 S.Ct. 2567, 180 L.Ed. 2d 580 (2011), held that in Supremacy Clause cases, courts cannot apply a presumption against finding conflict preemption. 180 L.Ed. 2d at 594-595 (Thomas, J. joined by Roberts, Scalia and Alito, JJ). In that plurality opinion, Justice Thomas stated that the "Supremacy Clause indicates a court need look no further than 'the ordinary meaning' of federal law, and should not distort federal law to accommodate conflicting state law." *Id.* In addition, this Court, in *TD Banknorth Ins. Agency v. Kofman*, 2008 U.S. Dist. LEXIS 58240, at * 37-38 (August 1, 2008 D. Me.) (recommended decision) did not apply a presumption against preemption where express preemption was at issue.

Defendants also suggest preemption is disfavored where a federal statute creates a system of cooperative federalism, and argue that the CWA is such a statute. MTD 8-9. However, as the cases cited by Defendants show, cooperative federalism arises when a federal statute creates an opt-in provision to a federal program: states can voluntarily run a federal program as long as they abide by certain minimum federal standards or rules. *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973) (cooperative federalism where state can voluntarily run an Aid to Families with Dependent Children program) (cited by Defendants); *Pharm. Research and Mfgs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001) (cooperative federalism where state can voluntarily join Medicaid). The CWA is an example of cooperative federalism only to the extent states can voluntarily administer the National Pollutant Discharge Elimination System ("NPDES") program, under which states issue wastewater discharge permits. 33 U.S.C. § 1342(b). *S. Ohio Coal Co. v. Dept. of Interior*, 20 F.3d 1418, 1427 (6th Cir. 1994) (referring to Ohio's administration of the NPDES program as part of a cooperative federalism system) (cited by Defendants). *The rules governing water quality standard revisions are not part of a voluntary program; they are mandatory.* Revisions must be submitted to EPA for approval, 33 U.S.C. § 1313 (c)(2) & (3), and they must satisfy the anti-degradation policy, 33 U.S.C. § 1313(d)(4)(B). Accordingly, cooperative federalism does not operate in this case to disfavor preemption of the Alewife Law.

The Supreme Court has held that a party may, as here, bring suit against a state official under the Supremacy Clause to enjoin implementation of a state regulation allegedly preempted by a federal statute. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96, n.14 (1983); *Verizon Md, Inc. v. Pub. Serv. Comm'n of Md*, 535 U.S. 635, 641-644 (2002). In *Shaw*, the Court stated that:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex parte Young*, 209 U.S. 123, 160-162 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw, 463 U.S. at 96, n.14. Many Circuits, including the First Circuit, have approved of actions with Supremacy Clause claims.[13]

In order to state a valid claim for relief under the Supremacy Clause, a plaintiff must merely (as Plaintiffs have here) (1) limit the relief sought to declaratory and injunctive relief; (2) direct the suit against a state actor; and (3) genuinely raise an allegation of preemption. *See e.g.*, *Independent Living*, 543 F.3d at 1061-1062. Thus, where a claim seeks "to enjoin state officials from implementing state legislation allegedly preempted by federal law," *id.* at 1062, the Supremacy Clause supplies the cause of action and the plaintiff "may invoke the jurisdiction of the federal courts," *Local Union*, 377 F.3d at 75.

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[13] *E.g.*, *Local Union No. 12004 USW v. Commonwealth of Massachusetts*, 377 F.3d 64, 72-77 (1st Cir. 2004) (quoting *Shaw*, 463 U.S. at 96, n.14 [set forth in previous paragraph, *supra*]); *The Wilderness Society v. Kane County, Utah*, 581 F.3d 1198, 1216 (10th Cir. 2009) ("[P]rivate litigants may bring a suit directly under the Supremacy Clause"); *Independent Living Ctr. of S. Cal. v. Shewry* 543 F.3d 1050, 1055 (9th Cir. 2008) ("[I]njunctive relief is presumptively available in federal courts to enjoin state officers from implementing a law allegedly preempted under the Supremacy Clause"); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 329 (5th Cir. 2008) (*Shaw*… clearly establishes a federal right of action against 'state officials' to enjoin the enforcement of preempted state regulations. This cause of action against state officials is an affirmative federal claim that can form the basis for federal jurisdiction"); *Burgio and Campofelice, Inc. v. NYS Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir 1997) ("[T]he Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.") (quoting 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3566, at 102 (1984)).

Contrary to Defendants' suggestion, MTD at 14-15, a plaintiff's ability to bring suit under the Supremacy Clause is not impaired by whether an express right of action is conferred upon the plaintiffs under the allegedly preemptive statute. *Independent Living*, 543 F.3d at 1058 (holding that private parties have the right "to seek injunctive relief under the Supremacy Clause regardless of whether the allegedly preemptive statute confers any federal 'right' or cause of action"); *Qwest v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) ("A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law"); *Local Union*, 377 F.3d at 75 (holding that preemption claims can be asserted "even absent an explicit statutory cause of action"); *St. Thomas-St John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000) ("[A] state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption"); *Vill. Of Westfield v. Welch's*, 170 F.3d 116, 124, n.4 (2d Cir. 1999) (holding that a cause of action under the Supremacy Clause "[does] not depend on the existence of a private right of action under the [preempting statute]"). Thus, even though the Supreme Court has held that the CWA does not contain any implied right of action to seek CWA-based remedies in addition to its already enumerated remedies (such as those for damages), *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11, 13-19 (1981), that holding is not inconsistent with the existence of a separate cause of action under the Supremacy Clause. Defendants' extensive reliance upon *Sea Clammers* is thus entirely misguided.

Again, this case is not different from *Pac. Merch v. Goldstene*, 517 F.3d 1108. There, plaintiffs successfully asserted a Supremacy Clause claim on the ground that a state regulation did not receive CAA-required EPA approval even though (1) the CAA has a citizen suit

provision (that in fact was the model for the CWA's citizen suit provision), and (2) like the CWA, the CAA has no private right of action other than what is provided in its citizen suit provision, *Powell v. Lennon*, 914 F.2d 1459, 1472, n.7 (11th Cir. 1990).

In an apparent effort to bolster its (incorrect) argument that Plaintiffs have no cause of action against Defendants, Defendants suggest Plaintiffs "might" have a cause of action against EPA and that such a case could provide Plaintiffs with the relief they seek. MTD at 16-17 (*citing Miccosukee Tribe of Indians of Fla. v. EPA*, 105 F.3d 599, 602-03 (11th Cir. 1997)). Whether or not Plaintiffs can sue EPA (which, in fact, they cannot) is irrelevant. First, Plaintiffs' case is not about whether EPA did its job in reviewing a water quality standard revision submitted to it by a state. Plaintiffs' case is about whether a change of water quality standards can stand under the Supremacy Clause in light of the fact that (1) the state never submitted the change to EPA for approval, and (2) the change conflicts with the CWA's antidegradation policy. As Maine's own DEP put it, "any state law or regulatory action that amends or has the effect of amending water quality standards but that fails to receive EPA approval, *is not legally effective*." *Brief of DEP in FPL Energy v. BEP*, LEXSEE 2006 Me S. Ct. Briefs 6365, at *6 (emphasis added). Plaintiffs simply seek a declaration that such is the case with respect to the Alewife Law.[14]

Moreover, it would not make sense to sue EPA. Plaintiffs would have to make the far-fetched argument that EPA is under a duty to continually scour the laws of the 50 states and territories, and their various state agency regulations, to determine whether a revised water quality standard was not submitted to EPA for review – a job made even harder where, as Maine did here, a state buries a revision to a water quality standard in a non-water quality related section of the state code. The CWA provisions that govern water quality standard revisions are

[14] Plaintiffs' claim is thus different from the claim asserted in *Miccosukee Tribe of Indians of Fla. v. EPA*, 105 F.3d 599, 602-603 (11th Cir. 1997), cited by Defendants. In *Miccosukee*, the plaintiffs challenged EPA's failure to review revised water quality standards. They did not claim preemption.

clearly written to save EPA from such a Sisyphean task. They are self-executing: if a state does not submit proposed revisions to EPA, they cannot go into effect. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.21. Accordingly it has been expressly held that EPA is under no duty to review water quality standards when a state does not submit a revised standard for review. *Nw. Envtl. Advocates v. U.S. EPA*, 268 F. Supp. 2d 1255, 1261 (D. Ore. 2003).

Second, even if Plaintiffs could sue EPA, as just discussed such a claim would not be exclusive and would not preclude a preemption suit. In *Pac. Merch.*, the shippers brought a Supremacy Clause claim even though - under the reasoning of Defendants here - EPA could have been sued for failing to review the emission standard at issue in that case.[15]

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss should be denied.

Respectfully submitted this 4th day of August, 2011

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[15] The 11th Circuit's holding in *Miccosukee* only addressed whether the District Court should have conducted its own factual findings to determine whether Florida's Everglades Forever Act changed the state's water quality standards, 105 F.3d at 602-03, not whether in the absence of a state's submission of a water quality standards change EPA had a mandatory duty to discover the change and approve or disapprove it. In fact, the circumstances surrounding the Miccosukee case changed and Florida did submit the Act for review. The EPA determined it did not change Florida's water quality standards and this decision was overturned by the District Court. *Miccosukee Tribe of Indians of Fla. v. EPA*, U.S. Dist. LEXIS 58838, at * 34 (September 11, 1998 S.D. Fla.). *Scott v. City of Hammond, Ind.*, 741 F.2d 992, 995 (7th Cir. 1984), cited by the *Miccosukee* court, 105 F.3d at 602-603, does not at all relate to the issue of a failure of a state to submit a water quality standard to EPA for approval.

CERTIFICATE OF SERVICE

I hereby certify that on this, the 4th day of August, 2011, I electronically filed the above document with the Clerk of Court using the CM/ECF system which will send notification of such filing to attorneys of record in this matter. To my knowledge, there are no non-registered parties or attorneys participating in this case.

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