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?

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I. INTRODUCTION

The United States and Canada have historically struggled to delineate a maritime geographic boundary for the Gulf of Maine in the Atlantic Ocean.[1] Running inland, from the Gulf of Maine, these countries not only share a boundary, but also dams on the St. Croix River system. For the past two decades, the St. Croix River system of Maine and New Brunswick has been the site of an increasing impasse between the United States and Canada concerning the management of fisheries resources. In 1995, this dispute culminated with the Maine legislature authorizing the modification of the Grand Falls Dam and the Woodland Dam on the St. Croix River to prevent the passage of alewives. Proponents of the bill argued that alewives were "eating machines" that killed and devoured "everything in a body of water."[2] Since this time, constituents within the Maine legislature, the U.S. federal government, and the Canadian government have attempted to intervene and reverse the devastating effect that the legislation has had on the rapidly declining alewife population.

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1. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12).

2. 1 Legis. Rec. House H-808, 1st Reg. Sess. (Me. 2001).

The alewife, known in Canada as Gaspereau,[3] is either a landlocked or an anadromous fish. Both types of alewives are indigenous to Maine and New Brunswick waters and this comment focuses on the native, anadromous alewives that formerly ran the waters of the St. Croix River. These fish are important to the Gulf of Maine ecosystem because they provide a source of food for large and smallmouth bass, brown trout, salmonids in freshwater; groundfish in the ocean and in estuaries;[4] and for osprey and bald eagles.[5] Additionally, both Maine and Canadian lobstermen depend on the alewife as bait during the spring lobster season. By preventing the passage of alewives into the St. Croix River, the Maine legislature has succeeded in preventing this species of fish from spawning. The practical effect of this has been to almost completely extinguish sea-run alewives from existence in the St. Croix River system.

This Comment argues that the unilateral decision by the Maine legislature to prohibit alewives from swimming upstream into Canada, and thereby preventing the fish from spawning violates not only U.S. federal law, but also international law. This Comment maintains that, from a policy perspective, state legislatures should not be the arbiters of international fisheries management decisions because foreign relations are not matters for state interference. Scientific data and studies have revealed that the presence of anadromous alewives within the St. Croix River system would have no adverse effect on either the flora or the fauna, including other species of fish, such as the smallmouth bass and salmon. Without intervention, the Maine legislature may succeed in single-handedly causing the extinction of a native species of fish, from a designated body of water. Sadly, this Comment concludes that the Maine legislature is allowed to occupy the field in this instance, and make critical decisions regarding fisheries management, because neither the U.S. Congress nor the Canadian government has precluded it from doing so.

Structurally, this Comment begins with a short introduction of the alewife and its history as a native fish in the St. Croix River system. Next, a discussion of the bill, An Act to Stop the Alewives Restoration Program

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3. Fisheries and Oceans Canada, Fish and Aquatic Life, Underwater World: The Alewife http://www.dfo-mpo.gc.ca/zone/underwater_sous-marin/gasparea/alewife-gaspareau_e.htm (last visited Feb. 20, 2008).

4. U.S. Fish and Wildlife Service, Gulf of Maine Coastal Program: All About Maine Alewives . . . Are Alewives Important for Recreational or Commercial Fishing? http://www.fws.gov/northeast/gulfofmaine/downloads/fact_sheets/alewife%20fact%20sheet.pdf (last visited Feb. 20, 2008).

5. Roberta Scruggs, *Panels Deadlock over Alewives: the Standoff Assures More Debate over Opening Fishways to Migration*, PORTLAND PRESS HERALD, Apr. 5, 2001, at B2.

in the St. Croix River, and its history will follow.[6] Then, a discussion of possible legal theories and dispute resolution devices will be shown as either inapplicable or ineffective to stop the Maine legislature's Bill. Finally, a short policy argument will advocate for either one or both of the U.S. or Canadian governments to enact new legislation that will prohibit a single state or province from unilaterally having the ability to enact fishery management legislation that would affect surrounding states, provinces, or countries.

II. DESCRIPTION OF THE ALEWIVE AND ITS PRESENCE IN THE ST. CROIX RIVER SYSTEM

A. Landlocked versus Anadromous Alewives

Alewives, *Alosa pseudoharengus*, are either landlocked or anadromous fishes that are members of the herring family and closely related to the American shad and blueback herring.[7] Landlocked alewives spend their entire life cycle in large lakes and are critical parts of the ecosystems in which they reside.[8] The United States and Canada share borders on several large lakes that contain these smaller landlocked alewives, including the Great Lakes[9] and Spednic Lake, which is also on the Maine and New Brunswick border.[10] As opposed to the smaller landlocked fishes, anadromous fishes are characterized by hatching in freshwater, spending most of their adult lives in the ocean, returning later to freshwater to spawn, and then finally making their way back to the ocean shortly after spawning.[11] Each year in May and June, adult alewives, blueback herring, and American

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6. The history of the bill is complex: the bill's original draft was presented before the House of Representatives on Feb. 14, 1995, as L.D. 520, 117th Legis. (Me. 1995), but was codified after it was amended substantially by Comm. Amend. A on Apr. 27, 1995. *See* discussion *infra* Part III.B.

7. U.S. Fish and Wildlife Service, Gulf of Maine Coastal Program: All About Maine Alewives . . . 1 (2004), *available at* http://www.fws.gov/northeast/gulfofmaine/downloads/fact_sheets/alewife%20fact%20sheet.pdf (last visited Feb. 20, 2008) [hereinafter *All About Maine Alewives*].

8. The Maine Department of Marine Resources, Maine River Herring Fact Sheet, http://www.maine.gov/dmr/bsrfah/alewife/ (last visited Feb. 20, 2008).

9. *Id.*

10. Roberta Scruggs, *Sportsmen Oppose Alewives in St. Croix; Opponents Say Alewives would Damage the $5 million Sport-Fishing Industry in the Watershed*, PORTLAND PRESS HERALD, Mar. 10, 2001, at B2.

11. *See* F. Lorraine Bodi & Eric Erdheim, *Swimming Upstream: FERC's Failure to Protect Anadromous Fish*, 13 ECOLOGY L.Q. 7 n.1 (1986).

shad migrate from the Atlantic Ocean to the St. Croix River system in order to visit its rivers, streams, ponds, and lakes.[12]

B. Historical Presence of Alewives in the St. Croix River System and Early Preservation Efforts

The first settlers to the United States observed that alewives used the St. Croix River as a breeding ground.[13] The St. Croix River once supported large runs of these fish that would ascend from the unobstructed river system nearly to its headwaters.[14] As early as the middle of the nineteenth century, though, precipitous declines in the abundance of alewives occurred due to the construction of impassible dams, overfishing, and pollution.[15]

In response to these declines, the citizens who lived along the St. Croix River began to petition the Maine legislature (legislature) and ask that their representatives pass protective bills to restore the abundance of alewives to the St. Croix River system. As early as 1821, William Vance of Plantation No. 6 on the St. Croix River wrote to the legislature requesting that a law be passed, which would end the overfishing on the river.[16] Mr. Vance expressed that the inhabitants along the river had suffered immensely from the overfishing and recognized that the river "is a boundary between part of this State and the British Colony of New Brunswick."[17] After the

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12. Keith A. Havey, *Restoration of Anadromous Alewives at Long Pond, Maine*, 90 TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY 281, 283 (1961).

13. C.G. ATKINS, THE FISHERIES AND FISHERY INDUSTRIES OF THE UNITED STATES: THE RIVER FISHERIES OF MAINE, S. MIS. DOC. NO. 124, at 699-700, 47th Cong., 1st Sess. (1887) (referring to testimonials that described an abundance of salmon, shad, and alewives on the Saint Croix River before the United States formally became a nation). Many rivers in Maine also historically produced enormous runs of alewife. In 1867, for example, the catch of alewives on the Kennebec River was estimated at 1,200,000. ME. BD. OF AGRIC., TWELFTH ANNUAL REPORT OF THE SECRETARY 111 (1867).

14. ME. DEPT. OF FISHERIES, FOURTH REPORT OF THE COMMISSIONER 8, 10 (1870); *see* ME. COMM'N OF SEA & SHORE FISHERIES, FIRST BIENNIAL REPORT 36, 91 (1918) [hereinafter ME. SEA & SHORE FISHERIES, BIENNIAL].

15. ME. BD. OF AGRIC., *supra* note 13, at 139-40; John R. Moring, *Recent Trends in Anadromous Fishes*, *in* THE DECLINE OF FISHERIES RESOURCES IN NEW ENGLAND: EVALUATING THE IMPACT OF OVERFISHING, CONTAMINATION, AND HABITAT DEGRADATION (R. Buchsbaum, J. Pederson, W.E. Robinson, eds., MIT Sea Grant College Program, Cambridge, Massachusetts, MITSG 05-5, 2005) (providing a detailed review of previous alewife declines in Maine).

16. Petition of William Vance Respecting Fisheries in the St. Croix River (Jan. 20, 1821) (on file with the Maine State Archives). The Maine State Archives is located at 84 State House Station, Augusta, Maine, 04333-0084 and has a website at http://www.maine.gov/sos/arc/.

17. *Id.*

Committee on Fisheries reviewed the petition, it recommended that a bill be drafted for review by the two chambers of the legislature.[18] Although the bill, An Act To Regulate the Taking of Fish in the River St. Croix and its Branches, was drafted, the bill ultimately did not pass, and instead was referred to the next legislature.[19]

In 1832, the inhabitants of Plantation No. 6 again petitioned the legislature for relief from overfishing.[20] The petitioners described that the fish were "being mostly destroyed and stopped from passing up this river to the Lakes to spawn, by the great number of seines and trap weirs, and other impediments in said river—which stop their passage."[21] Moreover, the petition recognized the international nature of the river and requested a law that would preserve and increase the fish in the St. Croix River. As with the year before, the petition passed committee muster, and a bill, An Act to Regulate the Taking of Salmon, Shad, & Alewives in the River St. Croix and its Branches, was drafted.[22] Although the bill did not pass, if it had, it would have provided protective measures to curb overfishing. Also, the bill would have only gone into operation after the government of the British Colony of New Brunswick adopted similar measures to ensure that the fishery prospered on the eastern side of the St. Croix River.[23]

It was not until 1836 that the legislature answered calls for relief. In 1836, citizens from the Town of Baring in Washington County, Maine petitioned the legislature, stating:

> The undersigned inhabitants of the Town of Baring in the County of Washington, respectfully represent, that formerly the fish called Salmon, Shad, and Alewives were very plenty in the River St. Croix, and its branches . . . . Your petitioners believe that if a law

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18. Committee on Fisheries, Recommendation for Leave to Bring a Bill (Jan. 26, 1821) (on file with the Maine State Archives).

19. An Act to Regulate the Taking of Fish in the River St. Croix and its Branches (Jan. 30, 1821) (the bill that "no person shall be allowed to take fish in the Westerly side of the river St. Croix or an any of its branches with any large net or seine, excepting between sunrise on Monday and sunrise on Thursday of each week. . . .") (on file with the Maine State Archives).

20. Rufus K. Lane, Fishery Petition for Plantation No. 6 (Jan. 3, 1823) (on file with the Maine State Archives).

21. *Id.*

22. An Act to Regulate the Taking of Salmon, Shad, & Alewives in the River St. Croix & its Branches (Jan. 15, 1823) (on file with the Maine State Archives). Prior to the draft and introduction of the former bill, a bill entitled An Act to Regulate the Taking of Fish in the River St. Croix was drafted, read on Jan. 11, 1823, but later withdrawn. An Act to Regulate the Taking of Fish on the River St. Croix (Jan. 11, 1823) (on file with the Maine State Archives).

23. *Id.* at Section IX.

> were passed compelling the owners of mills on said river to build suitable fishways round, through or over the mill dams on said river and also regulating the times and days of taking said fish, and requiring the fishways to be kept always open and the wears [sic] to be kept shut two days in each weak [sic], from the first day in April, to the first day in September, in each year, and prohibiting all persons from taking said fish on said days, eather [sic] in wears [sic], seines, driftnets, set nets, scoop nets, or with spears, that said fish would soon become plenty in said river and its branches, and greatly tend to promote the interests of this community, and the settlement of the wild land in this vicinity.[24]

In response to this particular petition, in 1837 the legislature enacted the bill, An Act to Regulate the Salmon, Shad and Alewive Fishery in the River St. Croix and its branches,[25] and concurrently allowed the erection of fishways and ladders on the St. Croix River.[26]

Thereafter, this historical cycle continued throughout the nineteenth century and into the early twentieth century; the laws and fishery management schemes would be deemed inadequate protection for the alewives and, in response, Maine citizens would begin campaigns to restore the numbers of the native fish to the rivers of Maine and Canada.[27]

In time, though, citizen petitions were replaced with reports and observations of biologists and other specialists hired to evaluate Maine's rivers and their inhabitants. It became commonplace for both the federal and state governments of the United States to commission annual reports regarding the protection and sustainability of its rivers. For example, as early as 1896, the Commissioner of Sea and Shore Fisheries of the State of Maine was issuing annual reports[28] that analyzed the prosperity of alewives and proffered new suggestions in order to better protect this native species.

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24. Petition of Mathew Fowler and Others Praying for a Law to Regulate the Taking of Fish in the Town of Baring, (Nov. 15, 1836) (on file with the Maine State Archives).

25. 1836 Me. Laws 433.

26. ME. DEPT. OF FISHERIES, *supra* note 14, at 8-10.

27. ME. SEA & SHORE FISHERIES, REPORT OF THE COMMISSIONER, 22-23, 24 (1896) [hereinafter ME. SEA & SHORE FISHERIES, REPORT]; ME. SEA & SHORE FISHERIES, BIENNIAL, *supra* note 14, at 36-37.

28. ME. SEA & SHORE FISHERIES, REPORT, *supra* note 27, at 22 (recommending "that a liberal appropriation be made for the purpose of collecting statistical information" and that additional funds be provided to the Commissioner in order for him to fulfill his duty to exercise supervision over all the fisheries in Maine); ME. SEA & SHORE FISHERIES, BIENNIAL, *supra* note 14, at 50 (reporting that better protection measures were necessary to stop mills along Maine rivers from preventing alewives from ascending the rivers and reaching their spawning grounds).

Afterward, the Maine Department of Inland Fisheries & Wildlife sought to ensure protection for native alewives in Maine's rivers by encouraging the construction of fishways and ladders.[29]

C. Importance of Alewives to the St. Croix River System

Historically, fishermen and government officials may have not known that although one female alewife can produce between 60,000 to 100,000 eggs,[30] the majority of these eggs, during the incubation period, serve as food for other coastal species that inhabit the spawning grounds and its surrounding area. What these first conservationists did know, though, was that if a Maine river contained alewives, it also contained plenty of other desired fish because the alewife was an "important source of food for many fresh and estuarine fish, as well as ever-present eagles, osprey, and other birds circling the rivers each spring."[31] Most notably, the alewife served as food for the atlantic cod,[32] until overfishing decimated this fishery and led to its crash.

III. AN ACT TO STOP THE ALEWIVES RESTORATION PROGRAM IN THE ST. CROIX RIVER

A. Spednic Lake's Fishery Crash

The undying attempts to restore all types of alewives to the upper portions of the St. Croix River were finally coming to a close after reaching successful numbers of alewife recoveries in the late twentieth century, and it appeared that the once historical configurations of the river system would reign again. However, in the mid-1980s, there was a substantial decline in numbers of smallmouth bass being caught in Spednic Lake, a large lake located in the upper portions of the St. Croix watershed.[33] Worried fishing guides, who participated in the lucrative bass fishery in Spednic Lake, asked

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29. Laurence F. Decker, *Fishways in Maine*, 17-27, 47, Me. Dep't of Inland Fisheries & Wildlife (1967).

30. *All About Maine Alewives*, *supra* note 7, at 2.

31. Gulf of Maine Research Institute, Undersea Landscapes of the Gulf of Maine: Alewives, http://www.gma.org/undersea_landscapes/alewives/index.html (last visited Feb. 22, 2008).

32. ALBERT JENSEN, THE COD 163 (Thomas Y. Crowell ed., Thomas Y. Crowell Co. 1972).

33. Emmet Meara, *Alewives Proposal Reaction Mixed*, BANGOR DAILY NEWS, Mar. 13, 2001, at B1.

Mike Smith, a state fisheries biologist, to investigate the cause of the fishery's crash.

In response to the request, Smith decided to scuba dive throughout Spednic Lake and then based his conclusions upon what he saw under the water.[34] After his dive, Smith deduced that the presence of alewives were to blame for the bass fishery crash, formulated from underwater observations such as, "I'd dive in the water and I'd see a school of alewives that would be 50 to 100 feet wide and 300 to 400 feet long. Nothing but young alewives. Everything else was gone."[35] This observation is questionable because an internationally recognized authority on scuba diving and the world's largest diver training organization, the Professional Association of Diving Instructors (PADI), states that underwater visibility, which may be affected by water movement (from schools of alewives, for example), weather, suspended particles, a diver's own kicks, or bottom composition, ranges from zero to more than two hundred feet.[36]

Nonetheless, members of the sport-fishing guide associations on the St. Croix waterway became convinced that the alewives were to blame for the decline of the smallmouth bass. Acting on this belief, these associations first began discussions with Canada in order to arrange a fisheries management scheme that would keep adult alewives from spawning in the center and upper areas of the St. Croix system.[37] However, Canadian officials have refused to agree to such management efforts and, therefore, the associations turned to the Maine legislature for a law that would allow the upper dams, which are controlled by the United States,[38] to close annually in anticipation of the adult anadromous alewife spawning season.[39]

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34. Roberta Scrubbs, *The Battle Over Alewives; A Plan to Reintroduce the Little Fish to the St. Croix River has Sport Fishing Interests Squaring off Against Both Maine and Canada*, PORTLAND PRESS HERALD, Mar. 18, 2001, at D8.

35. *Id.*

36. 2.06 PROFESSIONAL ASSOCIATION OF DIVING INSTRUCTORS (PADI), OPEN WATER DIVER MANUAL 127 (2005).

37. Diana Greattinger, *Alewife Habits Debated; Ecological Impact Focus of Public Hearing*, BANGOR DAILY NEWS, Mar. 3, 2001, at A1.

38. *Id.* The lowest dam on the St. Croix River is the Milltown Dam and the Dam's fishway is situated on the Canadian side of the river, which is controlled by the Canadian government; the Milltown Dam is situated a few miles north of Calais, Maine and below the Woodland Dam. *Id.* Since the inception of this impasse, the Canadian government has declined to close the Milltown Dam to alewives and has opted instead to incur the cost of trucking alewives upriver past the Milltown Dam after reviewing the costs of doing so with local trucking companies. Memorandum from Larry Murray, Deputy Minister of Fisheries and Oceans Canada, to Geoff Regan, Minister of Fisheries and Oceans Canada (May 3, 2004) (confidential document #2004-201-00123 that was released under Canada's Access to Information Act).

39. Greattinger, *supra* note 37.

B. The Bill's Adoption

On April 27, 1995, the Maine legislature passed the bill "An Act to Stop the Alewives Restoration Program in the St. Croix River (the Bill)."[40] It reads as follows:

CHAPTER 48

H.P. 385—L.D. 520

AN ACT TO STOP THE ALEWIVES RESTORATION PROGRAM IN THE ST. CROIX RIVER

EMERGENCY PREAMBLE. WHEREAS, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

WHEREAS, the bass fishery in the Woodland and Grand Falls flowages along the St. Croix River and its associated tributaries and lakes is extremely valuable to the economy of the State; and

WHEREAS, alewives and bass compete for the same food source; and

WHEREAS, that competition could significantly affect the bass fishery; and

WHEREAS, the alewife run in the St. Croix River normally begins in the first 2 weeks of May; and

WHEREAS, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health[,] and safety; now, therefore,

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MAINE AS FOLLOWS:

SEC. 1. 12 MRSA § 6134 is enacted to read:

§ 6134. ALEWIVES PASSAGE; FISHWAYS ON THE ST. CROIX RIVER

By May 1, 1995, the commissioner 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 St. Croix River, are configured or operated in a manner that prevents the passage of alewives.

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40. L.D. 520, 117th 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, *infra* note 47).

EMERGENCY CLAUSE. In view of the emergency cited in the preamble, this Act takes effect when approved.

C. Procedural Discussion of L.D. 520

On a very broad level, the Bill is wholly unlike ordinary legislation. First, the Bill was not only passed after its text was substantively revised, but also after it was procedurally revised to make it emergency legislation. As emergency legislation, the law was effective immediately after the Governor of Maine signed the Bill.[41] Second, these changes occurred after the Bill was presented to the Maine legislature.

Specifically, the Bill was introduced in the Maine legislature's House of Representatives[42] and then referred to the Committee on Inland Fisheries and Wildlife.[43] The Committee on Inland Fisheries and Wildlife revised the Bill substantially, "in what many now say was a midnight, back channel effort with no public input . . . ."[44] For instance, although the statement of fact, in the original bill simply stated "[t]his bill prohibits state-funded or state-supported alewife restoration programs in the St. Croix,"[45] the Bill's statement of fact, after considerable revision by the Committee on Inland Fisheries and Wildlife, read so as to stop new and already effective initiatives to restore alewives to the St. Croix River system.

After the Committee's amendments, the statement of fact explains that "[a]lthough the original bill would prevent the Department of Marine Resources and the Department of Inland Fisheries and Wildlife from initiating new alewife restoration programs, it would not stop the existing program on the St. Croix River."[46] Thus, in committee the statement of fact was revised to make clear that the amended Bill explicitly intends to stop all existing alewife restoration programs on the St. Croix River, not just new ones.[47]

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41. L.D. 520, Emergency Clause, 117th Legis. (Me. 1995). For more information about how a bill becomes law in the State of Maine, see the State of Maine's website, http://www.maine.gov/legis/lawlib/billpath.htm (last visited Feb. 20, 2008).

42. 1 Legis. Rec. House H-137 (1995).

43. *Id.* at H-140.

44. Naomi Schalit, *The Little Fish That Couldn't*, ISLAND JOURNAL: THE ANNUAL PUBLICATION OF THE ISLAND INSITUTE 72, 75 (2003).

45. L.D. 520, Statement of Fact (statement of fact comes from the original draft presented before the House of Representatives on Feb.14, 1995, but the bill was codified as amended by Comm. Amend. A, *infra*, note 47).

46. *Id.*

47. Comm. Amend. A to L.D. 520, No. H-78, 117th Legis. (Me. 1995).

In addition, the revised statement of fact, unlike the original Bill presented to the House of Representatives, gave several examples of how the existing fishways on the St. Croix should be modified at dam sites. It stated that the prevention of alewives should be achieved "by placing screens in the fishway, removing some baffles to increase water speed or adding planks in the fishway to create a plunge."[48] After the Committee on Inland Fisheries and Wildlife amended the Bill, it was returned to the House of Representatives with a report recommending that the Bill "Ought to Pass."[49]

As explained above, in Maine a bill normally becomes law ninety days after the end of the legislative session in which it was passed,[50] unless it is passed as emergency legislation. An "emergency clause" within a bill means that both the House and Senate must pass the bill by a two-thirds majority.[51] If this occurs, then a bill becomes effective the same day that the bill is approved by the Governor of Maine.

Here, the House first approved the Bill by a count of one hundred and thirty four in favor of the Bill and zero against it.[52] Thereafter, the Senate gave its approval by a vote of twenty six in favor of the Bill and zero against it.[53] The day after the Senate voted to approve the Bill, the Governor of Maine gave his approval by signing the Bill, making it effective on April 27, 1995.[54]

D. Why Did the Committee on Inland Fisheries and Wildlife Substantially Revise the Bill?

1. Procedural Process of the Bill

As discussed above, the Committee on Inland Fisheries and Wildlife completely overhauled the Bill's original draft that was numbered and presented to the legislature on February 14, 1995. This occurred because the Bill needed to go through a series of steps before returning to Maine's House of Representatives, the chamber in which the Bill originated.

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48. *Id.*
49. 1 Legis. Rec. House H-373 (1995).
50. The State of Maine's website, *supra* note 41.
51. Legis. Rec. House H-435 (1995).
52. *Id.*
53. Legis. Rec. Sen. S-588 (1995).
54. L.D. 520, Emergency Clause, 117th Legis. (Me. 1995).

Thus, the Bill was first distributed to members of the legislature.[55] Then, it was distributed to all town and city clerks who requested copies, which allowed the general public access to a copy of the Bill.[56] Next, a public hearing was held and proponents and opponents of the Bill voiced their positions; state officials, lobbyists, and citizens were able to testify as to their views regarding the Bill.[57] Afterwards, the Committee began a work session. At this stage, the Committee members discussed the Bill's objectives and then voted in order to provide the legislature with a recommendation or report.[58] It is at this point in the process that a committee can amend a bill in order to clarify, expand, restrict, or correct a bill's intent.

2. The Committee File

Throughout this process, committees ordinarily keep records that explain their review, analysis, and discussion of a bill. In this case, the Maine State Law Library was provided a recorded copy of the Committee file, lending some insight into the Committee on Inland Fisheries and Wildlife's reasoning.[59] The Committee's file contains testimony taken during the public hearing, three series of letters written to congressmen and Committee members, and a scientific report. However, a review of these materials does not shed any light on the reasons behind the substantial amendments to the Bill; the materials only confirm that there was no existing scientific report which might have confirmed that alewives were having a negative impact on smallmouth bass.

For example, the testimony[60] within the Committee file is from the Deputy Commissioner of Marine Resources, E. Penn Estabrook. Mr. Estabrook began his testimony by explaining the importance of the alewife as not only a valuable resource for commercial fishermen, but also as an important forage species for "ospreys, eagles, herons, freshwater

55. The State of Maine's website, *supra* note 41.

56. *Id.*

57. *Id.*

58. *Id.*

59. Sometimes, committee files contain little to no information about a committee's action. The State Law Library is located at State House Station 43, Augusta, Maine 04333-0043 [hereinafter State Law Library]. Additionally, the library's website is at http://www.maine.gov/legis/lawlib/refemail.htm.

60. *L.D. 520, An Act to Stop the Alewife Restoration Program in the St. Croix River: Hearing on L.D. 520 Before the Comm. on Fisheries and Wildlife*, 117th Legis. 1-2 (Me. 1994) (statement of E. Penn Estabrook, Deputy Commissioner of Marine Resources, The Department of Marine Resources) (on file with the State Law Library).

gamefish[,] and estuarine fisheries."[61] Then, he acknowledged that the Department of Marine Resources, the Canadian Department of Fisheries and Oceans, and the United States Fish and Wildlife Service were concerned with the already declining alewife population on the St. Croix River system.[62] After further testimony regarding the importance of alewives on the St. Croix, he concluded by stating that scientists should be afforded the opportunity to study the interactions between alewives and smallmouth bass; an opportunity that should not be precluded by the exclusion of alewives from the upper waters of the St. Croix.[63]

Next, the file contains three series of letters. The first series contains two letters and begins with a joint letter[64] sent from representatives of the Chiputneticook Lake International Conservancy, the Grand Lake Stream Guides Association, the Maine Professional Guides Association, and the Princeton Rod and Gun Club. The letter expresses concerns "about the recent decision to allow the migration of alewives up the St. Croix River as far as the Vanceboro dam."[65] The authors explain, among other things, their belief that both alewives and smallmouth bass compete for food, that research undertaken in 1977, showed that alewives brought a disease to smelt populations, which might spread to other species, and that the Canadian Department of Fisheries and Oceans "should not have the right to have total control over the alewive [sic] migration."[66]

The next letter was written by the Department of Marine Resources and the Department of Inland Fisheries & Wildlife in response to the previous letter.[67] It explains that the "decline in the bass population may have been due to the dramatic annual drawdowns of Spednick [sic] Lake, the presence of alewives, or a combination of these and/or other factors."[68] Also, the letter directs that if scientists "are to prove alewives do not have a detrimental effect, which appears to be the case on numerous other Maine

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61. *Id.* at 1.

62. *Id.*

63. *Id.* at 2.

64. Letter from Peter Roach, President, Chiputneticook Lake International Conservancy, & Alvah G. Harriman, President, Grand Lake Stream Guides Association, & Alvah G. Harriman, Member, Maine Professional Guides Association, & Paul Slipp, Member, Princeton Rod and Gun Club, to Roy Owen, Commissioner, Department of Inland Fisheries & Wildlife (Apr. 9, 1994) (on file with the State Law Library, *supra* note 59).

65. *Id.*

66. *Id.*

67. Letter from William J. Brennen, Commissioner, Department of Marine Resources, & Ray B. Owen, Jr., Commissioner, Department of Inland Fisheries & Wildlife, to Peter M. Roach, President, Chiputneticook Lake International Conservancy (July 8, 1994) (on file with the State Law Library).

68. *Id.*; *see* CAN. MANUSCRIPT REPORT NO. 1969, *infra* note 86.

rivers where alewives have coexisted with freshwater species for decades, we need to allow access of alewives and measure the effects, if any."[69]

The second series of letters begins with a letter[70] written by the Executive Director of the St. Croix International Waterway Commission to the Commissioner of the Department of Inland Fisheries and Wildlife. This letter explained that Lance Wheaton, a member of the Forest City Guides Association, had called him because Mr. Wheaton was extremely upset about the alewife management policies on the St. Croix River.[71] The letter explains that Mr. Wheaton was planning to go public, "apparently with an open meeting and press coverage," with proof that alewives negatively effect the lucrative bass fisheries.[72] Attached to the Executive Director's letter is a copy of his response letter[73] to Mr. Wheaton and a scientific report,[74] which is discussed in detail below. The response letter suggests that Mr. Wheaton contact the Maine Atlantic Sea Run Salmon Commission with his concerns and explains that the enclosed scientific report "outlines the various agencies' collective view of management directions for the next few years."[75]

Finally, a third letter was written by members of the Chiputneticook Lakes International Conservancy (CLIC).[76] It explicitly explains that the CLIC does "not want alewives or shad above the Grand Falls dam."[77] The letter states that the CLIC would like to hold a meeting with the media present that would involve demands from the CLIC.[78] Also, it contains

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69. *Id.*

70. Letter from Lee Sochasky, Executive Director, St. Croix International Waterway Commission, to Ray B. Owen, Jr., Commissioner, Department of Inland Fisheries & Wildlife (Aug. 4, 1994) (on file with the State Law Library) [hereinafter Sochasky-Owen].

71. Lance Wheaton, acting as a spokesman for the Chiputneticook Lakes International Conservancy, has also said, "[w]e've had six years of poor fishing at Spednic because of alewives that got into the lake in the 1980's. They took food from smelts and young bass and preyed on them, too. Don't let anyone tell you alewives aren't meat eaters." Tom Hennessey, *Alewife Reintroduction to Spednic Draws Strong Opposition*, BANGOR DAILY NEWS, Sep. 8, 1994 at PDA.

72. Sochasky-Owen, *supra* note 70.

73. Letter from Lee Sochasky, Executive Director, St. Croix International Waterway Commission, to Lance Wheaton, Member, Forest City Guides Association (Aug. 4, 1994) (on file with the State Law Library) [hereinafter Sochasky-Wheaton].

74. *See infra* text accompanying notes 84-87.

75. Sochasky-Wheaton, *supra* note 73.

76. Letter from Lance Wheaton, Spokesman, Chiputneticook Lakes International Conservancy Fishing Comm., & Peter Roach, President, Chiputneticook Lake International Conservancy, to Ray B. Owen, Jr., Commissioner, Department of Inland Fisheries and Wildlife (Aug. 11, 1994) (on file with the State Law Library).

77. *Id.*

78. *Id.*

threatening undertones and suggests that "it is time" for the Department of Inland Fisheries and Wildlife to "get [its] own act together."[79] Finally, the letter explains to its recipient, the Commissioner of Inland Fisheries & Wildlife, that he is "obviously . . . not aware of [his] own biologists [sic] studies over the past ten years."[80] Attached to this letter is a personal notation penned by Lance Wheaton, in which he explains that in 1984 all the fishing guides held a meeting with Mike Smith, an Inland Fisheries & Wildlife biologist.[81] As discussed earlier, Mike Smith made personal scuba diving observations, which are implausible according to PADI, and unreliable due to his failure to use the scientific method.[82]

The third and last series of three short letters begins with a letter from the St. Croix International Waterway Commission explaining to a member of the Forest City Guide Association that "the jurisdictional agencies are considering re-opening the portion of the St. Croix system *below* Spednic Lake to a now much-reduced run of alewives, based on an understanding that alewives and bass do co-exist compatibly in those waters."[83] The second letter is dated March 8, 1995 and states that the author has read both sides of the issue and still finds it confusing. He writes, "I believe some people arguring [sic] on both sides of the issue don't understand it either."[84] The third and final letter in the committee file simply states that Washington County Commissioners "put their support behind the enactment of this bill."[85]

Finally, the Committee file contains the aforementioned scientific report, which discusses fisheries management strategies for developing and maintaining several species of fish on the St. Croix river, including salmon, shad, alewives, and eels.[86] The report explains that the improvement in numbers of smallmouth bass on Spednic Lake may or may not be due to

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79. *Id.*

80. *Id.*

81. Letter from Lance Wheaton, *supra* note 76.

82. *See supra* text accompanying notes 34-36.

83. Letter from Lee Sochasky, Executive Director, St. Croix International Waterway Commission, to Andrew Brooks, Member, Forest City Guide Association (Aug. 23, 1994) (emphasis in original) (on file with the State Law Library).

84. Letter from Fred Hartman to Senator Stephen A. Hall (Mar. 8, 1995) (on file with the State Law Library).

85. Letter from Joyce E. Thompson, County Clerk, County of Washington, to Steven Hall, Chairman, Committee on Inland Fisheries and Wildlife (Mar. 13, 1995) (on file with the State Law Library).

86. ENHANCEMENT, CULTURE, AND ANADROMOUS FISH DIV. & RES. ALLOCATION AND LICENSING DIV., DEP'T OF FISHERIES AND OCEANS, CAN. MANUSCRIPT REPORT OF FISHERIES AND AQUATIC SCIS. NO. 1969: LONG-TERM MGMT. PLAN FOR THE DIADROMOUS FISHERIES OF THE ST. CROIX RIVER, PREFACE (1988).

reduced numbers of alewives that had gained access to the lake since the 1985 bass fishery crash.[87] Also, it suggests that research should be conducted to determine whether the interactions between smallmouth bass and alewives have adverse effects on each species.[88] Furthermore, the report states that the uncertainty surrounding water temperature and quality conditions continue, so "[the] physical and chemical aspects of river water will continue to be monitored on a regular basis and attempts will be made to relate fish movements in the system to varying water conditions."[89] Thus, the report echoes the Committee's discussion of the uncertainty surrounding the reasons for the bass fishery crash on Spednic Lake in 1985.

E. The Bill's Aftermath

1. Attempts to Restore Alewives to the St. Croix Watershed

After the Maine legislature passed the Bill with no scientific proof that alewives and smallmouth bass negatively impact one another, scientists and opponents of the Bill began the arduous battle of trying to reverse this legislation. However, it was not until 2001 that the issue was back before the Maine legislature.

On January 30, 2001, An Act to Restore the Passage of Alewives on the St. Croix River (the Restoration Bill), was introduced in the House of Representatives by Representative Ken Honey of Boothbay, Maine.[90] After a joint committee review of the Restoration Bill by both the Committee on Inland Fisheries and Wildlife and the Committee on Marine Resources, on May 15, 2001 the committees' reports to the House of Representatives recommended that the Restoration Bill "ought not to pass."[91] Thereafter, a debate ensued on the floor of the House about whether the Restoration Bill should be enacted.

Representative Dunlap of Old Town was of the position "that we should really look at a restoration of a native fish species for the betterment of the entire watershed in [the St. Croix River system]."[92] However, Representative David Trahan of Waldoboro countered that the restoration was unnecessary because the entire St. Croix waterway differed so much from

87. *Id.* at 8.
88. *Id.*
89. *Id.* at 11.
90. L.D. 365, 120th Legis. (Me. 2001).
91. 1 Legis. Rec. H-806, 1st Reg. Sess. (Me. 2001).
92. *Id.*

its historical configuration.[93] Also, Trahan was opposed to adopting the Restoration Bill because of two threats he received during the committee process. The first was from the Canadian government[94] threatening to truck the alewives over the blocked fishways and the other was from the U.S. federal government.[95] Trahan read directly from the document that was sent from the U.S. federal government to the Committee on April 2, 2001:

> By continuing to prohibit fish passage for alewives at the rate prescribed, the State of Maine, Department of Inland Fisheries and Wildlife risk being declared in diversion and would become ineligible to participate in the Sport Fish Restoration Program. The ineligible status will continue until funds for fish way [sic] construction at current market prices are returned or until the fish way [sic] again becomes operational. The current annual apportionment of sport fish restoration funds to Maine is approximately $2.4 million of which 75 percent goes to the Department of Inland Fisheries and Wildlife and the remainder to the Department of Marine Resources.[96]

Trahan asked that the House of Representatives ignore any and all threats from the U.S. federal government or Canadian government by not "buck[ing] under that kind of pressure and be[ing] in the pocket of the federal government."[97]

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93. *Id.* at H-807.

94. *Id.* Larry Marshall, a research manager from the Canadian Department of Fisheries and Oceans in Halifax, Nova Scotia told the Committee members that Canada had to work in the spirit of cooperation, but that the Canadians would truck the alewives around the two blocked dams, unless the Maine legislature reversed the Bill and once again allowed the passage of alewives into the upper portions of the St. Croix River. Roberta Scruggs, *Canada Insists Alewives be Restored to St. Croix: An Official says Fish Will be Trucked Around Dams if Maine doesn't Cooperate*, PORTLAND PRESS HERALD, May 13, 2001, at A1; Larry Murray, Deputy Minister of Fisheries and Oceans Canada, *supra* note 38.

95. 1 Legis. Rec. House H-807, 1st Reg. Sess. (Me. 2001). In 2000, Robert Sousa, assistant regional director for the U.S. Department of Interior had earlier informed Commissioner Lee Perry of the Maine Department of Inland Fisheries and Wildlife that the situation on the St. Croix watershed had to be remedied. Sousa reasoned that the Bill ran counter to the intended purposes of the dams, which were originally built with mostly federal money, by allowing barriers at the Woodland and Grand Falls dams to block the passage of alewives. *See* Diana Greattinger, *Alewife Spawning Plan Topic of N.B. Meeting*, BANGOR DAILY NEWS, May 8, 2000, at A1.

96. 1 Legis. Rec. House H-807.

97. *Id.*

Also, Representative Albion Goodwin from Pembroke asked that members of the House of Representatives oppose the Restoration Bill after stating:

> If we are going to support and allow alewives to go north of Woodland and Grand Lake Stream into these bodies of water [sic] they eat everything in there. You have to understand that we have piranhas in . . . North America. They are called alewives. They are eating machines. They eat everything in a body of water. That is why the fishery was destroyed in the early '90s and this is why we put the gates in at the Georgia Pacific Woodland Fish Way [sic].[98]

Then, Representative Morrison supported Goodwin's opposition and asked that other members of the House of Representatives oppose the Restoration Bill stressing:

> We are talking about the Canadians. The only thing I heard in the hearing are [sic] the Canadians are in favor of it. They are the ones that want it. The only reason I heard they want it is for baitfish for lobsters . . . . We are talking about protecting one small corner of the earth where there is an important economic impact.
>
> The Canadian acreage is about 1,800 acres of water. On the American side, we are talking 18,000 acres . . . . The only thing that I heard was the Canadians wanted it for baitfish for lobster. That is scary. The Canadian government, as has already been stated, threatened to, if we don't pass this, they are going to truck them up and dump them in anyway. Well, I guess we could knuckle under that scare and say we had better do it.[99]

Later, Representative Morrison again took the floor, but this time he was not trying to antagonize the legitimate interests of citizens from a foreign country. Instead, he wanted to assure members of the House of Representatives that a "young lady, an environmentalist" was incorrect in stating to the committees that eagles and osprey would not survive without alewives.[100] Although Morrison had seen a "pretty scrawny eagle" during an ice fishing trip, he guaranteed that he could take "a busload of legislators down and . . . could show you an eagle without even getting out of the bus on a tar road on Route 1 down in Calais, right next to the St. Croix, guaranteed."[101]

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98. *Id.* at H-808.
99. *Id.* at H-809.
100. *Id.* at H-811.
101. *Id.*

On the other hand, Senator Dunlap from Old Town argued that the Restoration Bill should be adopted because alewife ponds are "under the stewardship and ownership of all the people of the State of Maine, not just the citizens of Washington County, not that that diminishes our concern for their livelihood or their conditions."[102] Dunlap explained that one of the key conditions which caused the 1985 bass fishery crash on Spednic Lake has not been discussed, namely "the fact that there were draw downs in Spednik [sic] Lake of up to 14 feet, which not only affected the spawning, but also affected the [fish] feed, because the feed tends to rest on the top of the water."[103] Further, Dunlap stressed that the Restoration Bill was really about opening two dams on an international waterway; "[t]he hobgoblin of alewives, which has been illustrated by what happened on Spednik [sic] Lake is not even a reality under this bill."[104] Most importantly, though, Dunlap explained that he had asked fishing guides to prove scientifically that alewives had never been present above the Milltown Dam, but the only information that the guides had provided to the committee were a few letters from other fishing guides, which stated that these latter guides had never seen alewives in the St. Croix watershed.[105] Dunlap continued that these letters are "anecdotal information, but [they are] hardly scientific information."[106] In conclusion, Dunlap reiterated that the decision before the House of Representatives was a policy issue and an ecological decision and reminded his fellow representatives that the alewives are a native fish species to the St. Croix River System.[107]

Finally, Representative Muse from Fryeburg, Representative Bull from Freeport, and Representative Usher from Westbrook each took the floor in support of the Restoration Bill.[108] Representative Bull, like Dunlap, stressed that "[a]ll the evidence shows that this would be a reintroduction of a species that is indigenous to this area."[109]

After Representative Usher from Westbrook finished, a roll call was ordered.[110] The House of Representatives voted ninety-seven to forty-two in favor of accepting the Committees' recommendations that the Restoration Bill should not pass.[111] On the following day, May 16, 2001, the

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102. *Id.* at H-812.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at H-812-13.
109. *Id.* at H-813.
110. *Id.*
111. *Id.* at H-814.

Senate also accepted that the Restoration Bill ought not to pass and once again alewife restoration efforts were rejected by the Maine legislature.[112]

Still, on June 11, 2001, the House of Representatives adopted a Joint Resolution recognizing that it was in the best interests of the U.S. government, the State of Maine, "the Government of Canada[,] and the Province of New Brunswick to hold public hearings and consult with interested private and public entities and Native Americans to address and resolve the issues surrounding the release of alewives, or 'gaspereaux.'"[113]

Nevertheless, this did not stop the Canadian Department of Fisheries and Oceans from trucking alewives upstream to their native spawning grounds above the blocked fishways at the American controlled Woodland Dam after catching them at the Canadian controlled Milltown Dam and driving them a few miles upstream.[114] The manager of the Diadromous Fish Division, Maritimes Region for Fisheries and Oceans Canada, Larry Marshall, stated that this was the only way to conserve the alewife run and reported that more than half of the 4181 alewives that had returned to that area of the St. Croix watershed had been transported above the blocked dams.[115]

2. Scientific Studies Confirm that Smallmouth Bass and Alewives Can Live in Harmony Together and that Historically Alewives Have Prospered in the Upper Portions of the St. Croix Watershed

In 2006, Maine Rivers, a nonprofit organization, published two scientific studies that again irrefutably proved the two things that opponents to the Restoration Bill had claimed to be impossible. [116] First, and perhaps most importantly, the studies demonstrated that smallmouth bass and alewives can coexist and that when they do, the alewives do not negatively impact the growth, length, or conditions of the smallmouth bass. Second, the studies scientifically substantiated the historical claims and existence of alewife presence in the upper portions of the St. Croix River system. [117]

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112. 1 Legis. Rec. S-765-66, 1st Reg. Sess. (Me. 2001).

113. 2 Legis. Rec. H-1377, 1st Reg. Sess. (Me. 2001).

114. Diana Graettinger, *Spurning Maine, Canadians Dump Alewives*, BANGOR DAILY NEWS, June 6, 2001, at A1; Larry Murray, Deputy Minister of Fisheries and Oceans Canada, *supra* note 38.

115. Graettinger, *supra* note 114, at A1.

116. *See generally*, Maine Rivers' website, http://www.mainerivers.org/index.htm (last visited Feb. 10, 2008).

117. The argument about whether historical data substantiated that anadromous alewives once were part of large runs on the St. Croix River has been controversial since the beginning of the alewife impasse. *See supra* note 95 and accompanying text; Diana

The first scientific study was conducted by Dr. Theo V. Willis, a research scientist at the University of Southern Maine.[118] Dr. Willis's study used ten lakes, located throughout Maine and within Maine's Department of Inland Fisheries and Wildlife resource management Region C, as sources of research data to answer several questions surrounding the interactions between anadromous alewives and smallmouth bass.[119] Dr. Willis's interaction study of the species reveals that the years in which the smallmouth bass showed their best condition "and the years in which bass showed the poorest condition were years in which alewives were present."[120] Also, for three of the ten lakes, historical data regarding the presence or absence of alewives were available. Dr. Willis was able to conclude scientifically that the "growth of one year and older smallmouth bass [were] either statistically indistinguishable or slightly higher during years in which alewives were present compared with years in which they were absent."[121] Next, Dr. Willis explained that in order to affect the biology of fish that compete for food, fish diets must overlap at a rate of sixty-percent or higher.[122] Although both smallmouth bass and alewives have some general dietary similarities, he concluded that only Meddybemps Lake showed a overlap rate that was above sixty-percent.[123] Even more interesting, though, was that Dr. Willis discounted the importance of this overlap because it occurred as a result of the abundance of a single family of zooplankton on the Lake and also because both species had coexisted together on this Lake for well over a century.[124]

Finally, Dr. Willis found that "[n]o systematic difference in the weight of [smallmouth bass] tournament entries was observed between lakes with and without alewives."[125] Therefore, the study concluded that there was no evidence to show that the presence of alewives systematically harmed smallmouth bass in terms of length, conditions, or growth; and that based upon smallmouth bass tournament returns, the quality of sport fishing for

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Graettinger, *Plan May Bring Alewives to Upper St. Croix*, BANGOR DAILY NEWS, May 11, 2000, at A1.

118. DR. THEO V. WILLIS, ST. CROIX ALEWIFE – SMALLMOUTH BASS INTERACTION STUDY FINAL REPORT 1 (Maine Rivers, 2006), *available at* http://www.mainerivers.org/MaineRiversStCroixReportFinal.pdf.

119. *Id.* at 3.

120. *Id.* at 4-5.

121. *Id.* at 5.

122. *Id.* at 6.

123. *Id.*

124. *Id.* at 28.

125. *Id.* at 7.

bass does not logically differ between lakes with or without anadromous alewives.[126]

The second study began by explaining that the actions in 1995 by the Maine legislature resulted in denying anadromous alewives access to ninety-eight percent of their reproductive habitat on the St. Croix watershed.[127] The study explains that in order to come to this conclusion, the scientists first developed microsatellite deoxyribonucleic acid (DNA) markers for alewives.[128] Next, they conducted several scientific tests that allowed them to conclude that anadromous and landlocked St. Croix alewife populations are extremely different genetically, which suggests that these populations rarely, if ever, engage in interbreeding.[129] Finally, scientific tests revealed that although anadromous alewives had statistically significant DNA markers, "the genetic divergences among anadromous alewife populations were substantially less than those between the landlocked and anadromous populations."[130]

Importantly, the study demonstrates that such results are consistent with homing of alewives to their natal rivers, although some straying should be expected.[131] Also, these results imply that there is significant homing by alewives, such that they search for natal habitat "on the geographically fine scale of tributaries within a river system."[132] Essentially, this means that the anadromous alewives on the St. Croix River return from their ocean habitat in order to spawn, but once within the St. Croix watershed, the alewives actually search for and swim back to their biological spawning grounds.[133]

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126. *Id.* at 37.

127. PROFESSOR PAUL BENTZEN & I.G. PATERSON, GENETIC ANALYSES OF FRESHWATER AND ANADROMOUS ALEWIFE (*ALOSA PSEUDOHARENGUS*) POPULATIONS FROM THE ST. CROIX RIVER, MAINE/NEW BRUNSWICK 45 (2006), *available at* http://www.mainerivers.org/MaineRiversStCroixReportFinal.pdf.

128. *Id.* at 46.

129. *Id.* at 54. "Microsatellites gain their chief theoretical advantage as genetic markers because their many allelic variants (produced over much longer time-scales by mutation) make them very sensitive indicators of genetic drift, migration, and overall genetic diversity." *Id.* at 46.

130. *Id.* at 54.

131. *Id.* The Gulf of Maine Research Institute's website contains photos and a discussion about the annual struggle for alewives to return to their natal spawning grounds. Gulf of Maine Research Institute, *supra* note 31.

132. BENTZEN & PATERSON, *supra* note 127, at 54.

133. Notably, turn of the century accounts by groups commissioned to report on Maine fisheries observed this phenomenon. ME. BD. OF AGRIC., *supra* note 13, at 77 (observing that as alewives search for spawning grounds, they often push themselves "out of the rivers into the smallest brooks"); COMMISSION OF SEA & SHORE FISHERIES OF THE STATE OF MAINE, FIRST BIENNIAL REPORT 36 (1918) (discussing the problem with dams for migratory fish, which were "seeking their natural spawning grounds").

These anadromous alewives do not simply look for any spawning ground, but return from the ocean to spawn on their natal spawning ground.

IV. LEGAL ARGUMENTS TO OVERTURN THE MAINE LEGISLATURE'S BILL

A. The Clean Water Act

The Federal Water Pollution Control Act (Clean Water Act) is a U.S. federal statute that regulates national water quality and content.[134] Although the Clean Water Act does have citizen suit provisions, which allow citizens to have standing in order to sue for a violation of the Act, these provisions are limited to certain specific violations as outlined in the statute.[135] For example, the statute allows any person to bring suit against any government instrumentality or agency in order to stop a violation of "(A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation."[136] However, a review of the provisions that govern effluent limitations,[137] water quality related effluent limitations,[138] national standards of performance,[139] and toxic and pretreatment effluent standards,[140] reveal that a citizen would have no right to bring suit against the State of Maine or its agencies in order to challenge the Bill's consequences.[141] This is because the provisions deal with discharges into the water, not laws that take from the water. Although one of the national objectives of the Clean Water Act is to provide protection for and propagation of fish, shellfish, and wild-

134. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2006).
135. 33 U.S.C. § 1365 (2006).
136. 33 U.S.C. § 1365(a)(1)(ii) (2006).
137. 33 U.S.C. § 1311 (2006).
138. 33 U.S.C. § 1312 (2006).
139. 33 U.S.C. § 1316 (2006).
140. 33 U.S.C. § 1317 (2006).
141. In a recent case, the Supreme Judicial Court of Maine (Court) has held that Maine's antidegradation law, 38 M.R.S.A. § 464(4)(F)(1-A), "provides an additional requirement that must be met for [facilities] to obtain water quality certification pursuant to the Clean Water Act." FPL Energy Maine Hydro LLC v. Dep't of Envtl. Prot., 2007 ME 97, ¶ 38, 926 A.2d 1197, 1206. This means that a water quality certification under the Clean Water Act would only be issued to a Maine facility if the Department of Environmental Protection found that it did not disturb, impair, or significantly depredate the existing in stream use. 38 M.R.S.A. § 464(4)(F)(1-A)(a)-(b) (2001). Still, this additional requirement does not appear to open another avenue to challenge the Bill because the Clean Water Act makes clear that a license or permit would be needed for an activity or operation that "may result in any discharge into the navigable waters . . . ." 33 U.S.C. § 1341(a)(1) (2006).

life,[142] the citizen suit provisions arguably do not allow an opponent of the Bill to bring suit against the State of Maine and its respective agencies in order to allow the St. Croix River's alewives to once again be able to spawn on their natal grounds.

B. The North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) is an agreement that allows free trade between Mexico, the United States, and Canada.[143] The NAFTA Secretariat administers the regulatory authority and mechanisms specified under NAFTA to resolve trade disputes between the national governments in "a fair, timely, and impartial manner."[144] Thus, if Canada alleged that the United States was in violation of a provision of NAFTA because of the Maine State legislature's Bill, then the NAFTA Secretariat would begin a review of the allegation.

An argument could be made that Maine's actions put the United States in violation of Article 309(1), Import and Export Restrictions, which states:

> Except as otherwise provided in this Agreement, no Party may adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of the GATT, including its interpretative notes, and to this end Article XI of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made a part of this Agreement.[145]

The Canadian government could argue that because the Maine legislature is prohibiting the spawning and importation of alewives into Canada, the United States is in violation of NAFTA.[146] Further, the Canadian government

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142. 33 U.S.C. § 1251(a)(2) (2006).

143. North Atlantic Free Trade Agreement, U.S.-Can.-Mex., ch. 1, Dec. 17, 1992, 32 I.L.M 289, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (last visited Feb. 22, 2008) [hereinafter NAFTA].

144. North Atlantic Free Trade Agreement, NAFTA Secretariat: About the NAFTA Secretariat – Overview, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=184 (last visited Feb. 22, 2008).

145. NAFTA, *supra* note 143, at Part Two, Section C.

146. In the face of such a controversy, the U.S. Congress either could reject Maine's legislation embodied in the Bill and would doubtlessly prevail or accept the Bill and move forward in the NAFTA dispute resolution scheme. If the U.S. Congress accepted the Bill as valid, arguably it would become federal law. *See* Cuyler v. Adams, 449 U.S. 433 (1981).

could state that the alewives are goods, which lobstermen use as baitfish. Although this argument would likely be rejected by the NAFTA Secretariat as not meeting the objectives of NAFTA, the Maine legislature would be hard pressed to deny that Canada does not view alewives as goods and has not demanded their availability for commerce.[147]

C. International Joint Commission

The International Joint Commission (IJC) "prevents and resolves disputes between the United States of America and Canada under the *1909 Boundary Water Treaty*[148] and pursues the common good of both countries as an independent and objective advisor to the two governments."[149] However, the IJC does not command troops and one of its basic functions is to keep both countries informed of ongoing disputes and emerging issues.[150] Furthermore, unless both the United States and Canada jointly ask for the IJC's analysis, examination, and recommendation of a particular dispute, the IJC only has the authority to bring an emerging transboundary issue to the attention of the governments.[151]

On the other hand, when the IJC receives a "reference" from both countries asking for its input on a particular matter, it "usually appoints an investigative board or task force to examine the facts and advise on the questions."[152] Thereafter, the IJC will issue a report and the governments will either take certain action as requested in the report or will request that the IJC monitor the implementation of its recommendation. In implementing its recommendation, the IJC will ordinarily defer to one of its delegates. In this situation, the delegate that would be most applicable would be the IJC's

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What is clear, though, is "[t]hat foreign affairs are national affairs [and this] means that [the] ultimate, supreme authority over them is in the national government, and that states may not intrude upon them with initiatives or policies of their own." LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 150 (2d ed. 1996).

147. *See* 1 Legis. Rec. H-806, 1st Reg. Sess. (Me. 2001) and accompanying text.

148. The Boundary Water Treaty provides that the United States and Canadian governments may refer questions or matters of difference to the IJC for its analysis, examination, and recommendation. CAN. AND U.S. 2005 ANNUAL REPORT, INT'L. JOINT COMM'N (2005), *available at* www.ijc.org/php/publications/pdf/ID1591.pdf.

149. International Joint Commission, Canada & United States: Welcome—Mission Statement, http://www.ijc.org/en/home/main_accueil.htm (last visited Feb 22, 2008).

150. *Id.*

151. *Id.*

152. ANNUAL REPORT, *supra* note 148.

International St. Croix River Watershed Board.[153] However, neither Canada nor the United States has given the ICJ a reference to date.

Without a reference, the IJC is essentially only an information forum. The IJC can try to mediate between the countries in order to work out an ongoing transboundary dispute, but if one or both countries are unwilling to cooperate, the IJC is without additional authority to remedy the situation. Moreover, even after a reference is given by both countries to the IJC, the IJC's outcome is analogous to a mediation session. If the United States or Canadian governments do not like the recommendation given from the IJC after its resolution of a dispute, neither party has to follow the recommendation.

Thus, the IJC is not a likely candidate to resolve the dispute between Canada and the United States, evident by the Canadian government's deficiency in even requesting that the IJC and its International St. Croix River Watershed Board mediate on behalf of the country.

D. The Foreign Affairs Power and the Commerce Clause of the Constitution

If the Maine legislature wishes to continue its practice of prohibiting alewives access to their natal spawning in this St. Croix border fishery, the State of Maine may argue that it can do so under its police power to regulate fisheries.[154] This argument would likely fail because there is scientific and historic evidence, which oppose the reasons and basis for the Bill's enactment.

Moreover, the Commerce Clause of the U.S. Constitution could be used to strike down the Bill.[155] Here, the Bill (1) excludes the passage of commerce to Canada, specifically alewives that would be used by Canadian

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153. International Joint Commission, International St. Croix River Watershed Board: Mandate—Directive to the International St. Croix River Watershed Board, http://www.ijc.org/conseil_board/st_croix_river/en/directive.htm (last visited on Feb. 22, 2008) (discussing IJC's authority to establish the International St. Croix River Watershed Board; the Board's mandate, directive, and duties; and the assembly of the Board and its members' authority to establish committees).

154. The police power of a state derives from the U.S. Constitution's Fourteenth Amendment and has been aptly described by Chief Justice Marshall as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves." Gibbons v. Ogden, 22 U.S. 1, 203 (1824).

155. The Commerce Clause states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

lobstermen as baitfish and otherwise favors local economic interests,[156] and (2) does not protect the health and safety of citizens, but rather was intended to further the economic welfare of certain citizens in Washington County.[157] Nonetheless, under this avenue, the Legislature's judgment does not appear to be reviewable unless some aggrieved private interest, perhaps a Canadian lobsterman, challenged the Bill.[158]

Also, the Bill could be challenged because it "encroach[es] upon or interfere[s] with the just supremacy of the United States."[159] Specifically, it could be argued that the Bill violates Article I, Section 10 of the U.S. Constitution, "which is a catalogue of prohibitions and limitations upon the states, and most of them relate or are relevant to foreign affairs."[160] Previously, the U.S. Supreme Court has held that a State may be in violation of the federal foreign affairs power, "which the Constitution entrusts to the President and the Congress."[161] Although the reach of this constitutional doctrine and its limitations are unclear, it is without doubt that the U.S. Constitution forbids state sovereignty in international affairs and regulations.[162]

V. CONCLUSION: THIS PAGE INTENTIONALLY LEFT BLANK

History and science have proven that the State of Maine's Bill to prohibit alewives from spawning on the upper reaches of the St. Croix River in both Maine and Canada is simply bad policy. Also, international fishery decisions

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156. *See* Philadelphia v. New Jersey, 437 U.S. 617 (1978). This principle has not been followed in every situation. Maine v. Taylor, 477 U.S. 131, 151 (1986) (upholding an environmental law, which banned importation of out-of-state baitfish, because it could not be implemented in a non-discriminatory way). Still, the legislative history discussed above shows that one of the prominent reasons for supporting the Bill was to favor the local economic situation of Washington County and had nothing to do with an environmental purpose. *See supra* note 93 and accompanying text. "We are talking about protecting one small corner of the earth where there is an important economic impact." *Id.*

157. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1955) (stating that "[the Constitution] was framed upon the theory that the peoples of the several state must sink or swim together, and that in the long run prosperity and salvation are in union and not division").

158. HENKIN, *supra* note 146, at 155-56.

159. Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

160. HENKIN, *supra* note 146, at 151. The Foreign Affairs power states in pertinent part: "No State shall enter into any Treaty, Alliance, or Confederation . . . ." U.S. CONST., art. 1, § 10, cl. 1.

161. Zschering v. Miller, 389 U.S. 429, 432 (1968).

162. HENKIN, *supra* note 146, at 149.

are formally in the hands of the U.S. Congress and President, not the State of Maine's legislature.

Although Maine's action obviously affects a Canadian natural fishery and usurps the power of the federal and executive branches of the United States, neither Canada nor the United States has asserted their respective international regulatory authority. For example, the United States Congress could pass a law forbidding the State of Maine's actions and as discussed above, Canada could formally give a reference to the IJC.[163] Moreover, this contradicts previous United States and Canadian legislation, which states that the basis of fishery management schemes is to manage and conserve fisheries using the best scientific information available to ensure maintenance of populations at a level of maximum sustainable yield, as qualified by relevant environmental and economic factors.[164]

Why these governmental bodies do not intervene in this situation, but instead choose to empower the Maine legislature with the ability to make de facto international fisheries management law based upon false policy assertions is not readily ascertainable. Perhaps, it comes down to the very fact that these federal representatives simply want to go home at night rather than become part of this spectacle on the St. Croix River.

In the end, it appears that in order to realistically challenge the Bill, there must be new legislation passed. As this Comment went to publishing, the prefiling of a new bill, An Act to Restore Diadromous Fish in the St. Croix River,[165] took place. This bill would ensure that by May 1, 2008 the passage of alewives would be restored to the St. Croix River. It remains to be seen whether this bill will be passed.

As discussed, the other alternatives do not appear practical. The current federal and international laws do not provide a remedy for the persecuted alewives. The IJC does not have any regulatory authority. Finally, a constitutional challenge would be both costly and time consuming, especially when one considers that the alewife fishery on the St. Croix River is decimated.

Thus, this Comment concludes that it may have been purposeful that no viable avenue is currently in force to allow a Canadian or United States

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163. *See supra* Part IV.C-D.

164. United Nations Convention on the Law of the Sea (UNCLOS), art. 61(2)-(3), Dec. 10, 1982, 21 I.L.M. 1261, 1833 U.N.T.S. 397 (signed by former U.S. President Bill Clinton in 1994, but has not yet been ratified; signed by the Canadian government in 1982 and was ratified by Canada's Minister of Foreign Affairs Bill Graham in 2003; if and when the U.S. ratifies UNCLOS, it could open another avenue to international dispute settlement of fishery management schemes); Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C.A. §§ 1802(21), 1851 (2006).

165. L.D. 1957, 123d Legis. (Me. 2008).

citizen to bring suit against the State of Maine for the legislature's actions. It may just be that this page of the law was intentionally left blank.