UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY, *et al.*, Plaintiffs, v. NORMAN H. OLSEN, in his official capacity as Commissioner of the Maine Department of Marine Resources, *et al*., Defendants.	CIVIL ACTION NO.: 11-cv-00167-JAW

DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT, WITH INCORPORATED MEMORANDUM OF LAW

Pursuant to Fed. R. Civ. P. 12(b)(6), the defendants, Norman H. Olsen, in his official capacity as Commissioner of the Maine Department of Marine Resources ("DMR") and Chandler E. Woodcock, in his official capacity as Commissioner of the Maine Department of Inland Fisheries and Wildlife ("IF&W"), move to dismiss plaintiffs' claim against them for failure to state a claim upon which relief can be granted. The federal Clean Water Act ("CWA") requires all States to adopt their own water quality standards. For these standards to become effective under federal law, States must comply with certain CWA requirements, including obtaining approval of the standards, and any amendments, from the Environmental Protection Agency ("EPA"). Plaintiffs contend that Maine's law requiring that alewives be prevented from reaching portions of the St. Croix River is an amendment of the water quality standards applicable to that river and is "preempted" by the CWA due to Maine's failure to obtain approval from the EPA.

Plaintiffs' claim should be dismissed. The CWA explicitly authorizes States to amend their water quality standards, so such amendments cannot be preempted by the CWA. A claim that a State, in amending its standards, did not comply with applicable CWA requirements is not a preemption claim, and none of the three "forms" of preemption applies here. At best, plaintiffs are simply claiming that the State has not complied with the CWA's procedural requirements. The law restricting alewife access does not trigger the requirements of the CWA, however, because it is not a water quality standard. The law is simply one of countless examples of a State's routine exercise of its police powers over its wildlife and natural resources, and there is no legal support for the proposition that such laws must be approved by the EPA. Finally, even if the alewife law could somehow be considered an amendment to Maine's water quality standards, the CWA does not provide plaintiffs with a private cause of action to enforce the CWA's procedural requirements. Rather, the EPA has exclusive authority to approve and reject amendments to water quality standards, and if plaintiffs' even have a cause of action, it would be against the EPA seeking an order requiring it to review Maine's alewife law. In further support, the defendants rely upon the following Memorandum of Law:

MEMORANDUM OF LAW

Statutory Background

The CWA's objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As will be discussed in more detail, the CWA contemplates participation by both the federal government and the States. The CWA requires 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(a), (c)(2)(A). These standards must consist of designated uses of the States' waters and water

quality criteria based on such uses. 33 U.S.C. § 1313(c)(2)(A). The standards must also include an "antidegradation" policy to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12.

Whenever a State revises or adopts a new water quality standard, the State must submit it to the EPA for approval. 33 U.S.C. § 1313(c)(2)(A). If within sixty days of submission the EPA determines that the standard meets the applicable requirements of the CWA, the standard then becomes the applicable water quality standard for purposes of the CWA. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21. If the EPA determines that the new or revised standard is not consistent with the applicable requirements, the EPA must notify the State and specify the changes needed to assure compliance with the requirements of the CWA. *Id*. If the State does not adopt the changes within ninety days of notification, the EPA must itself promulgate an appropriate water quality standard. 33 U.S.C. § 1313(c)(3), (4). Additionally, a State may not remove the designated use of protection and propagation of fish, shellfish and recreation in and on the water without first conducting a use attainability analysis ("UAA"), and may not remove any designated use that is an existing use. 40 C.F.R. § 131.10(h), (j). Finally, where waters are meeting their designated uses, water quality standards can be revised only in compliance with the State's antidegradation policy. 33 U.S.C. § 1313(d)(4)(B).

The CWA has a provision authorizing citizen suits. 33 U.S.C. § 1365. Under this provision, "any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under [the CWA] or (B) an order issued by the [EPA's] Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). Additionally, the provision authorizes citizens to sue the EPA's Administrator

"where there is alleged a failure of the Administrator to perform any act or duty under [the CWA] which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(1). Notably, this provision does not authorize citizen suits against States that are alleged to have unlawfully revised their water quality standards.

As directed by the CWA, Maine, through its Water Classification Law, has established comprehensive water quality standards. 38 M.R.S. §§ 464-470. This law classifies individual water bodies (38 M.R.S. §§ 467-470) and establishes standards for each classification. 38 M.R.S. § 465-465-C. Generally, the surface waters of the St. Croix River basin above the Grand Falls dam are classified as AA, A and B (for river sections) and GPA (for lake sections). 38 M.R.S. § 467(13). All four classifications require that the waters be of such quality that they are suitable for the designated uses of drinking water after disinfection or treatment, recreation in and on the water, fishing, agriculture, navigation, and as habitat for fish and other aquatic life. 38 M.R.S. §§ 465(1), (2), (3), 465-A(1)(A). Except for Class AA river sections, these waters must also be suitable for industrial process and cooling water supply and hydroelectric power generation except as prohibited by 12 M.R.S. § 403. *Id.* As required by the CWA, Maine's water quality standards contain an antidegradation policy. 38 M.R.S. § 464(4)(F)(1).

Relevant Alleged Facts[1]

Alewives and blueback herring are anadromous fish that spend the majority of their lives at sea but return to freshwater to spawn. Complaint, ¶ 41. Under Maine law, both species are referred to collectively as "alewives." 12 M.R.S. § 6001(1-A). Alewives are native to Maine

[1] The State Defendants dispute some of the alleged facts, but take them as true for purposes of this motion to dismiss. *See Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001).

rivers and play an important role by serving as prey for a large variety of fish, birds, and sea and land mammals, and by providing cover for migrating Atlantic salmon that might otherwise be preyed upon by eagles and ospreys. *Id*., ¶¶ 42-43. The alewife population has "plummeted" during the last 200 years as a result of dams, pollution and overfishing. *Id*., ¶ 45. Both Maine and the federal government have stated that it is important to restore the alewife population in Maine. *Id*., ¶ 45.

In 1915, a dam was constructed on the St. Croix River at Grand Falls. *Id*., ¶ 46. The dam is currently owned by Woodland Pulp LLC. *Id*., ¶ 47. In 1964, a fishway was constructed at the Grand Falls dam, and this fishway "greatly improved alewife passage on the St. Croix and resulted in a resurgence of the anadromous alewife population." *Id*., ¶ 50. Between 1981 and 1987, the number of alewives returning to the St. Croix from the Atlantic Ocean increased from 169,000 to 2,625,000 fish. *Id*.

In the mid-1980s, there was a decline in the number of smallmouth bass caught in Spednick Lake, a large lake located in the upper portion of the St. Croix watershed above the Grand Falls dam. *Id*., ¶ 51. Sport-fishing guides believed that this decline was related to the increase in alewives, and a bill was introduced that would have prevented DMR and IF&W from initiating new alewife restoration on the St. Croix. *Id*. DMR and IF&W opposed the bill, stating that 1) alewives are a valuable resource for commercial fishermen and an important forage species for birds and freshwater gamefish, 2) alewives had not had a detrimental effect on freshwater species in other Maine rivers, and 3) the reasons for the decline of the bass population were uncertain. *Id*. The bill was amended, and, as enacted, it required DMR and IF&W to block alewife passage at both the Grand Falls dam and at the downstream Woodland dam. *Id*., ¶ 52. Subsequently, DMR and IF&W entered into an agreement with the owner of the Grand Falls

dam to close the dam's fishways to alewives. *Id.*, ¶ 53. By restricting alewives' access to spawning grounds, the law caused a "precipitous decline" in the alewife population. *Id.*, ¶ 54.

Subsequently, studies showed that alewives do not negatively impact the smallmouth bass population. *Id.*, ¶¶ 55-56. In March 2008, a bill was introduced to repeal the law that closed the fishways at the Grand Falls and Woodland dams to alewives. *Id.*, ¶ 57. The bill was amended, and, as enacted, the law (referred to here as the "2008 Alewife Law") required IF&W to ensure that the Woodland dam's fishway be opened to alewives but that the Grand Falls dam's fishway continue to be closed to alewives. *Id.*, ¶ 58. By keeping this fishway closed, 98 percent of the alewives' spawning and nursery habitat in the St. Croix River basin has been eliminated. *Id.*, ¶ 61.

Argument

Plaintiffs claim that the 2008 Alewife Law is "preempted" by the CWA because it allegedly revises Maine's water quality standards and was never submitted to the EPA for review and approval, as is required under the CWA for revisions to water quality standards. Complaint, ¶¶ 1, 5, 8, 63-74. This preemption claim make no sense given that the CWA creates a joint state-federal program and explicitly requires States to enact and amend their own water quality standards, subject to review and approval by the EPA. Thus, none of the "forms" of preemption apply here. To the extent that plaintiffs are claiming that Maine violated the CWA by not obtaining the EPA's approval of the 2008 Alewife Law, the claim still should be dismissed. First, the law restricting alewife access to portions of the St. Croix did not revise any water quality standard. Second, even if it did, and even if Maine did violate the CWA, plaintiffs do not have a private cause of action against the State to enforce provisions relating to the establishment and revision of water quality standards.

I. The 2008 Alewife Law Is Not "Preempted" by the CWA.

The Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824). Federal law may supersede state law in three different ways: 1) Congress can include language in the law that expressly preempts certain state laws; 2) the law can create a scheme of regulation that is so comprehensive that it essentially "occupies the field" and leaves no room for state regulation; or 3) the state law actually conflicts with federal law. *See, e.g., Hillsborough County, Florida. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458, 472-73 (1st Cir. 2009); *Hartford Enterprises, Inc. v. Coty*, 529 F.Supp.2d 95, 100-02 (D. Me. 2008). Even if the 2008 Alewife Law is an amendment to Maine's water quality standards – and, as discussed below, it is not – the CWA explicitly authorizes such amendments, and an amendment is not "preempted" simply because a State does not comply with the CWA's procedural requirements.

A. The Court Should Begin With the Presumption that the 2008 Alewife Law is Not Preempted.

"Preemption is strong medicine, not casually to be dispensed." *Grant's Dairy--Maine, LLC v. Commissioner of Maine Dept. of Agriculture, Food & Rural Resources*, 232 F.3d 8, 18 (1st Cir. 2000). In cases "where federal law is said to bar state action in fields of traditional state regulation," courts start with the presumption "'that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see*

also California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 325 (1997).[2] This presumption applies here.

More than 100 years ago, the Supreme Court recognized that management of wildlife is squarely within the police powers of the States. *Geer v. Connecticut*, 161 U.S. 519 (1896). Federal courts continue to recognize the States' authority to regulate wildlife within their borders. *See, e.g., Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 391 (1978); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) ("Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions."); *Lacoste v. Department of Conservation of State of Louisiana*, 263 U.S. 545, 552 (1924) ("Protection of the wild life of the state is peculiarly within the police power, and the state has great latitude in determining what means are appropriate for its protection."); *Wyoming v. United States*, 279 F.3d 1214, 1226 (10th Cir. 2002); *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1013 (9th Cir. 1994) ("Clearly, the protection of wildlife is one of the state's most important interests."). The Court should presume, then, that Congress, in passing the CWA, did not intend to preempt States from exercising their traditional power to regulate wildlife.

Further, while perhaps not as strong as a presumption against preemption, States are less likely to be preempted by federal statutes that specifically contemplate State participation. *See*

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[2] This presumption against preemption applies even when there is an express preemption clause. *Massachusetts Ass'n of HMOs v. Ruthardt*, 194 F.3d 176, 179 (1st Cir. 1999). Further, "the familiar assumption that preemption will not lie absent evidence of a clear and manifest congressional purpose must be applied not only when answering the threshold question of whether Congress intended any preemption to occur, but also when measuring the reach of an explicit preemption clause." *Id.* (emphasis in original). Accordingly, express preemption provisions must be narrowly construed. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (applying presumption against preemption to narrowly construe express preemption provision "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety"); *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005) ("This presumption against preemption leads us to the principle that express preemption statutory provisions should be given a narrow interpretation.").

New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 421 (1973) ("Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one."). As the First Circuit has noted, the principle that preemption should never be applied "casually" is "especially true" when the federal statute at issue utilizes "cooperative federalism." *Pharmaceutical Research and Mfrs. of America v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001). The CWA is just such a statute. *Southern Ohio Coal Co. v. Dept. of Interior*, 20 F.3d 1418, 1427 (6th Cir. 1994) ("[T]he CWA sets up a system of 'cooperative federalism,' in which states may choose to be primarily responsible for running federally-approved programs."); *see also National Min. Ass'n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003) (citing the CWA as an example of a "cooperative federalism" statute); *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 330 (3rd Cir. 2002) (same). Further, when it comes to establishing water quality standards, it is the States that have the "primary role," and EPA's "sole function" is to "review those standards for approval." *Natural Resources Defense Council, Inc. v. EPA*, 16 F.3d 1395, 1401 (4th Cir. 1993). Finally, the CWA itself declares that "[i]t is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . and to consult with the [EPA] in the exercise of [its] authority under [the CWA]." 33 U.S.C. § 1251(b) (emphasis added). Given that the CWA gives States a major, if not starring, role, it is far less likely that the CWA preempts State action.

B. The 2008 Alewife Law is Not Expressly Preempted by the CWA.

"Express preemption occurs when Congress states in the text of legislation that it intends to preempt state legislation in the area." *EEOC v. Massachusetts*, 987 F.2d 64, 67-68 (1st Cir. 1993); *see also Grant's Dairy--Maine*, 232 F.3d at 15 ("Express preemption occurs only when a

federal statute explicitly confirms Congress's intention to preempt state law and defines the extent of that preclusion."). Frequently, federal laws expressly declare that they "preempt" certain state laws, unambiguously using that very word. *See, e.g.*, 2 U.S.C. § 453(a); 6 U.S.C. § 488g(b); 17 U.S.C. § 912(c); 18 U.S.C. § 2710(f); 20 U.S.C. § 6735(a). Or, a federal law may declare that it "supersedes" certain state laws. 15 U.S.C. § 6603(e); 21 U.S.C. § 1603(c)(1); 42 U.S.C. § 6297(a)(1). A federal law may declare that states may not "enact or enforce" certain laws. 15 U.S.C. § 376a(e)(5)(A); 23 U.S.C. § 102(a); 49 U.S.C. § 13902(b)(4); 49 U.S.C. § 41713(b)(1). A federal law may declare that "no state . . . may regulate" in certain areas. 7 U.S.C. § 7756(a); 47 U.S.C. § 332(c)(7)(B)(iv).

While certainly Congress is not required to use specific words or phrases when expressing its intent to preempt state law, the CWA contains nothing that could be considered an express preemption provision. The CWA does not declare that any state laws are preempted, are superseded, or are otherwise without effect. It does not declare that States may not enact or enforce any laws, nor does it say that states may not regulate in any particular area. In fact, if anything, the CWA expressly preserves state regulatory authority. The CWA states that "[e]xcept as expressly provided," nothing in the CWA shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370.

It is true that the CWA requires States to submit amendments of their water quality standards to the EPA for approval. 33 U.S.C. § 1313(c). This is not an express preemption provision, however, but merely a provision governing the procedural requirements that must be met in order for a State's standard to become, as a matter of federal law, "the water quality standard for the applicable waters of that State." 33 U.S.C. § 1313(c)(3). Moreover, the CWA is

silent with respect to the status of unapproved state standards as a matter of state law. Presumably, then, an unapproved state water quality standard can still be enforced by the State and is not expressly preempted by the CWA. Finally, even when the EPA rejects a state water quality standard, the CWA does not declare the standard to be void or unenforceable. Instead, the CWA requires the EPA to itself promulgate the water quality standard. 33 U.S.C. § 1313(c)(3). While a standard promulgated by the EPA could conceivably preempt a State's standard, plaintiffs do not allege that the EPA has promulgated any such standard.

C. The CWA Does Not Occupy the Field of Wildlife and Natural Resource Regulation.

In the absence of express pre-emptive language, Congress's intent to pre-empt all state laws in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. *Rice,* 331 U.S. at 230. Pre-emption of an entire field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id*. Far from occupying the field, "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (emphasis added). As discussed above, the CWA provides for significant state participation and makes States primarily responsible for promulgating water quality standards. Clearly, Congress did not intend to occupy the field. *See Concannon,* 249 F.3d at 74 n.6 ("Nor is the doctrine of 'field' preemption relevant, as Medicaid is a cooperative federal and state program.").

D. The 2008 Alewife Law Does Not Conflict With the CWA.

Under "conflict preemption," "state law is preempted to the extent that it actually conflicts with federal law." *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Com'n*, 461 U.S. 190, 204 (1983). "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458, 472-73 (1st Cir. 2009). Plaintiffs allege that the 2008 Alewife Law "conflicts" with the CWA because 1) it is a "revised water quality standard" and was not submitted to, or approved by, the EPA; 2) the Law changed the designated use of the St. Croix River without a UAA; and 3) the Law violates "the CWA's anti-degradation policy, which prohibits elimination of existing uses and the weakening of water quality standards." Complaint, ¶ 75. These, though, are not allegations of conflict, but instead allegations that Maine violated the CWA by purportedly amending its water quality standards without complying with the CWA's requirements.

Certainly, it is not impossible for an entity to comply with both the 2008 Alewife Law and the CWA. The State's blockage of alewives has no impact on the ability of persons to comply with the CWA's requirements. Nor does the 2008 Alewife Law stand as an obstacle to the achievement of Congress's objectives. Assuming for the sake of argument that the Law is a revised water quality standard, Congress has made the States primarily responsible for promulgating water quality standards. *Natural Resources Defense Council,* 16 F.3d at 1401.

Maine cannot be interfering with Congress' objectives by doing that which Congress has required it to do.

II. Because the 2008 Alewife Law Is Not an Amendment to Maine's Water Quality Standards, It is Neither Preempted By, Nor Violates, the CWA.

To the extent plaintiffs are not claiming preemption but instead are claiming that Maine violated the CWA by not obtaining the EPA's approval of the 2008 Alewife Law or complying with other CWA requirements, their claim still fails. Such a claim is necessarily predicated on plaintiffs' assertion that the Law is an amendment to Maine's water quality standards, and this assertion is plainly wrong. Moreover, if the Court rejects defendants' argument in Section I and holds that amendments to State water quality standards are "preempted" by the CWA if the CWA's requirements are not followed, the 2008 Alewife Law would nevertheless not be preempted. Just like a claim that Maine violated the CWA, plaintiffs' claim that Maine is preempted is predicated on the incorrect assertion that the Law amended Maine's water quality standards.

As plaintiffs note, state water quality standards must consist of designated uses of the water body and criteria to protect such uses. Complaint, ¶ 27 (citing 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.2)). Maine has promulgated such standards for the St. Croix River. 38 M.R.S. § 467(13). Designated uses include drinking water after treatment, recreation in and on the water, fishing, agriculture, industrial process and cooling water supply, hydroelectric power generation, navigation, and as habitat for fish and other aquatic life. 38 M.R.S. §§ 465(1), (2), (3), 465-A(1)(A). The standards also include criteria to protect those uses. *Id.* The 2008 Alewife Law does not revise these standards. The designated uses and criteria for protecting these uses remain exactly the same. The fact that the Law prohibits alewives from accessing certain portions of the

river does not alter or amend those water quality standards. It is simply a routine exercise of the State's police powers – in this case, its power to regulate wildlife within the State.

Plaintiffs' argument that such an exercise of the State's police powers is a revision to a water quality standard would lead to absurd results. For example, fishing is a designated use, but it could not possibly be the case that a state law prohibiting fishing on a waterway (for example, to protect a particular species) must be submitted to the EPA as a revision to a water quality standard. Similarly, recreation is a designated use, but presumably a State would not need to submit to the EPA a law prohibiting the use of jet skis on a particularly scenic waterway. Another designated use is agriculture, but there is no reason to suspect that a state law limiting irrigation withdrawals to prevent dewatering must be approved by the EPA. Undoubtedly, States routinely exercise these and other police powers over waterways for which they have promulgated water quality standards. Here, the 2008 Alewife Law is an effort to achieve a balance between particular competing fish populations, which is a classic state wildlife management prerogative. Maine is not aware of a single case in which a court has held that a state law managing wildlife or imposing restrictions on specific uses of a waterway is somehow a revision of a water quality standard that must be submitted to the EPA for review and approval.

Because the 2008 Alewife Law is not a revision to Maine's water quality standards, it neither violates, nor is preempted by, the CWA.

III. Even if the 2008 Alewife Law Is a Revision to Maine's Water Quality Standards, Plaintiffs Do Not Have a Cause of Action Against Maine for Any Alleged Violations of the CWA's Requirements.

"[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979). Rather, if the statute does not expressly provide for a

private right of action, a right of action exists only if one can be inferred from the statute. *See, e.g., Thompson v. Thompson*, 484 U.S. 174, 179 (1988). The CWA does not expressly authorize private plaintiffs to sue States for allegedly failing to amend their water quality standards in conformance with the CWA's requirements. In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981), the Supreme Court held that there are no implied private causes of action to enforce the CWA. In *Sea Clammers,* plaintiffs brought suit against various entities for allegedly discharging waste into New York Harbor and the Hudson River in violation of, inter alia, the CWA. *Sea Clammers*, 453 U.S. at 4-5. The Court found that the CWA contains "unusually elaborate enforcement provisions," including a citizen suit provision and a provision allowing "any interested person" to seek judicial review of various actions by the EPA. *Id*. at 14. The Court held that "[i]n view of these elaborate enforcement provisions," and "[i]n the absence of strong indicia of a contrary congressional intent," it was "compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id*. at 14-15. Accordingly, "private remedies in addition to those expressly provided [in the CWA] should not be implied." *Id*. at 18; *see also Templeton Bd. of Sewer Com'rs. v. American Tissue Mills of Massachusetts, Inc*., 352 F.3d 33, 37 (1st Cir. 2003); *Board of Trustees of Painesville Tp. v. City of Painesville, Ohio*, 200 F.3d 396, 399-400 (6th Cir. 1999) ("Section 1365 is the Clean Water Act's citizen suit provision and is the sole avenue of relief for private litigants seeking to enforce certain enumerated portions of the statute.").

Here, plaintiffs are arguing that the State violated the CWA by 1) not submitting the 2008 Alewife Law to the EPA as required by 33 U.S.C. § 1313(c)(2)(A); 2) not performing a Use Attainability Analysis as required by 40 C.F.R. § 131.10(g)-(j); and 3) allegedly eliminating existing uses and weakening water quality standards in violation of the State's "anti-degradation"

policy. Complaint, ¶¶ 68-70. There is nothing in the CWA, though, that authorizes the plaintiffs to bring such claims against Maine, and Maine is aware of no case in which private individuals successfully sued a State for promulgating or amending water quality standards without complying with the CWA's requirements. Plaintiffs simply do not have a cause of action against Maine.[3]

This is not to say that the plaintiffs are without a remedy. Pursuant to 30 U.S.C. § 1365(a)(2), "any citizen may commence a civil action . . . against the [EPA] where there is alleged a failure of the [EPA] to perform any act or duty under [the CWA] which is not discretionary with the [EPA]." At least one court has recognized that if a State declines to submit an amended water quality standard for approval, the EPA nevertheless could have a mandatory duty to review it. *Miccosukee Tribe of Indians of Florida v. EPA*, 105 F.3d 599, 602-03 (11th Cir. 1997);[4] *see also American Wildlands v. Browner*, 260 F.3d 1192, 1196 (10th Cir. 2001) (plaintiff filed suit against the EPA alleging that it failed to take timely action to approve

[3] When a plaintiff sues in federal court under a federal statute that does not confer an express or implied cause of action, the lawsuit is properly dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Arroyo-Torres v. Ponce Federal Bank, F.B.S.*, 918 F.2d 276, 280 (1st Cir. 1990); *Sagoma Plastics, Inc. v. Gelardi*, 366 F.Supp.2d 185, 190 (D. Me. 2005); *see also Northwest Airlines, Inc. v. County of Kent, Mich*., 510 U.S. 355, 365 (1994).

[4] In some respects, *Miccosukee Tribe* is similar to the present case. There, Florida enacted the Everglades Forever Act, and plaintiff alleged that the Act effectively changed Florida's water quality standards and should have been submitted to the EPA for approval. 105 F.3d at 600-02. Florida denied that the Act changed its water quality standards and claimed that EPA approval was thus not necessary. *Id*. at 601. Plaintiff sued the EPA to compel it to treat the Act as a change in state water quality standards. *Id*. The court found that under the CWA, the EPA "has a mandatory duty to review any new or revised state water quality standards," and that a change in standards could invoke this duty even if the state fails to submit them to the EPA. *Id*. at 602-03. The court held that the district court was required to determine whether the Florida Act was a revised water quality standard. *Id*. at 603. On remand, the district court held that the Act was a change to Florida's water quality standards and remanded the matter to the EPA so that it could either approve or disapprove the change. *Miccosukee Tribe of Indians of Florida v. U.S.*, 1998 WL 1805539, *18-19 (S.D. Fla. 1998). Of course, the principal difference is that in *Miccosukee Tribe*, the plaintiff properly sued the EPA, while here plaintiffs improperly sued the State. *See also Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1090 (11th Cir. 2004) (in a lawsuit against the EPA under the CWA's citizen suit provision, district court was required to determine whether state law "had the practical effect of loosening Florida's water quality standards").

or disapprove state's new and revised water quality standards); *Northwest Environmental Advocates v. EPA*, 268 F.Supp.2d 1255, 1260 -61 (D. Or. 2003) (if state fails to submit a new proposal within 90 days of EPA's rejection of a water quality standard, the EPA has a nondiscretionary duty to promulgate a standard). So, while plaintiffs do not have a cause of action against Maine, a cause of action might lie against the EPA if the 2008 Alewife Law were in fact a change in Maine's water quality standards. *See Miccosukee Tribe of Indians of Florida v. U.S.*, 1998 WL 1805539, *18-19 (S.D. Fla. 1998).

Conclusion

For the reasons set forth above, the State respectfully requests that the Court dismiss plaintiffs' Complaint.

DATED: June 30, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 30th day of June, 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 the following:

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To my knowledge, there are no non-registered parties or attorneys participating in this case.

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