

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MAINE

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| CONSERVATION LAW FOUNDATION, INC. |) | |
| |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. |
| |) | |
| PATRICK KELIHER, Commissioner, Department of Marine Resources, and |) | |
| |) | |
| CHANDLER E. WOODCOCK, Commissioner, Maine Department of Inland Fisheries |) | |
| |) | |
| Defendants. |) | |
| |) | |

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION AND REQUEST FOR RELIEF

1. This complaint follows a prior lawsuit filed by Plaintiff Conservation Law Foundation, Inc. on May 31, 2012. The first suit brought claims against the United States Environmental Protection Agency (EPA) pursuant to Section 505(a)(2) of the Water Pollution Prevention and Control Act (the Clean Water Act or CWA) and to the Administrative Procedures Act (APA). *Conservation Law Foundation v. United States, et.al.*, Dt. No. 1:12-cv-00176-GZS (EPA Suit).

2. In relevant part, the EPA suit alleged that the Maine law that prevents native anadromous alewives (*Alosa pseudoharengus*) from returning to their natural habitat in the St. Croix River, 12 M.R.S.A § 6134 (Alewife Law), effected a change of Maine’s water quality standards that required the EPA to perform its mandatory and nondiscretionary duties to

review and either approve or disapprove the changes in water quality caused by the Alewife Law.

3. Subsequent to the filing of the Complaint in the EPA suit, the EPA in fact reviewed the Alewife Law and in turn issued a letter to the State of Maine dated July 9, 2012 which agreed with the allegations asserted by CLF in the Complaint. In the letter, EPA found the following:

- a. The Alewife Law “constitutes a de facto revision of the narrative criteria at 38 M.R.S. §§ 465 (1)(B) and (2)(B). Therefore, Section 6134(2) is subject to EPA review in accordance with Section 303(c) of the Clean Water Act and EPA's implementing regulations at 40 C.F.R. § 131”;
- b. The Alewife Law must be disapproved “because the revision of the narrative criterion at 38 M.R.S § 465(2)(B) is not accompanied by a sound scientific rationale and the revised criteria no longer support designated uses. *See* 40 C.F.R. § 131.11(a)(1)”;
- c. The Alewife Law “is not effective for Clean Water Act purposes, as provided by 40 C.F.R. § 131.21(e)”;
- d. To “address EPA’s disapproval and protect designated and existing uses, Maine should take appropriate action to authorize passage of riving herring to the portions of the St. Croix River above the Grand Falls Dam.”

See Exhibit A: July 9, 2012 Letter EPA to Maine Attorney General.

4. In response to the letter of July 9, 2012, Maine’s Attorney General wrote to the EPA on August 8, 2012. *See Exhibit B: August 8, 2012 Letter Maine Attorney General to EPA.* Maine’s Attorney General did not dispute EPA’s findings and conclusions in the EPA’s

July 9, 2012 letter. Rather, the Attorney General noted that Maine regards the Alewife Law “to be a fisheries management measure with meaning and effect only in that context” *See Exhibit B.*

5. The EPA’s July 9, 2012 letter constitutes final agency action because it is the EPA’s final determination that the Alewife Law operates as a water quality standards revision and its disapproval of such revision under Section 303 of the CWA.
6. Thereafter, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), the EPA suit was voluntarily dismissed with prejudice. *See Exhibit C: Executed Stipulation of Dismissal.*
7. Plaintiff now seeks a declaration that the Alewife Law is pre-empted and invalid as it conflicts with the federal Clean Water Act, regardless of the Attorney General’s characterization of the Alewife Law as a fishery management law.
8. In the alternative, Plaintiff seeks a declaration that paragraph (2) of the Alewife Law, 12 M.R.S.A. §6134(2) (2008), violates the dormant commerce clause which arises from the U.S. Constitution, Article 1 and/or is an improper exercise of the State’s authority to regulate fish and wildlife pursuant to the 10th Amendment and therefore must be invalidated.
9. Plaintiff seeks an injunction that forbids application of the Alewife Law and orders the Defendants to reopen the fish ladder at Grand Falls Dam to alewives and other anadromous fish.

JURISDICTION AND VENUE

10. This Court has original subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §§ 2201 and 2202 (declaratory judgment and further relief).

11. Venue properly lies in the District of Maine because a substantial part of the acts complained of occurred in this district and the water body that is the subject of the action is located in Washington County, Maine. 28 U.S.C. § 1391(b)(2) and 33 U.S.C. § 1365(c)(1).
12. In addition, Plaintiff maintains a principal place of business in Portland, Cumberland County, Maine. Its members reside throughout Maine and have suffered harm as a result of Defendants' actions and inactions in Washington County, Maine.
13. Finally, venue properly lies in the District of Maine because Plaintiff is suing Maine state officials in their official capacities for acting in violation of federal law. 28 U.S.C. 1391(b)(1). Federal jurisprudence has long recognized an exception to sovereign immunity when a citizen sues state officials in their individual capacities for acting in violation of federal law and seeks declaratory and injunctive relief. *Strahan v. Coxe*, 127 F.3d 155, 166 (1st Cir. 1997); *Coeur d'Alene Tribe of Idaho*, at 521 U.S. 261, 269-271; *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

PARTIES

14. Plaintiff Conservation Law Foundation, Inc. ("CLF") is a nonprofit public-interest environmental advocacy organization incorporated under Massachusetts law and in good standing in Maine, with a principal place of business in Portland, Cumberland County, Maine.
15. Plaintiff has approximately 3,000 members throughout Maine and the other New England states. Plaintiff's members have suffered and continue to suffer particular harm as a result of the events described in this complaint, including:
 - a. Stephen Barr: Stephen Barr is a resident of North Yarmouth, Cumberland County, Maine. Stephen Barr is a member in good standing of Plaintiff CLF.

During the tenure of his membership, Stephen has canoed and fished the St. Croix River and the lack of alewives has adversely impacted his interest in those activities. The Alewife Law has blocked alewives from reaching 98% of their spawning habitat and decimated their population in the St. Croix River, which harms Stephen's interests.

- b. Marion Freeman: Marion Freeman is a resident of Freeport, Cumberland County, Maine, has a family home on the shore of Passamaquoddy Bay in St. Andrews, New Brunswick, and is a member in good standing of Plaintiff CLF. During the tenure of her membership, Marion has boated, fished and recreated in Passamaquoddy Bay and the lack of alewives in the St. Croix River and Passamaquoddy Bay has adversely impacted her interests in those uses. The Alewife Law has blocked alewives from reaching 98% of their spawning habitat and decimated their population in the St. Croix River, which harms Marion's interests.
- c. Clinton "Bill" Townsend: Bill Townsend is a resident of Canaan, Somerset County, Maine. He has been a member in good standing of Plaintiff CLF since shortly after its founding. During the tenure of his membership, Bill has fished in many reaches of the St. Croix watershed. Bill has a deep and abiding interest in the restoration of native anadromous fish such as alewives to Maine's rivers, including the St. Croix River. As President of Maine Rivers, Bill obtained funding and data to support studies that established that alewives are not detrimental to smallmouth bass populations. He also testified before the Legislature in 2008 during debate over the Alewife Law, and has traveled

around the State watching alewife runs and fishing for them. Bill's interests have been adversely impacted by the Alewife Law. The Alewife Law has blocked alewives from reaching 98% of their spawning habitat and decimated their population in the St. Croix River, which harms Bill's interests.

- d. Carlton Davis Pike: Davis Pike is a resident of Lubec, Washington County, Maine. He is a member in good standing of Plaintiff CLF, and is a Board Member of CLF. Davis has a longstanding interest in the health and sustainability of the Passamaquoddy Bay marine ecosystem, of which alewives are a cornerstone. Davis, whose family has resided in Lubec for over 200 years, also has a longstanding interest in the health of the ecosystem in Passamaquoddy Bay and the economies of Lubec and other Downeast Maine communities that depend so heavily on that ecosystem. Davis has observed a decline in the numbers of groundfish in Passamaquoddy Bay since alewives, a critical forage fish, have been blocked from their natural habitat in the St. Croix River. The Alewife Law has blocked alewives from reaching 98% of their spawning habitat and decimated their population in the St. Croix River, which harms Davis's interests.

16. Defendant Patrick Keliher (Defendant Keliher) is sued in his individual official capacity as the Commissioner of the State of Maine Department of Marine Resources. Defendant Keliher shares responsibility for implementing the Alewife Law.

17. Defendant Chandler E. Woodcock (Defendant Woodcock) is sued in his individual official capacity as the Commissioner for the State of Maine Department of Inland Fisheries and Wildlife. Defendant Woodcock shares responsibility for implementing the Alewife Law.

LEGAL BACKGROUND

A. United States Constitution

18. The Supremacy Clause of the United States Constitution provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S.

Constitution, Art. IV, Clause 2.

19. Under the Constitution, state law can be preempted by federal law if: (1) there is an express statement of pre-emption by Congress; (2) the state law conflicts with federal law or (3) the federal government has regulated an area so pervasively that the federal law has occupied the field.

20. Article 1 of the United States Constitution has long been interpreted by federal courts as containing a dormant commerce clause that bans states from enacting laws that impermissibly impede interstate commerce or favor local interests over interstate commerce.

21. The 10th Amendment to the United States Constitution reserves certain powers to the states. In relevant part it empowers states to enact laws that protect and conserve resources like fish. It does not grant authority to enact laws that conflict with federal law or that exceed the legitimate purposes of police power.

B. Federal Clean Water Act

22. The purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA requires all states to

adopt water quality standards for their water bodies, subject to EPA review. 33 U.S.C. § 1313(c)(1). The water quality standards must: (1) designate uses of the waterway (*e.g.*, protection of aquatic life and recreational uses); (2) set water quality criteria, expressed as either narrative or numeric standards; and (3) contain an anti-degradation policy that protects existing uses. *See* 33 U.S.C. § 1313; 40 C.F.R. § 131.10-.12.

23. The water quality standard must take into account the water's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, agricultural, industrial, and other purposes" 33 U.S.C. § 1313(c)(2).

C. State Water Quality Standards

24. Pursuant to the CWA, 33 U.S.C. § 1313, Maine has established four classes of water quality standards for the state's freshwater rivers, ranging from "Class AA" to "Class C" waters, 38 M.R.S.A. § 465, and has enacted an anti-degradation policy mandating that "[e]xisting in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected." 38 M.R.S.A. § 464(4)(F)(1).

25. Class AA is the highest classification, and is applied to waters which are outstanding natural resources with free-flowing and natural habitat for fish and other aquatic life. 38 M.R.S.A. § 465(1).

26. Class A is the second highest classification. Class A waters must be of such quality that they are suitable as habitat for fish and other aquatic life, and the "habitat must be characterized as natural." 33 M.R.S.A. § 465(2)(A). "Natural" is defined to mean "living in, or as if in, a state of nature not measurably affected by human activity." *Id.* at § 466(9).

27. Class B is the third highest classification. Class B waters must be of such quality that they are suitable as unimpaired habitat for fish and other aquatic life. 38 M.R.S.A. § 465(3)(A).

“Unimpaired’ means without a diminished capacity to support aquatic life.” *Id.* at § 466(11).

28. Class C is the lowest classification. Class C waters must be of such quality that they are suitable as a habitat for fish and other aquatic life. 38 M.R.S.A. § 465(4)(A).

29. Class GPA is the sole classification for great ponds and natural lakes and ponds less than 10 acres in size. As with Class A waters, Class GPA waters must provide habitat characterized as “natural” for fish and other aquatic life. 38 M.R.S.A. § 465-A(1).

30. Maine’s anti-degradation law provides, in relevant part, that existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-stream water uses are those uses which have actually occurred on or after November 28, 1975, in or on a water body whether or not the uses are included in the standard for classification of the particular water body. Existing in-stream water uses include:

- a. Aquatic, estuarine and marine life present in the water body;
- b. Wildlife that utilize the water body;
- c. Habitat, including significant wetlands, within a water body supporting existing populations of wildlife or aquatic, estuarine or marine life, or plant life that is maintained by the water body;
- d. The use of the water body for recreation in or on the water, fishing, water supply, or commercial activity that depends directly on the preservation of an existing level of water quality. Use of the water body to receive or transport waste water discharges is not considered an existing use for purposes of this antidegradation policy; and

- e. Any other evidence that, for divisions (a), (b) and (c), demonstrates their ecological significance because of their role or importance in the functioning of the ecosystem or their rarity and, for division (d), demonstrates its historical or social significance.

38 M.R.S.A. § 464(4)(F)(1).

D. The Clean Water Act requires federal approval of state water quality standards

31. Maine, like all other states, is authorized to change or modify water quality standards but must submit any new or revised water quality standards to EPA for review. 33 U.S.C. § 1313(c); 40 CFR § 131.21.

32. Upon review, EPA has a non-discretionary duty to either approve or disapprove the revisions. 33 U.S.C. § 1313(c)(3). The review must determine: whether the state has adopted criteria that protect the designated water uses; whether the State has followed its legal procedures for revising or adopting standards; and whether the State standards which do not include the uses specified in section 101(a)(2) are based upon appropriate technical and scientific data and analyses. 40 C.F.R. § 131.5(a).

33. In addition, the EPA review must contemplate whether the revision or change to the water quality standards complies with the anti-degradation policy each state must adopt. 33 U.S.C. § 1313(d)(4)(B); *see* 40 C.F.R. § 131.12. The change must not degrade the water quality.

34. After CLF initiated its suit against EPA in 2012, EPA reviewed the Alewife Law and determined that it constituted a “de facto” revision of the narrative criteria for the St. Croix River. EPA found that the Alewife Law impermissibly degraded the water quality of the river and therefore was not effective for Clean Water Act purposes. *See paragraph 3 supra and Exhibit A*. EPA told Maine to “address EPA’s disapproval and protect designated and

existing uses ... by authoriz[ing] passage of river herring to the portions of the St. Croix River above the Grand Falls Dam.” *Id.*

E. FACTUAL HISTORY OF ALEWIVES IN THE ST. CROIX RIVER

35. The St. Croix River forms part of the international boundary between the United States and Canada. The river rises in the Chiputneticook Lakes and flows south and southeast, between Calais, Maine and St. Stephen, New Brunswick, emptying into Passamaquoddy Bay.
36. Historically, the St. Croix River had large runs of anadromous fish, particularly Atlantic salmon, American shad, blueback herring and alewife. Until 1825, reports establish that the average annual catch of salmon from the St. Croix at Salmon Falls near Calais, Maine was 18,000 and alewives came “in such numbers that it is supposed they could never be destroyed. The number of shad were [sic] almost incredible.” *See Exhibit D: Flagg, “Historical and Current Distribution and Abundance of the Anadromous Alewife (Alosa pseudoharengus) in the St. Croix River,” A Report to the State of Maine Atlantic Salmon Commission, May 30, 2007 (Flagg Report).*
37. Alewives and their close “cousin,” blueback herring (collectively referred to as river herring), are anadromous fish that spend the majority of their time at sea but return to freshwater to spawn.
38. Both species are native to Maine rivers and both have co-evolved and co-existed with other native fish in Maine’s streams, rivers, ponds and lakes for thousands of years.
39. Alewives have historically returned to Maine’s rivers and streams in early May to early June to spawn in upstream lakes and ponds. A female alewife can produce 60,000 – 100,000 eggs. Seaward migration of young alewives runs from late July to November.

40. Alewives are a critical cornerstone species for the ecology of freshwater, estuarine, and marine environments. Alewives:

- a. are a key food source for many species including striped bass, bluefish, tuna, cod, haddock, halibut, American eel, brook trout, rainbow trout, brown trout, lake trout, landlocked salmon, smallmouth bass, largemouth bass, pickerel, pike, white and yellow perch, seabirds, bald eagle, osprey, great blue heron, gulls, terns, cormorants, seals, whales, otter, mink, fox, raccoon, skunk, weasel, fisher, and turtles;
- b. are the preferred bait for the spring lobster fishery in Downeast Maine;
- c. provide alternate prey for osprey, eagles, great blue heron, loons and other fish-eating birds who might otherwise forage on downstream migrating juvenile Atlantic salmon;
- d. provide cover for upstream migrating adult salmon that may be preyed upon by eagles or osprey;
- e. provide cover for young salmon in estuaries and open ocean where they might be captured by seals; and
- f. are managed by thirty-five Maine municipalities with commercial harvesting rights to alewives on thirty-nine streams and rivers. These runs provide revenue to the towns, many of which lease their fishing privileges to independent fishermen.

Maine Department of Marine Resources, *River Herring Fact Sheet*,

<http://www.maine.gov/dmr/searunfish/alewife/index.htm>.

41. Beginning in 1825, a series of dams on the lower St. Croix River blocked the passage of anadromous fish, including alewives, to their natural spawning grounds.

42. By the late 1880s, with anadromous fish all but extirpated, other fish, particularly the non-native smallmouth bass, were introduced into the St. Croix River and its chain of lakes, creating a new and popular sport fishery.
43. At the beginning of the 20th century, the United States and Canada entered into the 1909 Boundary Water Treaty. The treaty established the International Joint Commission (“IJC”) to investigate, resolve and prevent boundary water disputes and issues between the countries, including the St. Croix River.
44. The IJC authorized construction of the Grand Falls Dam (circa 1915) on the St. Croix River in or around Kelleyland, Washington County, Maine. The dam created Grand Falls Flowage, a sprawling impoundment of water.
45. The IJC also authorized construction of the Woodland Dam (circa 1915) downriver of the Grand Falls Dam in or around Baileyville, Washington County, Maine. This dam created the Woodland Lake Impoundment.
46. The United States authorized the maintenance, use and operation of both dams in 1916. *An Act to Authorize the Maintenance and Operation of Dams Across the St. Croix River At Baileyville and Grand Falls, Maine*, ch. 407, 39 Stat. 534 (1916). In relevant part, that Act provided that the dams must comply with all United States laws currently in effect or subsequently enacted by Congress. *Id.*
47. At the time construction was authorized, both the Woodland Dam and the Grand Falls Dam were required to include fish passage for alewives and other anadromous fish.
48. Neither the Grand Falls Dam nor the Woodland Dam are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) under section 23 (b) of the Federal Power Act because they were built prior to 1920. 16 U.S.C. § 816.

49. Milltown Dam sits below the Woodland and Grand Falls Dams, and is the first dam on the St. Croix River. It is the oldest hydroelectric dam in Canada, and was constructed in the late 1880's with a fishway to allow passage of anadromous fish, including alewives.
50. In 1964, state-of-the-art fishways were reconstructed at the Woodland and Grand Falls Dams, for the purpose of passing alewives and other fish.
51. The fishway at Milltown Dam, however, allowed only limited passage until the early 1980's, when its fishway was modernized. In 1981, before the Milltown Dam's fishway was modernized, less than 200,000 alewives returned to the St. Croix. The combination of effective fish passage at the Milltown Dam, Woodland Dam and Grand Falls Dams led to a resurgence of alewives in the St. Croix River and its lakes and ponds so that by 1987, more than 2.6 million alewives returned. *See Exhibit D: Flagg Report at 6.*
52. In 1989 Maine upgraded the high quality waters of the St. Croix River and its tributaries from the outlet of Chiputneticook Lakes to its confluence with the Woodland Lake Impoundment from Class B to Class A waters. At the time, more than a million alewives returned annually to the St. Croix River to spawn. *Id.*
53. This upgrade to Class A required that the St. Croix River provide "natural" habitat, *i.e.*, habitat characterized as if in "a state of nature not measurably affected by human activity," for alewives and other anadromous fish. This use cannot be degraded without review or approval by EPA.
54. As required by the CWA, Maine submitted this change in the water quality standard for the St. Croix River, to the EPA, which reviewed and approved the Class A designation.

55. At the same time that alewives were restored to the St. Croix River in the millions, the population of smallmouth bass in one of the lakes above the Grand Falls Dam, Spednic Lake, decreased significantly.
56. Local fishing guides and companies, with an economic interest in the smallmouth bass fishery, claimed that the decrease in smallmouth bass populations was somehow related to the restoration of the native alewife. In response to significant political pressure but in the absence of any scientific support, in 1995 the Maine Legislature passed “An Act to Stop the Alewives Restoration Program in the St. Croix River,” as emergency legislation (the “1995 Alewife Law”). 40 L.D. 520, 117th Legis. (Me. 1995). In summary, the emergency preamble stated that alewives and smallmouth bass compete for the same food source, the competition could significantly affect the bass fishery, and therefore an emergency existed. *Id.* The law ordered the State to require the owners of the Woodland and Grand Falls dams to configure or operate the fishways on them in a manner that prevented the passage of alewives. *Id.*; 12 M.R.S.A. § 6134.
57. The 1995 Alewife Law prevented alewives from accessing 100% of their “natural habitat” above the Woodland and Grand Falls Dams. It caused the St. Croix River alewife population to plummet from millions of fish in 1995 to just 900 fish in 2002. *Exh. D: Flagg Report at 6-7.*
58. Contrary to the 1995 Alewife Law’s preamble, several subsequent scientific, peer-reviewed studies concluded that alewives and smallmouth bass can and do in fact coexist without detriment to either species. *See e.g.,* Kircheis, *et al.*, *Analysis of Impacts Related to the Introduction of Anadromous Alewives Into a Small Freshwater Lake in Central Maine, USA* (2002, revised 2004), at <http://www.maine.gov/dmr/searunfish/reports/lakegeorge04.pdf>;

see also Willis, St. Croix River Alewife Smallmouth Bass Interaction study (2006) at <http://www.maine.gov/dmr/searunfish/reports/stcroixalewifebass06.pdf>.

59. In light of the scientific evidence, an effort to repeal the 1995 Alewife Law was mounted in 2008. That effort met with very limited success -- the Maine Legislature passed legislation that allowed fish passage at Woodland Dam but continued to prohibit fish passage at Grand Falls Dam. 12 M.R.S.A. § 6134 (as enacted by Public Law, Chapter 587, LD 1957) (“2008 Alewife Law”).
60. Allowing operation of the fish passage facility at the Woodland Dam restored access to just two percent of the natural spawning habitat for alewives. Alewives continued to be blocked from 98 percent of their natural spawning habitat in the St. Croix River above the Grand Falls Dam.
61. The number of alewives to return to the river remains severely depleted – in 2008, only 12,261 alewives returned to the St. Croix. In 2012, that number had increased to 36,000, still far below the numbers when alewives were able to use the fish passage facilities at the Grand Falls Dam to gain access to native spawning areas.
62. In 2009, Maine changed the water quality designation of a portion of the upper St. Croix and the impoundment behind the Grand Falls Dam. That section, the Grand Falls Impoundment between Black Cat Island and Route 1, had retained Class B status in 1989 because of a discharge. By 2009, the discharge was eliminated and the water was upgraded to Class GPA to recognize it functioned like a Class A pond rather than a Class B river system.
63. In May of 2012, CLF filed a complaint against EPA demanding that they perform their federally mandated duty to review the Alewife Law to determine if it effected a change in

the water quality of the St. Croix River. EPA responded to the EPA suit by conducting the necessary review and determining that the Alewife Law did in fact effect an impermissible change in the Class A and AA water quality of the St. Croix River above Grand Falls Dam. EPA disapproved the Alewife Law and found it “[wa]s not effective for Clean Water Act purposes, as provided by 40 C.F.R. § 131.21(e). *See Exh. A, EPA Letter.*

64. EPA concluded that, “[t]o address EPA’s disapproval and protect designated and existing uses, Maine should take appropriate action to authorize passage of river herring to the portions of the St. Croix River above the Grand Falls Dam.” *Id.*

65. In response to this letter, the Attorney General for the State of Maine issued a letter dated August 8, 2012 indicating that Maine applied the Alewife Law as a matter of state fisheries management law and not within the context of the Clean Water Act, *see Exh B*, and that Maine did not intend to act in compliance with EPA’s finding that Maine should, without restriction, allow passage of river herring at the Grand Falls Dam in order to gain access to the remaining 98% of its native habitat.

COUNT I: CONFLICT PREEMPTION

66. Plaintiff repeats and re-alleges the allegations in the foregoing paragraphs as if fully set forth herein.

67. As EPA determined, the Alewife Law, 12 M.R.S.A. § 6134(2)(2008) constituted a new or revised water quality standard that, under federal law, had to be reviewed and approved or disapproved by the EPA.

68. The Alewife Law was not approved by the EPA under the CWA and EPA regulations because the revision of the narrative criterion at 38 M.R.S. § 465(2)(B) was not

accompanied by sound scientific rationale and the revised criteria no longer support designated uses.

69. The State of Maine does not deny this fact in its August 8, 2012 reply letter. *See Exh B.*

Instead the State takes the position that it is applying the Alewife Law for fishery management purposes.

70. It is not possible for the State of Maine to apply the Alewife Law for fishery management purposes without violating the water quality standards and criteria mandated by the CWA because the Alewife Law impermissibly eliminates the natural habitat for native alewives which existed at the time the upper St. Croix was designated Class AA and A waters.

Eliminating access to natural habitat for native fish is in direct conflict with the CWA.

71. In the alternative, enforcing the Alewife Law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as set forth in the CWA and its implementing regulations because the Alewife Law impermissibly eliminates access to the natural habitat for native alewives which existed at the time the upper St. Croix was designated Class AA and A waters in violation of federal law.

72. For these reasons, enactment of the Alewife Law must be enjoined as it conflicts with federal law and is preempted under the Supremacy Clause.

COUNT II: DORMANT COMMERCE CLAUSE

73. Plaintiff repeats and re-alleges the allegations in the foregoing paragraphs as if fully set forth herein.

74. Despite the considerable scientific evidence that alewives do not compete with smallmouth bass for food or habitat and are vital to the St. Croix ecosystem, in 2008 the Legislature only

amended the Alewife Law to allow alewives to pass through the Woodland Dam but not the Grand Falls Dam, reopening only 2% of the natural spawning habitat for alewives.

75. The continued ban on alewives above the Grand Falls Dam resulted from a desire to favor the interests of in-state fishing guides and companies and not from any sound science that required a ban on alewives to protect the small mouth bass population.
76. The dormant commerce clause limits a State's authority to impose regulations that impinge on interstate commerce.
77. The Alewife Law impermissibly impinges on interstate commerce because, among other impacts, it has severely depleted an important bait fish that supports an interstate fish and lobster trade.
78. Moreover the burden placed on interstate commercial fishermen and lobstermen is clearly excessive in relation to the putative local benefits of the Alewife Law, since there is no science supporting the need to ban alewives from the upper St. Croix in order to protect populations of small mouth bass in several lakes within the St. Croix watershed.
79. For these reasons, the Alewife Law violates the dormant commerce clause derived from the United States Constitution, Article 1.

COUNT III: IMPROPER EXERCISE OF POLICE POWER

80. Plaintiff repeats and re-alleges the allegations in the foregoing paragraphs as if fully set forth herein.
81. Pursuant to the Tenth Amendment and in the absence of conflicting federal regulation, Maine may regulate fish and wildlife to conserve species.
82. The Alewife Law must be enjoined as invalid because it is an impermissible exercise of police power and serves no legitimate purpose to conserve fish stock. In fact it does the

opposite because science shows that small mouth bass can not only co-exist with alewives, but thrive because alewives, a filter fish, serve to improve water quality in the lakes where small mouth bass have been introduced. In addition, the law, rather than conserving stocks of alewives, has caused a severe depletion in the species.

83. The Alewife Law is an impermissible exercise of police power because it conflicts with the CWA, and nothing in the CWA reserves a state's ability to regulate fish within the sphere of the CWA's mandate that waters provide natural habitat. If Congress had intended for States to retain primary jurisdiction over natural habitat and fishery, it could have included such language in the CWA. *See e.g.* the National Invasive Species Act, 16 U.S.C. § 4725 (contains a savings clause preserving a State's jurisdiction over non-invasive fish species).
84. For these reasons, the Alewife Law must be declared invalid and the State enjoined from enforcing 12 M.R.S.A. § 6134(2)(2008).

PRAAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

85. Declare that 12 M.R.S.A. § 6134(2)(2008) is an invalid law on the grounds that it: conflicts with and is preempted by the CWA; violates the dormant commerce clause; and constitutes an impermissible exercise of police power;
86. Issue an injunction requiring the Defendants to disregard 12 M.R.S.A. § 6134(2)(2008) and open passage of the Grand Falls Dam to alewives and other anadromous fish species;
87. Award Plaintiff its reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation; and, grant such other and further relief as the Court may deem just and proper.

Dated: October 15, 2012

/s/ Sean Mahoney
SEAN MAHONEY
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