IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs move for summary judgment. They seek an order declaring that Paragraph two of ME Pub. Law Ch. 587, 123rd Legislature; 12 M.R.S.A. §6134(2) (2008) (the "Alewife Law") is invalid because it violates the Supremacy Clause of the United States Constitution, and prohibiting Defendants from implementing the law. The grounds for this motion are set forth below.

INTRODUCTION

Alewives and blueback herring are ecologically, economically, historically, and culturally important to the St. Croix River basin and the entire Gulf of Maine ecosystem. However, in

2008, Maine enacted the Alewife Law directing the Commissioner of the Department of Marine Resources ("DMR") and the Commissioner of the Department of Inland Fisheries and Wildlife ("IFW") to eradicate alewives and blueback herring (collectively, "alewives") from 98 percent of their historic spawning and nursery habitat in the St. Croix River basin. The erroneous premise behind the Alewife Law is that eradicating alewives in the St. Croix is beneficial to smallmouth bass, a non-native fish favored by sport fishermen. By enacting the Alewife Law and eradicating an indigenous fish, Maine downgraded state water quality standards for the St. Croix River basin.

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

Plaintiffs are a conservation group and two individuals who use the St. Croix River and coastal Gulf of Maine waters. They have been aesthetically and economically harmed by the absence of alewives above the Grand Falls Dam required by the Alewife Law, and the related decrease in the Gulf of Maine population of alewives. They seek an order declaring the Alewife

Law unconstitutional under the Supremacy Clause and prohibiting the Commissioners of DMR and IFW from implementing the law.

JURISDICTION

This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Under 28 U.S.C. § 1331, federal courts have jurisdiction over an action seeking declaratory and injunctive relief against state officials on the grounds that federal law preempt state law. *E.g., Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 641-644 (2002); *Local Union No. 12004 USW v. Massachusetts*, 377 F.3d 64, 72-75 (1st Cir. 2004).

STATEMENT OF FACTS

Maine enacted the Alewife Law in 2008. ME Pub. Law Ch. 587, 123rd Legislature; 12 M.R.S.A. §6134(2) (2008). Paragraph two of the law directs the DMR and IFW Commissioners to "ensure that the fishway on the Grand Falls Dam [on the St. Croix River] is configured or operated in a manner that prevents the passage of alewives." "Alewives" is defined by law to mean both alewives, *Alosa pseudoharengus*, and blueback herring, *Alosa aestivalis*. 12 M.R.S.A. § 6001(1-A).

Defendants, the current Commissioners of the two agencies, are implementing the Alewife Law. Statement of Undisputed Material Facts ("SUMF") ¶ 3. The Alewife Law blocks alewives from approximately 98 percent of their spawning and nursery habitat. SUMF ¶ 38. Maine did not submit the Alewife Law for review or approval to the EPA as a change in water quality standards. SUMF ¶ 41.

Alewives are indigenous to the St. Croix River basin. SUMF ¶ 9.[1] They are ecologically, economically, historically, and culturally important to the St. Croix River basin and

[1] The premise of the Alewife Law was that eradicating alewives from the St. Croix River basin would benefit the smallmouth bass fishery. SUMF ¶¶ 31, 32. Scientific studies have proven this premise wrong. SUMF ¶¶ 34, 35.

the entire Gulf of Maine ecosystem. SUMF ¶ 10. The St. Croix River once produced the largest populations of alewives in New England. SUMF ¶ 11 Today, however, only a small fraction of that former population is found in a short section of the St. Croix River below the Grand Falls Dam. SUMF ¶ 12. Alewives play a keystone role in the river and coastal ocean ecosystem, serving as food for many other species of fish, marine mammals, and birds. SUMF ¶ 13. They are fished for by commercial and recreational fishermen, and are valuable to fisherman and related coastal economies as bait for lobster and recreational fishermen, and as forage for commercially valuable species like cod, halibut, and tuna. SUMF ¶¶ 15, 18, 19, 20.

Additional undisputed facts, including facts relating to standing, are referred to as necessary in the argument section, below. For a more detailed recitation of material facts, Plaintiff's refer this Court to its Statement of Undisputed Material Facts filed herewith.[2]

STANDARD OF REVIEW

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (amended December 1, 2010).

LEGAL AND REGULATORY BACKGROUND

The Law Of Preemption.

Article VI, clause 2 of the Constitution, the Supremacy Clause, provides that the laws of the United Sates "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws

[2] Supporting evidence for the SUMF is largely from government reports and publications, which are posted on government websites. These reports are authenticated by the Fleming declaration (Fed. R. Evid. 901(a)), and as official publications (Fed. R. Evid. 902(5)) and public records and reports (Fed. R. Evid. 901(7)). Reports that are prepared by Commissioner Olsen's Maine Department of Marine Resources are not hearsay because they are admissions. Fed. R. Evid. 801(d)(2). Alternatively, these (and government reports from other government agencies Plaintiffs submit) are admissible under the public records and reports exception to the hearsay rule. Fed. R. Evid. 803(8); *E.g.*, *PennEnvironment v. GenOn Northeast Management Company*, 2011 U.S. Dist. LEXIS 29098, at *32-33 (W.D. Penn. March 21, 2011).

of any State to the Contrary notwithstanding." U.S. Const., art. VI, clause 2. As recently stated by the First Circuit:

> To simplify a complex area of law, preemption arguments are generally divided into three categories. The first, express preemption, results from language in a statute revealing an explicit congressional intent to preempt state law. The second, field preemption, is that Congress may implicitly preempt a state law by creating a pervasive scheme of regulation. The third category is conflict preemption. In this category, state law is pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Weaver's Cove Energy, LLC. v. Rhode Island Coastal Resources Management Council, 589 F.3d 458, 472-73 (1st Cir. 2009) (internal quotes and citations omitted). The validity of state regulation must be judged against the "federal statutory structure," and there is "[n]o artificial presumption" of non-preemption of state rules. *U.S. v. Locke*, 529 U.S. 89, 107-08 (2000).

State law can be preempted not only by a federal statute, but also by federal agency action, including agency regulations. *FitzGerald v. Harris*, 549 F.3d 46, 55 (1st Cir. 2008); *see e.g. Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (Department of Transportation motor vehicle safety standard preempts state "no airbag" law). "'[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation'… ." *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (quoting *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-269 (1986)).

A state law that is preempted is "a nullity," *Massachusetts Association of Health Maintenance Organizations v. Ruthardt*, 194 F.3d 176, 178 (1st Cir. 1999), and "unenforceable," *New York v. FCC*, 486 U.S. at 64. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) ("state law that conflicts with federal law is without effect").

The Clean Water Act And State Water Quality Standards.

Pursuant to the Commerce Clause of the U.S. Constitution, Congress mandated that the nation's waters be managed consistent with the requirements of the Clean Water Act. U.S. CONST. art. I, sec. 8, cl. 3; 33 U.S.C. §1251 et. seq.; 40 C.F.R. § Part 131. The U.S. Constitution grants Congress the further power "[t]o make all Laws which shall be necessary and proper" for executing its enumerated powers and all other powers vested by the Constitution in the U.S. Government. U.S. CONST. art. I, sec. 8, cl. 18.

Congress declared that the objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA sets a "national goal" to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. §1251(a)(2). To further the objective and goal of the CWA, Congress required states to adopt water quality standards that "protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA]. 33 U.S.C. § 1313(c)(2)(A).

State water quality standards must consist of designated uses of its waters (such as habitat for fish or other aquatic life) and criteria to protect such uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.2. State water quality standards must also include an "antidegradation" policy to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12.

The CWA and its implementing regulations set forth mandatory procedural and substantive requirements for revising a state water quality standard, including that: (1) water quality standards and any amendments to them must be submitted to and approved by EPA before they become effective,33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.21; (2) once a designated use is established in state water quality standards and approved by EPA, a less

protective "sub-category" of that use for a specific waterbody may not be created unless and until a Use Attainability Analysis ("UAA") is performed and its conclusion, showing that the designated use is not achievable, is approved by EPA, 40 C.F.R. § 131.10(g), and; (3) where waters are meeting their designated uses, water quality standards can be revised only in compliance with the antidegradation policy, 33 U.S.C. 1313(d)(4)(B) and 40 CFR § 131.12.

In Maine, the Legislature is responsible for promulgating and revising water quality standards, 38 M.R.S.A. § 464(1) and (2), and for creating subcategories of designated uses, 38 M.R.S.A. § 464(3). Pursuant to the CWA and its implementing regulations, Maine adopted water quality standards for the St. Croix River Basin above the Grand Falls Dam that were approved by the EPA. 38 M.R.S.A. §467(13). These standards are discussed more fully below. Also pursuant to the CWA, Maine water quality standards include an antidegradation policy that protects existing in-stream uses and the water quality necessary to protect such uses. 38 M.R.S.A. § 464(4)(F)(1).

ARGUMENT

I. THE 2008 ALEWIFE LAW AND THE ACTIONS BY THE COMMISSIONERS OF DMR AND IFW TO IMPLEMENT THAT LAW ARE PREMPTED BY THE CWA AND EPA REGULATIONS.

A. The Alewife Law Lowered Maine's Water Quality Standards for the St. Croix River Basin Above the Grand Falls Dam.

Maine's water quality standards for the St. Croix River basin above the Grand Falls dam are classified as Class, A, B, and GPA, depending on the waterbody. 38 M.R.S.A. § 467(13). All of these classifications require that the waters be of such quality that they are suitable for the legally designated uses of fish habitat and for the human uses of recreation and fishing. 38 M.R.S.A. § 465(2)(A), (3)(A); 465-A(1)(A).

In addition, for waters that are classified as A and GPA, "[t]he habitat must be characterized as natural." 38 M.R.S.A. §§ 465(2)(A); 465-A(1)(A). "Natural" is defined by statute as meaning "in, or as if in, a state not measurably affected by human activity." 38 M.R.S.A. § 466(9). For waters that are classified as B, the habitat must be "unimpaired." 38 M.R.S.A. § 465(3)(A). "Unimpaired" is defined as "without a diminished capacity to support aquatic life." 38 M.R.S.A. § 466(11). The stringency of this standard is evidenced by the requirement that Class B waters "must be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community" even when there are discharges into the waters. 38 M.R.S.A. § 465(3)(C).

The 2008 Alewife Law lowers the St. Croix River basin water quality standards for a number of reasons. First, the 2008 Alewife Law negatively changes the narrative criteria for Class A, GPA, and B waters. By requiring the Grand Falls dam to block the passage of alewives and eradicating the species from 98 percent of the spawning and rearing habitat in the river basin, the Legislature required the river basin to (1) be "measurably affected by human activity" (thus lowering the class of A and GPA waters) and (2) have a "diminished capacity to support aquatic life" (thus lowering the class of B waters). *See Miccosukee Tribe of Indians of Florida v. United States of America*, 1998 U.S. Dist. LEXIS 15838, at *47-49 (S.D. Fla. 1998) (where a state statute authorizes actions that directly violate an existing state water quality standard, a change in water quality standards has occurred).[3]

Second, it is settled that fish passage "'clearly bear[s] on the attainment of the designated uses of fishing, recreation, and fish habitat.'" *S.D. Warren Company v. Maine Dep't of Envtl.*

[3] The fact that the Legislature did not call the 2008 Alewife Law a change in water quality standards is irrelevant. As the Court of Appeals for the Eleventh Circuit held, it is the *effect* of a law that determines whether a change in water quality standards occurs, not how that law is described by a state or what procedures were used to enact it. *Florida Public Interest Research Group Citizen Lobby, Inc. v. Florida Dept. of Envt'l Prot.,* 386 F.3d 1070, 1089-1090 (11th Cir. 2004).

Prot., 2004 Me. Super. LEXIS 115, at *10 (Cumberland 2004), *aff'd,* 2005 ME 27, 868 A.2d 210 (Me. 2005), *aff'd,* 547 U.S. 370 (2006) (quoting *Bangor Hydro-Electric Co. v. Board of Envtl. Prot.* 595 A.2d 438, 443) (Me. 1991). Maine regularly requires hydroelectric dams to provide fish passage in order to assure attainment of these designated uses. *E.g., S.D. Warren v. Bd. of Envt'l Prot.*, 2004 Me. Super. LEXIS 115, at *10-14; *Save Our Sebasticook, Inc. v. Board of Envt'l. Prot.*, 2007 ME 102, 928 A.2d 736, 739 (Me. 2007).[4] By requiring alewife passage to be eliminated at Grand Falls dam, the Legislature decided that the designated uses of fishing, recreation and fish habitat need not be attained, which constitutes a lowering of water quality standards.

Third, in requiring alewives to be eradicated from almost all of the St. Croix River basin, the Legislature decided that those waters must no longer support all indigenous species, and that the resident biological community must be changed so as to be void of the keystone aquatic species. This means that the Legislature has lowered the water quality standard to a classification below Class C. *S.D. Warren v. Dept. of Envt'l Prot.,* 2004 Me. Super. LEXIS 115, at * 13-14 ("Class B and C waters also must 'be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community.' [Statutory cites omitted]."); 38 M.R.S.A. § 465(4)(C) (Class C standards).[5]

[4] Under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, hydroelectric dams must obtain a state "water quality certification" before they may obtain a license to operate from the Federal Energy Regulatory Commission ("FERC"). A Section 401 water quality certification must contain provisions that ensure the licensed activity will not violate or prevent attainment of state water quality standards or other state water quality requirements. *S.D. Warren v Maine Bd. of Envt'l Prot.*, 540 U.S. 370 (2006). (Plaintiffs note that Grand Falls dam is not FERC-licensed because it is so old.)

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

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

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

BEP, In the Matter of S.D. Warren Company Presumpscot River Hydro Projects Water Quality Certification, Findings of Fact and Order on Appeal, p. 9 (October 2, 2003) (a copy of this order is attached as Fleming Ex. L).

Fourth, the waters above Grand Falls dam are degraded under the "antidegradation policy" set forth in EPA regulations. Under the CWA, the antidegradation policy requires state water quality standards to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. 40 C.F.R. § 131.12. An "existing use" is defined as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards. 40 C.F.R. § 13.3(e). "An existing use can be established by demonstrating that fishing, swimming, or other uses have actually occurred since November 28, 1975, or that the water quality is suitable to allow such uses to occur. Where an existing use is established, it must be protected even if it is not listed in the water quality standards as a designated use. Tier 1 requirements are applicable to all surface waters." EPA interpretive guideline, *available at:*

http://water.epa.gov/scitech/swguidance/standards/adeg.cfm. Partially or completely eliminating any existing use is not allowed under the antidegradation policy. U.S. EPA, *Water Quality Handbook*, 4.4.2. Maine's water quality standards contain an antidegradation policy that, consistent with the requirement of the CWA, protect the existing uses of Maine waters and the water quality necessary to protect such uses. 38 M.R.S.A. § 464(4)(F)(1).

The 2008 Alewife Law violates the federal antidegradation policy because it weakens the instream use of the waters above Grand Falls dam as fish habitat for indigenous alewives, and other species that depend upon the presence of alewives. *Miccosukee Tribe v. U.S.*, 1998 U.S. Dist. LEXIS 15838, at *53-54 (holding that a change in narrative water quality standards for the Everglades is invalid because it violated the antidegradation policy).[6]

The Alewife Law can also be viewed as unlawfully creating a less protective subcategory of the Class A, GPA, and B water quality standards applicable to these waters without undertaking mandatory procedural steps including performance of a UAA and approval of its conclusion by EPA, 40 C.F.R. § 131.10(g); SUMF ¶ 41-43. The 2008 Alewife Law creates a subcategory of use, only applicable to the St. Croix River basin above Grand Falls, of "natural except for alewives and alewife habitat." Water quality standards require that in all waters of the State, indigenous species must be protected. As a result of the Alewife Law, only in the St. Croix River basin must an indigenous species be eradicated. *See generally, FPL Energy Maine Hydro LLC v. Dept. of Envtl. Prot.*, 2007 ME 97, 926 A.2d 1197, 1207(Me. 2007) (discussing EPA disapproval of Maine Legislature's resolve to treat dam impoundments different from natural lakes on the ground that the Legislature created a subcategory without following CWA-required procedures and receiving EPA approval).

[6] Alewives migrated passed Grand Falls dam and populated the St. Croix River basin above the dam after November 28, 1975, SUMF ¶¶ 30-31, and thus the designated uses relating to the presence of alewives there are "existing uses."

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

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

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

> …state water quality standards and any amendments to them *must be approved by EPA before they become effective. 33 U.S.C. § 1313; 40 C.F.R. § 131.21; see also NRDC v. EPA, 279 F.3d 1180, 1183 (9th Cir. 2002).* Therefore, any state law or regulatory action that amends or has the effect of amending water quality standards but that fails to receive EPA approval, is not legally effective. *Id.*

Brief of Maine Dep't of Envtl. Prot. in FPL Energy v. BEP, LEXSEE 2006 Me S. Ct. Briefs 6365, at *6 (September 11, 2006) (emphasis in original).

Because EPA did not approve the change to water quality standards for the St. Croix River basin contained in the Alewife Law, and because Maine never even submitted the Alewife Law to EPA for approval, the law and actions by the Maine's fisheries commissioners to implement it are preempted by the CWA and its implementing regulations.[7]

Equally explicit and unambiguous are the CWA and its implementing regulations prohibiting creation of a less protective "subcategory" of designated use for a specific waterbody unless and until a UAA is performed and its conclusion, showing that the designated use is not achievable, is approved by EPA. 40 C.F.R. § 131.10(g). Here, no UAA was performed and approved, so to the extent the Alewife Law is considered to create a water quality standard subcategory, it is expressly preempted.

The CWA is also explicit and unambiguous in its prohibition against revising water quality standards so as to violate the antidegradation policy. The Act provides that for waters meeting or exceeding "levels necessary to protect the designated use for such waters… any water quality standard…may be revised *only* if such revision is subject to and consistent with the antidegradation policy established under this section. 33 U.S.C. 1313(d)(4)(B); *see also* 40 C.F.R

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

§ 131.12. As discussed above, the Alewife Law does not comply with the antidegradation policy and therefore must be preempted.

Lastly, Congress unambiguously sought to achieve the CWA' overall goal to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, 33 U.S.C. § 1251(a), through the CWA's provisions controlling adoption and revision of water quality standards. They not only required that changes to water quality standards must receive EPA approval, but also unambiguously stated that "[s]uch standards shall be such as to protect the public health or welfare, *enhance* the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A) (emphasis added). As discussed above, there is no question that the Alewife Law has the substantive effect of degrading, not enhancing, the quality of Maine's waters and thus must be preempted for this reason as well.

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

C. The 2008 Alewife Law And The Actions By Defendants To Implement It Unlawfully Conflict With The CWA And Must Be Preempted.

Under conflict preemption principles, when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" it is preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67, 74 (1941) (finding that the Pennsylvania Alien Registration Act's registration requirement was unenforceable where it stood as an obstacle to the full purposes and objectives regarding immigration that Congress had already provided in the Federal Alien Act); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-373 (2000);

Grant's Dairy Maine, LLC v. Comm'r of Maine Dept. of Ag., Food & Rural Resources, 232 F.3d 8, 15 (1st Cir. 2000).

As stated by the Supreme Court, to achieve the "ambitious goals" of the CWA set forth in 33 U.S.C. § 1251(a) (to restore and maintain chemical, physical, and biological integrity of waters and to attain water quality which provides for protection and propagation of fish, shellfish, and wildlife), the Act "establishes distinct roles for the Federal and State Governments." *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology,* 511 U.S. 700, 704 (1994). *See also Raymond Proffitt Foundation v. U.S. EPA*, 930 F. Supp. 1088, 1098 (D. Penn. 1996) ("The Act, and § 1313 in particular, sets forth state and federal responsibilities concerning promulgation of a water quality standard."). "Section 303 of the Act…requires each State, *subject to federal approval*, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. [33 U.S.C.] §§ 1311(b)(1)(C), 1313.". *PUD No. 1* 511 U.S. at 704 (emphasis added). If a state does not satisfy federal minimum requirements in establishing a water quality standard, EPA must reject it. 33 U.S.C. § 1313(c)(3); *see generally, PUD NO. 1,* 511 U.S. at 704-705 (state water quality standards must comply with requirements in 33 U.S.C. § 1251(a)(2) and the antidegradation policy). Also under the Act, a state can create a less protective subcategory of a designated use for a waterbody, but only if an extensive UAA is conducted pursuant to 40 C.F.R. § 131.10(g).

Here, Maine subverted the water quality standard scheme that was carefully crafted by Congress and EPA, and thus the Alewife Law is an obstacle to the "accomplishment and execution" of Congress' purpose and objective. This case is the mirror image of *FitzGerald,* 549 F.3d 46, where the First Circuit held a Maine law regarding management of the Allagash Wilderness Waterway ("AWW") was not preempted by the Wild and Scenic Rivers Act

("WSRA"). Under the WSRA, Maine is responsible for managing the AWW, which is a wild river in the Wild and Scenic Rivers System. The State enacted a law regarding access to the AWW that Plaintiffs argued was preempted by the WSRA under "stands as an obstacle" conflict preemption. The First Circuit rejected that argument, finding that the WSRA did not "mandate" "any specific standard" for the State to meet in managing the wild river, and that "the WSRA defines a limited role for the federal government, a role primarily of cooperation with and assistance to states… ." *Id.* at 55, 56.

By contrast, the CWA sets specific standards for states to meet in revising water quality standards, and defines an extremely prominent role (indeed, a veto power role) for the federal government in the revision of water quality standards – EPA must approve them or they do not go into effect. *Cf. Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.* 627 F.3d 730, 734 (9th Cir. 2010) (provision of Clean Air Act requiring EPA approval before California can adopt standards for emissions from non-road vehicles and engines "creates a zone of implied preemption… . Any such standard or requirement that the EPA has *not* duly authorized, therefore, is impliedly preempted… .") (emphasis in original).

Water quality standards must also serve the purposes of the CWA, 33 U.S.C. § 313(c)(2)(A), and must 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. The Alewife Law, however, directs "[t]he commissioner and the Commissioner of Inland Fisheries and Wildlife [to] ensure that the fishway on the Grand Falls Dam is configured or operated in a manner that *prevents* the passage of alewives." 12 M.R.S.A. § 6134(2)(2008) (emphasis added). This is in direct conflict with the CWA's objectives to restore and maintain

the physical and biological integrity of waters, and to attain water quality which provides for protection and propagation of fish, shellfish, and wildlife.

D. The Clean Water Act And Its Implementing Regulations Contain A Comprehensive Regulatory Scheme For Establishing And Revising Water Quality Standards That Preempts Maine's Alewife Law.

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

As described *supra* in section I.B., the CWA and its implementing regulations provide a comprehensive and extremely detailed scheme for how water quality standards can be revised. These provisions leave no room for states to create their own procedures or substantive criteria regarding water quality standard revisions, or to bypass the CWA's procedures and criteria to simply lower water quality standards by masking the change as something else. *Aloha Airlines*, 464 U.S. at 13. The CWA's comprehensive scheme for establishing and revising water quality standards makes clear Congress's intent to leave no room to for Maine to unilaterally lower its water quality standards for the St. Croix River.

II. PLAINTIFFS HAVE STANDING TO BRING THIS SUIT.

The First Circuit recently stated:

> A plaintiff wishing to establish standing must show "a concrete and particularized injury in fact, a causal connection that permits tracing the claimed injury to the defendant's actions, and a likelihood that prevailing in the action will afford some redress for injury." [Cites omitted]. The plaintiff need not show that "the defendant's actions are the very last step in the chain of causation" for injury." [Cite omitted]. It suffices if the plaintiff can show "injury produced by determinative or coercive effect upon the action of someone else." [Cite omitted].

Weaver's Cove, 598 F.3d at 467. The facts supporting are fully set forth in the SUMF ¶ (44-67) and accompanying declarations of Douglas H. Watts, Kathleen McGee, and Ed Friedman (Chair of FOMB), and will only be generally described here.

Plaintiffs have suffered an injury in fact. For instance, Douglas Watts, a professional nature photographer (who has photographed alewives), wants to travel to the St. Croix River basin above Grand Falls to photograph alewives but cannot because the Alewife Law blocks the alewives from entering the upper reaches of the river. SUMF ¶ 58. He would also fish above Grand Falls, but does not because the river basin there is in such a sadly unnatural state due to the eradication of alewives above the dam. SUMF ¶ 60. Kathleen McGee, an artist and political consultant, finds spending time in nature has spiritual qualities, provides artistic inspiration, and provides recreational opportunities. SUMF ¶ 64. Ms. McGee regularly spends time on the coast and in Gulf of Maine waters, including the lower St. Croix River. SUMF ¶ 64. Her experience and enjoyment of these waters is diminished because their natural biodiversity has been significantly impaired by the eradication of alewives from virtually all of the St. Croix River basin. SUMF ¶ 65. FOMB has members who own property along, work in, and recreate on the St. Croix River, and throughout the Gulf of Maine. SUMF ¶ 55. Their economic opportunities and enjoyment of these waters are diminished by the removal of alewives from 98 percent of the St. Croix River Basin. SUMF ¶¶ 48, 54, 58. *Animal Welfare Institute v. Martin*, 623 F.3d 19, 25-26 (1st Cir. 2010) (finding injury in fact where trapping regulations that will "interfere with Canada lynx's natural state and may increase animals' risk of death" reduce "the likelihood that" plaintiffs will observe lynx in their natural state); *Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 284 (1st Cir. 2006) (concluding that "[p]laintiffs in environmental suits may predicate claims of injury on aesthetic or recreational harms"); *United States Public Interest*

Research Group v. Heritage Salmon, 2001 U.S. Dist. LEXIS 13283, at *22, *26 (D. Maine August 28, 2001) (finding economic injury in environmental suit sufficient to prove standing) and (concluding that where harm to migratory fish is involved, injury in fact not limited to users of "narrowly confined waterbody" where offending conduct is occurring).

Plaintiffs' injuries are also traceable to the Alewife Law. The law literally eliminates alewives from a waterbody where Plaintiffs want to observe them, and clearly diminishes the natural biodiversity of the St. Croix River and the Gulf of Maine by blocking one of their most important keystone species from its tremendously productive spawning and rearing habitat. SUMF ¶¶ at 13, 14, 16, 38. This Court can redress Plaintiffs' injuries by striking down the Alewife Law and enjoining its implementation, which would allow alewives to return to their spawning habitat in the St. Croix River basin where they would have the opportunity to replenish their population to natural historic levels.[8]

CONCLUSION

For the reasons set forth above, Maine's Alewife Law, Section 1, Paragraph two of Pub. Law Ch. 587, 123rd Legislature; 12 M.R.S.A. §6134(2), and the actions by the Maine Commissioners of Marine Resources and Inland Fisheries and Wildlife to implement this law are pre-empted by the federal Clean Water Act and its implementing regulations and violate the Supremacy Clause of the U.S. CONST. art. VI, cl. 2. Plaintiff's request an order declaring the Alewife Law unlawful and prohibiting the Commissioners of DMR and IFW from implementing the law.

Respectfully submitted this 30th day of June, 2011

[8] FOMB has associational standing to sue on behalf of its members because (1) its members have standing to sue in their own right (Mr. Watts and Ms. McGee are FOMB members); (2) FOMB's members' interests are germane to FOMB's purpose (SUMF ¶ 52); and (3) the claim asserted and the relief requested does not require the individual participation of members. *U.S. PIRG*, 2001 U.S. Dist. LEXIS, at *19.

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

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