

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MAINE

CONSERVATION LAW FOUNDATION,)
INC.)

Plaintiff,)

v.)

Civil Action No.

UNITED STATES of AMERICA,)
ENVIRONMENTAL PROTECTION)
AGENCY,)

LISA P. JACKSON, Administrator,)
United States Environmental Protection)
Agency,)

and H. CURTIS SPALDING, Regional)
Administrator, Region 1,)
United States Environmental Protection)
Agency,)

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION AND REQUEST FOR RELIEF

1. Plaintiff Conservation Law Foundation, Inc. brings this citizen suit pursuant to Section 505(a)(2) of the Water Pollution Prevention and Control Act (known as the Clean Water Act (“CWA”), 33 U.S.C. § 1365(a)(2)) and pursuant to the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 701-706.
2. Plaintiff requests that this Court review 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”), and determine that it effects a change of

Maine's water quality standards that requires the United States Environmental Protection Agency ("EPA"), its Administrator, Lisa P. Jackson, in her official capacity, and its Regional Administrator for Region 1, H. Curtis Spalding, in his official capacity, to perform mandatory and nondiscretionary duties pursuant to 33 U.S.C. §§ 1313(c)(2) and 1313(c)(3). Those duties include the duty to review and approve or disapprove the changes made by the State of Maine through the Alewife Law to the water quality standards for the St. Croix River.

3. Plaintiff seeks declaratory judgment and injunctive relief under 28 U.S.C. §§ 2201 and 2202, attorneys' fees and costs of litigation under 33 U.S.C. § 1365(d), and such other relief as this court deems just and proper under 28 U.S.C. § 2202.
4. In addition or in the alternative to the relief sought under the CWA, Plaintiff seeks relief pursuant to the APA, based on the Defendants' arbitrary and capricious actions, and attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504; 28 U.S.C. § 2412.

JURISDICTION AND VENUE

5. This Court has original subject matter jurisdiction pursuant to 33 U.S.C. § 1365(a)(2), (district court jurisdiction of citizen suits against administrator under the CWA), 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §§ 2201 and 2202 (declaratory judgment).
6. Plaintiff has satisfied the statutory pre-suit notice requirements by serving certified letters dated and postmarked July 29, 2011 (the "Notice Letters") on the Defendants. 33 U.S.C. § 1365(b)(1)(A). *See* Exhibit A: Letters and Proof of Service.
7. More than sixty days have passed since Plaintiff served the Notice Letters.

8. Defendants have failed to respond to the Notice Letters. They have failed to this day to perform their mandatory duty to review changes made by the State of Maine to the water quality standards for the St. Croix River, first in 1995 and again in 2008 by the Alewife Law.
9. 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).
10. In addition, venue properly lies in Maine because 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. Finally, Defendants conduct business in the State of Maine from their regional office in Massachusetts.

PARTIES

11. 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. Plaintiff is a person as defined in the CWA. 33 U.S.C. §1362(5).
12. 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 failure of EPA to perform its duty to review the Alewife Law, which lowered the water quality of the St. Croix by eliminating access to 98% of alewife spawning habitat and decimating the alewife population in the St. Croix River, continues to harm his 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 failure of EPA to perform its duty to review the Alewife Law, which lowered the water quality of the St. Croix by eliminating access to 98% of alewife spawning habitat and decimating the alewife population in the St. Croix River, continues to harm her 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 failure of EPA to perform its duty to review the Alewife Law, which lowered the water quality of the St. Croix by eliminating access to 98% of alewife spawning habitat and decimating the alewife population in the St. Croix River, continues to harm his 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 failure of EPA to perform its duty to review the Alewife Law, which lowered the water quality of the St. Croix by eliminating access to 98% of alewife spawning habitat and decimating the alewife population in the St. Croix River, continues to harm his interests.

13. Defendant United States Environmental Protection Agency ("EPA") is a federal governmental agency headquartered in Washington, D.C., with ten regional offices. The

EPA is responsible for the overall administration and enforcement of the CWA, including review of and approval or disapproval of changes in water quality standards and anti-degradation policies pursuant to 33 U.S.C. §§ 1313(c)(2) and 1313(c)(3).

14. Defendant Lisa Jackson (“Defendant Jackson”) is sued in her official capacity as the Administrator of the EPA. Defendant Jackson bears ultimate responsibility for ensuring that the EPA carries out its mandatory and nondiscretionary duty to review and approve or disapprove new or revised water quality standards promulgated by states.
15. Defendant H. Curtis Spalding (“Defendant Spalding”) is sued in his official capacity as the Administrator for EPA’s New England Region (“Region 1”). EPA Region 1 includes jurisdiction over Maine. As Region 1 Administrator, Defendant Spalding is charged with the regional supervision, administration and enforcement of the CWA, including ensuring that the EPA performs its nondiscretionary and mandatory duty to review and approve or disapprove new or revised water quality standards.

CLEAN WATER ACT AND RELATED STATE LAW

16. 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.

17. 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, and agricultural, industrial, and other purposes" 33 U.S.C. § 1313(c)(2).
18. 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).
19. 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).
20. 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).
21. 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).
22. 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).

23. 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).
24. 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).

EPA DUTY TO REVIEW WATER QUALITY STANDARDS

25. A State 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. Even if a State fails to submit a new or revised standard, EPA has a mandatory duty to review any state law or policy that effects a change to state water quality standards.
26. 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).
27. 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.
28. If the EPA approves of the revised standards, the EPA must notify the state of its approval. 33 U.S.C. § 1313(c)(3). If the EPA determines that the revised standards are not consistent with the CWA, the EPA must notify the state of the changes required to correct the inconsistency. 33 U.S.C. § 1313(c)(3). If the state fails to adopt such changes, the EPA must promptly promulgate new standards consistent with the CWA. 33 U.S.C. § 1313(c)(4).

FACTUAL BACKGROUND

HISTORY OF ALEWIVES ON THE ST. CROIX RIVER

29. 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.
30. 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 B: 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”)*
31. Alewives, and their close “cousin,” blueback herring (commonly collectively referred to as river herring), are anadromous fish that spend the majority of their time at sea but return to freshwater to spawn.
32. 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.
33. 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.
34. 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>.

35. 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.
36. 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.

37. 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.
38. 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.
39. 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.
40. 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.*
41. 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.
42. 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.
43. 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.

44. 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.
45. 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. Flagg Report at 6.
46. 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 to the St. Croix River to spawn. *Id.*
47. 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.
48. As required by the CWA, Maine submitted this change in the water quality standard for the St. Croix River, along with changes for other water bodies in Maine, to the EPA, which reviewed and ultimately approved them.
49. 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.

THE ALEWIFE LAWS

50. Parties 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.
51. The 1995 Alewife Law was not submitted to the EPA for review and approval or disapproval. The EPA did not review the 1995 Alewife Law for consistency with the CWA and the St. Croix River’s Class A water quality standard.
52. 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 to just 900 fish in 2002. Exh. B: Flagg Report at 6-7.
53. 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>.

54. In light of the scientific evidence, an effort to repeal the 1995 Alewife Law was mounted in 2008. That effort met with minimal success -- the Maine Legislature passed legislation that only 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”).
55. 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.
56. The 2008 Alewife Law created a habitat on the St. Croix River that could not be characterized as “natural” as it was in fact “measurably affected by human activity,” namely the effective extirpation of alewives from their native spawning habitat.
57. As with the 1995 Alewife Law, the 2008 Alewife Law was not submitted to EPA for review. EPA did not review the 2008 Alewife for consistency with the CWA or the St. Croix River’s Class A water quality standard.
58. The number of alewives to return to the river remains severely depleted – in 2008, only 12,261 alewives returned to the St. Croix.
59. In 2009, Maine again changed the 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.

60. The change was submitted to and approved by EPA. EPA failed to consider whether this portion of the river could meet the GPA water quality standards or, if it did review the change, failed to properly apply the GPA water quality standards to that section of the river.

**COUNT I: VIOLATION OF MANDATORY DUTY, CWA SECTION 303(C) AND
REGULATIONS**

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

62. States must submit any new or revised water quality standard to EPA for review. 33 U.S.C. § 1313(c)(2); 40 CFR § 131.20(c).

63. EPA has a mandatory duty to review any new or revised water quality standard, whether a State submits it or not. 33 U.S.C. § 1313(c)(3); 40 CFR § 131.21(b).

64. In 1989, Maine raised the water quality of the St. Croix River above the Woodland Lake Impoundment from Class B to Class A. At that time, the river provided natural habitat for millions of alewives through successful restoration efforts including operating and effective fish ladders at the Woodland and Grand Falls Dams.

65. As required by the CWA, Maine submitted the change to EPA for review and the EPA approved that change.

66. In 1995, Maine's legislature passed the first Alewife Law with the express purpose and effect of barring passage of alewives at both the Woodland and Grand Falls Dams, preventing them from reaching 100% of their spawning habitat in the St. Croix River watershed.

67. The 1995 Alewife Law degraded the water quality standard of the St. Croix above the Woodland Lake Impoundment by eliminating natural habitat mandated by its Class A water quality standards.
68. The 1995 Alewife Law, as either a direct change in the water quality standard for the St. Croix River or as a policy change that affects the application and implementation of that water quality standard, should have been reviewed by the EPA for consistency with the CWA and the St. Croix River's Class A water quality standards. 33 U.S.C. § 1313(c)(3); 40 CFR § 131.20(c).
69. The EPA did not review the Alewife Law enacted in 1995.
70. In 2008, Maine's legislature revised the 1995 Alewife Law.
71. Despite the considerable scientific evidence that alewives do not compete with smallmouth bass for food or habitat and were vital to the St. Croix ecosystem, 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.
72. The Alewife Law enacted in 2008 continued to degrade the Class A water quality standard of the St. Croix River above the Grand Falls Dam Impoundment by eliminating the alewives' access to their natural habitat.
73. The 2008 Alewife Law, as either a direct change in the water quality standard for the St. Croix River or as a policy change that affects the application and implementation of that water quality standard, should have been reviewed by the EPA for consistency with the CWA and with the St. Croix River's Class A water quality standards. 33 U.S.C. § 1313(c)(3); 40 CFR § 131.20(c).

74. The EPA did not review the 2008 Alewife Law to determine its consistency with the CWA and the St. Croix River's Class A water quality standards.
75. By failing to perform its nondiscretionary duty to review and approve or disapprove of the changes effected by the Alewife Law to the St. Croix River's water quality standards, the EPA has violated its mandatory duties under 33 U.S.C. § 1313(c)(3) and EPA's regulations.

COUNT II: VIOLATION OF APA

76. Plaintiff repeats and re-alleges the allegations in the foregoing paragraphs as if fully set forth herein.
77. In 1989, DEP presented and the Maine Legislature enacted legislation that changed the designation of the St. Croix River from Class B to Class A from its source at Chiputneticook Lake to the Woodland Dam Impoundment. In 2009, DEP presented and the Maine legislature enacted legislation that changed the designation of a portion of the Grand Falls Impoundment from Class B to Class GPA.
78. DEP presented both changes to the EPA for review.
79. The EPA failed to carry out a complete and thorough review of the 2009 changes in designation as required by the CWA and its enabling regulations.
80. A complete and thorough review of the 2009 changes would have included review of scientific studies and evidence that alewives which were present and abundant in the Grand Falls Impoundment portion of the St. Croix River when the water was designated Class A in 1989 were no longer present in 2009.
81. If the EPA had reviewed this fact, it could not have approved the 2009 Class GPA water quality standard because, between 1989 (when it last reviewed the water quality standard for the upper St. Croix) and 2009, Maine had enacted laws that changed and downgraded

the water quality of the St. Croix river by degrading its habitat from the Class A habitat standard of “natural” to, at best, the Class B habitat standard of “unimpaired.”

82. If EPA had properly reviewed the 2009 change in the water quality standard for the St. Croix River, it would have had to order Maine to take steps to meet the St. Croix’s Class A designation by allowing alewives to reach their natural spawning habitat.

83. EPA’s failure to properly review the 2009 change in water quality was arbitrary, capricious and not in accordance with the CWA and its implementing regulations, in violation of the APA, 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that EPA's failure to perform its mandatory duty to review the Alewife Law(s) as part of the entirety of the State of Maine's submission of its water quality standards violated the CWA, [33 U.S.C. § 1313\(c\)\(3\)](#), and alternatively, that EPA's decision not to review the Alewife Law(s) as either a water quality standard or policy affecting water quality standards was arbitrary, capricious and otherwise not in accordance with law, under the APA, 5 U.S.C. § 706(2)(A);
2. Declare that EPA's approval of Maine’s 2009 water quality standards for the St. Croix River was arbitrary, capricious and otherwise not in accordance with law, under the APA, [5 U.S.C. § 706\(2\)\(A\)](#);
3. 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: May 31, 2012

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