

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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FRIENDS OF MERRYMEETING BAY,))
DOUGLAS H. WATTS, and))
KATHLEEN McGEE,))
))
<i>Plaintiffs,</i>)	Civil No. 1:11-cv-167-JAW
))
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))
))
<i>Defendants.</i>))
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**STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56 and Local Rule D. Me. R. 56, Plaintiffs submit this Statement of Undisputed Material Facts in support of their Motion for Summary Judgment.

Defendants

1. Defendant Norman H. Olsen is the Commissioner of the Maine Department of Marine Resources (“DMR”). Plaintiffs request the Court to take judicial notice of this fact pursuant to Fed. R. Evid. 201.

2. Defendant Chandler E. Woodcock is the Commissioner of the Maine Department of Inland Fisheries and Wildlife (“IFW”). Plaintiffs request the Court to take judicial notice of this fact pursuant to Fed. R. Evid. 201.
3. Defendants, acting in their official capacities, implement the Alewife Law. Email from Patrick Keliher to Doug Watts (November 16, 2010, 12:58 EST) (Declaration of Watts ¶ 7, Ex. A).

The Defendant’s and Other Government Documents Recognize the Importance of Alewives and Blueback Herring

4. The Maine Department of Marine Resources (“DMR”) posted a “Maine River Herring Fact Sheet” on its website, available at <http://www.maine.gov/dmr/searunfish/alewife/index.htm>. Declaration of Roger Fleming (“Fleming Dec.”) ¶ 2 and Ex. A.
5. The United States Fish and Wildlife Service (“USFWS”) posted a fact sheet entitled “All About Maine Alewives” (“Maine Alewives Fact Sheet”) on its website, available at <http://www.fws.gov/GOMCP/pdfs/alewife%20fact%20sheet.pdf>. Fleming Dec. ¶ 3 and Ex. B.
6. DMR produced the Maine Alewives Fact Sheet in conjunction with the USFWS Gulf of Maine Program and a non-governmental organization, Maine Rivers. Maine Alewives Fact Sheet, p. 1 (Fleming Dec. Ex. B).
7. The alewife, *Alosa pseudoharengus*, and the blueback herring, *Alosa aestivalis*, (collectively “river herring”) are anadromous fish that spend the majority of their life at sea but must return to ancestral spawning grounds (in freshwater) to spawn. Maine River Herring Fact Sheet, p. 1, 4 (Fleming Dec. Ex. A).

8. Alewives and blueback herring are native to Maine rivers and have coevolved and co-existed with other native fish and wildlife in Maine's streams, rivers, ponds and lakes for thousands of years. Maine River Herring Fact Sheet, p. 1 (Fleming Dec. Ex A).
9. Alewives are indigenous to the St. Croix River basin. Maine Rivers: Two Rivers Report, p. 9 ("genetic differences observed among alewife populations from different sub-drainages in the St. Croix watershed imply homing of alewives to their natal streams") (Fleming Dec. ¶ 11, Ex. J); Annual Report 2010, p. 1 ("Fossil evidence has indicated that alewives have been present in the basin [St. Croix watershed] since prehistoric times.") (Fleming Dec. ¶ 6, Ex. E).
10. Alewives are ecologically, economically, historically, and culturally important to the St. Croix River basin and the entire Gulf of Maine ecosystem. Maine Alewives Fact Sheet, p. 1 (Fleming Dec. Ex. B); St. Croix River: State of Watershed Report, pp. 8, 16, 12, 37 (Fleming Dec. ¶ 7 , Ex. F); Annual Report 2010, p. 1 (Fleming Dec. ¶ 6 , Ex. E).
11. The Saint Croix River once produced one of the largest populations of alewives in New England. Lewis N. Flagg. 2007. Historical and Current Distribution and Abundance of the Anadromous Alewife (*Alosa pseudoharengus*) in the St Croix River. Atlantic Salmon Commission, pp. 2-4 (Fleming Dec. ¶ 9, Ex. H).
12. Today, only a small fraction of that former population is found in a short section of the St. Croix River below the Grand Falls Dam. St. Croix River: State of Watershed Report, p. 39 (Fleming Dec. ¶ 7, Ex. F).
13. 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. Maine River Herring Fact sheet, p. 2 (Fleming Dec. Ex. A).

14. Alewives make up part of the natural biodiversity in the Merrymeeting Bay. NOAA Coastal Resource Coordination Program, pp. 1, 2 (Fleming Dec. ¶ 14, Ex. M).
15. Alewives are forage for 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. Maine River Herring Fact Sheet, p. 2 (Fleming Dec. Ex. A).
16. Alewives provide cover for upstream migrating Atlantic salmon that could be preyed upon by eagles or osprey. Maine River Herring Fact Sheet, p. 2 (Fleming Dec. Ex. A).
17. Historically, of all the migratory fish that came up Maine's rivers, alewives were the most abundant. Maine River Herring Fact Sheet, p. 3 (Fleming Dec. Ex. A).
18. Alewives and blueback herring are used for bait. Maine River Herring Fact Sheet, p. 3 (Fleming Dec. Ex. A).
19. Adult alewives are preferred bait for the spring lobster fishery. Maine River Herring Fact Sheet, p. 2 (Fleming Dec. Ex. A).
20. There are 35 Maine municipalities that have commercial harvesting rights to alewives on 39 streams and rivers. These runs provide revenue to the towns, many of which lease their fishing privileges to independent fishermen. Maine River Herring Fact Sheet, p. 2 (Fleming Dec. Ex. A).
21. The river herring population in Maine has plummeted during the last two centuries. Maine Alewives Fact Sheet, p. 1 (Fleming Dec. Ex. B).
22. Dams are one of the reasons the river herring population in Maine has decreased. Maine Alewives Fact Sheet, p. 1 (Fleming Dec. Ex. B).

23. The National Marine Fisheries Service (“NMFS”) considers both the alewife and blueback herring a “Species of Concern.” NMFS, “Species of Concern - River Herring,” available at http://www.nmfs.noaa.gov/pr/pdfs/species/riverherring_detailed.pdf (Fleming Dec. ¶ 4, Ex. C).

24. DMR and USFWS consider it important to restore the alewife population in Maine. Maine Alewives Fact Sheet, p. 4 (Fleming Dec. Ex. B).

25. DMR and USFWS have stated:

If we give alewives a chance by helping restore them to their ancestral spawning grounds, alewives will once again play an important role in bringing our rivers, lakes, estuaries and oceans back to life.

Maine Alewives Fact Sheet, p. 4 (Fleming Dec. Ex. B).

Grand Falls Dam

26. The Grand Falls dam on the St. Croix River was built in 1915 by the St. Croix Water Power Company and Spragues Falls Manufacturing Company. Order of Approval, p 1, (Fleming Dec. ¶ 5, Ex. D). The International Joint Commission authorized the construction Grand Falls dam in 1915. International Joint Commission (“IJC”) Order of Approval (Fleming Dec. ¶ 5, Ex. D).

27. Grand Falls dam is owned by Woodland Pulp LLC. The immediate preceding owner was Domtar Corporation. International St. Croix River Watershed Board (“St. Croix Board”), “Annual Report 2010,” p. 5 (Fleming Dec. ¶ 6, Ex. E).

Fishways On The St. Croix River And At Grand Falls Dam

28. Alewife management strategies in the St. Croix watershed historically have been geared toward the design, construction, and maintenance of fishways to allow passage around

dams. St. Croix Board, “St. Croix River: State of the Watershed Report,” p. 38, available at http://www.ijc.org/rel/boards/saint/watershed_report.pdf (Fleming Dec. ¶ 7, Ex. F).

29. Prior to 1980, an old fishway at Milltown allowed only limited passage of alewives. In 1981, completion of a new fishway at Milltown Dam, together with modern fishways constructed in 1964 at Woodland dam and Grand Falls dam, greatly improved alewife passage on the St. Croix and resulted in a resurgence of the alewife population. Anglers began to see schools of alewives below West Grand Lake dam and in Spednic Lake. St. Croix River: State of the Watershed Report,” p. 32 (map), 38 (Fleming Dec. Ex. F).
30. Between 1981 and 1987, alewife returns in the St. Croix River watershed increased from 169,000 to 2,625,000. “St. Croix River: State of the Watershed Report,” p. 38 (Fleming Dec. Ex. F).

The 1995 Law Prohibiting Alewife Passage At Grand Falls Dam

31. In the 1980s, some blamed the decline in the smallmouth bass population in Spednic Lake, located in the St. Croix River Basin, on alewives. Maine River Herring Fact Sheet, p. 6 (Fleming Ex. A).
32. Concern over the negative impact alewives might have on the smallmouth bass sport fishery led Maine to enact 1995 legislation to block migrating alewives from ascending the St. Croix River past the Grand Falls Dam and the Woodland Dam, located just downstream from the Grand Falls Dam, to reach their spawning grounds (“1995 Alewife Law”). Maine River Herring Fact Sheet, p. 6 (Fleming Ex. A).
33. The 1995 Alewife Law restricted alewife access to spawning grounds and was the primary cause of a precipitous decline in the St. Croix alewife population from hundreds

of thousands of fish in the mid-1990s to just 900 fish in 2002. Maine River Herring Fact Sheet, p. 6 (Fleming Ex. A).

Scientific Studies Show Alewives Do Not Negatively Impact Smallmouth Bass

34. In the 1990s, a 10-year collaborative study conducted by DMR, IFW, and the Maine Department of Environmental Protection at Lake George concluded that alewives had no negative impacts to the overall water quality, zooplankton, or recreational fisheries at Lake George. Maine River Herring Fact Sheet, p. 5 (Fleming Dec. Ex. A). DMR has posted the report of the study, 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> (Fleming Dec. ¶ 10, Ex. D).

35. A study published in 2006 by Theo V. Willis, a research scientist at the University of Southern Maine,

... found no evidence from available historic data for Downeast Maine lakes that the presence of alewives systematically harmed smallmouth bass in terms of length, condition or growth...Alewives were not significant predators on smallmouth bass...Based on one year’s data, therefore, competition for food between the two species does not appear to be important...Smallmouth bass tournament returns in the past few years were similar in lakes with and lakes without alewives, suggesting that the quality of sport fishing for bass does not differ systematically between lakes with and lakes without anadromous alewives.

River Herring Fact Sheet, p. 5 (Fleming Dec. Ex. A). DMR has posted this study at <http://www.maine.gov/dmr/searunfish/reports/stcroixalewifebass06.pdf> (Fleming Dec. ¶11, Ex. J).

The Alewife Law

36. In March of 2008, the Maine Legislature considered LD 1957, An Act To Restore Diadromous Fish in the St. Croix River ME Pub. Law Ch. 587, 123rd Legislature (“Alewife Law”) (Fleming Dec. ¶ 12, Ex. K).
37. Paragraph two of the Alewife Law directs the DMR and IFW Commissioners to “ensure that the fishway on the Grand Falls Dam is configured or operated in a manner that prevents the passage of alewives.” Alewife Law (Fleming Dec. ¶ 12, Ex. K)
38. As a result of the Alewife Law, alewives and blueback herring are blocked from approximately 98 percent of their natural spawning and nursery habitat in the St. Croix River watershed. International St. Croix River Watershed Board, “St. Croix River - State of the Watershed Report”, p. 37 (2008) (Fleming Dec. ¶ 7, Ex. F).
39. DMR and IFW entered into an agreement with the then-owner of Grand Falls dam, Domtar, specifying how alewives are to be prevented from using the dam’s fishway: a “stop log” is installed to block access to the fishway during an approximately three month period beginning April 1st of each year that alewives seek to migrate upstream.

“Memorandum of Understanding Blocking access of sea-run alewives into the Grand Falls Flowage at the Grand Falls Dam fishway; A joint agreement of the State of Maine Department of Inland Fisheries and Wildlife, The State of Maine Department of Marine Resources Bureau of Sea-Run Fisheries and Habitats, and Domtar (2010) (Fleming Dec. ¶ 8, Ex. G) (“Memorandum of Understanding”).
40. The 2008 Alewife Law is implemented consistent with the MOU by the Commissioners of DMR and IFW. Email from Patrick Keliher to Doug Watts (November 16, 2010, 12:58 EST) Declaration of Douglas Watts (“Watts Dec.”) ¶ 7, Ex. A).

41. The Alewife Law was never submitted to EPA by the State of Maine. (Watts Dec. ¶ 6).
42. The State of Maine never submitted any analysis that would be necessary to change Maine's water quality standards was ever submitted to EPA. (Watts Dec. ¶ 6).
43. EPA never issued an approval of the Alewife Law as a change in water quality standards. (Watts Dec. ¶ 6).

Facts Relating To Standing

44. Plaintiff Friends of Merrymeeting Bay ("FOMB") is a non-profit Maine corporation with over 400 members. (Declaration of Ed ("Friedman Dec.") ¶ 4).
45. FOMB undertakes research, advocacy, land conservation, education, and litigation activities in order to preserve the ecological, aesthetic, historical, recreational, and commercial values of Merrymeeting Bay, its watershed, and the Gulf of Maine (the part of the Northwest Atlantic Ocean where Merrymeeting Bay is located). (Friedman Dec. ¶ 5).
46. FOMB has members who live near, own property near, and recreate on and near Merrymeeting Bay and the rivers that flow into the Bay. (Friedman Dec. ¶ 6).
47. Among other activities, FOMB members kayak and canoe, recreationally fish, hike, photograph, and observe aquatic life and wildlife in and around Merrymeeting Bay and its watershed. (Friedman Dec. ¶ 7).
48. FOMB members receive economic value from Merrymeeting Bay through, among other activities, commercial fishing and guiding. (Friedman Dec. ¶ 8).
49. FOMB members are interested in maintaining the natural biodiversity of the Merrymeeting Bay watershed and the Gulf of Maine. (Friedman Dec. ¶ 11).

50. FOMB has long recognized the important connections between Maine's rivers and the Gulf of Maine. FOMB's Healthy Rivers, Healthy Gulf program is devoted to educating the public and policy makers about these connections. (Friedman Dec. ¶ 9).
51. Alewives are prey for many fish species, birds, and other animals in the Gulf of Maine including the Merrymeeting Bay and its watershed, which are harmed when less prey is available. (Friedman Dec. ¶ 10, 12); River Herring Fact Sheet, pp. 3-4 (Fleming Ex. A).
52. FOMB members' enjoyment of canoeing, kayaking, recreational fishing, photography, and nature observing are diminished because of this decrease in the natural biodiversity. Declaration of Douglas Watts ("Watts Dec.") ¶¶ 3, 5; (Declaration of Kathleen McGee ("McGee Dec.") ¶¶ 3, 4, 5, 8).
53. The Gulf of Maine and Merrymeeting Bay populations of some species that feed on alewives, such as striped bass and endangered Atlantic salmon, are low and their recovery is hindered by the reduction of alewives. Maine Alewives Fact Sheet (Fleming Dec. Ex. B); Saunders, et al., Maine's Diadromous Fish Community: Past, Present, and Implications for Atlantic Salmon Recovery. 2006. Fisheries 31(11):542-44 (Fleming Dec. ¶ 15, Ex. N).
54. If the populations of these species were to recover in the Bay, economic opportunities for FOMB members would increase because they would be able to guide more trips on the Bay and commercially fish for more species in the Bay. (Friedman Dec. ¶ 13).
55. FOMB members also travel specifically to the St. Croix River to carry out their work, kayak and canoe, recreationally fish, hike, photograph, and observe aquatic life and wildlife, and have advocated to reopen passage at Grand Falls dam, but to no avail. (Friedman Dec. ¶ 10).

56. Plaintiff Douglas H. Watts lives in Augusta, Maine. (Watts Dec. ¶ 1).
57. Mr. Watts is a professional photographer who specializes in photographing native fish and wildlife in Maine and New England, including alewives. His work, including photographs of alewives, is displayed in museums, appears in periodicals and on websites, and is used by federal and state fish and wildlife agencies and non-governmental conservation organizations. An example of an alewife photograph taken by Mr. Watts can be seen at the United States Fish and Wildlife Service website page on Maine alewives, at <http://www.fws.gov/GOMCP/pdfs/alewife%20fact%20sheet.pdf>. Mr. Watts uses special equipment to photograph and video fish, including alewives, underwater. (Watts Dec. ¶ 2).
58. Mr. Watts wants to photograph alewives in the St. Croix watershed above Grand Falls dam, but cannot because their access to the watershed is blocked at the dam. As a result, his ability to pursue his profession is harmed. If the 2008 Alewife Law was invalidated and alewives were allowed to migrate past Grand Falls dam, Mr. Watts would photograph alewives in the St. Croix watershed upstream of the dam. (Watts Dec. ¶ 3).
59. Mr. Watts is an outdoors writer who has written about alewives for the popular press. In addition, he has authored a research paper using previously unknown historic documents related to alewives on the Saint Croix River, Historic Documents Related to the Anadromous Fisheries of the St. Croix River, Maine and Canada (Maine Rivers 2005), which has been incorporated into a larger work, A Documentary History of the Alewife in Maine and New England (Watts 2011, in press). (Watts Dec. ¶ 4).
60. Mr. Watts has fished for native lake-dwelling Atlantic salmon and other fish species in the Saint Croix River watershed above Grand Falls dam, at Grand Lake Stream below the

outlet of West Grand Lake. However, he now considers that area to be in a sadly unnatural state due to the eradication of alewives, and is not interested in fishing there.

Mr. Watts would return to fish in the St. Croix River watershed above Grand Falls dam if the 2008 Alewife Law were invalidated and alewives were allowed to migrate past Grand Falls dam. (Watts Dec. ¶ 5).

61. Mr. Watts is a member of FOMB. (Watts Dec. ¶ 6).

62. Kathleen McGee resides in Bowdoinham, Maine. (McGee Dec. ¶ 1).

63. Ms. McGee is an artist, political consultant, and coordinator for FOMB's Healthy Rivers, Healthy Gulf Program. (McGee ¶ 1, 7).

64. Ms. McGee finds that nature has spiritual and transcendental qualities, and it is personally important to her to spend time in nature to experience these. She also finds that spending time in nature provides her with artistic inspiration. For these reasons, and as a form of recreation, Ms. McGee regularly kayaks, canoes, hikes, fishes, and observes nature on the waters and coast of the Gulf of Maine, including on the lower portion of the St. Croix River and Merrymeeting Bay. (McGee Dec. ¶ 2).

65. Ms. McGee would like the St. Croix River and other areas of the Gulf of Maine to be as natural as possible. Ms. McGee's enjoyment of these waters is diminished because alewives have been eradicated from 98% of the St. Croix River basin. (McGee Dec. ¶¶ 3-5, 7-8).

66. To Ms. McGee, the law blocking alewives and blueback herring from migrating past Grand Falls dam is a particularly dramatic assault on the natural biodiversity of the St. Croix River and the Gulf of Maine and has diminished Ms. McGee's enjoyment and use of the St. Croix River and the Gulf of Maine as a result. (McGee Dec. ¶ 4).

67. Ms. McGee is committed personally and professionally to protecting fresh water, estuarine, and marine ecosystems and the species that depend on them. Ms. McGee has worked to ensure the successful passage of many species of fish that migrate up Maine rivers to spawn - including on the St. Croix River. (McGee Dec. ¶ 6).

Respectfully submitted,

/s/ Roger Fleming
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Counsel for the Plaintiffs

Dated: June 30, 2011

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.

/s/ Roger Fleming
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