

Friends of Merrymeeting Bay

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August 13, 2010

Philip T. Feir
Colonel, U.S. Army
U.S. Co-Chair
St. Croix Int'l Watershed Board
696 Virginia Rd.
Concord, MA 01742

Bill Appleby
Director, MSC Operations-Atlantic
Canadian Co-Chair
St. Croix Int'l Watershed Board
45 Alderney Dr.
Dartmouth, NS B2Y 2N6

Dear Colonel Feir and Director Appleby,

Thanks for the opportunity to review the IJC Draft Adaptive Management Plan [ADMP] for native alewives and introduced smallmouth bass in the St. Croix River. Unfortunately, in what appears to be a feeble attempt to “split King Solomon’s baby”, there is nothing good to report. You have received many comments on the Plan and we echo those concerns of for example Kerry Hardy, Clinton Townsend, and NOAA.

The plan as presented is an abject failure in that it:

1. Has no basis in science.
2. Delays full alewife restoration efforts indefinitely.
3. Bases the well-being and restoration of a native species on the health of an introduced population.
4. Does not address inshore or offshore ecological, economic and social benefits that come with the restoration of a native alewife fishery.
5. Perpetuates the degradation of water quality [non-attainment] as promulgated illegally by the Maine State Legislature in violation of the U.S. Clean Water Act.

It appears unclear to us what the extent of the IJC authority and jurisdiction really is in this situation. Clearly there are mandates for the Commission to wield authority in cases affecting water levels on shared bodies of water. The St. Croix is a broad river system however and it may be that IJC authority only applies to the main stem where the border runs. It is also questionable whether the Commission can actually overrule the U.S. Clean Water Act [CWA]. Our belief is that responsibility for enforcement of the Clean Water Act rests only with the U.S. Environmental Protection Agency [EPA]. In eliminating an

existing use [alewives] of the river, the Maine Legislature has violated antidegradation language in Maine Statute and the CWA which says existing uses must be maintained. If these uses are not maintained, the water classification is essentially being downgraded and the state must perform a Use Attainability Analyses [UAA] which is then reviewed by EPA and rejected or approved. UAA's are extremely rare in occurrence and certainly a UAA whose fundamental purpose was to justify the extirpation of a species would probably not fare well. A UAA for the St. Croix was never performed prior to or since the closure of the river to alewives.

Friends of Merrymeeting Bay [FOMB] has submitted a letter to Region 1 of the EPA expressing our concerns on this legal issue and incorporated into our letter by reference those legal comments also submitted to the EPA by Douglas Watts. In an EPA response dated August 9th, they indicate a response addressing specific issues we have raised will be forthcoming in the near future.

Please find attached as appendices to these comments, our EPA letter and those comments submitted by Mr. Watts both of which are incorporated herein.

Thank you for the opportunity to comment on this draft plan. We urge you to reconsider and modify your draft providing a new revised plan for immediately implementing watershed-wide alewife restoration in keeping with US and Canadian laws.

Sincerely,



Ed Friedman, Chair

Attachments:

Appendix A: FOMB Letter to EPA

Appendix B: Douglas Watts Letter to EPA

Appendix A.

Mr. Curt Spalding
US EPA Regional Administrator
5 Post Office Square, Suite 100
Boston, MA 02109-3912
July 19, 2010

RE: St. Croix River, Maine

Mr. Spalding,

By this letter, Friends of Merrymeeting Bay [FOMB] requests you invoke your authority as Regional EPA Administrator to review the changes in Maine water quality standards and designated uses of the St. Croix River made by the Maine Legislature in 1995 and 2008. FOMB requests you determine if these changes are in compliance with the U.S. Clean Water Act [CWA].

These laws have never been reviewed or approved by US EPA for conformance and compliance with the Clean Water Act.

These two laws have:

1. Caused 98 percent of the St. Croix River watershed to go from attainment to non-attainment of its legally assigned water quality classification standards.
2. Caused an existing, legally assigned designated use of the St. Croix River to go from being actually present to being non-existent.
3. Prevented the legally assigned water quality standards and designated uses of the St. Croix River from being attained in perpetuity.
4. For all intents and purposes, illegally downgraded/ degraded the river when banning the passage of migratory alewives from anywhere but the bottom few miles of the St. Croix.

This major drainage once had one of the largest river herring populations in North America. Does the intentional extirpation [within the statutory CWA time parameters] of a native species trigger anti-degradation language in the CWA? Is the EPA responsible for ensuring designated uses are maintained?

Partly in an effort to avoid needless duplication and partly because his case is so well stated, FOMB herein incorporates by reference in its totality, the request sent you on July 9, 2010 by Douglas Watts of Augusta, ME.

By statute in 1995 and 2008 the Maine Legislature ordered the extirpation of alewives on the St. Croix, formerly home to probably the largest alewife run in North America. In so doing, the state has unilaterally made the decision to get rid of an “existing use” by shutting down over 90% of the river to alewives. In a recent proposal, The International Joint Commission suggests expanding alewife access to only 30% of their former habitat still with no scientific or legal basis for the restriction.

As you well know, anti-degradation language in the CWA and Maine Statute, prohibits the reduction of water quality [which includes fish populations not just water chemistry] without a Use Attainability Analyses [UAA] approved by EPA. A UAA has to our knowledge never been performed for the St. Croix River. Under the doctrine of “constructive submission”, just because the State did not conduct or submit a UAA or request a change in water quality classification the EPA is in no way relieved of its authority, obligation and responsibilities under the CWA to promulgate and or maintain water quality standards.

After your review of this and the Watts letter, please advise us of your intentions.

Thank you very much.

Sincerely,

Ed Friedman, Chair

Founded in 1975, Friends of Merrymeeting Bay (FOMB) utilizes research, education, advocacy, and land conservation to preserve, protect, and improve the unique ecosystems of Merrymeeting Bay. Diadromous fish restoration in the Bay and Gulf of Maine is an important focus of the group.

In 2001, FOMB Chair Ed Friedman was the recipient of an Environmental Merit Award from Region 1 of the EPA.

Appendix B.

Mr. Curt Spalding
US EPA Regional Administrator
5 Post Office Square, Suite 100
Boston, MA 02109-3912
July 4, 2010

RE: St. Croix River, Maine

Dear Mr. Spalding,

By this letter and evidentiary appendices I am requesting you invoke your authority as Regional EPA Administrator to review the changes in Maine water quality standards and designated uses of the St. Croix River made by the Maine Legislature in 1995 and 2008 to determine if they are in compliance with the U.S. Clean Water Act.¹ These laws have never been reviewed or approved by US EPA for conformance with the Clean Water Act. These two laws have:

1. Caused 98 percent of the St. Croix River watershed to go from attainment to non-attainment of its legally assigned water quality classification standards.
2. Caused an existing, legally assigned designated use of the St. Croix River to go from being actually present to being non-existent.
3. Have prevented the legally assigned water quality standards and designated uses of the St. Croix River from being attained in perpetuity.

¹ US EPA Water Quality Handbook, Section 6.3.: “When States adopt new or revised water quality standards, the State is required under CWA Section 303(c) to submit such standards to EPA for review and approval/disapproval. Section 131.20(c) of the Water Quality Standards Regulation requires the submittal to EPA to occur within 30 days of the final State action.”

I. Background.

The International Joint Commission (2008) states:

“Alewife management strategies in the [St. Croix River] watershed historically have been geared toward the design, construction, and maintenance of fishways to allow passage around dams. Prior to 1980, an old fishway at Milltown allowed only limited passage of alewives. In 1981, the completion of a new fishway at Milltown Dam, together with modern fishways constructed in 1964 at Woodland and Grand Falls, greatly improved alewife passage on the St. Croix and resulted in a resurgence of the anadromous alewife population (Flagg 2007). Anglers began to see schools of alewives below the West Grand Lake Dam and in Spednic Lake. Between 1981 and 1987, alewife returns increased from 169,000 to 2,625,000.

“This alewife resurgence coincided with a drastic decline of smallmouth bass in Spednic Lake, and raised concerns that the increased alewife population might be impacting smallmouth bass. As a result of these concerns, alewives were blocked from Spednic in May of 1987 and, as part of an assessment program aimed at developing a long-term alewife management plan, alewives were temporarily blocked at Grand Falls in 1991. In 1995, the State of Maine enacted emergency legislation to close both the Woodland and Grand Falls fishways to migrating alewives. After these closings, the St. Croix alewife population fell from a high of 2.6 million fish in 1987 to a low of only 900 returning adults in 2002.

“The Milltown Dam was not subject to the 1995 legislative action and, beginning in 2002, the Canada Department of Fisheries & Oceans began trucking alewives from the Milltown fishway 16 kilometers (10 miles) upstream to the Woodland Flowage where they were released to spawn. This effort allowed the alewife run to rebound to about 12,000 in 2006 (Flagg 2007).

In March of 2008, the Maine Legislature's Marine Resources Committee heard testimony on LD 1957, an act to overturn the 1995 state law closing fishways at the Woodland and Grand Falls Dam to anadromous alewives. While the original bill would have provided access to 52% of the spawning habitat available in the 1980s, an amended bill was passed, opening fish passage at the Woodland Dam only and restoring alewives to just over 2% of that habitat.”

Prior to 1995, the St. Croix River hosted one of the largest, if not the largest, population of migratory alewives (*Alosa pseudoharengus*) in the United States (IJC 2010).

In 1995, the Maine Legislature passed a law prohibiting the passage of spawning alewives to their critical, native habitat in the St. Croix River above the Woodland Dam near the river's head of tide. 12 MRSA §6134 (1995).

In 2008, the Maine Legislature amended this 1995 law to allow alewife passage at the Woodland Dam but to continue prohibiting alewives from migrating past the Grand Falls Dam. 12 MRSA §6134 (2008). This law deprives the few remaining St. Croix River alewives from access to 98 percent of their spawning and nursery habitat in the St. Croix River drainage (IJC 2008, 2010).

The 1995 and 2008 laws have altered the legally assigned water quality standards and designated uses of the entire St. Croix River watershed. These laws direct the Maine Commissioner of Inland Fisheries and Wildlife to ensure that no alewives can reach their spawning and nursery grounds in the vast lakes of the St. Croix River in Maine and Canada.

The sole purpose of these laws is to cause the extinction of native alewife in the St. Croix River. These laws do not apply to any other native fish species of the St. Croix River watershed. All native fish species are allowed to use the fishways installed at the Woodland and Grand Falls dams -- except the native alewife.

As best as can be discerned by the legislative record, Maine did not submit these laws to the US EPA for approval under the CWA upon enactment because Maine believed these laws dealt only with “fisheries management issues” and did not constitute material alterations to state water quality standards and legally designated uses of the St. Croix River requiring US EPA approval. The nature, intent and effect of these statutes shows Maine was incorrect in making this judgement. US EPA retains final authority to determine if a state statute qualifies as a change in water quality standards or legally designated uses of a waterbody and if the state is required to submit the statute to US EPA for review and approval. This what I am asking you to do now in your position as US EPA Regional Administrator regarding these two Maine laws which affect the St. Croix River watershed.

II. The 1995 and 2008 Maine alewife ban laws altered the legal water quality standards and designated uses of the St. Croix River and its tributaries.

In 1995 the Maine Legislature passed a law which ordered the Maine Commissioner of Inland Fisheries & Wildlife to prevent native alewives from passing through existing fishways at the Woodland and Grand Falls dams on the St. Croix River. In 2008 the Maine Legislature amended this law to order the Commissioner to prevent native alewives from passing through the fishway at the Grand Falls Dam.²

While these two laws do not explicitly amend the statutory water quality classifications for the St. Croix River and its tributaries and their legally assigned designated uses, they have directly done so. The IJC (2008, 2010) states these laws directly eliminate access by native alewife to 98 percent of their native habitat in the St. Croix River and have caused the native St. Croix River alewife population to fall from 2.6 million adults in 1987 to 900 adults in 2002.

² Because these two hydroelectric dams were constructed by Congressional approval in 1916 they do not fall under jurisdiction of the Federal Power Act or the Federal Energy Regulatory Commission. Fishways at these dams are operated under the supervision and authority of the Maine Dept. of Inland Fisheries & Wildlife.

The sole purpose and intent of these Maine laws was (and is) to cause the extinction of a native fish species, the alewife, from virtually all of its native and occupied habitat in the St. Croix River system. The laws have succeeded in their purpose. Today, only a tiny, remnant population of native alewives exists in the lowermost reaches of the St. Croix River.

The 1995 and 2008 laws rendered null and void the legal water quality standards designated uses established for the St. Croix River which pertain to the native alewife. They have done this by directing the Maine IF&W Commissioner to prevent any alewives from entering the St. Croix via existing fishways at the Woodland and Grand Falls dams. These fishways, located on the Maine side of the St. Croix River, are the only method by which native alewives can migrate from the ocean to their spawning grounds in the St. Croix River watershed above these dams. These laws have caused the St. Croix River above the dams to no longer provide suitable habitat for all indigenous aquatic species, as Maine's water quality classification statutes require.

The Maine DEP and Maine BEP have previously ruled that Maine water quality standards and designated uses for migratory fish species require the use to be actually present in the waterbody. *See* Maine BEP, Findings of Fact and Order Denying Appeal of S.D. Warren Company, Presumpscot River Hydro Relicensing, Sept. 3, 2003:

"Nowhere, as appellant suggests, does the 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 to support 'all' indigenous aquatic species ... Appellant's contention that water quality standards are being attained as long as the designated uses of fish, fishing and aquatic habitat are present to any degree in any portion of the river is thus contrary to the language of the statute and to the Legislature's stated objective 'to restore and maintain the chemical, physical and biological integrity of the State's waters.' 38 MRSA Section 464(1)."

The Maine DEP and Maine BEP's interpretation was upheld by the Maine Supreme Court in 2005. See *S.D. Warren v. Maine BEP*, 2005 ME 27 at ¶21: "Maine's law is settled in this area. In *Bangor Hydro-Electric Co.*, 595 A.2d at 442 n.4, we concluded that narrative criteria at 38 M.R.S.A. §465 (2001 & Supp. 2004), which requires waters "of sufficient quality to support all indigenous fish species," was intended to be an integral part of the water quality standards for the BEP to consider. We also concluded, based upon the specificity of the designated uses at 38 M.R.S.A. §465, that the Legislature's purpose for the language "suitable for the designated uses" was "that the designated uses actually be present." *Id.* at 442."

The 1995 and 2008 Maine laws directed the Maine IF&W Commissioner to make a legally designated use of the St. Croix River go from being 'actually present' to being non-existent. The Commissioner of Maine IF&W did not unilaterally decide to block alewives from the fishways of these St. Croix River dams in 1995 and 2008. He was ordered to do so by a statute enacted by the Maine Legislature.

Legislatures cannot pass laws which order state agencies to break the law. The Legislature must first amend the underlying law so as to make the activity lawful and then direct the agency to undertake the previously unlawful activity. The text of the 1995 and 2008 statutes shows the Legislature performed the second component, but not the first. The 1995 and 2008 statutes fail to perform the first and essential task of amending the underlying statutory water quality standards and designated uses of the St. Croix so as to allow the Maine Legislature to order the Commissioner of IF&W to break them. This was not done.³

³ Maine executive agencies are bound to obey all applicable U.S. and Maine laws. Except by directly amending the relevant statute, the Maine Legislature has no authority to direct a state agency to violate any state law. For this reason, the only reasonable inference of legislative intent one can draw from the 1995 and 2008 laws is that the Maine Legislature intended through these laws to amend the existing legal water quality changes to be submitted to US EPA for approval within 30 days of enactment. They were not.

Under either scenario, the 1995 and 2008 Maine laws are null and void because they violate the most basic tenets of the U.S. Clean Water Act. In the first scenario, in which the laws are interpreted as the Maine Legislature directing a state agency to violate the CWA, the laws are null and void since the Maine Legislature has no authority to direct anyone to violate the U.S. Clean Water Act.

In the second scenario, wherein these laws are interpreted as amendments of state water quality classification standards and legally designated uses of the St. Croix River, these laws are null and void because the U.S. Clean Water Act requires legislatures to submit any amendments to state water quality standards to US EPA for approval within 30 days of enactment.

Whatever the Maine Legislature's conscious intent may have been when passing these laws in 1995 and 2008, these laws amend the legal water quality standards and designated uses of the St. Croix River. They order the Maine IF&W Commissioner to forcefully extirpate a native fish species from its native habitat so that it will become extinct in that habitat. Maine water quality standards and legal designated uses of the St. Croix require that it be suitable habitat and capable of supporting all indigenous fish species, including the native alewife. The 1995 and 2008 laws have the sole purpose and effect of preventing these existing legally designated uses and water quality standards from ever being achieved.⁴

II. The 1995 and 2008 Maine alewife ban laws are null and void under the U.S. Clean Water Act.

These laws are null and void because by prohibiting alewife passage in the St. Croix River drainage, the Maine Legislature created a new sub-category of water quality

⁴ In *FPL v. Maine BEP*, 2007 ME 97, the Maine Supreme Court analyzed whether a legislative resolution, or any other non-explicit amendment of water quality standards enacted by the Maine Legislature could nullify existing standards for a waterbody. The Court ruled that any legislative effort to alter legal water quality standards and designated uses of a waterbody must be submitted to US EPA for approval, regardless of its specific mechanism. No procedural or statutory 'back doors' are permitted.

standards and designated uses for the St. Croix River, specifically a subcategory intended to prevent a native fish species, the alewife, from living in its native habitat in the St. Croix River and to extirpate this species from its existing habitat in the St. Croix River.

Under the U.S. Clean Water Act, whenever a state creates a new sub-category of water quality standards and designated uses for a waterbody those changes must be submitted to the U.S. Environmental Protection Agency (US EPA) for review and approval. 40 CFR 131.10 (g)(h).

The State of Maine has never submitted the changes made in the 1995 and 2008 laws to the US EPA for approval, as required by the U.S. Clean Water Act, and the US EPA has never approved them, as required by the U.S. Clean Water Act. Under the U.S. Clean Water Act, the changes made by Maine in 1995 and 2008 require a Use Attainability Analysis be conducted. Maine has never conducted such an analysis.

For this reason, even if Maine now submitted these legislative changes to the US EPA for approval, the US EPA could not approve them since Maine has never conducted a Use Attainability Analysis for these changes, as required by the U.S. Clean Water Act.⁵

Maine's water quality statutes establish a legal classification system for its waters, including those in the St. Croix River drainage lying within the boundaries of the State of Maine.⁶ This classification system is required by the U.S. Clean Water Act. The CWA requires Maine to establish narrative and numerical water quality standards for each classification and to assign designated uses for each classification. The CWA further requires Maine to assign each waterbody in the state to one of several classification categories. No waterbodies can be left unassigned to a classification.

Maine law puts natural lakes and ponds into the GPA classification and it puts rivers, brooks and streams into one of four classifications, AA, A, B and C. The natural ponds

⁵ See 40 CFR 131.10 (g) and (h) and discussion at the US EPA Water Quality Handbook, on-line at <http://www.epa.gov/waterscience/standards/handbook/chapter02.html#section7>

⁶The classification standards for waters in the St. Croix drainage are set forth in 38 MRSA §467(13).

and lakes of the St. Croix River watershed are assigned to Class GPA; the rivers, streams and brooks of the watershed, including the mainstem of the St. Croix to its head of tide, are assigned variously to the AA, A, B and C classifications. 38 MRSA §467(13).

All of Maine's waterbody classification categories contain a narrative water quality standard which states the waterbody must be of suitable quality to support all aquatic life indigenous to that waterbody. 38 MRSA §465 and 465-A. Indigenous means “supported in a reach of water or known to have been supported according to historical records compiled by State and Federal agencies or published scientific literature.” 38 MRSA §466(8). Maine’s lowest water quality standard, Class C, requires there shall be no detrimental changes in the resident biological community. 38 MRSA § 465(C).⁷ This standard also applies to all Class B, A and AA waters. “Detrimental changes” is defined as “no significant loss of species excessive dominance by any species or group of species attributable to human activity.” 38 MRSA §466(12). The narrative water quality standard for Class GPA waters (ie. natural lakes and ponds) states the habitat must be characterized as natural. 38 MRSA §465-A (1)(A). Natural is defined as “living in, or as if in, a state of nature not measurably affected by human activity.” 38 MRSA §466(9).

A large amount of historic, archaeological and scientific evidence shows the native, migratory alewife is an aquatic species indigenous to West Grand Lake, Spednic Lake and the other watershed segments referenced in the Plan. No historic or scientific evidence exists to suggest the contrary.

All of Maine’s various water quality classifications include indigenous fish and suitable habitat for them as a designated use. Alewives, as the IJC Plan notes, are indigenous to the St. Croix River drainage above the Woodland and Grand Falls dams. As such, under Maine law their existence in the St. Croix River drainage is a designated use under

⁷ See *FPL v. Maine BEP* (2007 ME 97) at 14: “Class C is Maine’s minimum EPA-approved water quality standard for hydropower impoundments and, therefore, under federal law, Maine is not permitted to apply a less stringent standard than Class C to a hydropower impoundment unless a UAA [Use Attainability Analysis] has been conducted and EPA approval has been obtained. See 38 M.R.S.A. § 464(9) (Supp. 1992); 38 M.R.S.A. § 465(4)(C); 33 U.S.C.S. § 1313; 40 C.F.R. §§ 131.10(g), (j), 131.20(c).”

Maine's water quality standards of classification which must be protected and maintained. If Maine wishes to specifically exclude native alewives as a designated use of the St. Croix River, as it did by statute in 1995 and 2008, the U.S. Clean Water Act requires Maine to conduct a Use Attainability Analysis and submit it and any statutory changes to the US EPA for review and approval. This has never been done.

US EPA rules state: "Once a use has been designated for a particular water body or segment, the water body or water body segment cannot be reclassified for a different use except under specific conditions. If a designated use is an existing use (as defined in 40 CFR 131.3) for a particular water body, the existing use cannot be removed unless a use requiring more stringent criteria is added." 40 CFR 131.10 (g) (h).⁸

US EPA rules state: "When States adopt new or revised water quality standards, the State is required under CWA Section 303(c) to submit such standards to EPA for review and approval/disapproval. Section 131.20(c) of the Water Quality Standards Regulation requires the submittal to EPA to occur within 30 days of the final State action." US EPA Water Quality Handbook, Section 6.2. 40 CFR 131, Subpart C. Because Maine never submitted these changes to US EPA within 30 days of enactment in 1995 or 2007, these changes are illegal under 40 CFR 131(C).

The Maine Supreme Court ruled in 2007:

"Pursuant to the Clean Water Act and its implementing regulations, states are required to designate uses of waterbodies within their borders. 33 U.S.C.S. § 1313 (2001); 40 C.F.R. § 131.10 (2006). Once such designated uses have been established and approved by the EPA, states are permitted to adopt subcategories of use for specific waterbodies, requiring less stringent criteria, provided they conduct a UAA and obtain EPA approval of any subcategory. 40 C.F.R. §§ 131.10(g), (j), 131.20(c) (2006)."⁹

⁸ See US EPA Water Quality Handbook, Section 2.7.3: "A State may change activities within a specific use category but may not change to a use that requires less stringent criteria, unless the State can demonstrate that the designated use cannot be attained." <http://www.epa.gov/waterscience/standards/handbook/chapter02.html#section7>

⁹ *FPL v. Maine BEP*, 2007 ME 97 at 13-14.

US EPA rules define a Use Attainability Analysis as: ‘a structured scientific assessment of the factors affecting the attainment of a use which may include physical, chemical, biological, and economic factors as described in section 131.10(g).’ 40 CFR 131.3.

As noted by the Maine Supreme Court, the U.S. Clean Water Act requires Maine to conduct a Use Attainability Analysis if it wishes to create a new sub-category of designates uses of a waterbody if the new designated use would require less stringent water quality criteria and standards than the existing standards.

Prior to 1995, all of the St. Croix River drainage was required by law to be suitable habitat for all indigenous aquatic species, including the native alewife. The 1995 law created a new sub-category of water quality standards and designated uses for the St. Croix River which, in effect, stated the St. Croix was no longer required to provide suitable habitat for one native species, the alewife.

The 2008 law, which prohibits alewife passage above the Grand Falls Dam, has the same effect. Both laws create new sub-categories of water quality standards and designated uses for the St. Croix River that are less stringent than previously existing standards, which required the St. Croix be suitable habitat for native alewives.

Due to the effect and intent of the 1995 and 2008 laws, the U.S. Clean Water Act requires Maine to conduct a Use Attainability Analysis prior to making these changes. Maine has never conducted a Use Attainability Analysis of these changes before or since enacting them by statute in 1995 and 2008. As such these changes are in violation of the U.S. Clean Water Act and are null and void.

III. The 1995 and 2007 Maine alewife ban laws on the St. Croix River violate the U.S. and Maine’s Anti-Degradation Laws.

The U.S. Clean Water Act requires all states, including Maine, to include in their state water quality standards and classification system what is called an "antidegradation

clause." This clause states that once a waterbody actually meets a certain level of quality, no action can be taken which would cause the waterbody to fail to achieve the level of quality it is presently achieving.

Maine, as required by the U.S. Clean Water Act, has included an anti-degradation clause in its general water quality standards. 38 MRSA §464 (4)(F)(1) *et seq.* This statute states in pertinent part:

“The antidegradation policy of the State is governed by the following provisions.

(1) 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. Determinations of what constitutes an existing in-stream water use on a particular water body must be made on a case-by-case basis by the department.”

The IJC Plan (2010) notes that alewives were present in their indigenous habitat in Spednic Lake and other parts of the St. Croix River drainage above the Woodland and Grand Falls dams in large numbers until the mid 1990s and they were present and abundant in these areas after November 28, 1975. This means that the ability of alewives to inhabit those portions of their indigenous habitat in the St. Croix River drainage which they actually occupied after Nov. 28, 1975 is an "existing in-stream water use" under Maine's anti-degradation statute which must be "maintained and protected." 38 MRSA §464 (4)(F)(1).

Maine’s anti-degradation law requires the Maine DEP to make a “case by case” decision on what constitutes an “existing in-stream use” of the St. Croix River under Maine law. The Maine DEP has never made or issued such a “case by case” decision regarding alewives in the St. Croix River. Because alewives were living throughout the St. Croix drainage in large numbers after 1975, in the absence of such a Maine DEP “case by case” decision to the contrary, they qualify as an “existing in-stream use” of the St. Croix River

under Maine's anti-degradation law, and this use must be maintained and protected. The 1995 and 2008 Maine alewife ban laws directly violate Maine's anti-degradation law because they had the intent and effect of eliminating an existing in-stream use of the St. Croix River by native alewives by preventing the alewives from physically gaining access to the river and living in it, as they did between 1995 and 1975. This was not an inadvertent or unplanned effect of the laws: it was their sole intent.

The U.S. Clean Water Act requires all states, including Maine, to include an antidegradation clause in their state water quality statutes. 40 CFR 131.12. Maine's existing anti-degradation clause was reviewed and approved by US EPA when it was last amended in 1991. The 1995 and 2008 alewife ban laws clearly violate Maine's anti-degradation statute, as last amended in 1991, because they eliminate an existing in-stream use of the St. Croix River by native alewives. Furthermore, Maine's anti-degradation statute requires the Maine DEP to conduct a "case by case" analysis when determining what is, and what is not, an existing in-stream use. The Maine DEP has never made such a "case by case" decision regarding native alewives in the St. Croix in regards to the 1995 and 2008 alewife ban laws.

US EPA regulations state, regarding anti-degradation laws: "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 the use to be attained--unless there: are physical problems, such as substrate or flow, that prevent the use from being attained." 40 CFR 131.12(a)(1).

In the case of native alewives, it is well proven that between 1975 and 1995 there were millions of alewives inhabiting the St. Croix River watershed annually. There is no question native alewives are an "existing in-stream use" of the St. Croix River as defined by the U.S. Clean Water Act.

The US EPA Water Quality Handbook states: "Section 131.12(a)(1) provides the absolute floor of water quality in all waters of the United States. This paragraph applies a

minimum level of protection to all waters If a planned activity will foreseeably lower water quality to the extent that it no longer is sufficient to protect and maintain the existing uses in that water body, such an activity is inconsistent with EPA's antidegradation policy, which requires that existing uses are to be maintained. In such a circumstance, the planned activity must be avoided or adequate mitigation or preventive measures must be taken to ensure that the existing uses and the water quality to protect them will be maintained.”

The US EPA Water Quality Handbook at Section 4.4.2 states: “No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards ... Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed.”¹⁰

The 1995 and 2008 St. Croix alewife ban laws violate 38 MRSA §464 (4)(F)(1) *et seq.* by failing to "maintain and protect" the existing in-stream use by native alewives of their indigenous, accessible habitat in the St. Croix River drainage, a use which actually occurred for many years on and after Nov. 28, 1975. These laws were designed to make alewives extinct in the St. Croix River, in violation of 38 MRSA §464 (4)(F)(1). It is hard to reconcile “drive to extinction” with “maintain and protect.”

IV. The Maine Legislature has no authority to order the Maine Commissioner of Marine Resources and the Commissioner of Inland Fisheries & Wildlife to violate the U.S. Clean Water Act on the St. Croix River.

Section 2 of Maine’s 2008 alewife ban states: “**2. Grand Falls Dam.** The commissioner and the Commissioner of Inland Fisheries and Wildlife shall ensure that the fishway on the Grand Falls Dam is configured or operated in a manner that prevents the passage of alewives.” 12 MRSA §6134(2). The Maine DMR and IF&W Commissioners have no

¹⁰ See US EPA Water Quality Handbook, Section 4.4.2, on-line at: <http://www.epa.gov/waterscience/standards/handbook/chapter04.html#section4>

legal authority to extirpate alewives from the St. Croix River by barring their passage at the Grand Falls dam, any more than the Commissioners have legal authority to dump rotenone into alewife spawning areas in the St. Croix River for the purpose of extirpating native alewives. The Maine Legislature has no authority to enact a law ordering an executive branch commissioner to directly violate the U.S. Clean Water Act. Yet, this is the sole purpose and effect of 12 MRSA §6134 as enacted on April 9, 2008.

V. Conclusion

The 1995 and 2008 State of Maine St. Croix River alewife ban laws have caused alewives to become extinct from 98 percent of their native habitat in the St. Croix River watershed; today, only a tiny remnant alewife population remains in the St. Croix. (IJC 2010). By law, the Maine Legislature was required to submit these 1995 and 2008 legislative changes to the US EPA for review within 30 days of enactment. Because Maine failed to do so, these laws are null and void. US EPA must now vacate them pursuant to its non-discretionary duties under the U.S. Clean Water Act.

Thank you for your time.

Sincerely,

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