



November 30, 2012

Certified Mail – Return Receipt Requested

Lisa Jackson
EPA Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: 60-Day Notice of Intent to File Suit under the Clean Water Act

Dear Administrator Jackson:

We are writing on behalf of Friends of Merrymeeting Bay (“FOMB”) and its member Kathleen McGee, to notify you of the U.S. Environmental Protection Agency’s (“EPA”) failure to perform its non-discretionary duty under section 303(c)(4) of the Clean Water Act (“CWA”). Specifically, EPA has failed to “promptly prepare and publish” a new regulation setting forth new or revised water quality standards for the St. Croix River. 33 U.S.C. § 1313(c)(4).

On July 9, 2012 EPA disapproved section (2) of 12 M.R.S. § 6134, which was enacted in 2008 in order to prevent alewives from passing the Grand Falls Dam on the St. Croix River, (“2008 Alewife Law”¹), as an unlawful revision to the narrative water quality standards for Class A and AA waters throughout the St. Croix River Basin. Maine had until October 8, 2012 (90 days) to make changes, consistent with EPA’s disapproval letter, necessary to come into compliance with the Clean Water Act. *See* 33 U.S.C. § 1313(c)(3). Maine failed to take any such action. As a result, EPA is required to “promptly” promulgate new standards consistent with the CWA, *see id.* § 1313(c)(4), but EPA has failed to do so.

This letter is provided pursuant to the 60-day notice requirement in the citizen suit provision of the CWA. *See* 33 U.S.C. § 1365(a)(2). As set forth below, FOMB and Ms. McGee intend to file suit to obtain injunctive and declaratory relief, as well as any other appropriate relief, including recovery of attorney’ fees and costs of litigation.

¹ Alewives (*Alosa pseudoharengus*) are anadromous fish that spawn in fresh water but spend the majority of their lives in salt water where they are critical components of the Atlantic coastal ecosystem. They are forage for numerous species of fish, birds, and mammals from the Carolinas to Maritime Canada. Atlantic coast populations have declined by more than 90% since 1985, due in significant part to habitat destruction. Progress has been made to restore habitat and improve fish passage at dams, however exceptions remain and the species is under consideration for listing as “threatened” under the Endangered Species Act.

I. Statutory Background

A. Clean Water Act

Congress declared that the objective of the Clean Water Act (CWA) “is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). Consistent with this objective Congress set a “national goal” of achieving “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). In order to fulfill the objectives and achieve the national goals, states are required to adopt narrative and numerical water quality standards and to review them at least every three years. *See* 33 U.S.C. § 1313(c)(1), (c)(2)(A). States must submit all new and revised water quality standards to the EPA for review. 33 U.S.C. § 1313(c)(2)(A). These water quality standards must include: (1) the designated uses of the waterways (e.g., the protection of aquatic life and recreational uses); (2) water quality criteria expressed as either narrative or numeric standards; and (3) an antidegradation policy that protects existing uses. *See id.* § 1313(c)(2)(A), (d)(4)(B); 40 C.F.R. § 131.10-12.

Congress set a high bar for state actions that change water quality standards or degrade water quality from an existing condition. Any change to an existing water quality standard must be consistent with the state’s antidegradation policy and submitted to the EPA for review. 33 U.S.C. § 1313(c)(2)(A), (d)(4)(B).² Upon review, the EPA has a non-discretionary duty to either approve or disapprove the revision. *Id.* § 1313(c)(3). When reviewing revised water quality standards, EPA must consider “whether the state has adopted criteria that protect the designated water uses” and “[w]hether the State has followed its legal procedures for revising or adopting standards.” 40 C.F.R. § 131.5. If EPA disapproves the standard, it must notify the state of the changes required to comply with the Clean Water Act. 33 U.S.C. § 1313(c)(3). If the state fails to adopt those changes within 90 days, EPA must “promptly” promulgate new standards consistent with the CWA. *See id.* § 1313(c)(4)(A); *see also* 40 C.F.R. § 131.22. Further, in any case where the EPA determines that a revised or new water quality standard is necessary to meet the requirements of the Act, it must promptly prepare and publish a regulation for the waters involved. *See* 33 U.S.C. § 1313(c)(4)(B).

Section 401 of the Act requires that any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA (“Section 401 Certification”). *See* 33 U.S.C. § 1341(a)(1). In addition, under section 404 of the CWA, a permit is required for any construction or alteration of a dam that would result in the discharge of dredge or fill material, and applicants must demonstrate that any such discharges would not significantly degrade the waterway and that there are no practicable alternatives less damaging to the aquatic environment. *See* 33 U.S.C. § 1344; 33 C.F.R. § 323.3; 40 C.F.R. Part 230.

² *See also* EPA Water Quality Handbook § 4.4.2 (“[n]o activity is allowable under the anti-degradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State’s water quality standards.”).

B. Maine's Water Quality Standards

In order to comply with the CWA, Maine established comprehensive water quality standards and classifies each individual waterbody. Under Maine law freshwater rivers, brooks, and streams are classified as Class AA, A, B, or C waters, and natural lakes and ponds are classified as GPA. *See* 38 M.R.S.A. §§ 465, 465-A. Maine's water quality standards for each class contain: (1) a list of designated uses; (2) a set of numerical criteria (pollutant limits necessary to protect designated uses); and (3) a set of narrative criteria. *Id.* All of Maine's waterbody classification categories contain narrative criteria which require the waterbody be of suitable quality to support all aquatic life indigenous to that waterbody.³ *See e.g.* 38 M.R.S.A. §465 and 465-A. Maine also enacted an antidegradation policy which requires 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). Existing uses are those actually attained on or after November 28, 1975. 40 C.F.R. § 131.3(e). Maine's anti-degradation policy provides that the state may only approve a Section 401 Certification when it finds that the activity will not have a significant impact on, or result in significant degradation of, existing uses. 38 M.S.R.A. § 464(4)(F)(1-A)(a), (b). A significant impact means “impairing the viability of the existing population [of fish or wildlife], including significant impairment to growth and reproduction or an alteration of the habitat which impairs viability of the existing population.” *Id.*

Maine's water quality standards for the St. Croix River basin above the Grand Falls Dam are classified as Class AA, A, B, and GPA. *See* 38 M.R.S.A. § 467(13). Narrative criteria for Class AA and A waters specify that “[t]he aquatic life . . . shall be as naturally occurs.” *Id.* §§ 465(1)(B), (2)(B). Natural means “free of measurable effects of human activity.” *Id.* §466(2). These criteria protect the designated uses for these pristine waters including “habitat for fish and other aquatic life,” and habitat that can be characterized as “natural.” *Id.* §§ 465(1)(A), (2)(A), 465-A(1)(A). The narrative criteria for Class B waters specify that the habitat must be “unimpaired”, *id.* at § 465(3)(A), which is defined as “without a diminished capacity to support aquatic life,” *id.* § 466(11). The stringency of this standard is reinforced by the requirement that 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. *Id.* § 465(3)(C).

The Maine legislature may change the classification of waters in the state, remove a designated use for a waterbody, or adopt a subcategory that requires less stringent criteria, if the revision complies with the Clean Water Act. *See* 38 M.R.S.A. §§ 464(2), (2-A). The Maine Board of Environmental Protection (“BEP”) must conduct a use attainability analysis (UAA) prior to proposing the removal of a designated use or the establishment of a subcategory of the use to the legislature, and may not recommend the removal of a designated use or the establishment of a subcategory of the use “if . . . [t]he water body in question is currently attaining the designated use.” 38 M.R.S.A. § 464(2-A)(A), (B)(3).

³ 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 M.R.S.A. §466(8). Even Maine's lowest water quality standard requires there shall be no detrimental changes in the resident biological community. *See* 38 M.R.S.A. §465(C). “Detrimental changes” is defined as “no significant loss of species or excessive dominance by any species or group of species attributable to human activity.” *See* 38 M.R.S.A. §466(12).

C. The 2008 Alewife Law, 12 M.R.S.A. § 6134(2)

The 2008 Alewife Law, 12 M.R.S.A. § 6134 (effective April 9, 2008, and amended April 6, 2012), directs the Commissioner of Marine Resources and the Commissioner of Inland Fisheries and Wildlife to take the following actions:

§ 6134. Alewives passage; fishways on the St. Croix River

This section governs the passage of alewives on the Woodland Dam and the Grand Falls Dam located on the St. Croix River.

1. Woodland Dam. By May 1, 2008, the commissioner and the Commissioner of Inland Fisheries and Wildlife shall ensure that the fishway on the Woodland Dam is configured or operated in a manner that allows the passage of alewives.
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.⁴

D. Federal Power Act

Under the Federal Power Act, 16 U.S.C. §§ 791-828c, the Federal Energy Regulatory Commission (“FERC”) is the licensing authority for the construction and alteration of dams across navigable waters. In deciding whether to license, FERC must “give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.” 16 U.S.C. 797(e). FERC also “require[s] the construction, maintenance, and operation by a licensee at its own expenses of such . . . fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce.” 16 U.S.C. § 811. Further, in order to protect and mitigate damage to “fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license . . . shall include conditions for such protection, mitigation, and enhancement” based on recommendations received from federal agencies and State fish and wildlife agencies such as Maine’s Department of Environmental Protection (“DEP”) and the Board of Environmental Protection (“BEP”). 16 U.S.C. § 803(j)(1). As a prerequisite to a FERC license, the applicant must provide FERC with a Section 401 Certification from the State that any discharge from the activity complies with the water quality standards. *See* 33 U.S.C. § 1341(a)(1).

⁴ Alewives are virtually indistinguishable from blueback herring (*Alosa aestivalis*), collectively “river herring,” although they are both native to coastal rivers on the Atlantic Seaboard including the Saint Croix River in the Gulf of Maine. In executing the 2008 Alewife Law, fishway operators do not, and cannot, distinguish blueback herring from alewives, nor does the barrier itself distinguish between these species of river herring and other migratory (i.e. sea lamprey, American shad, striped bass, American eel, alewife floater (*Anodonta implicata*) or local species that may need to pass (the barrier is designed so only Atlantic salmon *may* be able to pass, *if* they are able to leap over it). Thus, by extirpating native alewives from the Saint Croix watershed, the Maine Legislature has also extirpated the rivers’ native population of blueback herring and adversely impacted many other species that attempt to pass while the blockade is in effect including the alewife floater (*Anodonta implicata*), a freshwater mussel.

II. Factual Background

Alewives are indigenous to the Saint Croix watershed and require habitat that allows migration upstream and downstream. The main stem of the St. Croix River serves as the border between Maine and New Brunswick, Canada and it contains a number of dams that would inhibit the migration of alewives in the absence of fishways. Modern fishways constructed in 1964 on the Woodland (downstream of Grand Falls) and Grand Falls⁵ dams, and in 1981 at the Milltown dam (downstream of Woodland), greatly improved alewife and other diadromous fish passage on the St. Croix, resulting in an alewife resurgence (between 1981 and 1987 annual alewife returns increased from 169,000 to 2,625,000).

The alewife resurgence in the 1980's coincided with a decline in the non-native smallmouth bass population in Spednic Lake, located in the headwaters of the St. Croix in Maine. Some sport fishermen raised concerns that the increased alewife population might be adversely affecting smallmouth bass (although scientific studies confirmed earlier conclusions by scientists that alewives in fact pose no threat to the non-native bass). As a result, alewives were blocked from Spednic Lake in May 1987 and then temporarily blocked at the Grand Falls dam in 1991. In 1995, the State of Maine enacted legislation to close both the Woodland dam and the Grand Falls fishways to migrating alewives. After these closings, and as a direct result of this legislation, the St. Croix alewife population plummeted from a high of 2.6 million fish in 1987 to a low of only 900 returning adults in 2002.

Beginning in 2002, the Canadian Department of Fisheries & Oceans began trucking alewives captured in the Milltown fishway, which had not been closed in the 1995 legislation, 10 miles upstream of the Woodland dam where they were released to spawn. This effort allowed the St. Croix alewife population to rebound to about 12,000 fish annually beginning in 2006 in this small section of the St. Croix below the Grand Falls Dam. Alewives remained extirpated from 98 percent of their native spawning and nursery habitat in the St. Croix watershed. In March of 2008, in response to advocacy by FOMB and others, the Maine Legislature considered legislation to overturn the 1995 state law. While the original bill would have provided restored access to all upstream alewife spawning habitat, an amended bill was passed (the 2008 Alewife Law) that opened fish passage only at the Woodland Dam, directing Maine fisheries commissioners to operate the Grand Falls fishway so as to ensure that no alewives are allowed to pass.⁶ Thus, alewives remain extirpated from 98 percent of native alewives spawning and nursery habitat.

The Grand Falls fishway, located on the Maine side of the St. Croix River, is currently the only method by which native alewives could potentially migrate from the ocean to their spawning

⁵ The Grand Falls Dam was built in 1916 with federal funds as was its 1964 fishway which was apportioned by Congress to the United States Fish and Wildlife Service ("USFWS") for alewife and sea-run fish passage. Even the 1915 Order of Approval by the International Joint Commission provides for a fishway "designed to permit the passage of fish up and down stream." See November 19, 1915 Order of Approval at (f).

⁶ See FB Env'tl., Int'l Joint Comm'n, *St. Croix River: State of the Watershed Report* 18 (2008).

grounds in the St. Croix River watershed. Because Section 2 of the 2008 Alewife Law⁷ prevents their passage, the St. Croix River above the Grand Falls dam no longer provides suitable habitat for all indigenous aquatic species, as required by Maine's water quality standards. On July 9, 2012 EPA determined that 12 M.R.S.A. § 6134(2) unlawfully revised Maine's water quality standards for the entire St. Croix watershed because the revised standards no longer protect the designated and existing uses of the river by river herring. *See* July 9, 2012 EPA Letter at p.2 FN3 ("Because river herring are unable to migrate past the dam and spawn upstream, the numbers returning to even the portions of the St. Croix River accessible to river herring have declined dramatically. Thus, the entire river system (including, not just Class A and AA segments upstream of the Grand Falls Dam, but also Class A segments downstream of the Grand Falls Dam) has an artificially altered aquatic population."); *see also* p. 3.

For all of the reasons stated above, the 2008 Alewife Law impermissibly creates a less protective sub-category of the Class A, GPA, and B water quality standards for the St. Croix River Basin waters above (and below) the Grand Falls dam by creating a subcategory of "natural except for alewives and alewife habitat" and "unimpaired without alewives and alewife habitat." Maine did not perform a UAA for creation of such a sub-category of waters or submit the results of a UAA to the U.S. EPA for approval.

III. Prior Proceedings

After years of effort seeking to secure clear passage to alewives on the St. Croix River, FOMB, Douglas H. Watts, and Kathleen McGee filed suit in the U.S. District Court for the District of Maine seeking: 1) a declaratory judgment that the 2008 Alewife law was preempted by the Clean Water Act, and 2) an injunction ordering immediate removal of the barrier at the Grand Falls Dam and prohibiting further implementation of the Alewife Law. *See Friends of Merrymeeting Bay v. Olsen*, 839 F. Supp. 2d 366 (March 16, 2012). The district court granted the State of Maine's motion to dismiss the suit, finding that the CWA contained an administrative process including a citizen suit provision providing plaintiffs the opportunity to seek EPA review that had not been exhausted. *FOMB*, 839 F.Supp.2d at 375. Shortly thereafter, the FOMB sent a 60 day NOI to the U.S. EPA for its failure to perform its non-discretionary duty under section 505(a) of the Clean Water Act to review this *de facto* revision of Maine's water quality standards. *See* May 12, 2012 FOMB 60 day NOI to U.S. EPA.

Within 60 days of receiving FOMB's NOI, EPA reviewed the 2008 Alewife Law and disapproved it as an unlawful revision to the narrative water quality standards for Class A and AA waters throughout the St. Croix watershed. *See* July 9, 2012 Letter from U.S.EPA to Maine Attorney General William Schneider ("EPA Letter"). Specifically, EPA found that "Section 6134(2) constitutes a new or revised water quality standard that EPA has the authority and duty to approve or disapprove under Section 303(c)(3) of the Clean Water Act because it is legally binding upon the state, and because, for the Class A and AA reaches of the St. Croix River main

⁷ The 2008 Alewife Law is implemented by installing a "stop log" at the Grand Falls Dam fishway which blocks access during a three month period of time beginning April 1st of each year when alewives seek to migrate upstream. *See* 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).

stem and tributaries upstream of the Grand Falls Dam, it addresses water quality criteria by specifically c[u]lling out river herring, which are indigenous aquatic life species previously protected by Maine’s narrative water quality criteria for Class A and AA waters.” *Id.* at 1. EPA explained that the law “cannot be approved under the Clean Water Act and EPA regulations because the revision of the narrative criterion at 38 M.R.S. §§ 465(1)(B) and (2)(B) is not accompanied by a sound scientific rationale and the revised criteria no longer support designated uses.” *Id.* EPA advised Maine that based on its disapproval it “should take appropriate action to authorize passage of river herring to the portions of the St. Croix River above the Grand Falls Dam.” *Id.* at p. 4.

IV. State Inaction

On August 8, 2012, Maine’s Attorney General responded to the EPA letter disapproving the 2008 Alewife Law. Maine concurred with EPA that the 2008 Alewife Law could no longer be applied for “discrete federal CWA purposes” (such as Section 401 Certifications), but claimed that Maine “has always regarded the Alewife Law to be a fisheries management measure with meaning and effect only in that context” *See* August 8, 2012 Letter from Schneider to U.S. EPA at p. 2. Maine’s letter made clear that it did not intend to open passage at the Glen Falls Dam consistent with EPA’s disapproval letter, and stated that Maine instead supports the Alewife Adaptive Management Plan (*available at: <http://www.ijc.org/rel/st-croix-alewife/background>*) – a plan developed by the International St. Croix River Watershed Board. The proposed plan contains no commitment to any action within a fixed timeframe, would institute new barriers to alewife passage at Spednic and West Grand Lakes dams that would continue to block alewife access to 70 percent of their habitat, and is based on the same flawed scientific hypothesis (that indigenous alewives harm small-mouth bass) that EPA rejected in its disapproval.⁸

V. EPA’s Mandatory Duty Under 33 U.S.C. § 1313(c)(4)

EPA is subject to a citizens-suit once it fails to perform a non-discretionary duty. 33 U.S.C. § 1365(a)(2).

EPA has a nondiscretionary duty under § 1313(c)(3)(A) to promptly promulgate new or revised water quality standards when a State fails to revise its standards after an EPA disapproval. *See Northwest Environmental Advocates v. U.S. EPA*, 268 F.Supp.2d 1255, 1262 (D. Oregon 2003)(holding EPA had a nondiscretionary duty to promptly promulgate a revised water quality standard (temperature criterion) after Oregon failed to submit its own revision within 90 days of EPA’s disapproval). As the *NWEA* Court explained, this mandatory duty is consistent with giving full effect to the plain meaning of the Clean Water Act. *NWEA*, 268 F.Supp.2d at 1260. *See also Raymond Proffitt Found. v. U.S. EPA*, 930 F. Supp. 1088, 1097 (E.D. Pa. 1996); *Idaho Conservation League v. Russell*, 949 F.2d 717, 720 (9th Cir. 1991); *Idaho Conservation League v. Browner*, 968 F. Supp. 546, 548 (W.D. Wash. 1997). Here, the EPA violated the CWA when it failed to take prompt action on or before October 8, 2012 to promulgate a new or revised water quality standard in response to Maine’s failure to revise its standards to authorize passage of river herring to the waters above the Grand Falls Dam (90 days after EPA’s determination and

⁸ *See* EPA Letter at p. 3 (“EPA is not aware of any sound scientific rationale for excluding indigenous river herring (or other migratory species) from the St. Croix River . . .”).

disapproval of 12 M.R.S.A. § 6134(2)). *See* 33 U.S.C. § 1313(c)(4)(A); *see also* 40 C.F.R. § 131.21(a).

EPA also has a non-discretionary duty to promulgate a new or revised water quality standard under 33 U.S.C. § 1313(c)(4)(B) once it determines that one is necessary to meet the requirements of the CWA. *See Northwest Environmental Advocates v. EPA*, 268 F.Supp.2d 1255, 1263 (D. Or. 2003) (a cause of action may arise under 303(c)(4)(B) if there is evidence that EPA made a determination that a new or revised standard is necessary and failed to act on it, or made a determination that the existing regulation was inadequate,)); *see also Florida Wildlife Fed'n v. Jackson*, 853 F. Supp. 1138; 2012 WL 537529 (N.D. Fla. 2012) (once EPA determines that Florida's nutrient standard are inadequate it has a duty to promulgate new ones under 303(d)(4)(B)). Once EPA determined that the 2008 Alewife Law revised the narrative criteria such that the designated and existing uses in the Class A and AA waters in the St. Croix watershed cannot be achieved, it had a duty to promulgate a new or revised standard to meet the requirements of the Act, yet failed to do so.

VI. An Appropriate Water Quality Standard Is Critical To Protect Water Quality In The St. Croix River Basin And Directly Applicable To Numerous Federal And State Decisions

Under the CWA, any applicant for a Federal license or permit must provide the licensing or permitting agency with a certification from the state that the proposed activity will meet state water quality standards. For the reasons stated in EPA's July 9, 2012 letter, it is currently impossible for MDEP to craft a water quality certification for any dam or other activity requiring a license or permit at or above the Grand Falls Dam containing the legally required finding, consistent with 38 MRSA §465(1) and (2), that such waters will attain the narrative criteria and legally designated and existing uses for the St. Croix River. EPA's failure to exercise its non-discretionary duty to promptly promulgate a new water quality standard that ensures the attainment of the waterbody's narrative criteria, and existing and designated uses, allows the waters above the Grand Falls Dam to remain out of compliance with Maine's water quality standards, which require these such waters to be "natural" and suitable habitat to support the river's native, indigenous alewives. Thus, no license or permit for any dam on the St. Croix can lawfully be issued until the law is changed and alewives once again have access to those waters.

While the Grand Falls was constructed in prior to the Federal Power Act,⁹ and may be exempt from certain FERC regulation, it is not exempt from all federal law.¹⁰ For example, if the Dam needed alterations or replacement, Section 401 and 404 requirements would be triggered.

⁹ The Federal Power Act gave FERC authority over those dams not exempted by Section 817 (authorized by Congress prior to 1920). The Grand Falls Dam was built in 1915 by the Saint Croix Water Power Company.

¹⁰ Pursuant to the Boundary Waters Treaty signed between the U.S. and Great Britain in 1910, Congress enacted a law in 1916 titled "An Act to authorize the maintenance and operation of dams across the Saint Croix River at Baileyville and Grand Falls, Maine." Pub. L. No. 64-234, 39 Stat. 534 (1916). This Act makes lawful the Grand Falls and Woodland Dams after the fact and asserts federal control over the dams operations pursuant to the Commerce Clause. Section 2 of this law states: "That the dams herein authorized, and their maintenance and operation, shall be subject to and in accordance with all the pertinent provisions of the laws of the United States now in force, or which may hereafter be enacted by Congress to regulate and govern the construction of dams across navigable waters." Section 3 states: "The right to alter, amend, or repeal this Act is hereby expressly reserved."

In addition, there are at least three FERC licensed dams directly upstream from the Grand Falls Dam on the St. Croix River - West Grand Lake (FERC No. 2618); Spednic Lake (FERC No. 2492) and East Grand Lake/Forest City Dam (FERC No. 2660) – that are undergoing FERC re-licensing. See <http://www.ferc.gov/industries/hydropower.asp>. All of the Section 401 Certifications required for the upstream dams must comply with applicable provisions of the CWA and Maine’s state water quality standards (waters supporting all indigenous species would be a necessary “condition” of the license). See 16 U.S.C. § 1341(a)(2).

As EPA has already determined, the blockage of alewives at the Grand Falls Dam fundamentally prevents the waters of the St. Croix River basin from attaining their narrative water quality criteria and designated and existing uses; and prevents Maine from being able to carry out its legal duty under Section 401 to certify (or not certify) that these dams will be operated so as to attain water quality standards in and above their receiving waters. In addition, this change in water quality standards cripples FERC and the U.S. Fish & Wildlife Service’s (“USFWS”) ability to prescribe fishways and other devices at these federally licensed dams necessary to protect, maintain, restore and benefit native, indigenous fish species, including native anadromous alewives, as required by the Federal Power Act. 16 U.S.C. 797(e).

Conclusion

Unless EPA performs its mandatory duty to promptly promulgate a new water quality standard, Friends Of Merrymeeting Bay and Ms. McGee intend to file suit at the close of the 60-day notice period pursuant to 33 U.S.C. § 1365(a) and will seek appropriate injunctive and declaratory relief, as well as a recovery of attorney fees and litigation costs as provided under the law.

This notice is provided on behalf of the Friends of Merrymeeting Bay, P.O. Box 233, Richmond Maine, 04357 and Kathleen McGee, Bowdoinham, Maine. We are acting as counsel to FOMB and Ms. McGee in this matter, and ask that all communications regarding this matter be directed to the undersigned at the following e-mail addresses: rfleming@earthjustice.org and efuller@earthjustice.org.

If you wish to discuss this matter, please contact Roger Fleming at (978) 846-0612 or Erica Fuller at (508) 400-9080.

Sincerely,

/s/ Roger Fleming
Roger Fleming, Attorney
Erica Fuller, Attorney
Earthjustice
Washington, D.C.

Cc: U.S. Attorney General Eric H. Holder Jr.
Region 1 Administrator Curt Spalding
William J. Schneider, Attorney General State of Maine
Ronald Fein, Regional Counsel, U.S. EPA Region 1