

Friends of Merrymeeting Bay win legal victory against dam operators

by Chris Chase
Coastal Journal staff

MIDCOAST — The Federal Circuit Court of Appeals in Boston has reversed the dismissal of a lawsuit intended to protect Atlantic salmon and American shad from turbines of hydroelectric dams along the Kennebec River.

The lawsuit, brought by Environment Maine and Friends of Merrymeeting Bay against

Brookfield Asset Management, was kept alive by a Clean Water Act agreement that went into place when the Edwards Dam, located on the Kennebec, was removed. The lawsuit claims that Brookfield is violating water quality standards at four of its dams: Lockwood, Hydro Kennebec, Shawmut and Weston.

"This is based on language that evolved after the removal of Edwards Dam," said Friends of Merrymeeting Bay Chair Ed

Friedman. "Language went into the water quality certificates of each dam at the removal."

The court of appeals reversed U.S. District Judge George Singal's decision that the groups could not prove their case. Now, Singal will have to take a second look.

According to Friedman, the Clean Water Act agreement requires that Brookfield perform studies on the total "take" of salmon caused by operating

hydroelectric turbines in the river. "There was language that says in the agreement, 'If the dam owner desires to pass fish through the turbines, then they have to do those studies,'" said Friedman.

Friedman said Brookfield has not done any of those studies, but has continued to operate the turbines. To meet the requirements of the agreement, Brookfield has to show that the operation will not result in significant injury or death to the endangered species passing through them.

"The certifications take the common-sense view it is unsafe for adult salmon and shad to be swimming through rapidly spinning turbine blades," said Friedman. "The burden is on Brookfield to prove otherwise with scientific evidence."

The court of appeals evidently agreed with the two environmental groups, finding that if the dam isn't proven to be effective at allowing salmon to bypass the turbines, Brookfield is knowingly taking salmon by operating its dams.

"The justice said, 'If your bypass is 99 percent ineffective, then really, you're talking about moving fish through turbines, so you have to do the studies,'" said Friedman.

The lawsuit initially was targeting dams on both the Kennebec and the Androscoggin River in hopes that the hydroelectric turbines would be shut down during the annual migration of salmon and shad downriver.

According to Friedman, the two species are up against nearly impossible odds at the Fort Andross dam in Brunswick. The 935-foot-long dam has only one

non-turbine downstream passage: An 18-inch round hole situated between the turbines.

"Very unfortunately, Brunswick is no longer in the game. None of the dams in the Androscoggin are in the game any more," said Friedman. "They're basically blowing off the Androscoggin."

The latest court ruling is being viewed by Friedman as a victory tempered by Singal's previous decision.

"We got sent back to the same guy who didn't think there's a problem with an 18-inch round hole within a 1,000 foot dam," said Friedman.

According to Zev Korman, vice president of investor relations for Brookfield, the company is committed to making efforts to follow regulations and protect salmon.

"We have been working actively with the appropriate agencies on a plan to benefit and protect Atlantic salmon in keeping with regulations," said Korman. "We're reviewing the decision and look forward to continuing this work."

What the final result will be is obviously up to the court, but Friedman said the best-case scenario will be a cease of operations during salmon migration.

"If Brookfield simply can't keep adult fish out of its turbines, they should shut off the turbines during migration season," said Friedman. "Without safe dam passage for salmon and shad, these species will never recover."

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