UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY AND ENVIRONMENT MAINE,	)	
Plaintiffs,	)	
v.	)	**C.A. No. 11-cv-00035-GZS**
BROOKFIELD POWER US ASSET MANAGEMENT, LLC, and HYDRO KENNEBEC, LLC,	)	**(Oral Argument Requested)**
Defendants.	)	

BROOKFIELD'S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, TO STAY THE CASE

Defendants Brookfield Power US Asset Management, LLC and Hydro Kennebec, LLC (Brookfield) move to dismiss the First Amended Complaint filed by two advocacy organizations, Friends of Merrymeeting Bay and Environment Maine (hereafter FOMB) for lack of subject matter jurisdiction, because it is unripe. Alternatively, Brookfield moves to stay the case until the expert federal agencies have had an adequate opportunity to establish a scientifically-supported species protection plan, including a determination of whether an incidental take statement should be issued to Brookfield in accordance with the applicable regulations under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (ESA).

Plaintiffs improperly seek this Court's premature intervention in the ongoing administrative decision-making process of the agencies empowered by Congress to make the necessary judgments about measures to foster recovery of imperiled populations of Atlantic salmon under the ESA. Plaintiffs' legal theories and the relief they seek call for the Court to intrude on the discretionary functions of the National Marine Fisheries Service (NMFS) and the

United States Fish and Wildlife Service (FWS). These agencies undertook years of study that resulted in the listing of the Atlantic salmon as a protected species, and in that exhaustive process they developed exceptional scientific resources and expertise to make determinations of what might be a prohibited "take" within the context of the unique conditions at Brookfield's dam and within the meaning of the agencies' own regulations. The agencies are keenly aware that each dam presents different circumstances as to what may be required to prevent "take" and reduce obstacles to utilization of critical habitat. Since even before the listing took effect, Brookfield has actively cooperated with the agencies in timely and legally compliant proceedings to establish a species protection plan grounded in science and tested under actual conditions. The agencies are well along in their work towards incidental take decisions, and, once made, their findings and determinations will be subject to judicial review.

FOMB asks the Court to jump the gun, to declare that any possible losses of salmon at Brookfield's dam in the interim would constitute an unlawful "take," and to enter a decree imposing measures and timetables regarding the operation and maintenance of a power-generating dam. As the agencies know, the imposition of idealistic but unstudied changes to the dam (such as the punchplates touted by plaintiffs) could actually make matters worse. On the other hand, dismissing this case or staying it until the agencies make their decisions will not worsen the species' plight, but will allow them to develop the factual record and apply their expertise to those facts in order to make sound, scientific decisions in accordance with their regulations.

Brookfield intends to file the preliminary draft Biological Assessment with NMFS next month, and anticipates that the Biological Opinion will be filed in the spring of 2012. There is no evidence that Atlantic salmon will be harmed in Brookfield's turbines in the short interim.

Salmon migrating upstream from the Atlantic Ocean cannot reach Brookfield's dam. Any returning adults are trapped and trucked from a dam below Brookfield's dam to a point in the river far above it. As for the downstream portion of the migration, studies of smolts (migrating juveniles) to date show that they successfully pass downstream through Brookfield's dam.

Brookfield shares Plaintiffs' goals for returning Atlantic salmon to abundance. Nevertheless, after the agencies have worked on this project for more than a decade, FOMB demands that the Court intercede now and impose its own rules for dam operations going forward, just a few months before the agencies finalize their conclusions. This runs afoul of Supreme Court and First Circuit precedent that firmly establishes the ripeness doctrine as the means to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967); *McInnis-Misenar v. Maine Medical Center*, 319 F.3d 63, 70 (1st Cir. 2003); *City of Fall River v. F.E.R.C.*, 507 F.3d 1, 6 (1st Cir. 2007). Cf. *Bennett v. Spear*, 520 U.S. 159, 173-174 (1997) (ESA plaintiffs' claims are reviewable only when consultation-incidental take permit processes are completed by wildlife agencies and have conclusive legal effects.) At a minimum, the Court should stay the proceeding until the agencies have completed the requisite studies and issued their final decision.

I. Facts Relevant To Jurisdiction, Ripeness, and Stay

The 2000 Final Rule. The factual context of the case is set forth in the federal agencies' rulemaking documents with respect to the endangered species listing and critical habitat designation for the Gulf of Maine Distinct Population Segment (DPS) of Atlantic salmon, *Salmo salar*. After more than a decade of intensive study, including international scientific peer review, NMFS and FWS published their original Final Rule in November 2000. The species' severe

slide towards extinction began in the nineteenth century after intensified human settlement, industry, and exploitation of natural resources. The impending jeopardy was attributable to many causes, including the destruction of habitat, obstruction of the natal rivers, pollution, overutilization in commercial and recreational fisheries, disease and predation, as well as harm to wild populations occasioned by previous river stocking programs and aquaculture. The agencies concluded that two distinct population segments from Long Island Sound and Central New England had already been extirpated. They decided to extend ESA-protected status to the remnants of the third distinct population segment native to the Gulf of Maine. Specifically, the agencies defined the Gulf of Maine DPS as comprising only "the Kennebec River downstream of the former Edwards Dam site, northward to the mouth of the St. Croix River . . .," and included the river-specific hatchery fish in that region.[1] The agencies thus expressly excluded from the listing wild and hatchery fish that once inhabited the upper Kennebec River, where Brookfield operates the dam which is the subject of this lawsuit.[2] In the 2000 Final Rule, NMFS and FWS specifically excluded all natural or hatchery salmon from the Androscoggin River system, which shares its estuary, Merrymeeting Bay, with the Kennebec River.

The 2009 Final Rule. In June 2009, NMFS and FWS published a new Final Rule on Determination of Endangerment Status.[3] This Final Rule was based upon additional study by scientists from various federal and state agencies and commissions, assembled as the so-called

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[1] "*The river specific hatchery-reared fish are also included as part of the DPS.* However, these hatchery fish will *not* count toward a delisting until they have spawned naturally in the wild." 65 FR 69459, November 17, 2000. (emphasis added).

[2] Brookfield's Hydro Kennebec facility, upstream of the Lockwood Dam, also in Waterville, and downstream of the Shawmut Dam in Fairfield, has been cut off from natural migrations of wild Atlantic salmon for many years. *See* Declaration of Kevin Bernier, attached as Exhibit A.

[3] A separate rule, specifically designating the critical habitat to be protected as part of the species' recovery program, was promulgated on the same day. That critical habitat designation includes basically the entire watershed of every river system (including the Kennebec, Androscoggin and Penobscot) within the historic range of the fish. 74 FR 29300, June 19, 2009.

2005 Biological Review Team. This Rule expanded the 2000 listing by modifying the freshwater boundaries of the Gulf of Maine DPS to include the Penobscot, Kennebec and Androscoggin Rivers, except generally for the portions above certain impassable falls that had historically limited the upstream extent of the anadromy. (Anadromy means that spawners return to freshwater after the marine phase of their life cycle in order to reproduce). As to the Kennebec River system, NMFS determined that critical habitat ends above the Sandy River, thereby excluding from the designation former salmon spawning grounds long obstructed by eight upriver dams. The agencies' decision to expand the DPS designation took into account revised estimates of abundance, productivity, genetic diversity and spatial distribution in the preceding nine years. In the 2009 Rule, the agencies emphasized that it was essential to utilize all suitable habitat throughout the three additional river systems as ecological platforms to propagate the intermixed hatchery populations raised at Green Lake National Fish Hatchery (GLNFH) and Craig Brook National Fish Hatchery (CBNFH).[4] In the recovery program, government agencies are stocking eggs or fry propagated from these hatchery fish – which are neither natural, wild inhabitants of the Kennebec River system nor genetically identical to any such fish – above Hydro Kennebec, and these mixed-river origin salmon may encounter the Hydro Kennebec facility on downstream migrations.[5]

Brookfield's operation of the dam. Brookfield currently owns and operates the 15 MW Hydro Kennebec dam, built in 1985 to replace a 19th century facility. The dam supplies power to

[4] Salmon kelts and smolts can proceed downstream at Hydro Kennebec via three routes: in the newly constructed fish passageway constructed in 2006, on spill over the dam, or through one of the turbine units. While plaintiffs allege that fish are harmed in passing through Brookfield's modern turbine units, nothing supports a claim that mortalities have in fact occurred in recent operation of the facility under defendants' ownership.

[5] If the agencies are ultimately successful with their program, Kennebec-origin fish may one day return to Merry-meeting Bay, navigate the 40 miles past the former Edwards Dam site at Augusta, then to, and over Lockwood Dam, then move towards the Hydro Kennebec facility. As Plaintiffs note (Complaint § 15), the number of adults arriving in Merrymeeting Bay to begin ascent of the Kennebec has been declining for many decades. Without a fundamental change in resource management or removal of the downriver dam, there is no reasonable likelihood that any upstream migrating wild salmon will approach Hydro Kennebec in the near future.

consumers on the grid. *See* Bernier Declaration, attached as Exhibit A, at ¶ 7. Brookfield first leased the facility from Madison Paper in 2005. That lease expired in 2009, but Brookfield purchased the dam from Madison Paper in 2010. *Id.*

Even before it owned the dam, Brookfield initiated discussions with NMFS (as the lead agency for salmon species protection programs), FERC (as the energy licensing agency authorized to add environmental conditions to the license), and other state and federal agencies about the best means of promoting the salmon population. *Id.* at ¶8. Brookfield and the agencies shared studies and reports regarding fish passage, fish migration, and equipment evaluations. *Id.* Fish passage engineers reviewed data and made site-specific recommendations about the best means of allowing salmon and other fish to migrate. As a result of those discussions, in 2006 Brookfield installed a state-of-the-art downstream fishway that allows Atlantic salmon and other migratory species to travel downstream. *Id.* at ¶11. Brookfield continues to test and improve the fishway.[6] *Id.* at ¶12.

The agencies and Brookfield have not focused their efforts on upstream passage for the simple reason that there is no evidence that any upstream-migrating Atlantic salmon have reached Brookfield's site for well over 100 years. *Id.* at ¶9. Dams located downstream from Brookfield's facility have blocked salmon migrating upstream from the Atlantic Ocean to Brookfield's site. *Id.* Since 2006, government agencies have trapped the upstream-migrating Atlantic salmon at the Lockwood Dam (below Brookfield's dam) and trucked them to the Sandy

[6] For example, in 2011 Brookfield hired a consultant with the approval of FWS, NMFS, and other resource agencies to develop a plan to test the fishway's effectiveness. During May and June 2011, 98 radio-tagged Atlantic salmon smolts were released over five days above the dam, and their downstream movements were monitored using radio telemetry. A downstream stationary receiver was located approximately one-half mile below the dam. A total of 95 out of the 98 smolts passed the Project, consistent with normal survival rates of smolts in the river, as it is expected that some smolts will be taken by predation, disease, or other natural causes (or simply regurgitate their tags). Of the 95 smolts determined to have passed Hydro Kennebec, only two fish did not pass Lockwood, the next dam downstream, and remained in the stretch of river between the two projects. One of those fish was a smolt passed by spill and the other was a smolt passed via turbine. Also, while most smolts passed over the spill and downstream bypass, almost 17% of the smolts passed through the dam's turbine units. *Id.* at ¶15

River, a tributary to the Kennebec above Brookfield's dam. *Id.* Thus, upstream-migrating salmon bypass Brookfield's dam completely. *Id.* Unless and until government agencies stop trapping and trucking the salmon, there is virtually no risk that upstream-migrating Atlantic salmon can be harmed by Brookfield's dam. *Id.*

Before publication of the 2009 Final Rule, Brookfield worked cooperatively with the agencies to develop Interim Species Protection Plans (SPP) for the dam. *Id.* at ¶¶11-12 Brookfield proposed preparation of a Biological Assessment and SPP in advance of additional ESA Section 7 consultation with FERC. Brookfield anticipates that the Section 7 consultation will provide for authorized incidental take of Atlantic salmon for adverse impacts that cannot be avoided or minimized at the project. In February 2011, NMFS notified Brookfield that it had reviewed Brookfield's proposal for addressing ESA compliance at the dam "and affirms that the approach you have outlined is a reasonable path forward." *Id.* at ¶13.

On March 14, 2011, FERC designated Brookfield as the non-federal representative to prepare a draft Biological Assessment, which NMFS will consider in its official Biological Opinion under the ESA consultation procedure, 16 U.S.C. §§ 1536(a), (b), and (c). *Id.* at ¶14. Brookfield expects to forward the preliminary draft Biological Assessment next month, in early November 2011, and file the draft Biological Assessment with FERC in January 2012. *Id*. at ¶16. Brookfield expects that FERC will forward the draft Biological Assessment to NMFS to initiate formal consultation that month, and for NMFS to file its Biological Opinion with FERC and Brookfield in the spring of 2012. *Id.* In the course of these procedures, NMFS will necessarily reach judgments concerning the permitted level of "incidental take" of transplanted adults, their offspring, and hatchery-origin smolts (stocked as eggs or fry), if any, as well as what constitutes a prohibited "take" of federally-supervised releases of mixed river-origin hatchery stocks.

III. Procedural Posture

Plaintiffs' Substituted Complaint was filed June 2, 2011. On July 14 and July 22, 2011, the Magistrate Judge issued his Recommended Decisions on Motions to Dismiss by Defendants Miller Hydro, Topsham and NextEra Energy et al., in parallel cases against other dam operators on river systems covered by the 2009 Final Rules. Judge Singal affirmed the recommended decisions, but left open the question of whether to grant a stay if the ESA administrative consultation process will result in final agency action in the near future.

IV. Argument: This Case Is Not Ripe And Should Be Dismissed Or Stayed Because The Issues Are Under Active Consideration By The Expert Administrative Agencies.

Defendants respectfully request the Court to dismiss this case because it is not ripe for adjudication. NMFS, FWS and federal "action agencies"[7] have enormous responsibilities in the ambitious effort to reconstitute the environmental conditions that supported Atlantic salmon runs before their decline in the early 1800s. The agencies must use their legal authorities and scientific resources to reduce pollution, control impacts from forestry and agriculture, restrict real estate development and other activities that compromise wetlands, roll back overutilization in commercial and recreational fisheries, and address many other challenging aspects of the new regime. The case framed in FOMB's Complaint relates to one strand of the Atlantic salmon recovery program set in motion by the 2009 Final Rules: What will each operator of a dam currently generating electricity to serve people and businesses in the Kennebec, Androscoggin and Penobscot watersheds be required to do in light of its particular circumstances and placement in its river system, in order to facilitate the species' restoration and delisting? As NMFS develops new standards for technological adaptations and operational changes designed to avoid

[7] FERC is the action agency here, but virtually every cabinet department in the executive branch will have ESA consultation-initiating decisions or projects; Transportation, Homeland Security, Defense, Army Corps of Engineers, Agriculture, and EPA will all present questions involving the ESA concepts of "take" and "jeopardy."

"jeopardy" or adverse affect to the species, hydropower facilities will have to comply or face enforcement actions under ESA Section 9 for failure to do so.

Dismissal for lack of ripeness or a stay is appropriate because NMFS biologists and decision makers are still evaluating Brookfield's dam and hundreds of projects and recovery actions throughout designated critical habitat area consisting of almost 20,000 kilometers of perennial river, stream and estuarine habitat, and 800 square kilometers of lake habitat. In light of this ongoing evaluation, adjudication regarding Brookfield's dam is premature: decisions made regarding protection for the species at various locations in this vast swath of territory will affect other decisions regarding rivers and dams throughout the ecosystem. NMFS' emerging position on what measures are feasible for each individual dam operator to improve fish passage and reduce mortalities at its site must be informed by multi-seasonal scientific studies of the sort Brookfield is conducting as part of its draft Biological Assessment.

A. Plaintiffs' Contention That the Court Is Justified In Exercising Jurisdiction Now, In Order To Punish Or Redress Ongoing ESA Violations Not Being Dealt With in Pending Agency Deliberations, Does Not Withstand Careful Scrutiny.

In this lawsuit, Plaintiffs maintain (Substituted Complaint ¶1) that Brookfield is violating the law by, "in ESA parlance, illegally 'taking' this species [because] Defendants' dam kills and injures salmon with its rotating turbine blades when the fish try to pass through them . . .." They aver (Complaint ¶4) that neither NMFS nor FWS have taken action to redress the violations. FOMB says (Complaint, ¶5) that Brookfield hasn't taken "a number of basic, feasible steps, such as keeping fish from swimming into their spinning turbine blades," and this suit must go forward so the Court can issue an Order (Complaint, pp. 19-20) "declaring [Brookfield] to be violating the take prohibition," and directing Defendants to "prepare a BA according to a specified schedule." Apparently, in Plaintiffs' inflexibly strict liability theory of the case, Brookfield's

operation of the Hydro Kennebec facility became automatically and irreversibly illegal at the moment the 2009 ESA listing and critical habitat rules went into effect.[8]

Several links in the chain of Plaintiffs' logic deserve careful analysis. First, there is a substantial zone of ambiguity in the ESA definition of "take," encompassing eight active verbs explicated by the residual clause, "or attempt to engage in any such conduct."[9] The definition of "take" has never been the subject of authoritative agency interpretation or litigated in any circumstances resembling those in this case. For example, people construct homes, commercial office buildings with windows, and drive vehicles with windshields, into which birds collide tens of millions of times each year in the United States. No one asserts that the owners of such property or machines should be subject to prosecution for offending "conduct" under the similar "take" prohibition of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §703 et seq., nor were civil penalty or criminal charges preferred against the owners or pilots of U.S. Airways Flight 1549, which landed in the Hudson River after MBTA protected birds were entrained in the turbine rotors of the aircraft's jet engines.[10] It seems unlikely that such an incident would have been considered a violation, calling for enforcement of ESA, had the ingested bird been an eagle, falcon, or warbler listed as a threatened or endangered species. In general, the Government has lately taken the position that mortalities of migratory birds occurring in the operation of industrial facilities are subject to MBTA enforcement, but that prosecutorial discretion is appropriately exercised to account for the actor's good faith identification and implementation of

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[8] In *Bennett v. Spear*, 520 U.S. at 172-75, the Supreme Court emphasized the critical significance of the administrative deliberations involved in the interagency consultation and incidental take provisions of the statute, ruling that "a Biological Opinion . . . alters the legal regime . . . [with] virtually determinative effect . . .," thereby finally creating a case or controversy meeting the standards for adjudication under Article III.

[9] *See* 16 U.S.C. 1532(19), which states that "take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct," and is susceptible to interpretation that the prohibition is aimed at volitional, active conduct.

[10] See W. Langewiesche, *Fly By Wire: The Geese, The Glide, The Miracle On The Hudson* (Ferrar, Strauss, Giroux (2009), pp. 45-75.

reasonable measures to reduce harm. *See, e.g. United States v. Moon Lake Elec. Assoc.*, 45 F. Supp 2d 1070, 1085 (D. Col. 1999) (failure to install inexpensive protective equipment); *United States v. Kauai Island Utility Corp.*, No. 1:10-cr-296-JMS (D. Hawaii 2010)(failure to cooperate towards collision mortality reduction); *Cf. United States v. FMC Corp*, 572 F. 2d 902, 905 (2d Cir. 1979)("Certainly, construction which would bring every killing within the statute, such as those caused by automobiles, airplanes, plate glass modern office buildings … into which birds fly, would offend reason and common sense….").

The troublesome problem of interpreting what is prohibited "take" within the meaning of the wildlife laws, specifically as applied to the category of collision mortalities, electrocutions on power lines and the like, has become increasingly controversial. One major area of review relates to the paradigm of wind energy generating facilities, analogous to dams insofar as they are turbine blades in the air column instead of the water column. The issue is currently the subject of a three-year Federal Advisory Committee Act proceeding, reaching its conclusion in the near future. Under the most recent version of proposed federal guidelines, wind energy companies which follow those guidelines will be seen as "identifying and implementing reasonable and effective measures to avoid the take." See http://www.fws.gov/windenergy/docs/WEG_September_13_2011.pdf, Guidelines Draft July 12, 2011, pp 12-13 (Sept. 20, 2011 redraft of phraseology).

We mention this analogous law and policy dilemma *not* to contend categorically that endangered salmon mortalities occurring in the turbines of hydroelectric dams may never be held to be prohibited take within the ambit of ESA Section 9. Rather, the point is that this dynamic zone of ambiguity in administrative and enforcement discretion is complex, current and fact-sensitive, by no means the cut-and-dried proposition asserted by FOMB. The Court should reject

plaintiffs' attempt to override the government's more fully-informed administrative and prosecutorial discretion via the citizen suit route, in a case in which no government agency is represented.[11]

Of still greater relevance here is the undisputed, regrettable fact that the only Atlantic salmon now to be found in the vicinity of Brookfield's Hydro Kennebec Dam are hatchery-propagated fish or their progeny, released by government agencies at various points upstream. As Plaintiffs note (Substituted Complaint ¶15), five adult salmon returned to the lower Kennebec River, below the Lockwood Dam, in 2010. *No* wild upstream-migrating salmon have reached Hydro Kennebec at Waterville for many decades, probably not since the Edwards Dam at Augusta was erected in 1837. Putting aside the matter of whether these hatchery stocks are properly to be regarded as equivalent to wild Kennebec River origin salmon for all endangerment status purposes,[12] or should be considered experimental population(s) within the specialized meaning of the statute,[13] it is a question of first impression whether the government may be the active party in introducing a fish into a habitat unoccupied by wild fish in any recent period, and

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[11] Plaintiffs ask the Court to accept their overbroad thesis that all dams "take" salmon, or once did, in one harmful way or another. In this theory, "take" liability attaches whenever an ESA-protected animal or plant is harmed by anything attributable to the past installation or effect of a dam. We do not believe the government shares that view, or that any case law, agency regulation or guidance supports FOMB's position.

[12] As noted above, the 2000 listing originally included only "river specific hatchery-reared stocks," which clearly do not count as natural fish for purposes of delisting and recovery. It is somewhat unclear from the 2009 listing rule just how all "associated conservation hatchery programs" will be treated, considering the current "low level of genetic divergence with the rest of the [wild] GOM DPS," and the extremely few, if any, remaining wild Kennebec-origin fish. See 74 FR 29344, 29348.

[13] Brookfield supports the agencies' current plans and objectives. However, in view of the fact that more than 100 years have elapsed since any upstream migrating adult salmon have reached the Hydro Kennebec Dam site, it would have been biologically correct for NMFS and FWS to conclude that the species was extinct in the wild in the Upper Kennebec, just as the agencies found it to be extinct in the Saco, Merrimack, and Connecticut Rivers. Then, however, there could have been no critical habitat designation, which may only be made for areas "currently occupied" by the species. Thus, reintroduction of the species into the Kennebec would have had to proceed pursuant to rules for "experimental populations….outside the current range," under ESA Section 10(j), 16 U.S.C. 1539(j), and would have raised difficult questions about whether the newly reintroduced fish constituted a "nonessential population," to be treated like a species proposed for listing and not given the full protections of the ESA. *See "Little Known But Important Features of the Endangered Species Act: Distinct Population Segments, 4(d) Rules, and Experimental Populations*", http://www.fws.gov/pacific/news/grizzly/esafacts.htm, September 6, 2011.

then contend that any subsequent harm to the fish somewhere downstream becomes a prohibited "take." At the very least, it would seem that in such circumstances the government should specify the reasonable and prudent conditions by which the operator should manage the facility to reduce the alleged harm, rather than to immediately commence an enforcement case, based on a notion of absolute prohibition, on the day the endangerment status rule is promulgated. (In the pending incidental take statement process, this positive dialogue about practicable conservation measures is precisely what is occurring between Brookfield and the agencies.) Again, Brookfield urges no categorical view here on such a stark, theoretical clash of positions, but calls the Court's attention to an unresolved complexity which justifies deference to further agency developments.

Most importantly, FOMB has seriously overstated the risk of injury to downstream migrating salmon in Brookfield's turbines, especially in light of Defendants' recent fish passage improvements. As exemplified by the spring 2011 radio telemetry study results, along with previous qualitative studies at the project, fish passage studies at Brookfield's facility have provided favorable results. *See* Bernier Dec. at ¶15.

While Brookfield does not contend that this study demonstrates once and for all that its fish passage improvements have eliminated any possibility of salmon injury at the facility, the results are strikingly positive and clearly refute FOMB's contention that prohibited take is occurring.[14] Certainly, these results undercut FOMB's contention that there are discrete violations occurring at present or that immediate judicial intervention is required to preserve the species. Instead, these recent results underscore Defendants' contention both that the dispute

[14] *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 691 n. 2, 708-709 (1995)(restriction expressly limited to actions causing actual death or injury; habitat modification alone does not constitute prohibited harms).

between the parties is bound up in matters now properly in front of NMFS, and that there is no justification for the Court to intrude in the agencies' diligent process at this point.

B. The Court Should Stay The Case Pending Final Agency Action.

While the case is unripe for judicial review at this time, it would also properly be stayed under the primary jurisdiction doctrine, which is "specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *American Automobile Mf'rs Assoc. v. Massachusetts Dep't of Environmental Protection*, 163 F.3d 74, 81 (1st Cir. 1998) (citations and quotations omitted). There is no fixed formula for applying the doctrine, but courts recognize it can avoid a ruling that might otherwise disrupt an agency's regulatory regime, and can promote national uniformity in the interpretation and application of federal regulations. *Id.* The First Circuit has identified three factors to guide a court's decision on whether to defer action pending an agency decision:

> (1) whether the agency determination l[ies] at the heart of the task assigned the agency by Congress; (2) whether agency expertise [i]s required to unravel intricate, technical facts; and (3) whether, through perhaps not determinative, the agency determination would materially aid the court.

Id. (quoting *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir. 1979)). Where statutory interpretation is required, referral to the agency with primary jurisdiction may be advisable in those circumstances where a court would defer to the agency's interpretation under *Chevron*. *Id.* A court may grant an indefinite stay where there is no firm deadline for agency action, or "might refer a matter to an administrative agency, explicitly providing, however, that if the agency fails to rule within a reasonable amount of time, the court would either vacate the referral order and decide the matter itself, or issue an order" compelling agency action. *Id.* at 82.

Under these standards, a stay is particularly appropriate under the present circumstances. The administrative process is already well underway, the agencies are actively gathering data to

establish the best means to protect habitat, promote the health of the species, and determine whether to issue an incidental take statement pursuant to their own regulations. The task involves specific attention to the varied circumstances of each dam within the salmon's critical habitat, most of which do not have a downstream passageway designed solely for fish passage like Brookfield's. A sound decision on the take issue is not simple or easily made, and will depend on the data currently being acquired. Further, the results of the Biological Assessment and subsequent studies will aid the Court after the agencies have made their final decision.

Brookfield, along with its experts and consultants, has been conducting studies and gathering data at Hydro Kennebec for over five years, and will provide the preliminary draft Biological Assessment to NMFS in November 2011. NMFS will then make comments and recommendations about the Assessment. By January 2012, Brookfield expects to complete the draft Biological Assessment and submit it to FERC. Upon finishing its review, FERC will forward the Biological Assessment to NMFS. NMFS will then prepare the Biological Opinion. Even though the agencies cannot provide a steadfast deadline for issuance of a final decision, Brookfield expects that the agencies will be in a position to make a final decision by the spring of 2012. A stay until that point is reasonable, particularly given the favorable fish passage study results demonstrated thus far at Hydro Kennebec.

C. Plaintiffs' Arguments That This Court Must Rush To Judgment Here Ahead Of Federal Agency Action Are Internally Inconsistent.

FOMB, committed to restoration of ecological conditions that existed before human settlement in Maine, is concerned that the federal agencies timely get about the business of implementing actual protections pursuant to the ESA listing rule. They note (Complaint ¶15)

that salmon stocks in the region were decimated by a broad range of man's activities over a long period of time, and the Kennebec River has not seen anything like the historic abundance for a century or more. Without question, dams were a major factor in the demise of the wild ancestral stocks; it is equally undeniable that the worst harm to the species happened long ago.[15]

For purposes of these lawsuits, however, Plaintiffs choose to accentuate the purported consequence of possible individual mortalities of small numbers of salmon originating from upriver transplants or stocking. In their Response to NextEra's Objections to the Magistrate Judge's Recommended Decision, they say, "*If the ESA is to have any meaning, it must protect imperiled species when they are most vulnerable, in the period before the Services implemented a plan for their restoration."* (Plaintiffs' Response at 7) (emphases added). With all due respect, it cannot be seriously maintained that the long term restoration plan for the species will be prejudiced in any way by the loss of whatever limited number of transplanted and hatchery origin salmon might be injured at dams, or in any other place or manner, in the newly-listed river systems during the interim migrations. Hundreds of thousands of hatchery salmon have been (and will continue to be) stocked upstream of Hydro Kennebec as eggs or fry. While Brookfield, for its part, is working to ensure that no incidental mortalities of any fish occur at its facility, the overriding objective is to address the long term recovery plans and structural issues of fish passage that will be central to the ongoing interagency consultations.

Plaintiffs also advert to the importance Congress placed on citizen suit jurisdiction. (*See* Plaintiffs' Response To Topsham Hydro Objections To Recommended Decision at 5-6). FOMB argues that since Congress specifically negated citizen suits in certain situations, such as where

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[15] "*Although Atlantic salmon do not presently occur in the Kennebec River* due to the lack of upstream fish passage at the first mainstem dam (see discussion of habitat connectivity later in this section), available habitat for Atlantic salmon is expected to be impacted by alteration of the natural hydrograph." Fay et al 2006, p. 78 (cited in 2009 listing rule, 74 FR 29344, 29345-29347).

the government has formally commenced civil or criminal cases to enforce violations of the law, no ripeness or primary jurisdiction considerations apply outside of those exceptions. But there is nothing in the text or legislative history of the statute to indicate that Congress meant to go so far as to overrule the bedrock Article III ripeness principles of *Abbott Labs*, even if that was within its legislative power to do. Moreover, Plaintiffs' aim here is not only to shift the venue of the recovery program from the executive branch to the judiciary, but to try to do so in the absence of the agencies with the expertise on the subject matter. While it is not Brookfield's contention that this suit must be dismissed solely because FOMB has not joined NMFS (or FERC, as its interagency consultation partner) as a party, Plaintiffs' choice to exclude the regulators seems to reflect a recognition that the government would likely answer by affirming that these matters are the subject of pending administrative deliberations not yet ripe for judicial review.

FOMB protests delay to await agency consideration of incidental take applications, because "it borders on unconscionable for defendants to suggest that an action to prevent further take *in the interim* of salmon that are on the brink of extinction now . . . should be dismissed or stayed in deference to the administrative process." (*See* Plaintiffs' Response To NextEra Objections at 9-11) (italics in original). Inflammatory rhetoric cannot obscure the internal inconsistencies of such a predicate for skipping the administrative process on the way to court. The agencies' insistence on scientific rigor in the evaluation of listing and recovery issues inherently calls for meaningful biological data and detail, and a view of what will be conducive to a solid recovery plan for the species into the decades ahead. Plaintiffs' assertion that recovery will begin earlier or proceed more securely by judicial intervention is both simplistic and misleading, especially when seen in light of their proposed remedy: that Brookfield be put on a

schedule to complete a Biological Assessment and a submission for an incidental take statement. As explained above, Brookfield began that course well before Plaintiffs filed their Complaint.

This case is distinct from the parallel cases. Based upon Plaintiffs' assertions in the FPL, Topsham and Miller Hydro cases, the Court apparently found that those dams "take" migrating salmon by "preventing access to significant amounts of spawning and rearing habitat, by . . . causing delays in passage . . . [and by constituting] barriers to the migration of other fish whose presence is necessary for the salmon to complete their life cycle . . . [by] adversely alter[ing] predator-prey assemblages, and by creating slow-moving impoundments on formerly free-flowing reaches, making those habitats less suitable for spawning and impairing essential behavior . . . and by result[ing] in adverse hydrological changes." For the reasons stated above, the same cannot be said for Brookfield's dam, and Plaintiffs cannot merely rely on the bald assertions in their Complaint to demonstrate otherwise. Their allegations of adverse habitat alteration or modification within the meaning of the agencies' ESA regulations call for the application of NMFS' and other resource agencies' expertise to the specific circumstances of each facility and surrounding environments. Also, the degradations of habitat Plaintiffs here complain of, as if they were acts of present illegal "take," actually all occurred in the past, long before the effectiveness of the 2009 rules. Put another way, the "normal circumstances" or "baselines" of the present environment are obviously poor as far as salmon populations are concerned, but that was the case even at the time the ESA listing petitions were first filed in the early 1990s. There may be no plausible claim of prohibited "take" for acts of habitat alteration entirely completed before the rules were adopted, or even before the first listing petitions were filed in the early 1990s.[16]

[16] In the parallel cases, Plaintiffs relied on inapposite case law, particularly *Loggerhead Turtle v. County Council of Valusia County*, 896 F. Supp. 1170, 1179 (M.D. Fla. 1995). *Loggerhead* is an intensively fact-specific

The Court should consider the full implications of Plaintiffs' superficially straightforward theory: all dams are harmful to salmon, and all dams therefore illegally "take" salmon, and the Courts therefore are required to give declaratory relief and continuing jurisdiction for all citizen suits seeking to penalize and redress all such alleged harm. Brookfield urges that the acceptance of plaintiffs' proposition will inevitably lead to judicial supervision of Maine's rivers, watersheds and fisheries management, and embroil the courts in a spiral of biological, technical and hydrological engineering issues for which the executive branch's wildlife agencies are far better suited, and to whom Congress intended judicial deference.

In Count II of their Complaint, FOMB contends that defendants are violating their Clean Water Act water quality certification, as well as the terms of the Kennebec Hydro Developer Group [KHDG] Settlement Agreement, with regard to shad and salmon, by their alleged failure to "demonstrate through site-specific quantitative studies designed and conducted in accordance with [NMFS and FWS] that [fish] passes through turbines will not result in significant injury

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case about whether the standards for a preliminary injunction were met where defendants' imminent, active conduct would result in deaths of breeding turtles, and plaintiffs alleged irreparable harm that could not be remedied in the course of defendants' application for an incidental take permit. FOMB makes no irreparable harm argument here, nor could one plausibly be advanced in view of the ample hatchery supply of salmon eggs and fry.

Nor should the district court opinion in *Coho Salmon v. Pacific Lumber Co.*, 61 F. Supp. 2d 1001, 1015-16 (N.D. Cal. 1999), be considered controlling or instructive here. First, that case was not determined under the First Circuit's interpretation of the Supreme Court's pronouncements regarding Article III ripeness, but rather that of the Ninth Circuit, and the district court was clearly troubled by the clash between the expansive Ninth Circuit standard on ESA habitat modification and prohibited take and the Supreme Court's more conservative standard established in *Babbit v. Sweet Home Chapter of Communities For a Great Oregon*, 515 U.S. 687, 691 n.2, 696-700 (1995). Second, the district court in *Coho* rejected a different view of ripeness that was being espoused by the defendant in that case, which consisted of an overreaching attack on plaintiffs' standing and an unreasonable insistence that plaintiffs bore the burden at the outset to "conclusively establish . . . certain . . . imminent future harm . . . to the coho salmon populations in the watershed." It was in that context that the district court was unsympathetic to defendants' contention that plaintiffs' application for injunctive relief could not be immediately entertained, basing its determination of ripeness on its rejection of defendant's erroneous view of imminent harm. The district court therefore explicitly found that "the pendency of PALCO's ITP [i.e., incidental take permit] application is not relevant to whether PALCO's timber harvesting operations have resulted or will imminently result in the 'take' of salmon in the watersheds," without respect to the fact that the challenge arose a time prior to FWS and NMFS action on its incidental take permit. For both of these reasons, Brookfield believes that *Coho* is an unusual outlier decision, seldom cited or followed elsewhere, and should not be seen as instructive on the issues presented here.

and/or mortality." Plaintiffs misinterpret the KHDG settlement, in that Brookfield does not seek "to achieve interim downstream passage by means of passage through turbines." On the contrary, while fish do successfully pass through Hydro Kennebec turbines, Brookfield constructed the downstream fishway specifically to avoid their travel through the turbines. Brookfield seeks NMFS' approval of the fish passage study protocol and the interim species protection plan under the more stringent standards of ESA, which the agencies deem sufficient to meet all preexisting CWA and KHDG settlement standards. Plaintiffs' effort to engraft a CWA citizen suit theory further highlights their intent to circumvent NMFS' supervision of anadromous fish recovery in the Kennebec River. We submit that the Court should also dismiss Count II, but will be prepared to brief and argue the matter independently if the Court believes the issue warrants independent adjudication.

V. Request for Oral Argument

Brookfield requests oral argument on this motion. The usefulness of oral argument is sharpened by the Court's August 17, 2011 decision to deny FOMB's motion for preliminary injunction concerning emergency repairs to the Worumbo Dam, by the United States' submission there on behalf of FERC and NMFS, and by Judge Singal's orders affirming the recommended decisions in the parallel cases, but leaving open the issue of whether a stay may be appropriate.

VI. Conclusion

For reasons that are distinctively presented in this case with regard to the absence of current "take" within the meaning of ESA, Brookfield believes that the correct result here is dismissal on ripeness grounds. In the alternative, the Court should stay the matter, awaiting the conclusion of timely filed, pending applications before NMFS and other federal agencies.

Dated at Portland, Maine this 12th day of October, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 12th day of October, 2011, I electronically filed this pleading with the Court's CM-ECF system, which automatically sends notification to all counsel of record.

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