UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY and ENVIRONMENT MAINE, Plaintiffs, v. BROOKFIELD POWER US ASSET MANAGEMENT, LLC, and HYDRO KENNEBEC, LLC, Defendants.	C.A. No. 1:11-cv-00035-GZS

PLAINTIFFS' OPPOSITION TO BROOKFIELD'S MOTION TO DISMISS OR STAY

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This Court should deny the motion by Defendants Brookfield Power US Asset Management, LLC and Hydro Kennebec, LLC (collectively, "Brookfield") to dismiss or stay this case on Article III ripeness grounds or, alternatively, to stay the case on primary jurisdiction grounds ("MTD"). Less than three months ago, this Court rejected similar motions in the three companion cases pending before it against Miller Hydro, Topsham Hydro, and NextEra, for reasons that are just as valid today. The only additional points raised by Brookfield in this motion are either wrong as a matter of law, wrong as a matter of fact, or both.

Brookfield's dam, like the other three Kennebec River dams at issue in these suits, has harmed endangered Atlantic salmon in the past and continues to do so at present. This Court's adjudication of these cases will help halt and remediate this harm, and will complement, not disrupt, the federal government's long-term plans for the restoration of this species.

STATEMENT OF PLAINTIFFS' CLAIMS

As in the three companion cases,[1] Plaintiffs bring this suit to stop Brookfield from "taking" salmon in violation of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1)(b). Plaintiffs allege that Brookfield's Hydro Kennebec dam: kills and injures salmon with its rotating turbines blades; impedes upstream and downstream salmon passage, which prevents salmon from gaining access to significant amounts of spawning and rearing habitat; alters the natural habitat to such a degree that the essential behavior patterns of the fish are significantly impaired; and has other deleterious effects on salmon. Substituted Complaint ("Sub. Compl.") (Docket No. 20) ¶¶ 1, 27. Plaintiffs also allege that the Atlantic salmon population of the Kennebec River is near extinction, that dams such as Brookfield's are a significant cause of the salmon's current peril, and that immediate measures are needed to protect the remaining salmon

[1] Friends of Merrymeeting Bay and Environment Maine (collectively, "FOMB") v. Miller Hydro Group, 11-CV-36; FOMB v. Topsham Hydro Partners LP, 11-CV-37; and FOMB v. NextEra Energy Resources, LLC, 11-CV-38.

from the effects of these dams. Id. ¶¶ 15, 19-21, 26, 29, 50, 53. Brookfield may legally "take" salmon only if it first obtains authorization from the National Marine Fisheries Service ("NMFS"). Brookfield is attempting to obtain an "incidental take statement" ("ITS") from NMFS under the ESA Section 7 consultation process, 16 U.S.C. § 1536(o)(2). Under this process, as set forth in 50 C.F.R. §§ 402.12-402.14, a biological assessment ("BA") and then a biological opinion ("BiOp") must be prepared and adopted before any ITS can be issued.

Plaintiffs also bring this suit to enforce the terms of the water quality certification issued for Brookfield's dam under Section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341. The water quality certification imposes operating conditions designed to protect water quality standards, such as those requiring suitable habitat for fish and other aquatic life. Sub. Compl. ¶¶ 32-33. The certification prohibits Brookfield from allowing downstream-migrating adult salmon or shad to pass through its turbines without first conducting quantitative studies proving that such passage does not result in significant injury or mortality. Id. ¶ 35.

STANDARD OF REVIEW

Although Brookfield does not identify the procedural basis for its motion, Plaintiffs assume that Brookfield files its motion to dismiss Plaintiffs' ESA claim as a post-Answer Rule 12(h)(3) challenge to subject matter jurisdiction.[2] Accordingly, the familiar Rule 12(b)(1) standard applies. See Augustine v. United States, 704 F.2d 1074, 1075 n.3, 1077 (9th Cir. 1983). Brookfield's challenge to Plaintiffs' CWA claim, on the other hand, does not appear to be jurisdictional, but it may be a challenge to the legal sufficiency of the Substituted Complaint brought under Rule 12(c), in which case the equally familiar Rule 12(b)(6) standard applies. See Shapiro v. Haenn, 190 F. Supp. 2d 64, 66 (D. Me. 2002).

[2] Technically, the motion to stay this claim on primary jurisdiction grounds is not a challenge to subject matter jurisdiction, but rather is a request that the court decline to exercise the jurisdiction it plainly has. See United States v. Lahey Clinic Hospital, Inc., 399 F.3d 1, 18 (1st Cir. 2005).

ARGUMENT

I. PLAINTIFFS' ESA CLAIM IS RIPE FOR ADJUDICATION.

Brookfield suggests that the question of whether it is committing a "take" is enshrouded in "a substantial zone of ambiguity," MTD at 9, and that this Court lacks the institutional competence to make a ruling without specific future guidance from NMFS. This position badly misconstrues the nature of ripeness as a jurisdictional bar, and vastly overstates the complexity of the "take" prohibition.

A. Article III Requires Only That A Controversy Be Concrete.

Although Brookfield seeks dismissal of Plaintiffs' ESA claim under "the bedrock Article III ripeness principles of [Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967)]," MTD at 17, Brookfield neither addresses the applicability of the Supreme Court's ripeness jurisprudence to this case nor articulates the standard for Article III ripeness. Perhaps this is because it is abundantly clear that there is a justiciable "controversy" here.

As noted by this Court in the parallel suit against Miller Hydro, the ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Miller Hydro Recommended Decision on Motion to Dismiss ("Rec. Dec.") (Docket No. 11) at 8 (quoting Stern v. United States Dist. Ct., 214 F.3d 4, 10 (1st Cir. 2000)).[3] In order to assess Article III ripeness, "it is necessary to determine whether the issue presented is fit for judicial review – an inquiry that typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends on facts that may not yet be sufficiently developed." Stern, 214 F.3d at

[3] The same language was quoted in the decision recommending denial of Topsham Hydro's motion to dismiss. The Court entered an Order Affirming the Recommended Decision of the Magistrate Judge ("Rec. Dec. Order") in all three of the companion cases on September 9, 2011. Plaintiffs will cite chiefly to the Miller Hydro orders throughout.

10. This standard has nothing to do with any alleged "unresolved complexity" in the applicable legal standard, MTD at 13, or with whether an agency may be examining related questions[4] – it asks simply whether the facts underlying a plaintiff's claim are sufficiently developed, such that a court may evaluate the claim.[5]

B. The Issues In This Case Are Fit For Judicial Review.

This Court determined in the Miller and Topsham Hydro cases that Plaintiffs' ESA claims are well-defined and fit for review, finding "[t]here is no sense in which the disagreement between the parties set forth in the complaint is 'abstract.' It is instead quite concrete." Miller Hydro Rec. Dec. at 9; see also id. at 8 ("Whether a statutory violation is taking place now is not dependent on facts that have not yet been sufficiently developed."). As in those cases, the facts underlying Plaintiffs' take claim here are neither remote nor contingent; they are happening now.

Brookfield ignores these earlier rulings. Instead, it claims that the Court has no jurisdiction because "[t]he definition of 'take' has never been the subject of authoritative agency interpretation or litigated in any circumstances resembling those in this case." MTD at 10. This is not true, and even if it were, it would not affect this Court's jurisdiction to hear this case.

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[4] Compare Ernst & Young v. Depositors Econ. Protection Corp., 45 F.3d 530, 537, 540-41 (1st Cir. 1995) (controversy held too "remote" where a "stretched chain" of eight separate events, many of them "speculative," would have had to transpire before the harm alleged by plaintiffs would have occurred), with Downeast Ventures, Ltd. v. Washington County, 2005 WL 3409483, at *8 (D. Me. Dec. 12, 2005) (Kravchuk, M.J.) (claim based "on an application of historical facts to the law" is fit for judicial decision, even though contemporaneous state case could have resolved dispositive questions), aff'd, 2006 WL 377976 (D. Me. Feb. 16, 2006).

[5] Plaintiffs note that while there also is a *prudential* aspect of ripeness, where courts evaluate "the extent to which withholding judgment will impose hardship – an inquiry that typically turns upon whether the challenged action creates 'a direct and immediate dilemma for the parties,'" Stern, 214 F.3d at 10 (quoting Abbott Labs., 387 U.S. at 152); see also McInnis-Misenor v. Maine Medical Center, 319 F.3d 63, 70 (1st Cir. 2003) (hardship prong of ripeness doctrine is "entirely prudential"), Brookfield neither raises prudential ripeness nor argues that there is no present hardship. To the contrary, Brookfield insists that there *is* a "current" "dilemma," but that it is too "complex" and "fact-sensitive" for this Court to resolve. MTD at 11. Moreover, this Court found the hardship prong satisfied in the Miller Hydro and Topsham Hydro cases, in reasoning also applicable here. See Miller Hydro Rec. Dec. at 9. See also Part II.D infra (discussing harm likely to be caused to Atlantic salmon were this case to be stayed).

1. Courts routinely decide whether a take is occurring.

The definition of "take" is neither ambiguous nor complex. Most schoolchildren know what is meant by terms like "kill," "wound," and "trap."[6] 16 U.S.C. § 1532(19). Where NMFS and the U.S. Fish and Wildlife Service ("USFWS") (collectively, "the Services") believed further interpretation would be helpful, they provided elucidating definitions by regulation. See 50 C.F.R. § 17.3 (defining "harm" and "harass"); 50 C.F.R. § 222.102 (further defining "harm"). Courts have had no difficulty in applying the statutory and regulatory definitions and determining whether a take has occurred, even where the Services have not weighed in on the specific circumstances of the case. See, e.g., Strahan v. Coxe, 127 F.3d 155, 165-66 (1st Cir. 1997) (upholding take determination based on expert affidavits, party admissions, and eyewitness accounts); Palila v. Hawaii Dep't of Land & Natural Resources, 649 F. Supp. 1070, 1072 n.3, 1080 (D. Hawaii 1986) (finding adverse habitat modification based on expert testimony), aff'd, 852 F.2d 1106, 1109-10 (9th Cir. 1988) (upholding same).[7]

The fact that Brookfield is participating in a Section 7 consultation process makes this Court no less able to understand and apply the definition of "take."[8] See, e.g., MTD at 1 (claiming that "Plaintiffs improperly seek the Court's premature intervention in th[is] ongoing administrative decision-making process"); id. at 10 n.8 (citing Bennett v. Spear, 520 U.S. 520

[6] See Endangered Species Consultation Handbook (Mar. 1998) (available at http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) at 4-46 ("Most of these terms are commonly understood.").

[7] In an effort to illustrate "[t]he troublesome problem of interpreting what is prohibited 'take,'" Brookfield engages in a convoluted discussion of car windshields, plane crashes, wind turbines, and the Migratory Bird Treaty Act. MTD at 10-11. However "controversial" those regulatory cases might be, this Court need not determine whether a random instance of a plane or car hitting a bird is a take in order to determine whether the near-constant operation of a large hydroelectric dam situated directly in the path and critical habitat of migrating salmon is a take. A more apt aviary analogy would be: Brookfield's dam is like a wind turbine located in the birdhouse at the zoo (with the wind blowing continuously). Moreover, courts have had no trouble determining that wind turbines *can* cause take. See, e.g., Animal Welfare Inst. ("AWI") v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 564-80 (D. Md. 2009).

[8] Brookfield cites to no case holding that a take claim is not ripe during the pendency of Section 7 consultation, and Plaintiffs are unaware of any such case.

U.S. 159, 172-75 (1997) for the proposition that only after a BiOp issues will there "finally" be an Article III controversy). This Court has already rejected that argument: consideration of related ESA issues by the Services does not "constrain[] the power of the federal judiciary," or "preclude a federal judge from considering the same facts." Miller Hydro Rec. Dec. at 6-7 (quoting AWI v. Martin, 623 F.3d 19, 28-29 (1st Cir. 2010), citing other case law, and distinguishing Bennett).[9] Brookfield is also wrong to suggest that "adjudication regarding Brookfield's dam is premature [because] decisions made regarding protection for the species … will affect other decisions regarding rivers and dams throughout the ecosystem." MTD at 9. This Court need only determine whether Brookfield's dam, for instance, "kills" or "harms" salmon when the fish pass through Brookfield's turbines. See Coxe, 127 F.3d at 165 ("[A] single injury to one whale is a taking under the ESA."). And, in crafting a remedy, this Court need not develop a comprehensive, statewide conservation plan in conflict with any efforts by the agencies, nor must a take determination await the resolution of such efforts. See United States v. Glenn-Colusa Irr. Dist., 788 F. Supp. 1126, 1134 (E.D. Cal. 1992) (take determination need not wait until "after the agency adopts a recovery plan … or issues protective regulations").

2. The presence of hatchery fish does not create "unresolved complexity" for this Court.

Brookfield questions whether "transplanted and hatchery origin salmon" stocked in the Kennebec are afforded protection under the ESA, MTD at 12-13, 16, and argues that their presence creates "unresolved complexity" that requires the Court to dismiss this case in order to

[9] Nor, as this Court also held, does Plaintiffs' take claim "compel the Court to step into the Federal Agencies' handling of the ongoing process that administers or implements the ESA." Miller Hydro Rec. Dec. at 7. Brookfield asserts that "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." MTD at 17. Of course, there was no "choice to exclude the regulators" to be made here – it is *Brookfield*, not the agencies, that is committing the alleged "take." Nor are regulatory agencies necessary parties in citizen enforcement suits. See generally Association to Protect Hammersly, Eld, and Totten Inlets v. Taylor Resources, Inc., 299 F.3d 1007, 1014 (9th Cir. 2002).

give "deference to further agency developments" regarding protection of those fish, MTD at 13. This argument is specious. The young Atlantic salmon fry stocked (and Atlantic salmon eggs planted) "to supplement … natural populations" are expressly included in the endangered species listing. 74 Fed. Reg. 29,344, 29,348 (June 19, 2009).[10] As the Services stated, the "primary focus of the hatchery program … is to conserve the genetic legacy of Atlantic salmon in Maine until habitats can support natural, self-sustaining populations." Id. at 29,349. The Services deem these conservation hatchery salmon, which are genetically similar to aboriginal Kennebec River salmon, to be "essential for recovery" of the species. Id. at 29,348. (The accompanying declaration of fishery biologist Randy E. Bailey discusses the stocking program and the importance of prohibiting takes of these fish. See Bailey Dec. ¶¶ 15-19.) The Services have made clear that the taking of these salmon without prior authorization – even for scientific purposes – is unlawful. See Declaration of Charles C. Caldart ("Caldart Dec.") Ex. 1, at 3 ("fish passage efficiency studies for salmon" require take permits under 16 U.S.C. § 1539(a)(1)(A)).

Moreover, Brookfield's assertion that only "hatchery [salmon] or their progeny," MTD at 12, populate the Kennebec is flatly inconsistent with the findings of the National Academy of Sciences ("NAS"). In 2002, after reviewing the available data, the NAS concluded:

> [C]urrent Maine salmon in the [Distinct Population Segment] rivers [including the Kennebec] are not mainly hatchery mixtures but rather show the typical metapopulation structure that characterizes wild population of salmon and their relatives in places where stocking has been absent or insignificant.

Caldart Dec. Ex. 2, at 48. See also Bailey Dec. ¶¶ 10-14.[11]

[10] Brookfield did not appeal the listing decision, and it may not challenge it here. See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 172 (1978) (ESA determinations by the Services that were not appealed may not be challenged in later enforcement action). If Brookfield truly believes that these fish should have been treated as "experimental populations" under 16 U.S.C. § 1539(j), MTD at 12 & n.13, it is free to petition the Services. It may not, however, collaterally attack the listing decision itself.

[11] Brookfield cites to a 2006 report concluding that "Atlantic salmon do not presently occur in the Kennebec River, due to the lack of upstream fish passage at the first mainstem dam," MTD at 16 n.15, but this conclusion had

C. The Argument That Defendants Have Not Committed A Take Goes To The Merits Of The Case.

Brookfield also asserts an "Article III" argument not made by Miller or Topsham: that Plaintiffs' ESA clam is not ripe because there is no take. See, e.g., MTD at 20 (urging "dismissal on ripeness grounds" because of "the absence of current 'take' within the meaning of [the] ESA"). This is a merits argument, not a jurisdictional one. A party need not *prove* the elements of a substantive claim in order to invoke the power of the federal courts to *adjudicate* that claim.[12] Plaintiffs allege that Brookfield is currently taking salmon in a number of specific ways, and Brookfield has formally denied these allegations, Answer (Docket No. 24) ¶¶ 1, 27. The issue thus is fully engaged, and is ripe for this Court's adjudication.

Even if the question of whether Brookfield is committing a take *were* an issue of Article III jurisdiction, the issue is so intertwined with the merits that it would be difficult, if not impossible, to decide one without the other. See, e.g., Hollingsworth v. United States, 2005 WL 3435099, at *6 (D. Me. Dec. 14, 2005) (denying Rule 12(b)(1) motion where resolving mixed jurisdiction-merits question "would require the Court to make evidentiary assessments on a sterile and incomplete record"). In such a circumstance, the Plaintiffs would be entitled to (and thus hereby request) full discovery and an evidentiary hearing. See Valentin v. Hospital Bella Vista, 254 F.3d 358, 363 & n.3 (1st Cir. 2001).

D. The Record Before The Court Indicates That Brookfield Is Taking Endangered Atlantic Salmon At The Hydro Kennebec Dam.

To the extent that the Court deems it relevant to the resolution of this motion, it is evident

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nothing to do with whether wild salmon remain. Rather, it reflected the fact that the present trap and truck program had not yet been put in operation at that first downstream dam, see id. at 6-7 (Lockwood dam program began in 2006), and thus *no* salmon of any origin were making their way up the river to spawn. However, salmon were naturally spawning in areas of the Kennebec *below* Lockwood dam at that time. See Bailey Dec. ¶ 12.

[12] Cf. Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 91-92 (1988) (there is no "expansive principle that a statute saying 'the district court shall have jurisdiction to remedy violations [in specified ways]' renders the existence of a violation necessary for subject-matter jurisdiction") (brackets in original).

even at this stage of the case that Brookfield is taking salmon. Mr. Bailey's declaration details three primary ways in which endangered Atlantic salmon are killed or otherwise significantly harmed by the Hydro Kennebec dam: (1) as a direct or indirect result of physical damage inflicted as the fish pass through the dam's turbines, over its spillway, or through its fish bypass structure ("fishway") on their way downstream, Bailey Dec. ¶¶ 20-26;[13] (2) as a result of the habitat modifications caused by the two- to three-mile long impoundment above the dam, id. ¶ 28;[14] and (3) by being denied upstream passage to spawning habitat, id. ¶¶ 29-30. The Services identified all three factors as contributing to their decision to list the Atlantic salmon in the Kennebec as endangered, see 74 Fed. Reg. at 29,362 (dams pose "the greatest impediment to self-sustaining Atlantic salmon populations in Maine"), and reiterated these factors in a 2009 letter sent to the owners of hydroelectric dams on the Kennebec and Androscoggin Rivers, see Caldart Dec. Ex. 1, at 1-2 (dams "directly and substantially reduce survival rates of Atlantic salmon"). Brookfield's arguments to the contrary are unavailing.

1. The 2011 smolt study does not demonstrate that the dam passes downstream migrating salmon safely.

Brookfield touts the results of a 2011 radio telemetry study as "strikingly positive," and argues that they "clearly refute [Plaintiffs'] contention that prohibited take is occurring" during downstream migration. MTD 13; see also id. at 2-3 (asserting that "[t]here is no evidence that Atlantic salmon will be harmed in Brookfield's turbines," and that this study "show[s] that they successfully pass downstream through Brookfield's dam"). The study results show no such

[13] The physical stress caused by such passage – *e.g.*, being struck by turbine blades, being forced by water flow to strike against hard objects, encountering turbulence – can injure or disorient the fish, which can affect their ability to make a successful run out to the ocean and can make them more susceptible to predators. See id.

[14] The impoundment affects the ability of salmon smolts to navigate downstream, and the point at which the reservoir meets the dam is a well-known site for predators to wait to prey upon the salmon. See id. Smolts are young salmon that have grown to a length of about 7-8 inches and are undergoing physiological changes that make them ready to be able to survive in marine conditions; they are about 1/4 the length of adults. See id. ¶¶ 9, 23.

thing, which perhaps explains why Brookfield did not provide to the Court the study report or other documents pertaining to the study.[15] In fact, the study was not designed to measure the harm caused by the dam's turbines, but rather to measure the effectiveness (*vel non*) of the dam's fishway. See Caldart Dec. Ex. 3, § 1.2. As its own documents show, Brookfield knows full well that fish travelling through its rotating-blade turbines are prone to be seriously harmed, see, e.g., Caldart Dec. Ex. 4, at 2 ("Downstream passage through the turbines is expected to result in 15%-20% mortality."), as do the Services, see 74 Fed. Reg. at 29,362 (dam turbines "typically kill or injure between 10 and 30 percent of all fish").[16]

Further, the "mark-recapture" part of the study, designed to assess *harm* from travel through the fishway, *was never conducted*, see Caldart Dec. Ex. 3, § 3.1; id. Ex. 5; consequently, not a single fish was physically examined for signs of injury. Since radio telemetry detects signals from tags on injured and dead fish, the mere fact that a signal was detected downstream is not useful in determining whether the salmon associated with that tag was harmed. See Bailey Dec. ¶ 27. In this light, Brookfield's statement that "[o]f the 95 smolts determined to have passed Hydro Kennebec, only two fish did not pass Lockwood … and remained in the stretch of river between the two projects" (MTD at 6 n.6) – implying that all of those fish were alive and unharmed – is highly misleading.

2. The fact that there is a dam downstream of Hydro Kennebec does not absolve Brookfield from take liability.

Seeking to deflect blame elsewhere, Brookfield suggests that its dam does not "take" salmon by blocking access to upstream habitat because the State of Maine traps salmon below

[15] After its motion was filed, Brookfield provided the study report to Plaintiffs, upon Plaintiffs' request.

[16] Mr. Bailey agrees with these assessments, and notes further that focusing solely on death or immediate physical injury understates the overall harm to salmon. See Bailey Dec. ¶¶ 21-24.

the Lockwood dam, one mile downstream, and conveys them upriver (past the Hydro Kennebec, Shawmut, and Weston dams) to spawning grounds in the Sandy River. See MTD at 6-7, 18. This argument fails for at least three reasons. First, it would be considerably healthier for the salmon if they could swim upstream past Hydro Kennebec and make their way to the next dam on their own. See Bailey Dec. ¶¶ 29-30. Second, the trapping and trucking of the salmon, which would not be necessary if it were not for Hydro Kennebec and the other dams, is *itself* a take.[17] Third, the fact that other dams are *also* committing a take by blocking upstream access does not absolve Brookfield from its own take liability for doing so. See Coxe, 127 F.3d at 165 ("[T]he existence of other means by which takings … occur" is "irrelevant to the determination of whether the [defendant] has engaged in a taking.").

3. Adverse habitat modification is ongoing.

Brookfield argues that because the dam was built before Atlantic salmon were listed as endangered, the company cannot be liable for a take by reason of habitat modification. See MTD at 18. This overlooks the various allegations in the complaint that Brookfield's *current, ongoing* operations at Hydro Kennebec dam are causing adverse habitat modification. Sub. Compl. ¶¶ 24, 27(f)-(g). Moreover, NMFS disagrees with Brookfield. During its 1999 rulemaking defining "harm," several commenters urged that "the current owner of a dam lawfully installed before a species is listed should not be liable for take based on subsequent listing," and insisted that "liability for take must be based upon some action occurring after the effective date of listing." 64 Fed. Reg. 60,727, 60,729 (Nov. 8, 1999). The agency replied:

> NMFS agrees that *simply holding title* to a barrier that affects access to the habitat of listed species is not necessarily a take under the ESA. However, *maintaining or improving an existing facility* may actually injure or kill members of a listed

[17] The trap and truck program is lawful only because the State of Maine has been issued a permit authorizing this take. See Caldart Dec. Ex. 1, at 2.

> species if it significantly impairs essential behavioral patterns such as spawning, rearing or migrating. *Maintaining an existing barrier* that prevents or impedes access to habitat may cause take of listed species, if adequate comparable habitat is not otherwise available to the listed population.

Id. (emphases added); see also, e.g., Coho Salmon v. Pacific Lumber Co., 61 F. Supp. 2d 1001, 1004-05 (N.D. Cal. 1999) (adjudicating citizen suit alleging take of endangered salmon by "past and present [timber] harvesting operations, including … the construction and maintenance of roads and bridges" even where listing decision was prompted by "long-term trends in atmospheric conditions" and predation by seals, in addition to logging).

II. A STAY OF PLAINTIFFS' ESA CLAIM IS NOT WARRANTED.

Brookfield also argues that the ESA portion of this case should be stayed under the primary jurisdiction doctrine until NMFS makes a formal decision as to whether (and under what conditions) to authorize an incidental take.[18] This Court rejected this argument in all three of the companion dam cases, for reasons equally applicable here. See Miller Hydro Rec. Dec. at 9-11.

A. Brookfield Does Not Address, Much Less Satisfy, The First Circuit's Demanding Test For Applying Primary Jurisdiction In Environmental Citizen Suits.

As the First Circuit explained in Chico Service Station v. Sol Puerto Rico Ltd., 633 F.3d 20, 31-32 (1st Cir. 2011), "[a]bstention is, at its core, a prudential mechanism that allows federal courts to take note of and weigh significant and potentially conflicting interests that *were not – or could not have been – foreseen by Congress* at the time that it granted jurisdiction for a given class of cases to the courts." Id. (emphasis added). Dismissal or stay of citizen suits under abstention doctrines such as primary jurisdiction essentially rewrites the enforcement scheme

[18] To the extent that Brookfield seeks a stay on "ripeness" grounds, see MTD at 8, this request fails for the same reason that its ripeness argument for dismissal fails.

chosen by Congress, and therefore is highly disfavored.[19] In the ESA, Congress foresaw, and provided for, numerous circumstances in which agency action would preclude (or limit the scope of) citizen suits alleging a "take" – most notably, the *actual issuance* of an ITS or incidental take permit ("ITP") – but did not carve out an exception for instances in which an ITS or ITP application was pending, see, e.g., AWI v. Martin, 588 F. Supp. 2d 70, 97 (D. Me. 2008) ("[T]o stay the case would sanction an ongoing violation of the ESA."), even where the issuance of that ITS or ITP was alleged to be imminent, see, e.g., Alabama v. United States Army Corps of Eng'rs, 441 F. Supp. 2d 1123, 1127 (N.D. Ala. 2006) (request for interim injunctive relief adjudicated even though final BiOp expected to issue in less than two months).[20]

Further, as noted above, the Services have already exercised whatever discretion they have in defining a "take" in the express terms of their regulations. See Part I.B.1, supra. This Court owes no deference to these agencies either in interpreting the plain terms of 16 U.S.C. § 1532(19), or in applying the plain language of those regulations.[21] See generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) ("[T]he court,

[19] See, e.g., United States Public Interest Research Group ("USPIRG") v. Atlantic Salmon of Maine, LLC ("ASM"), 339 F.3d 23, 34 (1st Cir. 2003) (CWA); USPIRG v. Heritage Salmon, Inc., 2002 WL 240440, at *15-*17 (D. Me. Feb. 19, 2002) (Kravchuk, M.J.) (CWA); Maine People's Alliance v. Holtrachem Mfg., 2001 WL 1704911, at *7-*9 (D. Me. Jan. 8, 2001) (Resource Conservation and Recovery Act ("RCRA")); Raritan Baykeeper v. NL Indus., Inc., – F.3d –, 2011 WL 4537837, at *3-*4 (3d Cir. Oct. 3, 2011) (CWA & RCRA).

[20] Brookfield does not attempt to refute this authority. It intones the familiar test for applying primary jurisdiction, see MTD at 14 (citing American Aut. Mfr.'s Assoc. ("AAMA") v. Massachusetts Dep't of Envtl. Protection, 163 F.3d 74, 81 (1st Cir. 1998)), but does not attempt to explain how this common-law prudential doctrine can be squared with the language and structure of the ESA. Moreover, the lessons Brookfield gleans from the AAMA opinion are inapplicable here. Concerns about "disrupt[ing] an agency's regulatory regime" are overstated, MTD at 14, since, as this Court already found, determining whether a "take" has occurred while the Section 7 consultation process is ongoing does not "entangle" the Court in administrative matters, see Miller Hydro Rec. Dec. at 11. (If an ITS is issued at some point, the Court certainly can diminish any potential conflict by taking its contents into account in crafting a remedy.) And the purported need to "promote national uniformity in the interpretation and application of federal regulations," MTD at 14, directly contradicts Brookfield's companion argument that the application of the ESA "involves specific attention to the varied circumstances of each dam," id. at 15.

[21] Brookfield also does not address this Court's finding that "the ESA does not place the ITP and ITS process within the administrative control of a single agency," Miller Hydro Rec. Dec. at 10 (noting that three separate federal agencies are responsible for interpreting the ESA, in addition to the federal action agency), a factor that further undercuts Brookfield's suggestion that deference can be meaningfully accorded here.

as well as the agency, must give effect to the unambiguously expressed intent of Congress."); Christensen v. Harris County, 529 U.S. 576, 588 (2000) (where regulation "is not ambiguous[,] … [t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation").[22]

Brookfield does suggest that two factors distinguish this case from the companion cases – that the Hydro Kennebec dam is equipped with "a downstream passageway designed solely for fish passage," and that Brookfield "expects that the agencies will be in a position to make a final decision" on the contents of a BiOp "by the spring of 2012," MTD at 15 – but neither justifies this Court's countenancing Brookfield's continuing take of Atlantic salmon.

B. A Significant Percentage Of Salmon Do Not Use Brookfield's Downstream Fishway, Which May Itself Be Harming Salmon.

Brookfield's own evidence demonstrates that its self-described "state-of-the-art downstream fishway," MTD at 6, a 4-foot wide slot on the face of a 800-foot wide dam, coupled with a floating boom and curtain that is supposed to guide salmon to this spot, is not a panacea.[23] Even with it, significant numbers of fish still pass over the dam's spillway or through its turbines. The above-referenced 2011 telemetry study, done during high river flow, found that 67.4% of the salmon smolts passed the dam over the spillway, 16.8% passed through the

[22] Brookfield also devotes a long footnote to two of the cases upon which the Court relied earlier, see MTD at 18-19 n.16 (discussing Coho Salmon v. Pacific Lumber Co., 61 F. Supp. 2d 1001, 1015-16 (N.D. Cal. 1999); Loggerhead Turtle v. County Council of Volusia County, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995), aff'd in pertinent part, 148 F.3d 1231, 1246 n.17 (11th Cir. 1998)), but fails to acknowledge or distinguish their holdings rejecting primary jurisdiction under "very similar … facts to the instant case." Miller Hydro Rec. Dec. at 11. In both cases, the court declined to dismiss a "take" enforcement suit even where the defendants had already submitted an ITP application, and where their activities were already subject to a complex conservation agreement with state and federal authorities. Brookfield's characterization of Coho Salmon as an "unusual outlier decision" *on ripeness* is puzzling, since that opinion did not discuss ripeness *at all*. And although Brookfield insists that the defendants there made an "overreaching attack on plaintiff's standing" – namely, that one has to prove a take in order to invoke the court's Article III power – it overlooks how similar that is to its own fallacious Article III argument, see Part I.C, supra.

[23] The boom itself has been plagued with problems since its installation in 2006, including three rips in the past year alone. See Caldart Dec. Ex. 8 (Dec. 2010); id. Ex. 7 (Apr. 2011); id. Ex. 9 (Aug. 2011).

turbines, and only 14.7% used the bypass. See Caldart Dec. Ex.10, at 2-3. As discussed above, passage through turbines and passage by "spill" (that is, falling some 35 feet from the top of the dam onto ledges or rocks below) can kill or injure salmon, and can disorient them so that they are more susceptible to predation by birds and larger fish. See Bailey Dec. ¶¶ 21, 26. Other studies at the dam indicate that when there is no spill, *approximately as many fish pass through the turbines as use the fishway*. See id. ¶ 24. Moreover, passage through the fishway itself is not benign, see id. ¶ 25; Caldart Dec. Ex. 12, at 2-3, and Brookfield has been directed by the Services to conduct another study in the spring or summer of 2012 to assess the harm caused by its fishway, see Caldart Dec. Ex. 11.

C. Brookfield's "Expectations" As To When The Section 7 Consultation Process May Conclude Do Not Satisfy This Court's Prerequisite For Reconsidering A Stay.

In denying the earlier stay motions, the Court specified that it might revisit the issue "if [the defendant] can provide *documentation* that the ESA administrative consultation process will result in final agency action by a *date certain* in the near future." Miller Hydro Rec. Dec. Order at 1 (emphases added). Despite bearing a "heavy burden" of proof on the propriety of a stay, St. Bernard Citizens for Envtl. Quality v. Chalmette Ref., 348 F. Supp. 2d 765, 767 (E.D. La. 2004), Brookfield fails to provide such documentation. To the contrary, it concedes that "the agencies cannot provide a steadfast deadline for issuance of a final decision." MTD at 15.

Nonetheless, Brookfield invites the Court to stay the ESA claim on Brookfield's supposition that the issuance by NMFS of a formal BiOp is "just a few months" away. MTD at 3. In support, Brookfield submits the Declaration of Kevin R. Bernier, its regulatory compliance manager, together with a pair of letters to and from NMFS. See Bernier Dec. ¶ 1 & Ex. B, C. But neither of the letters mentions BiOp timing *at all*, and one of them suggests a reason – *i.e.*,

the involvement of the action agency, the Federal Energy Regulatory Commission ("FERC"), in the Section 7 process – why the BiOp may take considerably longer to finalize.[24] The declaration offers only Mr. Bernier's "expectation" as to the agencies' timeline, and references several *additional* steps in the consultation process, any of which could occasion considerable delay.[25] Brookfield's preferred implication that each link in this chain of events will be a "rubber-stamp" review – or that federal agencies move with hasty dispatch generally – is simply not credible, especially where potential appeals by industry, conservation, *or* state entities dissatisfied with these decisions loom as a real threat.[26] In practice, it often takes *years*, not months, between the submission of a BA and the issuance of a BiOp and ITS.[27] See Bailey Dec. ¶¶ 33-35. None of the evidence offered by Brookfield establishes a "date certain" for a final decision on Brookfield's request for an ITS, or suggests that this Court would be "jump[ing] the gun" by deciding the take question now. MTD at 2.

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[24] The March 2011 letter from FERC to NMFS notes that, in order "to ensure [FERC's] compliance with *its* responsibilities under the ESA," FERC must "review[] the draft BA" prior to submitting it to NMFS, and may "modif[y]" that draft should it be deemed factually or legally insufficient. Bernier Dec. Ex. C at 1-2 (emphasis added). This review, and any additional back-and-forth between Brookfield and FERC, would obviously delay the process further.

[25] Mr. Bernier states that he "expect[s]" Brookfield to submit a *preliminary* draft BA *to NMFS* by November 2011, that "NMFS will then make comments" on that preliminary document and return it to Brookfield for revision (no "expected" timeline is given for that review, nor any indication of how sweeping those changes might be), that he "expect[s]" Brookfield to make any required changes and submit the *draft* BA *to FERC* by January 2012, that FERC "will forward the draft [BA] *to NMFS* to initiate formal consultation" (but no "expected" timeline is given for FERC's independent review and potential modification of the BA), and that he then "expect[s]" that "NMFS will file its [BiOp] with FERC and Brookfield in the spring of 2012" (but no "expected" timeline is given for completing the fish passage injury/mortality study, a likely prerequisite to the BiOp). Bernier Dec. ¶ 16 (emphasis added). There is, of course, no evidence that what Mr. Bernier *expects* is what NMFS or FERC actually *will* do.

[26] The listing of the Atlantic salmon population that is the subject of this litigation was itself the product of a 1999 lawsuit brought by environmental organizations against the Services. See Maine v. Norton, 257 F. Supp. 2d 357, 399 (D. Me. 2003). The Services' decision to list the Maine salmon population was subsequently challenged by the State of Maine and various industry groups as "arbitrary and capricious" under the Administrative Procedure Act ("APA"), but was upheld upon a finding by this Court that the Services had "acted within the scope of [their] legal authority," had "adequately explained [their] decision," had "based [their] decision on facts in the record," and had "considered the relevant factors." Id. at 389. Any BiOp ultimately prepared by NMFS or ITS issued to Brookfield will have to be crafted with due care so as to pass muster under this same APA standard.

[27] For example, the state of Maine filed a complete ITP application for its trapping program, which takes endangered Canada lynx, in *June 2007*. See Martin, 623 F.3d at 23. USFWS put out a *draft* ITP for comment only *this month*. See 76 Fed. Reg. 69,758 (Nov. 9, 2011).

D. Granting a Stay Would Harm Endangered Atlantic Salmon, And This Court Can Order Meaningful Relief.

Brookfield argues that hatchery salmon are in plentiful supply, and that the Atlantic salmon recovery effort "will [not] be prejudiced in any way" by any harm it and the other dams cause to salmon now in the river. MTD at 16. This position evinces a surprisingly cavalier attitude towards the nascent recovery effort, which, as discussed, relies on hatchery salmon to supplement the Kennebec River population. As the Services have emphasized, supplies of hatchery brood stock are fragile, due to "the potential for disease outbreaks … or other catastrophic failure" at the hatchery. 74 Fed. Reg. at 29,348. Moreover, "there is a high mortality rate going from eggs [planted] in the gravel to smolt-sized fish migrating to the sea." Bailey Dec. ¶ 9. Thus, "[i]t will be essential to the recovery effort to reduce the mortality rate of Atlantic salmon smolts during their migratory journey from upstream rearing areas down to the Merrymeeting Bay estuary, and to do so as quickly as possible," id., for the loss of even a single year of smolts would "hinder[] recovery efforts for decades," id. ¶ 19.

There are a number of immediate measures, consistent with long-term recovery plans, that Brookfield could implement to reduce its impact on Kennebec River salmon, see id. ¶¶ 31-32, and Plaintiffs are entitled to seek such relief during the period Brookfield is committing a take without authorization.[28] Although Brookfield attempts to pigeon-hole Plaintiffs' remedies to a judicially-enforceable schedule for completing a BA, see MTD at 17-18, it is clear that Plaintiffs have asked for more, see Sub. Compl. at 19-20, and that this Court can craft meaningful injunctive relief now. See, e.g., South Yuba River Citizens League v. NMFS, – F. Supp. 2d –, 2011 WL 3163296, at *1 (E.D. Cal. July 26, 2011) (in case involving threatened

[28] See, e.g., Coxe, 127 F.3d at 158, 170 (upholding injunction requiring defendant to develop robust proposal "to restrict, modify or eliminate the use of fixed-fishing gear" causing take and to "convene an Endangered Whale Working Group" to identify further measures to minimize harm); Martin, 588 F. Supp. 2d at 110 (issuing preliminary injunction ordering State of Maine to prevent lynx from accessing "killer-type" traps).

salmonid species at dam, extensive supplemental protective measures ordered even though agency was under court order to issue BiOp within six months).[29]

III. PLAINTIFFS' CLEAN WATER ACT CLAIM CAN BE READILY ADJUDICATED AS WELL.

In an apparent afterthought, see MTD at 19-20, Brookfield suggests that the Court "should also dismiss" Count II of the Substituted Complaint, which alleges that Brookfield is violating its CWA water quality certification by allowing adult salmon and shad to pass through the dam's turbines without having "first demonstrat[ed]," through requisite "site-specific quantitative studies," that "passage through the turbine(s) will not result in significant injury and/or mortality (immediate or delayed)." Sub. Compl. ¶ 35. Brookfield does not articulate a jurisdictional challenge to this claim,[30] much less offer any valid reason why the Court cannot readily adjudicate it.[31]

Even assessed as a challenge under Rule 12(c) – the post-Answer counterpart to a Rule 12(b)(6) motion asserting a "failure to state a claim" – Brookfield's argument must be rejected. The portion of the water quality certification at issue applies "to the extent [the dam owner]

[29] The interim injunctive measures ordered in South Yuba against the dam operator were extensive, including the optimization of flashboard use, removal of debris from and installation of locked grates at fish ladders, inspection and dredging of sediment after high flow events, and development of a plan to reduce crossbreeding among spring-run and fall-run salmon. Id. at *9-*16. Moreover, federal courts have the equitable power in citizen enforcement cases to order remediation of harm caused by *past* illegal conduct; this is so even where the relief imposes requirements more stringent than those contained in an agency-issued permit. See generally ASM, 339 F.3d at 30.

[30] Brookfield does not allege that the CWA claim is not ripe for review, and any implicit suggestion that this claim is unripe until NMFS reviews and "approv[es] of the fish passage study protocol and the interim species protection plan under the [allegedly] more stringent standards of [the] ESA," MTD at 20, fails for several reasons: (1) the water quality certification operates as a *current prohibition* on allowing adult salmon and shad to pass through the dam's turbines *until* studies are approved by NMFS (and other agencies), those studies actually are performed, and they actually demonstrate that no significant harm will occur; (2) NMFS does not administer the CWA, and is not charged with determining compliance with the requirements of CWA water quality certifications; and (3) NMFS has no statutory jurisdiction at all over shad, since these fish are not listed under the ESA. For similar reasons, any implied primary jurisdiction argument would fail as well. See NextEra Am. Rec. Dec. (Docket. No. 34) at 5-7.

[31] Indeed, Brookfield *concedes* the basic elements of Plaintiffs' CWA claim, having admitted in its pleadings that adult salmon and shad are present upstream of the dam and that the requisite studies have not been done, Answer ¶¶ 37, 39, and admitting in this motion that downstream migrating salmon *do* pass through the dam's turbines, even during periods of high river flow, see MTD at 6 n.6.

desires to achieve interim downstream passage [of adult salmon or shad] by means of passage through turbines." Sub. Compl. ¶ 35. Brookfield claims it "does not seek 'to achieve interim downstream passage by means of passage through turbines," but rather has "constructed [a] downstream fishway specifically to *avoid* their travel through turbines." MTD at 20; see also Bernier Dec. ¶¶ 7, 11, 15 (discussing the purpose and alleged efficacy of the fishway). Because Brookfield has submitted evidence outside of the pleadings on this issue, the Court can either ignore this evidence and rely on Plaintiffs' complaint allegations (and all reasonable inferences thereon), or consider the evidence and convert the motion into one for summary judgment under Rule 56. See Rubert-Torres v. Hospital San Pablo, Inc., 205 F.3d 472, 475 (1st Cir. 2000).[32]

Under the first standard, the challenge to Plaintiffs' complaint fails because Plaintiffs have alleged that Brookfield "achieve[s] (or attempt[s] to achieve) downstream passage of adult salmon through Hydro Kennebec dam's turbines" and "ha[s] likewise chosen to pass … adult shad through the … turbines," Sub. Compl. ¶¶ 38-39, and that its fishway "is not effective at preventing salmon and shad from swimming through turbines," id. ¶ 40. These allegations, which must be presumed true on a Rule 12(b)(6) motion, are sufficient to state a claim that Brookfield "desires" to pass fish through the turbines.[33] Under the Rule 56 standard, the challenge fails because Brookfield's own evidence shows that *more* salmon pass through the dam's turbines than through the constructed fishway, which raises (at least) a genuine, triable issue regarding Brookfield's "desire."[34] See also Bailey Dec. ¶ 24 (roughly *half* of the downstream migrating fish pass through Brookfield's turbines under no spill conditions).

[32] Because discovery in this case is still ongoing, Plaintiffs submit that the former is the better course. See id.

[33] The meaning of the term "desires" in the certification surely does not turn on the stated (or subjective) hopes or wishes of Brookfield's personnel, but rather on whether Brookfield operates the dam knowing that adult salmon or shad will pass through the dam's turbines.

[34] Should the Court be inclined to disagree, Plaintiffs respectfully ask that the Court allow further discovery (*e.g.*, depositions) to shed additional light on Brookfield's "desires" before it rules. See Fed. R. Civ. P. 12(d).

Brookfield also suggests that the ESA somehow preempts or supplants the CWA Section 401 water quality certification program. See MTD at 20 (implying that compliance with the water quality certification must be determined by NMFS). Any such argument fails as a matter of law.[35] The Section 401 program is separately enforceable, and applies broadly to federally-licensed dams. See, e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Protection, 547 U.S. 370 (2006). See generally J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l, 534 U.S. 124, 142-44 (2001) (compliance with one federal statute does not constitute compliance with, or vitiate the need to comply with, any other federal statute). Moreover, NMFS has no statutory authority to revise the terms of Brookfield's Section 401 certification. If Brookfield has a quarrel on this point, it is with Congress, for imposing separate requirements on Brookfield's dam as part of the CWA, and for granting citizens the right to enforce those requirements.[36]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Brookfield's motion to dismiss or stay the case be denied.

Dated: November 30, 2011

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[35] Brookfield's assertion that "the agencies deem [the ESA Section 7 consultation process] sufficient to meet all preexisting CWA … standards," MTD at 20, is also *factually* unfounded: Brookfield submits no evidence of any agency's views on the matter.

[36] Brookfield derides "Plaintiffs' effort to engraft a CWA citizen suit theory" in providing supplemental protection to salmon and shad, MTD at 20, but ignores the plain language in CWA Section 505 authorizing citizens to enforce the water quality certification at issue. See 33 U.S.C. § 1365(a) (allowing enforcement of any "effluent standard or limitation") & (f)(5) (defining this term to include the provisions of Section 401 certifications).

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2011, I electronically filed on behalf of the above-named Plaintiffs the above Plaintiffs' Opposition To Brookfield's Motion To Dismiss Or Stay with the Clerk of Court using the CM/ECF system, which will send notification of such filings to all other counsel of record.

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