

No. 13-1220

United States Court of Appeals for the First Circuit

**FRIENDS OF MERRYMEETING BAY and ENVIRONMENT MAINE,
Plaintiffs-Appellants,**

v.

**HYDRO KENNEBEC, LLC, and BROOKFIELD POWER US ASSET
MANAGEMENT, LLC,
Defendants-Appellees.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MAINE

BRIEF OF APPELLANTS

David A. Nicholas (Bar No. 14876)
20 Whitney Road
Newton, Massachusetts 02460
(617) 964-1548
dnicholas@verizon.net

Bruce M. Merrill (Bar No. 42682)
225 Commercial Street Ste 501
Portland, Maine 04101
(207) 775-3333
mainelaw@maine.rr.com

Joshua R. Kratka (Bar No. 90605)
National Environmental Law Center
44 Winter Street, 4th Floor
Boston, Massachusetts
(617) 747-4333
josh.kratka@verizon.net
rfreed@nelconline.org

Charles C. Caldart (Bar No. 1095229)
National Environmental Law Center
1402 Third Ave., Suite 715
Seattle, Washington 98101
(206) 568-2853
cccnelc@aol.com

Counsel for Appellants

CORPORATE DISCLOSURE STATEMENT

Appellants Friends of Merrymeeting Bay and Environment Maine are non-profit corporations that have not issued shares of stock to the public and have no corporate parent.

/s/ David A. Nicholas

David A. Nicholas (Bar No. 14876)

20 Whitney Road

Newton, Massachusetts 02460

(617) 964-1548

dnicholas@verizon.net

Attorney for Plaintiffs

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Local Rule of Appellate Procedure 34.0(a), Appellants Friends of Merrymeeting Bay and Environment Maine request oral argument on this matter. Because resolution of this appeal turns on consideration of facts admitted into the summary judgment record that the District Court failed to analyze, oral argument will enable the parties to fully argue the relevant factual record. In addition, oral argument will provide an opportunity for the parties to focus on, and respond to, the factual and legal issues of greatest concern to the Court.

JURISDICTIONAL STATEMENT

Plaintiffs brought a Clean Water Act (“CWA”) citizen enforcement suit against Defendants (collectively, “Brookfield”) for violating a water quality certification that governs the operation of Brookfield’s Hydro Kennebec hydroelectric project on the Kennebec River in Maine. The District Court had jurisdiction over this matter pursuant to 33 U.S.C. § 1365(a) and (f)(5) (authorizing citizens to enforce Clean Water Act water quality certifications in district court) and 28 U.S.C. § 1331 (federal question jurisdiction). In the same case, Plaintiffs asserted an Endangered Species Act (“ESA”) claim pursuant to 16 U.S.C. § 1540(g), but that claim is not at issue on this appeal.

This is an appeal from the District Court’s January 14, 2013, Order on Cross Motions for Summary Judgment (“SJ Order”) (Singal, J.) denying Plaintiffs’ motion for summary judgment on liability on their CWA claim and granting Defendants’ motion for summary judgment on the CWA claim. Joint Appendix (“J.A.”) 143-149. (Plaintiffs are not appealing the District Court’s January 14, 2013, Order on Renewed Motion to Dismiss, which dismissed Plaintiffs’ ESA claim. J.A.130-142.) A judgment for Defendants was entered on January 14, 2013. J.A. 150-151. Plaintiffs timely filed this appeal on February 11, 2013. J.A. 152-153. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

The Judgment disposed of Plaintiffs' claims in their entirety, and the SJ Order is an appealable final order.

ISSUES PRESENTED

The Clean Water Act water quality certification governing operation of Brookfield's hydroelectric dam provides, "In the event that adult shad and/or Atlantic salmon begin to inhabit the impoundment above the ... project, and to the extent the licensee [Brookfield] desires to achieve interim downstream passage of out-migrating adult Atlantic salmon and/or adult shad by means of passage through turbine(s), licensee must first demonstrate through site-specific quantitative studies...that passage through turbines(s) will not result in significant injury and/or mortality..." Plaintiffs brought a citizen suit claiming that Brookfield violated this provision and thus the CWA, which requires compliance with water quality certifications. On cross motions for summary judgment, the District Court granted summary judgment for Brookfield, ruling that Brookfield did not "desire" to pass adult salmon or shad through its turbines.

1. In determining whether Plaintiffs raised a genuine issue of material fact regarding Brookfield's "desire" to use its turbines as an interim passage route, did the District Court err by excluding from its analysis of Brookfield's motion for summary judgment evidence that: (a) Atlantic salmon and/or shad are in fact

passing through the turbines, (b) Brookfield knows such passage occurs, and (c) Brookfield has not taken sufficient steps to prevent that passage?

2. Should summary judgment have been granted for Plaintiffs because they presented undisputed evidence that: (a) adult Atlantic salmon and shad inhabit the impoundment upstream of the Hydro Kennebec Project; (b) Brookfield desires to provide downstream passage for some of these fish through the Project's turbines, as it is aware that its system to divert fish away from the turbines is inadequate yet has decided not to take other measures (such as placing grates in front of the turbine intakes, or shutting down the turbines during salmon and shad migration seasons) to eliminate the turbines as a means of downstream passage for these fish; and (c) Brookfield has not performed the required site-specific quantitative studies to show that turbine passage will not harm these fish?

STATEMENT OF THE CASE

Plaintiffs' Claims

Brookfield owns and operates the Hydro Kennebec hydroelectric project (the "Project" or "Hydro Kennebec dam") on the Kennebec River in Maine. J.A. 82, 83 (Stipulations of Fact ["SF"] 2, 6, 8). On January 31, 2012, Plaintiffs, two conservation groups, filed a Complaint (J.A. 23-42) containing claims under both the ESA and the CWA.

1. In their ESA claim, Plaintiffs alleged that Brookfield’s operation of the Project is “taking” endangered Atlantic salmon by killing and wounding them in violation of the take prohibition of ESA § 9(a), 16 U.S.C. § 1538(a). A take is only excused if done in strict compliance with a formally-issued Incidental Take Statement (“ITS”) pursuant to Section 7 of the ESA or Incidental Take Permit (“ITP”) pursuant to Section 10 of the ESA. 16 U.S.C. § 1536(o)(2) (ITS); 16 U.S.C § 1539(g) (ITP). The Complaint alleged that Brookfield had obtained neither an ITS nor an ITP, and thus was not authorized to take salmon. This claim is not at issue in this appeal.

2. The CWA claim concerns a water quality certification issued by the State of Maine that governs certain aspects of the Project’s operations. Water quality certifications are issued pursuant to Section 401 of the CWA, 33 U.S.C. § 1341. In this case, the terms of the water quality certification were jointly negotiated by the Project’s operator, the State of Maine, and a variety of stakeholders (but not Plaintiffs) in 1998 and memorialized in an agreement known as the Kennebec Hydro Developers Group Agreement (“KHDG Agreement”), which was then expressly incorporated into the certification.¹ Plaintiffs allege that Brookfield is violating the following provision of the certification:

¹ The water quality certification is attached in the addendum to this brief and in the Joint Appendix at 179-187. Relevant excerpts of the KHDG Agreement are also attached in the addendum to this brief and in the Joint Appendix at 154-178.

In the event that adult shad and/or Atlantic salmon begin to inhabit the impoundment above the...project, and to the extent that licensee [Defendants] desires to achieve interim downstream passage of out-migrating adult Atlantic salmon and/or adult shad by means of passage through turbine(s), licensee must first demonstrate through site-specific quantitative studies...that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed).

J.A. 102-103 (SF 134); J.A. 164-165 (KHDG Agreement at 11-12).

On June 2, 2011, Plaintiffs filed a Substituted Complaint (“Subst. Compl.”) correcting the name of one of the Defendants. J.A. 52-72.

By June 23, 2011, both Defendants had filed an Answer. J.A. 43-51 (Answer of Hydro Kennebec, LLC) and J.A. 73-81 (Answer of Brookfield Power US Asset Management, LLC). Defendants later, on October 12, 2011, filed a Motion to Dismiss or in the Alternative to Stay the Case (Docket Entry 31), arguing lack of ripeness and primary jurisdiction because Defendants were in the process of trying to obtain an ITS. The District Court denied the motion on February 9, 2012 (Docket Entry 53). The Court subsequently granted Defendants’ Renewed Motion to Dismiss with respect to the ESA claim, on mootness grounds, after the National Marine Fisheries Service (“NMFS”) issued an ITS authorizing certain takes of salmon at the Hydro Kennebec dam. J.A. 130-142. However, in the same order, the District Court denied Defendants’ motion to dismiss the CWA claim on mootness grounds. J.A. 141.

The Cross Motions For Summary Judgment On The CWA Claim

Plaintiffs and Defendants filed cross motions for summary judgment on the CWA claim.² A joint record (Docket Entries 78-96), including Stipulations of Fact (“SF”) (J.A. 82-107), was submitted with the motions.

Plaintiffs argued that Brookfield is violating its water quality certification because: (1) Brookfield admits that adult Atlantic salmon and American shad inhabit the impoundment upstream of the Project during migration seasons; (2) Brookfield admits that it provides downstream passage for some of these fish through the Project’s turbines; (3) Brookfield is aware that its system to divert fish away from the turbines is only partially successful, yet it has decided not to take measures (such as placing grates in front of the turbine intakes, or shutting off the turbines during migration season) to eliminate the turbines as a means of downstream passage for these fish; and (4) Brookfield admits it has not performed the required site-specific quantitative studies to show that turbine passage will not harm these fish.

Brookfield argued that the operative language in the water quality certification applies only if Brookfield desires to pass *all* adult salmon and shad downstream *solely* through the Project’s turbines, and that its installation of a

² The parties also filed cross motions for summary judgment on the ESA claim, but the District Court did not rule on those motions before dismissing the ESA claim on mootness grounds. The District Court’s dismissal of the ESA claim is not at issue on this appeal.

diversionary device demonstrates – despite the ineffectiveness of that device – that Brookfield does not “desire” to use its turbines as a downstream passage route for adult salmon and shad —regardless of whether, in fact, these fish continue to have access to the turbines.

The District Court denied Plaintiffs’ motion and granted Brookfield’s motion, ruling:

It is what the licensee, the Defendants, desire – or want – that triggers [the site-specific study requirement]. The reasonable interpretation of this clause carries a subjective component. ...

Plaintiffs attempt to substitute “knowledge” or “expectations” for “desire.” That is, Plaintiffs argue that because Defendants know or expect that some Atlantic salmon and/or shad may be passing through the turbines, Defendants desire to have the fish pass through the turbines. Had the parties to the [KHDG] Agreement [which is incorporated into the certification] intended Defendants’ knowledge or expectation of Atlantic salmon or shad passing through the turbines to trigger the requisite studies, the parties could have so stated.

J.A. 147-148. The District Court found that because Brookfield installed “a fish boom and turbine bypass route,” it did not “desire” to pass the fish through turbines and thus did not violate the certification’s requirements. J.A. 148. The District Court stated:

Plaintiffs present evidence that Atlantic salmon and/or shad are in fact passing through the turbines and Defendants have not taken sufficient steps to prevent that passage. *Even assuming the truth of the evidence, it is not germane to the Court’s inquiry.* Knowledge does not equate to desire. Accordingly, Defendants have demonstrated an absence of evidence to support the CWA claim and Plaintiffs have failed to raise a genuine issue of material fact.

J.A. 148-149 (emphasis added).

STATEMENT OF FACTS

Adult Atlantic Salmon And American Shad In The Kennebec River

Atlantic salmon are anadromous, meaning they are born in fresh water, migrate to the ocean, and then return to fresh water to spawn. J.A. 88 (SF 41). The Atlantic salmon population of Maine's Kennebec River was placed on the ESA's endangered species list on June 19, 2009. J.A. 84 (SF 17). Adult Atlantic salmon spawn in a tributary to the Kennebec River known as the Sandy River, with each adult female laying eggs there in the late fall. J.A. 88, 91 (SF 42, 59). Post-spawning adults, known as "kelts," migrate downstream in the Kennebec in April, May, October, November, and December. J.A. 88, 91 (SF 43, 62, 64).

After the eggs hatch, the resultant juvenile salmon spend one to three years feeding and growing until they undergo a series of body chemistry changes; at this point, they become "smolts" ready to enter salt water. J.A. 88 (SF 45, 46). Smolts migrate down the Kennebec in the spring. J.A. 91 (SF 62, 63). The smolts that survive this migration spend one to three years in the ocean, developing into mature adult salmon ready to return to their natal rivers to complete the spawning cycle. J.A. 89 (SF 49). Generally, adult salmon migrate upstream in the Kennebec from May to October. J.A. 91 (SF 58). Some Atlantic salmon are capable of

completing this spawning and migration cycle several times over the course of a lifetime. J.A. 92 (SF 65).

American shad are also an anadromous species. Adult shad return to the Kennebec River from the ocean from May to mid-July, and then out-migrate down the Kennebec after spawning. J.A. 92 (SF 66). Adult shad migrate down the Kennebec River from June through August. J.A. 110-111 (Defendants' Opposition to Plaintiffs' Statement of Material Facts ["Def. Opp. SMF"] ¶ 7).

The Hydro Kennebec Project does not have any mechanism that would allow upstream-migrating adult salmon or shad to pass upstream. J.A. 100 (SF 118). Adult salmon and shad returning to the Kennebec River are therefore trapped at the Lockwood Project, the next dam downstream, and trucked upstream. The adult Atlantic salmon are put into trucks and transported to, and deposited in, the Sandy River spawning grounds located upstream of Hydro Kennebec and three other Kennebec hydroelectric projects. J.A. 92, 100 (SF 67-68, 71, 118). From 2006-2011, many dozens of adult salmon returned to the Kennebec River and were counted when trapped at Lockwood for trucking. J.A. 92 (SF 69). Returning adult American shad trapped at Lockwood are trucked to, and deposited in, spawning areas in the Kennebec River upstream of the Hydro Kennebec Project. J.A. 92 (SF 66, 70-71); J.A. 111 (Def. Opp. SMF ¶ 9).

The Hydro Kennebec Project

Hydro Kennebec is the second hydroelectric project on the Kennebec River upstream of the Merrymeeting Bay estuary. J.A. 82, 83 (SF 1, 3). The Hydro Kennebec Project is owned by defendant Hydro Kennebec, LLC, which is also the holder of the Federal Energy Regulatory Commission (“FERC”) license to operate the Project. J.A. 83-84 (SF 6, 9-10). Defendant Brookfield Power US Asset Management, LLC (“Brookfield Power”) is the management entity operating the project on a day-to-day basis, and has primary responsibility for ensuring that the Project complies with environmental laws such as the ESA and CWA. J.A. 83-84 (SF 8-9, 11).

The Hydro Kennebec Project spans the entire width of the Kennebec River. J.A. 83 (SF 4). By damming the river, the Project creates a 3,900-acre impoundment upstream of the Project, which extends approximately four miles upstream. J.A. 83 (SF 5). The Project has two hydroelectric turbines used to generate electricity. J.A. 93 (SF 73-74).

Downstream Fish Passage At The Hydro Kennebec Project

All Atlantic salmon migrating downstream from the Sandy River must pass four hydroelectric dams on the Kennebec River to reach Merrymeeting Bay and then the ocean: the Weston, Shawmut, Hydro Kennebec, and Lockwood Projects, in that order. J.A. 91 (SF 62). All American shad migrating downstream from

above the Hydro Kennebec Project on the Kennebec River must pass the Hydro Kennebec and Lockwood Projects, in that order, to reach Merrymeeting Bay and then the ocean. J.A. 83, 91 (SF 3, 62).

Downstream migrating salmon and shad can pass the Hydro Kennebec Project by three means: through the turbines, through a fish bypass slot, or over the spillway. J.A. 93 (SF 72). Fish cannot pass over the spillway unless there is water flowing over the spillway (a condition known as “spill”); spill occurs only when the flow of the river is high enough that it exceeds the maximum flow capacity of the two turbines and the fish bypass. J.A. 93 (SF 79). When there is no spill, downstream migrating salmon and shad can pass the Project only through the turbines or the bypass slot. J.A. 93, 105 (SF 79, 147). Downstream migrating fish pass through the Project’s turbines both when there is spill and when there is no spill, but a greater proportion of them pass through the turbines at the Project when there is no spill. J.A. 97 (SF 104). See also Defendants’ Motion for Summary Judgment (Docket Entry 106), at 14 (fish do pass through the Project’s turbines).

Downstream migrating fish that pass through the Project’s turbines are at risk of injury or mortality from blade strike. J.A. 93 (SF 80). The Project’s two turbines each have four blades that spin at 115 revolutions per minute, *i.e.*, roughly twice per second for each blade, when generating electricity, J.A. 93 (SF 73-74).

The larger the fish, the more likely it will be struck by a blade during passage through one of the Project's turbines. J.A. 95 (SF 92).

The fish bypass, installed in 2006, is a 4-foot by 8-foot rectangular slot located near the Project's turbine intakes. J.A. 93, 103 (SF 76, 137). The maximum flow rate of the bypass (the rate of river flow through the river when the bypass is fully open) is only 320 cubic feet per second ("cfs"). J.A. 93 (SF 77). In contrast, the Project's turbines have a combined maximum flow rate of approximately 7,900 cfs. J.A. 93 (SF 75).

Brookfield has attempted to place a floating guidance boom with a hanging curtain in front of the turbine intakes, to try to route fish to the relatively tiny bypass slot, but this system has had a variety of problems. Specifically:

- High river flows cause the boom to be pulled below the water's surface, providing an opportunity for fish to pass over the boom to the turbine intakes directly behind it. J.A. 120 (Def. Opp. SMF ¶¶ 35-36).
- In 2007, 2010, and 2011, the curtain hanging below the boom ripped, creating holes large enough for fish to swim through. J.A. 120 (Def. Opp. SMF ¶ 37).
- On the occasions when the curtain ripped, the boom and curtain system was completely removed for repairs. J.A. 120-121 (Def. Opp. SMF ¶ 38).
- From April 1 to May 28, 2007, and from April 1 to May 19, 2008, high flows in the Kennebec River prevented the initial installation of the boom and curtain. J.A. 121 (Def. Opp. SMF ¶ 39).
- In 2008, the boom was iced-in and damaged from mid-December through the end of the year. J.A. 121 (Def. Opp. SMF ¶ 40).

- The boom does not extend all the way to the entrance of the bypass; there is a 4-5 foot gap (J.A. 215 (FERC inspection report) and Defendants' Opposition to Plaintiffs' Additional Statement of Facts, p. 3 (¶25) (Docket Entry 125) through which fish can pass.

Moreover, studies conducted by Brookfield have demonstrated that, *even when the boom and curtain are fully deployed and operational*, a significant percentage of salmon avoid the boom and curtain and pass downstream through the turbines. J.A. 104-105 (SF 143, 144, 146) (17% passed via the turbines during a time when spill was occurring); J.A. 105 (SF 147) (as many as 61% passed via the turbines during a time when no spill was occurring); J.A. 857 (NMFS Biological Opinion indicates that 31% passed via the turbines even with the latest version of the guidance boom and curtain in place). These guidance devices function differently in their ability to guide shad towards the bypass and away from the turbines. J.A. 105 (SF 148). In 2011, a NMFS biologist told Brookfield, in response to its proposal to install a new guidance boom at the Project, that “effectiveness studies to date on fish booms in [Maine] have not been very encouraging.” J.A. 104 (SF 141, 142).

Despite its knowledge that the boom and curtain system is only partially effective at keeping fish out of the turbines even when fully operational, Brookfield has made the decision to operate its turbines continuously during salmon and shad migration seasons, thus affording adult salmon and shad access to

the Project's spinning turbines. Brookfield has continued to operate its turbines even when the guidance system is damaged, or completely inoperable, and it has not considered acting otherwise. J.A. 105 (SF 149). See J.A. 148 (SJ Order at 6: "Plaintiffs present evidence that Atlantic salmon and/or shad are in fact passing through the turbines and Defendants have not taken sufficient steps to prevent that passage").

The Clean Water Act Water Quality Certification

Congress declared that the objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA sets a "national goal" of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). To further the objective and goals of the CWA, Congress directed states – or, if they fail to do so, the Environmental Protection Agency ("EPA") – to adopt water quality standards that "protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA]." 33 U.S.C. § 1313(c)(2)(A); id. at §§ 1313(a)(3)(C) and 1313(b)(1); 40 C.F.R. §§ 131.2 and 131.3(i); Friends of Merrymeeting Bay v. Olsen, 839 F. Supp. 2d 366, 370 (D. Me. 2012) ("Under the CWA, states are responsible for establishing water quality standards for all of their water bodies"). State water quality standards must specify designated uses of its waters (such as

habitat for fish or other aquatic life) and set forth criteria to protect such uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.2 and 131.3(i); Olsen, 839 F. Supp. 2d at 370.

In Maine, the Legislature sets water quality standards. 38 M.R.S.A. § 464(1) and (2); Olsen, 839 F. Supp. 2d at 371. The Kennebec River in the impoundment above the Hydro Kennebec Project has been classified by the State of Maine as a Class C waterway. 38 M.R.S.A. § 467(4)(A)(10-A)(a). The Legislature has declared:

Class C waters must be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as a habitat for fish and other aquatic life.

38 M.R.S.A. § 465(4)(A) (emphasis added). The Kennebec River immediately below the Hydro Kennebec Project (until it reaches the impoundment created by the next dam downstream, Lockwood) has been classified by the State of Maine as a Class B waterway. 38 M.R.S.A. § 467(4)(A)(10-A). The Legislature has declared:

A. Class B waters must be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12 section 403; navigation; and as habitat for fish and other aquatic life. The habitat must be characterized as unimpaired.

38 M.R.S.A. § 465(3) (emphasis added). “‘Unimpaired’ means without a diminished capacity to support aquatic life.” 38 M.R.S.A. § 466(11). These classifications were approved by EPA under 33 U.S.C. § 1313(c), thus becoming “part of the federal law,” Arkansas v. Oklahoma, 503 U.S. 91, 110 (1992).

Provisions for fish passage, such as the portions of the Hydro Kennebec water quality certification at issue here, “clearly bear on the attainment of the designated uses of fishing, recreation and fish habitat,” and thus are integral to Maine’s water quality standards. S.D. Warren Co. v. Maine Dep’t of Env’tl. Prot., 2004 Me. Super. LEXIS 115, at *10 (Cumberland County May 4, 2004), aff’d, 2005 Me. 27, 868 A.2d 210 (Me. 2005), aff’d, 547 U.S. 370 (2006) (quoting Bangor Hydro-Electric Co. v. Bd. of Env’tl. Prot., 595 A.2d 438, 443 (Me. 1991)); see Olsen, 839 F. Supp. 2d at 374, n.8. Maine environmental regulators regularly require hydroelectric dams to provide passage for fish in order to assure attainment of the designated uses contained in water quality standards. E.g., Save Our Sebasticook, Inc. v. Bd. of Env’tl. Prot., 2007 Me. 102, ¶5, 928 A.2d 736, 739 (Me. 2007) (fish passage required at Sebasticook River dam); S.D. Warren, 2004 Me. Super. LEXIS 115, at *10-14 (fish passage required at Presumpscot River dams).

Under Section 401 of the CWA, federally-licensed hydroelectric projects must obtain a water quality certification as a condition of their operation. See generally S.D. Warren Co. v. Maine Bd. Of Env’tl. Prot., 547 U.S. 370 (2006). The

purpose of the water quality certification, which becomes part of the facility's FERC license, is to ensure that the dam's operation will not prevent attainment of water quality standards. *Id.* at 386.³ Accordingly, water quality certifications contain operating limitations. 33 U.S.C. § 1341(d); *S.D. Warren*, 547 U.S. at 386. Here, the water quality certification for the Hydro Kennebec Project provides:

INTERIM DOWNSTREAM FISH PASSAGE: The [licensee] shall continue and where needed improve existing operational measures to diminish entrainment, allow downstream passage, and *eliminate significant injury to out-migrating anadromous fish in accordance with the terms of the KHDG Settlement Agreement.*

J.A. 102 (SF 132) (emphasis added). The full text of the provision of the KHDG Settlement Agreement thus incorporated into the water quality certification is as follows:

4. Downstream passage at []Hydro Kennebec
 - a. Interim passage beginning upon the effective date of this Agreement:
 - (1) Generally. Licensee will continue and where needed improve existing interim operational measures (e.g. controlled spills, temporary turbine shutdowns), to diminish entrainment, allow downstream passage of out-migrating alewife, Atlantic salmon, blueback herring and

³ The narrative requirements of water quality certifications are enforceable in a federal citizen enforcement suit, such as this one, brought under 33 U.S.C. §§ 1365(a) & (f)(5). See *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 712-15 (1994) (narrative provisions enforceable); *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998) (water quality certifications explicitly included among the "standards or limitations" enforceable in citizen suits).

American shad, and eliminate significant injury or mortality (immediate or delayed) to out-migrating species. Licensee agrees to consult with state and federal agencies to develop an approved plan for interim downstream passage facilities and/or operational measures to minimize impacts on downstream migrating fish, with evaluation based on qualitative observations.

(2) Passage through turbines. To the extent that licensee desires to achieve or continue interim downstream passage of out-migrating alewife, and/or juvenile Atlantic salmon or shad by means of passage through turbine(s), licensee must demonstrate, through site-specific qualitative studies designed and conducted in consultation with the resource agencies, that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed). *In the event that adult shad and/or Atlantic salmon begin to inhabit the impoundment above the [] Hydro Kennebec project, and to the extent that licensee [Defendants] desires to achieve interim downstream passage of out-migrating adult Atlantic salmon and/or adult shad by means of passage through turbine(s), licensee must first demonstrate through site-specific quantitative studies designed and conducted in consultation with the resource agencies that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed). In no event shall licensee be required to make this quantitative demonstration for adult shad and adult Atlantic salmon before May 1, 2006.*

Licensee shall conduct studies (designed in consultation with the resource agencies) prior to the date by which permanent downstream passage facilities are to be operational to determine the effectiveness of various downstream passage techniques in preparation for the design and installation of permanent downstream facilities.

J.A. 164-165 (KHDG Agreement at 11-12) (emphasis added). The italicized language is the portion of this provision at issue in this appeal.

Plaintiffs' Clean Water Act Claim

Plaintiffs alleged in the Substituted Complaint that (1) adult Atlantic salmon and adult American shad inhabit the impoundment upstream of the Project, (2) Brookfield desires to use the Project's turbines as a means for some of these fish to pass the Project, and (3) Brookfield has not conducted any Project-specific study to show that such turbine passage does not cause significant injury and/or mortality (immediate or delayed) to these fish.⁴ J.A. 64-65 (Subst. Compl. ¶¶ 36, 37).

Plaintiffs claim that as a result, Brookfield violated the water quality certification provision prohibiting passage of adult salmon and shad through turbines unless and until the safety of such passage has been established by reliable site-specific studies. Accordingly, Plaintiffs claim that Brookfield has failed to "eliminate significant injury to out-migrating anadromous fish in accordance with the terms of the KHDG Settlement Agreement," as is required by the Hydro Kennebec water quality certification.

For relief, Plaintiffs requested an order requiring Defendants to comply with the water quality certification's prohibition against adult salmon and shad turbine

⁴ In their Answers, Defendants admitted the first and third of these allegations. J.A. 47 (Answer of Hydro Kennebec ¶¶ 36, 37) and J.A. 77 (Answer of Brookfield Power ¶¶ 36, 37).

passage. J.A. 69-70 (Subst. Compl. Relief Request c). Mere performance of site-specific studies on the effect of turbine passage on adult salmon and shad would not be sufficient to comply with the water quality certification. Rather, turbine passage is not allowed under the terms of the certification unless and until Defendants “*first demonstrate* through site-specific quantitative studies...that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed).” J.A. 102-103 (SF 134); J.A. 164-165 (KHDG Agreement at 11-12) (emphasis added). The water quality certification presumes that turbine passage for adult salmon and shad is unsafe unless site-specific studies prove otherwise. Plaintiffs seek to prevent Brookfield from continuing to allow turbine passage in the absence of reliable site-specific studies demonstrating that such passage is sufficiently safe.

SUMMARY OF ARGUMENT

First, the District Court’s grant of summary judgment to Brookfield on Plaintiffs’ Clean Water Act claim was based solely on its finding that Brookfield did not “desire” to achieve downstream passage of adult salmon and shad at Hydro Kennebec through the Project’s turbines. (Using turbines as a passage route is prohibited by Brookfield’s CWA water quality certification unless site-specific studies prove that such passage is safe.) However, the District Court expressly and

improperly refused to consider the types of objective evidence routinely held to be relevant in determining a party's subjective desire.

Applying the correct "totality of the circumstances" approach to the undisputed evidence in the summary judgment record, as this Court recently did in United States v. Gen. Elec. Co., 670 F.3d 377 (1st Cir. 2012), and viewing those facts in the light most favorable to Plaintiffs, it is clear that at a minimum Plaintiffs raised a genuine issue of material fact as to whether Brookfield "desires" to maintain turbine passage as a means of downstream fish passage at the Hydro Kennebec Project.

Second, the undisputed material facts in the record entitle Plaintiffs to a ruling of summary judgment in their favor. Brookfield admits two of the three elements of Plaintiffs' claim (that adult salmon and shad inhabit the impoundment above the Project, and that no site-specific studies have been done). And when the totality of the circumstances are considered, it cannot reasonably be maintained that Brookfield has no "desire" to use its hydroelectric turbines as one means of passage for downstream migrating fish at Hydro Kennebec. Brookfield knew the boom and curtain system it installed to keep adult salmon and shad out of the turbines often did not work or could not even be installed; it knew that, even when the boom and curtain system was fully operational, fish could (and did) avoid it and access the turbines; and, knowing this, Brookfield continued, without

interruption, to operate its turbines, and thus to make them available as one of the downstream passage routes for out-migrating salmon and shad.

Brookfield's arguments to the contrary before the District Court rely on tortured definitions of "inhabit" and "desire," which are contrary to common usage and established law, respectively. Brookfield also misconstrues the water quality certification in arguing that it must "desire" turbine passage as the *exclusive* means of downstream passage in order to be held liable; the certification expressly prohibits any degree of turbine passage unless such passage is first proven safe.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] a grant or denial of summary judgment by the district court *de novo*," and "[t]he presence of cross-motions neither dilutes nor distorts [the *de novo*] standard of review." OneBeacon Am. Ins. Co. v. Commercial Union Assur. Co. of Canada, 684 F.3d 237, 241 (1st Cir. 2012) (citations and internal quotes omitted; brackets in the original).

As the District Court correctly explained, a party is entitled to summary judgment if, on the record before the Court, it appears "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A “material fact” is one that has “the potential to affect the outcome of the suit under the applicable law.” Nereida–Gonzalez v. Tirado–Delgado, 990 F.2d 701, 703 (1st Cir. 1993) (citing Anderson, 477 U.S. at 248) (additional citation omitted).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the Court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 34 (1st Cir. 2005); Santoni v. Potter, 369 F.3d 594, 598 (1st Cir. 2004). The above-described standard “is not affected by the presence of cross-motions for summary judgment.” Gwadosky, 430 F.3d at 34 (citation omitted). “[T]he court must mull each motion separately, drawing inferences against each movant in turn.” Cochran v. Quest Software, Inc., 328 F.3d 1, 6 (1st Cir. 2003) (citation omitted).

The District Court improperly applied this standard to the cross-motions for summary judgment here. In its consideration of both motions, it disregarded facts of the type that, as a matter of law, have been held to be material to the determination of a party’s “desire” – here, to Brookfield’s desire regarding fish passage through its turbines. As described in Section II below, properly admitted

but disregarded facts regarding Brookfield's knowledge and actions are material to Brookfield's motion and, particularly when viewed in the light most favorable to Plaintiffs, certainly raise a genuine issue as to what Brookfield's "desire" is, precluding summary judgment for Brookfield. As described in Section III below, those same facts are both undisputed and, as a matter of law, material to Plaintiffs' motion. Once those facts are considered, a reasonable jury could not return a verdict for Brookfield, requiring that summary judgment be granted for Plaintiffs.

II. IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, THE DISTRICT COURT ERRED BY RULING THAT THE KNOWING ACTS OF DEFENDANTS TO ENABLE TURBINE PASSAGE ARE "NOT GERMANE" TO THE QUESTION OF WHETHER DEFENDANTS "DESIRE" TO PASS ADULT SALMON AND SHAD THROUGH THEIR TURBINES.

In its ruling on the CWA claim, the District Court assumed: (1) "adult salmon and shad do inhabit the impoundment upstream of the dam" (J.A. 147) and (2) "Atlantic salmon and/or shad are in fact passing through the turbines and Defendants have not taken sufficient steps to prevent that passage" (J.A. 148). The District Court also found that "Defendants do not contest that the requisite site-specific quantitative studies have not been performed to show that turbine passage will not result in injury and/or mortality to the fish." J.A. 146; see also J.A. 47 (Answer of Hydro Kennebec ¶ 37); J.A. 77 (Answer of Brookfield Power ¶ 37); J.A. 103 (SF 135). The District Court's grant of summary judgment was based solely on its finding that Brookfield did not "desire" to achieve downstream

passage of adult salmon and shad at Hydro Kennebec through the Project's turbines.

Contrary to the District's Court opinion, Plaintiffs did not argue that "desire" is an ambiguous term. Plaintiffs agree with the District Court that the common meaning of "desire" is "[t]o wish or long for; want." J.A. 147 (SJ Order at 5). Nor did Plaintiffs argue that Brookfield's intent is irrelevant to the CWA claim, see J.A. 147 (SJ Order at 5); rather, Plaintiffs agree that what Brookfield *wants* – how it *actually intends* to achieve downstream passage of adult salmon and shad – is the issue to be resolved.⁵ Finally, contrary to the District Court's characterization, Plaintiffs are not attempting "to substitute 'knowledge' or 'expectations' for 'desire'" in the language of the water quality certification. J.A. 148 (SJ Order at 6). Rather, Plaintiffs, in line with a wide range of legal authority on the issue, believe that a party's "knowledge" and "expectations" provide crucial *objective evidence* of a party's actual desire – evidence the District Court improperly disregarded.

While Plaintiffs are unaware of a decision under the CWA addressing whether a party "desires" a particular result, courts have in numerous other

⁵ Although Plaintiffs noted in a footnote that the CWA is a strict liability statute, Plaintiffs' Motion for Summary Judgment (Docket 107) at 18, n.27, the thrust of Plaintiffs' argument before the District Court was that Defendants' actions and inactions demonstrate that they "mean [i.e., intend] to allow downstream passage" through the Project's turbines, id. at 18.

contexts resolved questions of intent, and of “desire” in particular, by using a “totality of the circumstances” approach. The District Court did not apply such an approach here. Instead, the District Court expressly refused to consider the types of evidence routinely held to be relevant in determining a party’s desire.

In general, “subjective intent may be inferred from the objective circumstances.” United States v. Sherman, 551 F.3d 45, 50 (1st Cir. 2008); De Leon-Reynoso v. Ashcroft, 293 F.3d 633, 637 (3d Cir. 2002) (quoting with approval then-Judge Alito’s observation at oral argument that “subjective intent is generally inferred from objective facts”); Kosilek v. Spencer, 899 F. Supp. 2d 190, 208-209 (D. Mass. 2012) (subjective state of mind “is often inferred from behavior” [citation omitted]). Similarly, intent “may be inferred from the totality of relevant facts.” Aucella v. Town of Winslow, 583 A.2d 215 (Me. 1990) (citing Washington v. Davis, 426 U.S. 229, 241-42 (1976)) (regarding invidious intent to discriminate); United States v. Vavlitis, 9 F.3d 206, 214 (1st Cir. 1993) (“[f]raudulent intent may be established by circumstantial evidence and by reasonable inferences from facts and situations”); Stone v. Perry, 60 Me. 48 (1872) (in replevin action, “intent of the parties can be inferred from their acts or the circumstances”); Ne. Ins. Group v. Leonard, 1998 Me. Super. LEXIS 16, at *6 (Cumberland County January 20, 1998) (in insurance coverage case, court stated

that intent to injure is inferred from nature of a party's actions in committing a crime).

More specifically, courts routinely use a "totality of the circumstances" test to determine whether a person "desires" a particular outcome. Sofar v. Johnston, 237 F.3d 411, 455 (5th Cir. 2000) (test used to determine whether criminal defendant "desired" to have counsel present); Scott Elliot Smith, LPA v. Travelers Casualty Ins. Co., 2012 U.S. Dist. LEXIS 68181, at *5 (S.D. Ohio, May 16, 2012) (test used to determine whether plaintiffs "desired" to defeat diversity jurisdiction by amending complaint); Taylor v. Bd. of Educ. of City School Dist. of New Rochelle, 191 F. Supp. 181, 194-195 (S.D.N.Y. 1961) ("purposeful desire" to segregate established by "course of conduct" "viewed in its totality"); see also State of Maine v. Lemay, 2012 Me. 86, ¶ 21, 46 A.3d 1113, 1119 (Me. 2012) (evidence of flight permits an inference that defendant "desired" to avoid prosecution).

The District Court did not consider the totality of the circumstances in deciding whether Defendants "desire" that their turbines provide a means of downstream passage for adult salmon and shad. Rather, the District Court explicitly refused to consider circumstances clearly relevant to assessing Defendants' intent. Stating that "[k]nowledge does not equate to desire," J.A. 148 (SJ Order 6), the District Court either dismissed or overlooked the principle that a

party's knowledge can provide strong *evidence* of desire. Leavitt v. Corr. Med. Serv., Inc., 645 F.3d 484, 497 (1st Cir. 2011) (Eighth Amendment claim requires proof that prison officials have a "sufficiently culpable state of mind," which is a "subjective inquiry" that can be satisfied by showing the officials had "actual knowledge" of harm to inmate); AUSA Life Ins. Co. v. Ernst and Young, 206 F.3d 202, 221 (2d Cir. 2000) (in a Securities and Exchange Act 10(b) action, court stated, "we can easily find that [the defendant] possessed the requisite intent to deceive, manipulate, or defraud" where it knew that its actions placed its fiduciaries at undisclosed risk); Gagnon v. Coombs, 39 Mass. App. Ct. 144, 151, 654 N.E.2d 54, 59 (Mass. App. 1995) (the scope of agency that a principal "desires" can be inferred from the facts known to the principal and agent). Contrary to this authority, the District Court held that Defendants' knowledge and expectation that (1) adult salmon and/or shad are in fact passing through the Project's turbines, and (2) its turbine diversion efforts are ineffective, are "not germane to the Court's inquiry." J.A. 148. Moreover, the District Court made no reference to Defendants' decision to continue to run their turbines knowing fish would access them. The complete exclusion of these facts from the District Court's analysis is underscored by the Court's finding of an "absence of evidence" from Plaintiffs on the question of "desire." J.A. 148.

In an analogous case, this Court examined a company's "knowledge" and actions in determining whether it had the "intent" to dispose of a hazardous substance within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). In United States v. Gen. Elec. Co., 670 F.3d 377 (1st Cir. 2012), the U.S. sued GE for costs the government incurred in remediating the Fletcher's Paint Works and Storage Facility Superfund Site. The Environmental Protection Agency had found leaking barrels of Pyranol, a hazardous substance, on a site owned by Fred Fletcher, a chemical scrapper, and had conducted a cleanup of the site under CERCLA. The U.S. claimed GE was liable for the cleanup costs because it had "arranged" for the disposal of Pyranol, a hazardous substance, by selling it to Fletcher.

To be an "arranger" within the meaning of CERCLA, GE had to have "intended" to dispose of the Pyranol. Id. at 383. This Court, citing Burlington Northern & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009), stated, "an entity's knowledge that a product it sells will be discarded may be a probative factor of its intent to 'dispose of' that product," though knowledge alone would not be sufficient to prove intent. GE, 670 F.3d at 383. This Court analyzed in detail whether GE knew that some of the Pyranol it sold to Fletcher was of no use to him because of its poor quality, and found that was indeed the case. Id. at 388-391. This Court then went on to find that, in light of this knowledge, GE's "history of

purposeful inaction in relation to the scrap Pyranol left at the Fletcher Site” undercut its claim “that it did not harbor the intent necessary” to be an arranger. Id. at 390; see id. (“GE made no effort...to retrieve, cleanup, or otherwise properly dispose of the thousands of drums of scrap Pyranol Fletcher had claimed were unusable to him”); see also id. at 389 (the “collective effect” of GE’s conduct, “rather than prevent or reduce the likelihood of disposal, was to ensure it”). This Court thus concluded that GE had the requisite intent to be an “arranger” of hazardous substance disposal within the meaning of CERCLA.

Here, Plaintiffs presented undisputed evidence that Brookfield knew the boom and curtain system installed to keep adult salmon and shad out of the turbines often did not work: it would sink, it developed holes, it had to be removed from the river at times, and sometimes it could not be installed on time. Further, Brookfield knew that, even when the boom and curtain system was fully operational, fish could (and did) avoid it and access the turbines. See J.A. 104, 105 (SF 146, 147, 148) (Brookfield’s studies confirm that salmon pass through the Project’s turbines); Defendants’ Motion for Summary Judgment (Docket 106) at 14 (Defendants acknowledge that “fish do travel...through the HKP [Hydro Kennebec Project] turbines.”). Yet Brookfield continued, without interruption, to operate the Hydro Kennebec turbines, and thus to make them available as one of the downstream passage routes for out-migrating salmon and shad. Brookfield’s

decision to run the turbines during migration seasons – and its failure to pursue an alternate course, such as installing a grate in front of the turbines sufficient to keep adult fish out – was, like GE’s inaction in dealing with Pyranol, material evidence that Brookfield desires to pass adult fish through turbines. At a minimum, these facts and circumstances raise a genuine issue of material fact as to whether Brookfield “desires” to maintain turbine passage as a means of downstream fish passage at the Hydro Kennebec Project.

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

These same undisputed facts entitle Plaintiffs to a ruling of summary judgment in their favor. When the totality of the circumstances are considered, it cannot reasonably be maintained that Brookfield has no “desire” to use its hydroelectric turbines as one means of passage for downstream migrating fish at Hydro Kennebec.

In its arguments to the District Court, Brookfield suggested three reasons why it should not be found to be in violation of this provision of their water quality certification; none is availing.

First, Brookfield argued that, although adult salmon and shad are undeniably present in the impoundment (reservoir) above Hydro Kennebec as they make their way downstream after spawning, they do not “inhabit” the impoundment. Quoting the Merriam-Webster Dictionary, Brookfield argued that “to inhabit” means “to

occupy as a place of settled residence or habitat,” and suggested that “while adult salmon and shad may use the HKP project area as a migratory route,” they do not reside there. Defendants’ Opposition to Plaintiffs’ Summary Judgment Motion (Docket 113) at 17. This argument simply ignores the second half of the dictionary definition; this portion of the Kennebec River is part of the migratory “habitat” of the salmon and shad, and they “inhabit” it (as they inhabit all of the various parts of their habitat) during certain portions of their migratory life cycle. Certainly, these anadromous fish – who travel hundreds of miles to and from the ocean – cannot be said to have a single “place of settled residence,” and it is ludicrous to suggest that the term “inhabit” has that meaning here. Moreover, Brookfield’s argument ignores the fact that both Defendants admitted that adult salmon “inhabit” the impoundment in their Answers. J.A. 47 (Answer of Hydro Kennebec ¶ 36) and 77 (Answer of Brookfield Power ¶ 36).

Second, Brookfield argued that the operative language in the water quality certification is meant to apply only “if Defendants desire to rely *exclusively* on turbine passage” as a means of passing these fish past the Hydro Kennebec Project. Id. (emphasis added). See also Defendants’ Motion for Summary Judgment (Docket 106) at 15 (“What was prohibited under the Agreement was reliance *exclusively* on turbine passage.”) (emphasis added). It is clear from the plain language of the water quality certification that this is not the case. The KHDG

Agreement (incorporated by reference in the certification) states that “*to the extent* licensee desires to achieve interim downstream passage ... by means of passage through turbine(s),” the licensee must first demonstrate such passage is safe. J.A. 102 (SF 134) (emphasis added). This language clearly contemplates that whatever amount of turbine passage Brookfield chooses to allow at the facility must first be shown, through the requisite quantitative studies, to be safe for adult salmon and shad. The water quality certification, in turn, states that it is the licensee’s obligation to “*eliminate* significant injury to out-migrating anadromous fish in accordance with the terms of the KHDG Settlement Agreement.” J.A. 102 (SF 132) (emphasis added). Brookfield’s construction – that only *some* of the harm need be avoided – simply does not comport with the language of the water quality certification.

Third, Brookfield argued that the term “desire” in the KHDG Agreement means nothing more than what Defendants “long or hope for,” (Defendants’ Opposition to Plaintiffs’ Summary Judgment Motion (Docket Entry 113) at 16), regardless (apparently) of whether they knowingly allow salmon and shad to swim directly into the Hydro Kennebec Project’s turbines. This argument conflicts with the prevailing law, which is that “desire” and “intent” are to be measured by the objective evidence, and not only by the professed longings of the actor in question. Moreover, this interpretation conflicts with the purpose of the KHDG Agreement

and the water quality certification: to “eliminate significant injury to out-migrating fish.” Brookfield’s interpretation is also inconsistent with the very water quality standards that the water quality certification is designed to attain. As discussed above at pages 15-16, the applicable water quality standards require that the river above and below Hydro Kennebec be “suitable as a habitat for fish,” and the adequacy of fish passage through the Project is deemed integral to this criterion. If the water quality certification truly required nothing more than that Brookfield professes *hope* that adult salmon and shad will avoid the Project’s rapidly spinning turbine blades, it would assuredly fail to achieve this objective. Doubtless this is why Kevin Bernier, Brookfield’s environmental and fisheries manager at Hydro Kennebec, JA 87 (SF 37, 38), acknowledged in 2005 that the water quality certification “requires that site-specific quantitative studies be conducted (after May 1, 2006) *before any* interim downstream passage of adult shad or Atlantic salmon occurs through the turbines.” J.A. 105 (SF 150) (emphasis added).⁶

⁶ Brookfield may also argue that the Maine Department of Environmental Protection determined in a 2006 order that Hydro Kennebec was in compliance with its water quality certification. This argument should be rejected for several reasons. First, Brookfield did not make this argument in its summary judgment briefing before the District Court, but rather raised it only months after the close of summary judgment briefing, in a portion of a reply brief on its renewed motion to dismiss that was stricken by the District Court. J.A. 141 (Order on Renewed Motion to Dismiss at 12). Second, the DEP order in question (J.A. 190-196) applies to another portion of the KHDG Agreement (IV.B.4.a.1), and not to the turbine passage provisions at issue in this case (IV.B.4.a.2). Third, even if DEP *had* determined that Hydro Kennebec was in compliance with these provisions,

CONCLUSION

The grant of summary judgment for Defendants should be reversed, and Plaintiffs' summary judgment motion should be granted.

Respectfully submitted,

/s/ David A. Nicholas

David A. Nicholas (Bar No. 14876)
20 Whitney Road
Newton, Massachusetts 02460
(617) 964-1548
dnicholas@verizon.net

/s/ Bruce M. Merrill

Bruce M. Merrill (Bar No. 42682)
225 Commercial Street, Suite 501
Portland, Maine 04101
(207) 775-3333
mainelaw@maine.rr.com

/s/ Joshua R. Kratka

Joshua R. Kratka (Bar No. 90605)
National Environmental Law Center
44 Winter Street, 4th Floor
Boston, Massachusetts 02108
(617) 747-4333
josh.kratka@verizon.net

/s/ Charles C. Caldart

Charles C. Caldart (Bar No. 1095229)
National Environmental Law Center
1402 Third Avenue, Suite 715
Seattle, Washington 98101
cccnelc@aol.com

that conclusion would not be binding on this Court. The CWA has given federal courts the authority to interpret the meaning of water quality certifications, and that authority cannot be displaced by a state agency interpretation that conflicts with the plain language of the document. Fourth, the 2006 order addressed the situation known to DEP at that time, and was conditioned on studies to determine the effectiveness of the downstream bypass slot and guidance system. As discussed, however, every bypass effectiveness study since 2006 has confirmed that a significant portion of downstream migrating fish still pass through the Project's turbines. Regardless of how it is interpreted, then, DEP's 2006 order does not diminish the weight of evidence demonstrating Brookfield's desire to maintain turbine passage as one means of achieving downstream passage for adult salmon and shad.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type volume limitation of Fed. R Civ. App. P. 32(a)(7)(B) because this brief contains 9,031 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Fourteen Point Times New Roman.

/s/ David A Nicholas

David A. Nicholas

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2013, I caused the Brief of Appellants to be electronically filed with the Court's CM/ECF system, which automatically sends notification to the following counsel of record for Appellees:

George T. Dilworth
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, Maine 04101
(207) 772-1941
tdilworth@twmlaw.com

Donald A. Carr
Aileen Meyer
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street NW
Washington, D.C. 20037
(202) 663-9227
donald.carr@pillsburylaw.com
chuca.meyer@pillsburylaw.com

/s/ Joshua R. Kratka

Joshua R. Kratka

ADDENDUM

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**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

FRIENDS OF MERRYMEETING BAY,)	
et al.,)	
)	
Plaintiffs,)	
	)	Docket no. 2:11-cv-35-GZS
v.)	
)	
BROOKFIELD POWER US ASSET)	
MANAGEMENT, LLC, et al.,)	
)	
Defendants.)	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Before the Court are the cross-motions for summary judgment filed by Brookfield Power US Asset Management, LLC and Hydro Kennebec, LLC (together, the “Defendants”) (ECF No. 106) and Friends of Merrymeeting Bay and Environment Maine (together, the “Plaintiffs”) (ECF No. 107). Because the Court previously dismissed Count I of Plaintiffs’ Substituted Complaint (ECF No. 20) as moot (see Order On Renewed Motion To Dismiss, January 14, 2013), only summary judgment as to Count II of Plaintiffs’ Substituted Complaint remains before the Court.¹ As explained herein, the Court GRANTS Defendants’ Motion For Summary Judgment (ECF No. 106) as to Count II and DENIES Plaintiffs’ Motion For Partial Summary Judgment (ECF No. 107) as to Count II.

¹ In addition, Plaintiffs and Defendants filed five motions in limine to exclude expert testimony (ECF Nos. 100, 101, 103, 104 and 105). Because those motions were not implicated in the Court’s decision on the present motions for summary judgment as to Count II of Plaintiffs’ Substituted Complaint (ECF No. 20) or the Renewed Motion To Dismiss (ECF No. 133), the motions in limine (ECF Nos. 100, 101, 103, 104 and 105) are DENIED AS MOOT. Also, Defendants requested oral argument related to the motions for summary judgment (ECF No. 140). As the Court stated in its Order On Renewed Motions To Dismiss, the Court determines that this matter can be decided without oral argument, and thus DENIES Defendant’s Motion To Hear Oral Argument Pursuant To Local Rule 7(f) (ECF No. 140).

I. LEGAL STANDARD

Generally, a party is entitled to summary judgment if, on the record before the Court, it appears “that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.”

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). An issue is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. at 248. A “material fact” is one that has “the potential to affect the outcome of the suit under the applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993) (citing Anderson, 477 U.S. at 248) (additional citation omitted).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the Court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. Santoni v. Potter, 369 F.3d 594, 598 (1st Cir. 2004).

Once the moving party has made this preliminary showing, the nonmoving party must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” Triangle Trading Co. v. Robroy Indus., Inc., 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); see also Fed. R. Civ. P. 56(e). “Mere allegations, or conjecture unsupported in the record, are insufficient.” Barros-Villahermosa v. United States, 642 F.3d 56, 58 (1st Cir. 2011) (quoting Rivera-Marcano v. Normeat Royal Dane Quality A/S, 998 F.2d 34, 37 (1st Cir. 1993)); see also Wilson v. Moulison N. Corp., 639 F.3d 1, 6 (1st Cir. 2011) (“A

properly supported summary judgment motion cannot be defeated by conclusory allegations, improbable inferences, periphrastic circumlocutions, or rank speculation.”) (citations omitted). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” In re Spigel, 260 F.3d 27, 31 (1st Cir. 2001) (quoting In re Ralar Distributions, Inc., 4 F.3d 62, 67 (1st Cir. 1993)).

The above-described “standard is not affected by the presence of cross-motions for summary judgment.” Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 34 (1st Cir. 2005) (citation omitted). “[T]he court must mull each motion separately, drawing inferences against each movant in turn.” Cochran v. Quest Software, Inc., 328 F.3d 1, 6 (1st Cir. 2003) (citation omitted); see also Alliance of Auto. Mfrs., 430 F.3d at 34 (“[L]ike the district court, we must scrutinize the record in the light most favorable to the summary judgment loser and draw all reasonable inferences therefrom to that party's behoof.”).

II. DISCUSSION

Both Plaintiffs and Defendants move for summary judgment on Count II of Plaintiffs’ Substituted Complaint (ECF No. 20).² Count II claims that Defendants, who hold the Federal Energy Regulatory Commission (“FERC”) license for the Hydro Kennebec hydroelectric dam (“Hydro Kennebec dam”) located on the Kennebec River, are violating the Clean Water Act by failing to comply with the water quality certificate for that dam.

The objective of the Clean Water Act (“CWA”) is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Accordingly,

² The Court’s discussion of the pending motions assumes familiarity with this Court’s Order On Renewed Motion To Dismiss. In that Order, the Court granted Defendants’ motion to dismiss Plaintiffs’ Endangered Species Act claim (Count I) as moot in light of the issuance of an incidental take statement. The Court also denied Defendants’ motion to dismiss Plaintiffs’ claim (Count II) under the Clean Water Act as moot.

under the CWA, hydroelectric dams must obtain a state “water quality certification” before they may obtain a license to operate from FERC. 33 U.S.C. § 1341. The water quality certification then becomes a condition of the FERC license. Id. §1341(d).

Here, the Hydro Kennebec dam operates subject to the terms and conditions of a water quality certification originally issued in 1986 by the State of Maine pursuant to Section 401 of the Clean Water Act (Stipulations Of Fact (ECF No. 95) (“SF”) ¶ 131). That water quality certificate contains the following provision:

INTERIM DOWNSTREAM FISH PASSAGE: The applicant shall continue and where needed improve existing operational measures to diminish entrainment, allow downstream fish passage, and eliminate significant injury to out-migrating anadromous fish in accordance with the terms of the KHDG [Kennebec Hydro Developers Group] Settlement Agreement.

(SF ¶ 132.) The KHDG Settlement Agreement, in turn, provides:

To the extent that licensee desires to achieve or continue interim downstream passage of out-migrating alewife, and /or juvenile Atlantic salmon or shad by means of passage through turbine(s), licensee must demonstrate, through site-specific qualitative studies designed and conducted in consultation with the resource agencies, that passage through turbine(s) will not result in significant injury and/or mortality (immediate and delayed). In the event that adult shad and/or adult Atlantic salmon begin to inhabit the impoundment above the . . . project, and to the extent that licensee desires to achieve interim downstream passage of out-migrating adult Atlantic salmon and/or adult shad by means of passage through turbine(s), licensee must first demonstrate through site-specific quantitative studies designed and conducted in consultation with the resource agencies, that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed). In no event shall licensee be required to make this quantitative demonstration for adult shad and adult Atlantic salmon before May 1, 2006.

(SF ¶ 134.)

Defendants do not contest that the requisite site-specific quantitative studies have not been performed to show that turbine passage will not result in injury and/or mortality to the fish. Although Defendants contest whether adult salmon and shad “inhabit” the impoundment

upstream of the dam, Defendants concede that the fish may use the impoundment as a migratory route. (See Defs.’ Opp’n To Pls’ Mot. For Summary J. (ECF No. 113) at 17.) Nonetheless, assuming that adult salmon and shad do inhabit the impoundment upstream of the dam, the Court finds that Defendants are not violating the CWA because Defendants do not “desire” to achieve passage of the fish via the turbines.

Both Plaintiffs and Defendants urge different meanings of the following phrase in the Agreement: “To the extent licensee *desires* to achieve interim downstream passage of out-migrating Atlantic salmon and/or adult shad by means of passage through the turbine(s)” (SF ¶ 134, emphasis added.) Although Plaintiffs paint this clause as ambiguous and needing of the Court’s interpretation, the relevant portion -- “to the extent licensee desires” -- is not ambiguous. See Waltman & Co. v. Leavitt, 722 A.2d 862, 864 (Me. 1999) (“When a contract is reasonably subject to two or more interpretations, or its meaning is unclear, it is ambiguous.”) It is what the licensee, the Defendants, desire – or want – that triggers the remainder of the clause’s requirements. The reasonable interpretation of this clause carries a subjective component. See, e.g., American Heritage Dictionary 491 (5th ed. 2011) (defining “desire” as “[t]o wish or long for; want: *a reporter who desires an interview; a teen who desires to travel*”). Plaintiffs challenge that subjective intent is not relevant and that Defendants could simply shut the turbines down during migration and thereby avoid the need to conduct the studies. This interpretation, however, ignores the plain language of the Agreement and reads the relevant words out of the Agreement. Because the clause is in the Agreement, the Court will give it effect. See OfficeMax v. Levesque, 658 F.3d 94, 99 (1st Cir. 2011) (“[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which

leaves a part unreasonable, unlawful, or of no effect.” (quoting Restatement (Second) of Contracts § 203(a)).

Alternatively, Plaintiffs attempt to substitute “knowledge” or “expectations” for “desire.” That is, Plaintiffs argue that because Defendants know or expect that some Atlantic salmon and/or shad may be passing through the turbines, Defendants desire to have the fish pass through the turbines. Had the parties to the Agreement intended Defendants’ knowledge or expectation of Atlantic salmon or shad passing through the turbines to trigger the requisite studies, the parties could have so stated.

The evidence before the Court on summary judgment reveals that Defendants do not desire to pass Atlantic salmon and/or shad through the turbines. Instead, the Defendants’ desire is that the fish bypass the turbines. The Hydro Kennebec dam has a fish boom and turbine bypass route to allow Atlantic salmon and shad to bypass the dam without swimming through the turbines. (Bernier Dep. (ECF No. 89-7) at 59-60; Letter from Kevin Bernier dated March 5, 2007 (ECF No. 83-4) at 1.) Kevin Bernier, testifying for Defendants, stated that one reason Defendants installed the fishway in 2006 was to allow salmon to bypass the dam without passing through the turbines and “[t]o provide [the salmon] with a safe route downstream.” (Bernier Dep at 59-60.) Moreover, the bypass was installed as an alternative to conducting the requisite studies, showing that Defendants did not “desire” to pass fish through the turbines. (See *id.*) Plaintiffs present evidence that Atlantic salmon and/or shad are in fact passing through the turbines and Defendants have not taken sufficient steps to prevent that passage. Even assuming the truth of the evidence, it is not germane to the Court’s inquiry. Knowledge does not equate to desire. Accordingly, Defendants have demonstrated an absence of evidence to support the CWA

claim and Plaintiffs have failed to raise a genuine issue of material fact. Therefore, Defendants are entitled to summary judgment on Count II.

V. CONCLUSION

For the reasons explained herein, Defendants' Motion For Summary Judgment (ECF No. 106) is GRANTED as to Count II. Plaintiffs' Motion For Partial Summary Judgment (ECF No. 107) is DENIED as to Count II. In addition, the motions in limine (ECF Nos. 100, 101, 103, 104 and 105) are DENIED AS MOOT.

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 14th day of January, 2013.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY)	
and ENVIORNMENT MAINE)	
Plaintiffs,)	
)	
v.	)	Civil No. 1:11-cv-35-GZS
)	
HYDRO KENNEBEC LLC and)	
BROOKFIELD POWER US ASSET)	
MANAGEMENT LLC)	
Defendants,)	

JUDGMENT

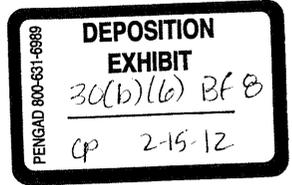
In accordance with the Order on Renewed Motion to Dismiss and Order on Cross Motions for Summary Judgment, issued on January 14, 2013 by U.S. District Judge George Z. Singal, JUDGMENT is hereby entered for the Defendants, Hydro Kennebec, LLC and Brookfield Power U.S. Asset Management, LLC and against the Plaintiffs, Friends of Merrymeeting Bay and Environment Maine.

CHRISTA K. BERRY
CLERK

By: /s/Lindsey Caron
Deputy Clerk

Dated: January 14, 2013

SCANNED



AGREEMENT BETWEEN MEMBERS OF THE KENNEBEC HYDRO DEVELOPERS GROUP, THE KENNEBEC COALITION, THE NATIONAL MARINE FISHERIES SERVICE, THE STATE OF MAINE AND THE U.S. FISH AND WILDLIFE SERVICE

I. Parties.

This Agreement (hereinafter "Agreement") is by and between:

A. each member of the association known as the Kennebec Hydro Developers Group ("KHDG"), to wit:

- 1. Central Maine Power Company, owner of the following hydroelectric facilities that are the subject of this Agreement: Fort Halifax (Federal Energy Regulatory Commission ("FERC") Project No. 2552); Shawmut (FERC Project No. 2322); and Weston (FERC Project No. 2325);
2. Kennebec Hydro Resources, Inc., on behalf of Merimil Limited Partnership, owner of the following hydropower facility that is the subject of this Agreement: Lockwood (FERC Project No. 2574);
3. UAH-Hydro Kennebec Limited Partnership, owner/agent of the following hydropower facility that is the subject of this Agreement: Hydro-Kennebec (FERC Project No.2611);
4. Ridgewood Maine Hydro Partners, L.P., owner of the following hydropower facility that is the subject of this Agreement: Burnham (FERC Project No. 11472);
5. Benton Falls Associates, owner of the following hydropower facility that is the subject of this Agreement: Benton Falls (FERC Project No. 5073);

B. each member of the association known as the Kennebec Coalition, to wit: American Rivers, Inc; the Atlantic Salmon Federation; Kennebec Valley Chapter of Trout Unlimited; the Natural Resources Council of Maine; and Trout Unlimited;

C. the National Marine Fisheries Service, U.S. Department of Commerce;

D. the following agencies of the State of Maine:

Maine Department of Inland Fisheries and Wildlife; Maine Department of Marine Resources; and the Maine State Planning Office; and

E. the United States Fish and Wildlife Service, U.S. Department of the Interior.

In this Agreement, reference to "the resource agencies" hereinafter is understood to mean the following parties: the Maine Department of Inland Fisheries and Wildlife, Maine Department of Marine Resources, Maine Atlantic Salmon Authority, National Marine Fisheries Service and United States Fish and Wildlife Service.

II. Purposes.

This Agreement is intended to accomplish the following purposes: to achieve a comprehensive settlement governing fisheries restoration, for numerous anadromous and catadromous species, that will rapidly assist in the restoration of these species in the Kennebec River after the termination on December 31, 1998 of the existing agreement between the State of Maine and the Kennebec Hydro Developers Group; to avoid extensive litigation over fish passage methodologies, timetables and funding; to assist in achieving the removal of the Edwards dam; and to fund the next phase of a restoration program for these species on the Kennebec River.

III. Elements that apply to all parts of this agreement:

A. Effective Date.

This Agreement will become effective upon:

1. signature by all parties of it; and
2. signature by all parties to this Agreement, and signature of Edwards Manufacturing Company, the City of Augusta, Maine, and the National Fish and Wildlife Foundation of appropriate settlement documents to be submitted to FERC pursuant to 18 C.F.R. §385.602.

B. Required Filings with Regulatory Agencies

The parties agree that, immediately after this Agreement and the Lower Kennebec River Comprehensive Hydropower Settlement Accord become effective, they will make joint, formal filings to FERC requesting that FERC:

1. incorporate all applicable terms of this Agreement into existing or proposed FERC licenses for hydropower facilities owned by KHDG

turbine (s) will not result in significant injury and/or mortality (immediate or delayed). In no event shall licensee be required to make this quantitative demonstration for adult shad and adult Atlantic salmon before May 1, 2006.

Licensee shall conduct studies (designed in consultation with the resource agencies) prior to the date by which permanent downstream passage facilities are to be operational to determine the effectiveness of various downstream passage techniques in preparation for the design and installation of permanent downstream facilities.

- b. Permanent passage: Permanent downstream facilities will be operational on the date that permanent upstream passage is operational. Licensee will be permitted to install permanent downstream passage at an earlier date if it so chooses.

4. Downstream passage at UAH-Hydro Kennebec

- a. Interim passage beginning upon the effective date of this Agreement:

(1) Generally. Licensee will continue and where needed improve existing interim operational measures (e.g. controlled spills, temporary turbine shutdowns), to diminish entrainment, allow downstream passage of out-migrating alewife, Atlantic salmon, blueback herring and American shad, and eliminate significant injury or mortality (immediate or delayed) to out-migrating species. Licensee agrees to consult with state and federal agencies to develop an approved plan for interim downstream passage facilities and/or operational measures to minimize impacts on downstream migrating fish, with evaluation based on qualitative observations.

(2) Passage through turbines. To the extent that licensee desires to achieve or continue interim downstream passage of out-migrating alewife, and/or juvenile Atlantic salmon or shad by means of passage through turbine(s), licensee must demonstrate, through site-specific qualitative studies designed and conducted in consultation with the resource agencies, that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed). In the event that adult shad and/or adult Atlantic salmon begin to inhabit the impoundment above the UAH-

VI. Enforceability

The parties to this Agreement acknowledge that there may be no adequate remedy at law for any breach of the terms of this Agreement and, therefore, that any party shall be entitled to obtain specific performance of any other party's breach hereof, in addition to and without waiver of any other available remedy should such relief be determined to be appropriate.

SEEN AND AGREED TO THE DAY OF , 1998, by:

Central Maine Power Company

By: [Signature]

Its: President

Dated: 26 May 98

Kennebec Hydro Resources, Inc.

on behalf of:

Merimil Limited Partnership

By: [Signature]

Its: President

Dated: 26 May 98

UAH-Hydro Kennebec Limited Partnership

By: [Signature]

Its: General Manager

Dated: MAY 26, 1998



STATE OF MAINE
DEPARTMENT OF
ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, MAINE
04333

ANGUS S. KING, JR.
GOVERNOR

DEPARTMENT ORDER

IN THE MATTER OF

UAH-HYDRO KENNEBEC LIMITED	)	MAINE WATERWAY DEVELOPMENT AND
PARTNERSHIP	)	CONSERVATION ACT AND
WINSLOW, KENNEBEC COUNTY, ME.	)	WATER QUALITY CERTIFICATION
HYDRO KENNEBEC PROJECT)	
	)	FINDINGS OF FACT AND ORDER
#L-11244-35-I-M (Approval)	)	FISH PASSAGE MODIFICATION

Pursuant to the provisions of 38 MRSA Sections 464 et seq. and Sections 630 et seq., 06-096 CMR 450 (Administrative Rules for Hydropower Projects, effective date September 1, 1987), and Section 401 of the Federal Water Pollution Control Act (a.k.a. Clean Water Act), the Department of Environmental Protection has considered the application of UAH-HYDRO KENNEBEC LIMITED PARTNERSHIP with its supportive data, agency review comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. APPLICATION SUMMARY

The applicant proposes to modify the fish passage conditions of the existing hydropower project permit and water quality certification for the Hydro Kennebec Project to be consistent with the terms of the May 26, 1998 *Agreement Between Members of the Kennebec Hydro Developers Group, the Kennebec Coalition, the National Marine Fisheries Service, the State of Maine, and the US Fish and Wildlife Service ("KHDG Settlement Agreement")*. The Hydro Kennebec Project is licensed to UAH-Hydro Kennebec Limited Partnership and Kimberly-Clark Tissue Company as FERC Project No. 2611, and is located on the Kennebec River in the Town of Winslow and the City of Waterville, Kennebec County, Maine.

2. PROCEDURAL HISTORY

- a. Original Approval and Conditions. By Order #L-11244-35-A-N dated June 6, 1986, the Board of Environmental Protection approved a Maine Waterway Development and Conservation Act Permit and Water Quality Certification for the proposed redevelopment and relicensing of the existing Hydro Kennebec (Scott Winslow) Project.

In its approval, the Board found that the State's fisheries agencies were planning for the long-term phased restoration of anadromous fish (including alewives, American shad and Atlantic salmon) to the Kennebec River drainage. The Board further found that adequate fish passage facilities would be needed at the Hydro Kennebec Project in the future to support this restoration effort.



UAH-HYDRO KENNEBEC LIMITED	2	MAINE WATERWAY DEVELOPMENT AND
PARTNERSHIP	)	CONSERVATION ACT AND
WINSLOW, KENNEBEC COUNTY, ME.	)	WATER QUALITY CERTIFICATION
HYDRO KENNEBEC PROJECT)	
	)	FINDINGS OF FACT AND ORDER
#L-11244-35-I-M (Approval)	)	FISH PASSAGE MODIFICATION

Based on these findings, the Board attached a condition to its approval requiring that upstream fish passage facilities be constructed at the project at such time as upstream fish passage facilities were completed at the Edwards Dam in Augusta, and further provided that annual runs of American shad or Atlantic salmon at the Edwards Dam reached 500 or 250 adults, respectively, and that downstream fish passage facilities be constructed once anadromous fish had been stocked in the Kennebec River above the project dam. These schedules were consistent with state fisheries agencies' existing anadromous fish restoration plan.

- b. 1986 KHDG Agreement. Subsequent to the Board's approval, the applicant joined with several other hydropower project owners in entering into an agreement with the State's fisheries agencies regarding the restoration of anadromous fish to the Kennebec River system. Under the terms of the *Agreement Between the State of Maine and Kennebec Hydro Developers Group ("1986 KHDG Agreement")*, effective January 23, 1987, the project owners were to provide a total of \$1.86 million over a 12-year period to facilitate restoration efforts (specifically, to finance the trapping, trucking and stocking of anadromous fish and studies of fish passage efficiencies and habitat needs) and to provide permanent fish passage at their dams during the 1999-2001 period in accordance with a revised restoration plan. The agreement covered four projects (Lockwood, Hydro-Kennebec, Shawmut, and Weston) on the Kennebec River and three projects (Fort Halifax, Benton Falls, and Burnham) on the Sebasticook River.

The *1986 KHDG Agreement* did not address fish passage at the Edwards Dam in Augusta, which represents the first barrier on the Kennebec River to the upstream spawning migration of anadromous fish.

- c. First Fish Passage Modification. The applicant subsequently proposed to modify the fish passage conditions of the DEP permit/certification and FERC license for the Hydro Kennebec Project to be consistent with the terms of the *1986 KHDG Agreement*.

By Order #L-112441-35-E-M dated February 24, 1988, the Board modified the terms of its original approval for the Hydro Kennebec Project to be consistent with the *1986 KHDG Agreement*. In summary, the modified condition provided that the applicant:

- Provide funding and conduct fisheries studies in accordance with the 1986 KHDG Agreement;
- Provide interim downstream fish passage at the project once anadromous fish had been stocked above the project;

UAH-HYDRO KENNEBEC LIMITED	3	MAINE WATERWAY DEVELOPMENT AND
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WINSLOW, KENNEBEC COUNTY, ME.)	WATER QUALITY CERTIFICATION
HYDRO KENNEBEC PROJECT)	
	)	FINDINGS OF FACT AND ORDER
#L-11244-35-I-M (Approval)	)	FISH PASSAGE MODIFICATION

- Install permanent upstream and downstream fish passage facilities at the project no later than May 1, 1999;
- Submit final design and operational plans for all fish passage facilities for agency approval prior to construction;
- Conduct a follow-up study to determine the effectiveness of all fish passage facilities;
- Submit a fish passage study plan for agency approval prior to implementation of the study; and
- Submit the results of the fish passage study and any recommendations for improvements in fish passage design or operation.

Both the modified condition and the *1986 KHDG Agreement* provided that, if continuation of the interim trap and truck program after 1998 (when the 12-year program funding ran out) will meet the restoration objectives of the State's restoration plan, any party to the agreement could apply for a revision of the fish passage conditions for the project.

d. Restoration Activities. For the 11 years between 1987 and 1997, inclusive, the Department of Marine Resources stocked a total of over 530,000 adult alewife spawners into the Kennebec and Sebasticook Rivers above the Edwards Dam. These fish were trapped and trucked from the Brunswick fishway on the Androscoggin River and from the Edwards Dam using an experimental fish pump installed in 1989.

During the same time period, DMR stocked a total of 7,830 adult shad spawners and over 3.5 million juvenile shad (fry and fingerlings) into the Kennebec and Sebasticook River systems. The adult shad were trapped and trucked from the Narraguagus River in Washington County, Maine, and from the Connecticut River in Holyoke, Massachusetts. Beginning in 1993, juvenile shad were trucked from a new hatchery on the Medomak River in Waldoboro.

Currently, there is no plan for active salmon restoration in the Kennebec drainage. To date, the interim plan has been to move whatever salmon become available at the Edwards Dam upriver. Only a few salmon were released above the Edwards Dam during the 11 year restoration period.

UAH-HYDRO KENNEBEC LIMITED	4	MAINE WATERWAY DEVELOPMENT AND
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In addition, permanent downstream fish passage facilities were constructed at the Fort Halifax and Benton Falls Projects and studies were conducted of alewife downstream passage on the Sebasticook River and a cooperative study among DEP, DMR and DIF&W to determine whether alewife stocking would be detrimental to resident fish species and water quality in lakes in the Kennebec drainage.

As of 1997, and apart from the experimental fish pump that was installed in 1989 and which proved effective only for alewives, no progress had been made in obtaining permanent state-of-the-art fish passage for all anadromous fish at the Edwards Dam.

- e. 1997 Proposal. On April 23, 1997, after negotiations between the KHDG members, the State, and the Kennebec Coalition to revise fish passage installation dates and to allow for continued contributions to the trap and truck program reached an impasse, the KHDG members filed to amend the FERC licenses for the projects covered by the *1986 KHDG Agreement* to, among other things, (1) require installation of fish passage facilities only when (a) either permanent fish passage is available at the Edwards Dam or that dam is removed, and (b) a biological assessment process determines that restoration efforts have advanced sufficiently to require fish passage at the dams above the Edwards Dam, and (2) modify the schedule to submit fish passage design plans until after it has been determined through a biological assessment process that fish passage facilities are necessary.

The KHDG members' proposal was subsequently opposed by the State of Maine, the US Departments of Interior and Commerce, and the Kennebec Coalition.

On August 1, 1997, the DEP received a filing from the KHDG members to amend the fish passage conditions of the DEP permits and/or certifications for the several KHDG member-owned projects to be consistent with the April 23, 1997 KHDG members' filing with FERC.

By Order dated September 26, 1997, FERC found the KHDG members' applications for amendment of licenses to change fish passage requirements to be untimely, and denied the proposed amendments without prejudice to the applications being refiled after new licenses were issued for the Fort Halifax and Weston Projects.

By letter dated October 20, 1997, the DEP agreed to retain the KHDG members' applications on file as pending applications, subject to appropriate action after (1) new licenses had been issued by FERC for the Fort Halifax and Weston Projects, (2) the KHDG members' applications for license amendments had been refiled with FERC, and (3) there had been an opportunity for a negotiated agreement between the KHDG members and the State of Maine on all outstanding fish passage issues.

UAH-HYDRO KENNEBEC LIMITED	5	MAINE WATERWAY DEVELOPMENT AND
PARTNERSHIP	)	CONSERVATION ACT AND
WINSLOW, KENNEBEC COUNTY, ME.	)	WATER QUALITY CERTIFICATION
HYDRO KENNEBEC PROJECT)	
	)	FINDINGS OF FACT AND ORDER
#L-11244-35-I-M (Approval)	)	FISH PASSAGE MODIFICATION

f. 1998 Agreements. On May 26, 1998, various parties, including the State of Maine and the KHDG members, signed the Lower Kennebec River Comprehensive Hydropower Settlement Accord. Once approved by FERC and other regulatory agencies, this accord will accomplish the following:

- A charitable donation of the Edwards Dam from Edwards Manufacturing Company to the state of Maine;
- The removal of the Edwards Dam by the State of Maine in 1999;
- Contribution of \$2.5 million for dam removal and related activities by Bath Iron Works and \$4.75 million for fish restoration activities and studies and dam removal by the members of the Kennebec Hydro Developers Group; and
- The amendment of certain fish passage obligations at seven dams on the Kennebec and Sebasticook Rivers owned by KHDG members.

Included as part of the accord is the *Agreement Between Members of the Kennebec Hydro Developers Group, the Kennebec Coalition, the National Marine Fisheries Service, the State of Maine, and the US Fish and Wildlife Service ("KHDG Settlement Agreement")*. The Agreement is intended to: achieve a comprehensive settlement governing fisheries restoration, for numerous anadromous and catadromous species, that will rapidly assist in the restoration of these species in the Kennebec River after the termination on December 31, 1998 of the *1986 KHDG Agreement*; avoid extensive litigation over fish passage methodologies, timetables and funding; assist in the removal of the Edwards Dam; and fund the next phase of a fisheries restoration program for the Kennebec River.

By letter dated July 20, 1998, the KHDG members have requested that DEP resume the processing of their pending applications such that the fish passage conditions of the DEP permits and/or certifications for the several KHDG member-owned projects are amended to be consistent with the *KHDG Settlement Agreement*.

3. REVIEW COMMENTS

The Maine Department of Marine Resources, Department of Inland Fisheries and Wildlife, and State Planning Office, the Kennebec Coalition (American Rivers, Inc., the Atlantic Salmon Federation, Kennebec Valley Chapter of Trout Unlimited, the Natural Resources Council of Maine, and Trout Unlimited), the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the Edwards Manufacturing Company, and the City of Augusta, Maine, are all on record in support of the Settlement Accord and the *KHDG Settlement Agreement*.

UAH-HYDRO KENNEBEC LIMITED	6	MAINE WATERWAY DEVELOPMENT AND
PARTNERSHIP)	CONSERVATION ACT AND
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No comments in opposition to the terms of the *KHDG Settlement Agreement* have been received from any public or private entity or person.

BASED on the above Findings of Fact, and the evidence contained in the application and supporting documents, the Department CONCLUDES that there is a reasonable assurance that the modification of the fish passage conditions of the hydropower project permit and water quality certification for the Hydro Kennebec Project to be consistent with the terms of the *KHDG Settlement Agreement* will not violate applicable water quality standards.

THEREFORE, the Department hereby MODIFIES Condition #4 of Order #L-11244-35-A-N dated June 6, 1986, and amended by Order #L-11244-35-E-M dated February 24, 1988, regarding the installation of fish passage facilities and other provisions relating to the restoration of anadromous fish with respect to the Hydro Kennebec Project, to read as follows:

A. FISHERIES RESTORATION SUPPORT

The applicant shall provide funding, conduct studies, engage in consultation, install fish passage facilities, report on annual restoration activities, and comply with all additional duties and obligations as set forth in the *Agreement Between Members of the Kennebec Hydro Developers Group, the Kennebec Coalition, the National Marine Fisheries Service, the State of Maine, and the US Fish and Wildlife Service ("KHDG Settlement Agreement")*, dated May 26, 1998.

B. EEL PASSAGE

(1) Study. The applicant shall, in consultation with the National Marine Fisheries Service and the US Fish and Wildlife Service, join other KHDG members and the Department of Marine Resources in undertaking a three-year research project to determine (a) the appropriate placement of upstream fish passage for American eel at each of the seven KHDG member-owned dams, and (b) appropriate downstream fish passage measures for American eel at each KHDG member-owned project.

(2) Consultation. Based on the results of the eel passage study and beginning no later than January 1, 2002 and ending no later than June 30, 2002, the applicant shall join other KHDG members in consulting with NMFS, USFWS, and DMR to attempt to reach agreement on the appropriate location of upstream eel passage at each KHDG member-owned dam, and the appropriate downstream eel passage measures to apply to each KHDG member-owned project.

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- (3) Upstream Passage. If agreement is reached by all consulting parties on the location of upstream eel passage at each project, the applicant shall install such passage facilities at the Hydro Kennebec Project during 2002.
- (4) Downstream Passage. If agreement is reached by all consulting parties on appropriate downstream eel passage measures, the applicant shall join the other parties in requesting that FERC approve the agreed-to passage measures.
- (5) Lack of Consensus. If no consensus is reached on eel passage issues by June 30, 2002, the applicant or any of the consulting parties shall be free to petition DEP or FERC to approve appropriate conditions relating to eel passage at the project.
- (6) Lack of Funding. In the event that DMR does not receive the necessary appropriation or legislative spending authorization required to fund the eel passage study discussed above, all provisions of this condition regarding eel passage shall be null and void.

C. INTERIM DOWNSTREAM FISH PASSAGE

The applicant shall continue and where needed improve existing interim operational measures to diminish entrainment, allow downstream passage, and eliminate significant injury or mortality to out-migrating anadromous fish, in accordance with the terms of the *KHDG Settlement Agreement*.

D. PERMANENT UPSTREAM FISH PASSAGE

- (1) Installation and operation. Permanent upstream fish passage facilities shall be installed and operational at the project no later than 2 years following (a) the passage of at least 8,000 American shad in a single season through the interim trap, lift, and transfer facility at the Lockwood powerhouse or (b) development of an alternate trigger for fishway installation based on the biological assessment process for Atlantic salmon, alewife and blueback herring described below, whichever comes first, provided, however, that in no event shall permanent upstream fish passage facilities be required to be operational at the project before May 1, 2010.
- (2) Biological assessment process. State and federal fisheries agencies will continue to assess the status and growth of the populations of shad and other anadromous fish in the Kennebec River drainage. Should the growth of Atlantic salmon, alewife or blueback herring spawning runs make it necessary to adopt an alternative approach for triggering fishway installation to the shad trigger used above, the agencies will meet with the

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applicant to attempt to reach consensus on the need for and timing and design of permanent upstream fish passage facilities at the project. Any disputes on the need for an alternate trigger for fishway installation will be handled through the FERC process.

E. PERMANENT DOWNSTREAM FISH PASSAGE

Permanent downstream fish passage facilities shall be installed and operational at the project no later than the date on which permanent upstream fish passage facilities are operational at the project as required by this approval.

F. FISH PASSAGE FACILITIES PLANS

The applicant shall, in accordance with the schedule(s) established by FERC, submit final design and operational plans for all interim and permanent upstream and downstream fish passage facilities and/or operational measures required by this approval, prepared in consultation with state and federal fisheries agencies. These plans shall be reviewed by and must receive approval of the fisheries agencies, the DEP, and FERC prior to construction.

G. FISH PASSAGE EFFICIENCY STUDIES AND RESULTS

- (1) Studies. The applicant shall, in consultation with state and federal fisheries agencies, conduct a study or studies to determine the effectiveness of all interim and permanent upstream and downstream fish passage facilities and/or operational measures required by this approval, in accordance with the terms of the *KHDG Settlement Agreement*.
- (2) Study plans. The applicant shall, in accordance with the schedule(s) established by FERC, submit plans for a study or studies to determine the effectiveness of all interim and permanent upstream and downstream fish passage facilities and/or operational measures required by this approval, prepared in consultation with state and federal fisheries agencies. These plans shall be reviewed by and must receive approval of the fisheries agencies, the DEP, and FERC prior to implementation.
- (3) Results of studies. The applicant shall, in accordance with the schedule(s) established by FERC, submit the results of any fish passage effectiveness study or studies, along with any recommendations for changes in the design and/or operation of any interim or permanent upstream or downstream fish passage facilities constructed and/or operated pursuant to this approval. The Department reserves the right, after notice and opportunity for hearing, to require reasonable changes in the design and/or operation of these fish passage facilities as may be deemed necessary to adequately pass anadromous fish through the project site. Any such changes must be approved by FERC prior to implementation.

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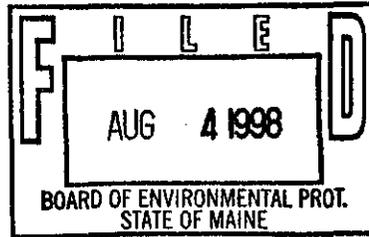
DONE AND DATED AT AUGUSTA, MAINE, THIS 31st DAY OF July, 1998.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: Martha Korgis
Edward O. Sullivan, Commissioner

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES

Date of initial receipt of application: 8/1/97
Date application accepted for processing: 8/7/97



Date filed with Board of Environmental Protection: _____

This Order prepared by Dana Murch, Bureau of Land & Water Quality.

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