**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**

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| FRIENDS OF MERRYMEETING BAY, *et al.*, | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | C.A. No. 1:11-cv-00035-GZS |
| | ) | |
| BROOKFIELD POWER US ASSET MANAGEMENT, LLC, *et al.*, | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Although this Court has afforded Plaintiffs an opportunity to supplement their earlier briefing, Plaintiffs have once again failed to demonstrate that they are entitled to summary judgment as a matter of law. On the contrary, Plaintiffs have failed to raise any genuine issue of material fact that undercuts the Court's prior determination that Defendants did not desire to route adult salmon (*i.e.*, kelts) or adult shad through the turbines at any of the four projects at issue. Even when taking all facts in the light most favorable to Plaintiffs, as a Court typically would not do in evaluating Plaintiffs' cross-motion, the uncontroverted record evidence shows that:

1. Defendants put structures and measures in place at each of the four projects that were intended to divert kelts and adult shad away from project turbines;
2. Defendants developed those diversion structures and measures in consultation with, and following the approval of, the resource agencies with expertise in fish passage matters;
3. Defendants conducted and continue to conduct studies of the effectiveness of their bypass and diversion efforts, also in consultation with the agencies;

4. Defendants took actions to maintain and improve their fish diversion and bypass measures over time, again in consultation with the resource agencies; and
5. Defendants were never asked by the resource agencies to undertake additional measures or spend additional funds to further supplement Defendants' bypass and diversion efforts.

Faced with undisputed record evidence of Defendants' manifest desire to divert fish to bypass the project turbines, Plaintiffs make two recurring assertions regarding the *sufficiency* of Defendants' efforts, but both lack the evidentiary underpinning to support Plaintiffs' request for summary judgment. First, Plaintiffs assert that Defendants' efforts in this interim period were not as effective as they should have been. Plaintiffs' Supplemental Memorandum in Support of Plaintiffs in the Parties' Cross-Motions for Summary Judgment ("Pl. Br.") at 8, 10, 11-12, and 14. As discussed in more detail below, however, the record is essentially devoid of any empirical data on the effectiveness of Defendants' diversion efforts for kelts and adult shad at any of the four projects. Second, Plaintiffs assert that Defendants should have implemented different or additional bypass and diversion measures at each of the four projects. Pl. Br. at 7, 9, 10, and 15. The record lacks of any evidence that any of the alternative measures posited by Plaintiffs would have been any more effective than the measures that the resource agencies actually did approve for Defendants' implementation. Because both of Plaintiffs' primary assertions consist only of untenable inferences and unsupported speculations, they are inadequate to support their request for summary judgment.

Given the abundance of evidence manifesting Defendants' ongoing, affirmative desire to divert kelts and shad away from the project turbines, and the lack of any record evidence that Defendants actually desired to route kelts and adult shad through the project turbines, Defendants

respectfully request that this Court reject Plaintiffs' request for summary judgment and instead enter summary judgment for Defendants.

## ARGUMENT

### 1. Plaintiffs Have Offered No Empirical Evidence of Kelt or Shad Bypass Effectiveness at the Four Projects, and Instead Rely Only on Unsupportable Inferences and Inappropriate Surrogates.

The First Circuit has acknowledged that no "objectively measurable" level of bypass effectiveness is required of Defendants, and that effectiveness is only "one of the pieces of information forming the background against which the court or the fact finder can determine what Defendants desire." Slip Op. at 12. The Agreement itself similarly contains no requisite numerical level of bypass effectiveness, and despite Plaintiffs' contentions to the contrary, there is essentially no empirical data on the bypass effectiveness of Defendants' diversion measures for kelts or adult shad on the Kennebec River.[1]

Given the lack of virtually any empirical, quantitative evidence of kelt bypass effectiveness at the four projects,[2] Plaintiffs resort to proposing a surrogate – the relative water *flows* into and around the turbines, at least those flows reported in three draft "White Papers"

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[1] The Agreement does, however, effectively establish a *qualitative* standard of effectiveness – namely, that level of effectiveness provided by the diversion measures approved by the resource agencies with expertise in this area *plus* whatever additional effectiveness would be derived from supplemental funding or measures required by the resource agencies pursuant to Section III(F) of the Agreement. BFSF ¶ 1 [HK719]. Since Defendants have implemented the diversion measures approved by the resource agencies, BFSF ¶¶ 2, 4, 6, 14, 20, 23, 25, 29, 39-42; BFASF ¶ 49, made ongoing improvements to those approved measures, BFSF ¶¶ 9, 16-18, 21, 27-28, 30-34, 43; BFASF ¶ 48, and have not been asked by the resource agencies for additional funding or fish mitigation measures, Defendants have met the requisite qualitative level of effectiveness in their Clean Water Act certifications. As there are neither quantitative standards nor site-specific empirical data on kelts or adult shad bypass effectiveness at the four projects, it is Defendants' compliance with the Agreement's qualitative bypass effectiveness requirements that should form "the background against which the [C]ourt . . . can determine what Defendants' desire." Slip Op. at 12.

[2] There have been no studies conducted with respect to downstream migration of kelts at any of the facilities, other than a 2007 study at Lockwood conducted before the bypass facilities were installed, much less any studies specific to kelt bypass effectiveness. BFSF ¶ 24. The results of the 2007 kelt study at Lockwood are considered suspect, however, because it used a limited number of smaller fish and was conducted before diversionary structures were installed. See also BFASF ¶ 50.

developed by Defendants' consultants. Such water flow data are inappropriate surrogates for bypass effectiveness or for Defendants' supposed "knowledge" that kelts and shad pass through the turbines (Pl. Br. at 5, 8, 10, 14), however, for several reasons. First, the draft "White Papers" expressly recognize that no site-specific bypass effectiveness information exists for kelts and adult shad at the evaluated projects, which necessitated a resort to estimates of effectiveness based on data "manipulation" and extrapolation. BFASF[3] ¶¶ 11, 50; *see* [LSW907-08, 1033-34, 1162-63] (Lockwood, Shawmut and Weston draft White Papers) (noting "lack of downstream bypass efficiency studies for Atlantic salmon kelts").[4] The White Papers lack that empirical data because they were not developed to evaluate bypass effectiveness relevant to Plaintiffs' Clean Water Act claims. Instead, they were developed solely for the purpose of *estimating* overall fish mortality for the purpose of developing Habitat Conservation Plans for the Lockwood, Shawmut, and Weston projects pursuant to the Endangered Species Act (ESA). BFASF ¶¶ 11, 50.

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[3] Defendants are submitting with this Opposition brief certain additional facts, which are identified herein as Brookfield's Additional Supplemental Statement of Undisputed Material Facts ("BFASF"), and which continue the numbering from Brookfield's Supplemental Facts ("BFSF") [ECF 165]. Defendants otherwise follow the same citation convention as in their Supplemental Memorandum of Law (*see* n. 2).

[4] As noted above, there is no empirical evidence of kelt bypass effectiveness other than the 2007 telemetry study on hatchery kelt at Lockwood, which pre-dated the installation of Defendants' diversion structures at that facility. Without reliable empirical evidence on kelt bypass effectiveness, Plaintiffs suggest that Defendants may have derived some knowledge of the bypass effectiveness from draft White Papers, but those papers have never provided competent evidence on this issue. The White Papers were not directed at the downstream turbine passage of kelts or adult shad at issue here, but rather were generalized surveys regarding station survival rates for all life stages of the Kennebec River Atlantic salmon population – fry, par, smolts and kelts. These surveys took place after diversionary facilities were installed only with regard to juvenile smolts, which are outside the scope of the Agreement provision presently at issue. *See, e.g.*, Lockwood draft White Paper ("[w]hole station kelt survival was modeled using delayed (48-hr) smolt survival rates"; estimates regarding "[p]roportion of kelts diverted" based on "recent smolt radio-tagging conducted at Lockwood"'; estimates regarding "[f]ish bypass guidance efficiency" based wholly on "Atlantic salmon smolts") [LSW912]; ("whole station survival for outmigrating kelts at Lockwood" identified as "manipulated" by "modifying the various input parameters," with "whole station survival estimate for kelts [being] generated by using a fish bypass efficiency rate" based wholly on an "average value obtained during field studies using smolts"[LSW913]); (because "data was unavailable for the kelt lifestage, empirical data from smolt studies was used as a surrogate") [LSW914]. While such mathematical derivatives might serve as appropriate proxies when working with available data to craft future Habitat Conservation Plans, they are wholly inappropriate measures by which to judge Plaintiffs' allegation (which Defendants deny) that Defendants had actual knowledge that their kelt bypass measures had actually proven ineffective in the past.

Plaintiffs' attempts to treat the flow data and associated estimates of fish mortality in the White Papers as empirical evidence of bypass effectiveness, and to further infer therefrom Defendants' knowledge of kelt or adult shad bypass effectiveness at the four projects, are wholly inappropriate. Rather than supporting summary judgment in Plaintiffs' favor, these failed attempts to produce bypass effectiveness data serve only to affirm the propriety of summary judgment in Defendants' favor. *See Triangle Trading Co. v. Robroy Indus. Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (A party must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.") (citations omitted); *see also* Fed. R. Civ. P. 56(e) (a court may grant summary judgment "[i]f a party fails to properly support an assertion of fact").

Second, by using water flow data, Plaintiffs fail to recognize the diversionary effects of booms and other measures designed to divert fish, but not water flows. BFASF ¶ 47. Just because 94% of the flow could be going through the turbines during a no-spill period, for example, does not mean that only 6% of the fish would be diverted by a boom to a sluice gate or other bypass opening. These structures and measures exist to divert fish away from turbines *despite* predominant flows – that is their very point – rendering Plaintiffs' reliance on the White Papers' flow data incompetent as evidence regarding the paths that kelts actually take.

Third, water flows also do not account for the deterrent effect that trash racks often have for fish swimming toward them, even with wide bar spacing. BFASF ¶ 46. Accordingly, even if fish do not encounter a diversion boom or are somehow able to circumvent it, fish can still bypass turbines whenever they swim away from the trash racks.

Fourth, water flows and bypass effectiveness do not directly correlate. At some point, increasing flows becomes counter-productive to fish diversion. Excess flows through sluice and bypass structures can have an undesired effect of creating turbulence, which can impede fish

bypass efforts. BFASF ¶ 47.

In short, the First Circuit has allowed Plaintiffs to present evidence to demonstrate their contention that Defendants had actual knowledge that their efforts to bypass and divert kelts were ineffective, but instead of making such a demonstration, Plaintiffs have relied only on data manipulation, extrapolation, and conjecture. The First Circuit was quite clear that it was only "in the event that bypass facilities prove ineffective" that there is "the possibility that Defendants *might* desire downstream passage through the turbines." Slip Op. at 11 (quoted in Pl. Brief at 5) (emphasis added). Here, however, the record is devoid of any quantitative evidence that Defendants' diversion measures were ineffective at bypassing kelts. Plaintiffs are therefore left to present only untenable inferences on bypass effectiveness, none of which support Plaintiffs' speculation that Defendants might be said to have desired turbine passage by possessing actual knowledge of such ineffectiveness and by failing to undertake sufficient improvement measures.

Indeed, the available evidence is wholly contrary to Plaintiffs' contention. The record is uncontroverted that Defendants' words and deeds manifested Defendants' clear and unwavering desire to divert kelts and shad away from the turbines. BFSF ¶¶ 7-9, 13, 14-18, 20-23, 25-37, 39-43; BFASF ¶¶ 48-49. There is no evidence that Defendants' bypass measures were ineffective at diverting kelts, and the fact that the resource agencies never asked Defendants to undertake additional measures or spend additional funds to further supplement those measures demonstrates that Defendants had a good faith basis to believe these bypass and diversion efforts were in fact sufficiently effective. As the First Circuit concluded in this case, "even when 'elusive concepts such as motive or intent are at issue, summary judgment is appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'" Slip Op. at 8 (citing *Vives v. Fajardo,* 472 F.3d 19, 21 (1st Cir.

2007)).

2. Defendants' Desire, Not Their Knowledge, Remains the Sole Determinant of Defendants' Obligation to Conduct Turbine Studies.

As this Court and the First Circuit have previously recognized, there is a big difference between knowing that something might take place and desiring that it take place. *See* HK ECF 144 at 6 [HK 7605]; LSW ECF 132 at 28 [LSW4949]; *see also* First Cir. Slip Op. at 9. Defendants and the resource agencies knew that Defendants were unlikely to achieve 100% fish diversion effectiveness, as evidenced by the effectiveness studies that were built into the Clean Water Act water quality certifications and the inherently interim nature of their collective efforts to find a more permanent solution. HKJSF ¶¶ 132,134; LSWJSF ¶ 195; BFSF ¶¶ 1, 3; BFASF ¶ 45. But the *knowledge* that there might be some degree of turbine passage does not in any way suggest a *desire* to pass kelts and shad through the turbines. On the contrary, Defendants have produced an abundance of uncontroverted evidence – in their words, in their installation of fish bypass structures, in their ongoing actions to improve those structures' effectiveness and in their ongoing consultations with the government resource agencies -- that they intended and continue to desire to divert all fish around the turbines. *See, e.g.*, BFSF ¶¶ 7-9, 13 (Defendants' stated desire to divert fish away from turbines); BFSF ¶¶ 3-6 (Defendants' ongoing consultation with resource agencies); BFSF ¶¶ 14-18, 20-23, 25-37, 39-43; BFASF ¶ 48; *see also, e.g.*, LSWJSF ¶ 197 [LSW3900]; HKJSF ¶ 117 [HK5868]; HKMF ¶ 6 [HK6289].

The emphasis on whether and to what extent Defendants desire to route fish through the turbines, rather than on what Defendants knew or whether they achieved a particular level of fish passage through the turbines versus the bypass, is clear from the language of the Agreement itself. It requires turbine studies only "*to the extent" Defendants desire* such passage through the turbines, not *"to the extent Defendants achieve" or observe any particular level of downstream*

*turbine passage*. HKJSF ¶ 134 [HK5871-72]; LSWJSF ¶ 196 [LSW3899]. S*ee also* Pl. Br. at 5 ("To the extent' (this is the phrase the KHDG Agreement uses) Defendants desire to achieve such passage. . . ."). In this critical respect, Plaintiffs offer only evidence that Defendants and resource agencies knew that some kelts might go through the turbines, but remain empty-handed in terms of producing any evidence that Defendants actually *desired* this to happen.

Plaintiffs have failed by a wide margin to establish that they are entitled to judgment in their favor as a matter of law. If both parties' cross-motions are considered concurrently, summary judgment for Defendants remains appropriate because Plaintiffs have yet to come forward with any plausible evidence indicating that Defendants actually *wanted* kelts and shad to go through the project turbines.[5] *In re Spigel,* 260 F.3d 27, 31 (1st Cir. 2001) ("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.") (quoting *In re Ralar Distribs., Inc.* 4 F.3d 62, 67 (1st Cir. 1993)).

3. Defendants' Actions and Interactions with the Resource Agencies Were Consistent With Defendants' Desire to Bypass the Turbines.

The mandate from the First Circuit requires this Court to consider in its evaluation of Defendants' desire not only the effectiveness of Defendants' fish diversion efforts, but also Defendants' actions and interactions with resource agencies towards the implementation of additional measures to improve diversion effectiveness. *See* Slip Op. at 13-15 ("[T]he district court could still grant summary judgment in concluding that the dam owner did not desire passage through the turbines based on other information, such as good faith efforts to ameliorate problems with the bypass method."); (The agencies' conduct "should be considered" in the

[5] "Desire" is defined in the *Oxford English Dictionary* (online ed.) as to "strongly wish for or want (something)."

court's evaluation of Defendants' desire, for such conduct "often informs the court's interpretation of the agreement"). Defendants' Supplemental Statement of Undisputed Material Facts details many examples of the manifestations of Defendants' stated desire to divert fish, the sufficiency of which Plaintiffs attempt to challenge by asserting that:

- Defendants should have undertaken additional measures beyond what the resource agencies approved and required;
- Defendants should have been more timely in installing diversionary facilities and maintaining or repairing those facilities; and
- Defendants undertook diversion measures disfavored by the resource agencies.

As explained further below, Plaintiffs' criticisms are groundless.

a. The Agreement Prohibits Defendants from Unilaterally Designing or Undertaking Certain Downstream Fish Passage Measures.

Plaintiffs criticize Defendants for failing to do more to enhance bypass effectiveness, including replacing the existing trash screen bars with more narrow trash screen bars in front of the turbines. Pl. Br. at 7. While Plaintiffs might regard measures such as tighter trash rack bar spacing as desirable, that view rests on the theoretical notion that kelts and adult shad could swim between the existing trash rack bars rather than on the reality that the existing racks already deter fish from passage through the turbines. BFASF ¶ 46; [HK4258] (Bernier Dep. 101:1-3) ("I know on our hydro-acoustic and camera studies [that] there were fish resisting going through the trash racks"). Plaintiffs also fail to consider the countervailing design consideration of avoiding injury and mortality to kelts and shad from impingement against trash racks with spacing that is too narrow. This is why the evaluation of the sufficiency of diversion measures was left to the signatory resource agencies with expertise in these matters.

Plaintiffs also criticize Defendants for failing to shut down the turbines when Defendants

realized that some kelts and shad might use the turbines for downstream passage (Plaintiffs suggest this is the "most telling" evidence of Defendants' desire to pass fish through turbines). Pl. Br. at 7. By doing so, however, Plaintiffs misread the Agreement, and the water quality certifications that incorporate it, in several material ways. First, they inappropriately conflate two separate obligations in the Agreement– Defendants' obligation to improve existing interim operational measures for downstream passage and Defendants' obligation to conduct a turbine study because they intended to route fish through the turbines. *Cf.* Agreement at IV(B)(4)(a)(1) and IV(B)(4)(a)(2); IV(C)(2)(a)(1) and IV(C)(2)(a)(2); and at IV(D)(2)(a)(1) and IV(D)(2)(a)(2); HKJSF ¶¶ 132, 134 [HK5871-72]; LSWJSF ¶¶ 195, 196 [LSW3899].

Second, they read important language out of the Agreement – specifically, that interim operating measures such as "uncontrolled spills, temporary turbine shutdowns, and sluiceways" were only required "where needed;" the specific measures were to be spelled out in a plan developed in consultation with the resource agencies based on "qualitative observations." *Id.* Defendants have already employed uncontrolled spills during high spring flows and have utilized sluiceways; Plaintiffs have produced no evidence indicating that a need existed to abandon Defendants' diversion efforts and shut down the turbines, and no plan or resource agency directive has required Defendants to do so.[6]

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[6] Plaintiffs mistakenly assume that power generation and fish passage cannot coexist, even though that was the entire premise of the Agreement. BFSF ¶ 44; HKSF ¶ 131 [HK5871]; LSWJSF ¶ 193 [LSW3899] (contemplating that the Agreement terms be incorporated into the FERC operating licenses for the four projects at issue).

Plaintiffs also fail to recognize that Defendants' reductions in generation caused by project shutdowns may be inconsistent with the balancing of beneficial public uses struck by FERC for the projects. *See Idaho Rivers United v. FERC*, 189 F.Appx. 629, 2006 US App. Lexis 17566 - 2006 (9th Cir. 2006) (upholding FERC decision to deny a request to adopt run-of-river operations, given the loss in project generation and dependable electricity generating capacity in *Idaho Power Company*, 110 FERC ¶ 61,242, at P 31 (2005)); *California v. FERC*, 966 F.2d 1541, 1549-51 (9th Cir. 1992) (upholding FERC's ability to reject fish and wildlife agencies' recommendation on minimum flow requirements for project's bypass, based on additional expense of minimum flows and FERC's balancing of beneficial public purposes in *Henwood Associates, Inc.*, 50 FERC ¶ 61,183, at

Third, the identified additional measures are only to be pursued "in accordance with the terms of the KHDG Settlement Agreement," and as discussed at length in Defendants' Supplemental Memorandum of Law, their existing measures satisfied the Agreement and the resource agencies tasked in the Agreement with seeking additional measures should such be needed. BFSF ¶ 1 [HK719] (Section III(F) of Agreement).

Finally, even if Plaintiffs were to establish that it might have been possible for Defendants to have improved the effectiveness of their existing interim operational measures (which they have not established), it would still not evidence a desire to pass the fish through the turbines. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("The 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."); *see also Nereida-Gonzales v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993) (A "material fact" is one which has "the potential to affect the outcome of the suit under applicable law.").

Plaintiffs are also far off the mark in their assertion that Defendants "refused" to undertake these and other measures, suggesting that the resource agencies requested such measures and Defendants deliberately disobeyed the request. *See* Pl. Br. at 7. The Agreement prohibits Defendants from acting unilaterally; Defendants can construct only those facilities that are either approved up-front by the resource agencies, BFSF ¶ 1 ("The functional and final

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61,568 (1990)); s*ee also American Rivers v. FERC*, 201 F.3d 1186, 1205 (9th Cir. 2000) (upholding FERC's ability to reject as inappropriate, due to cost impacts and lack of significant improvement for fishery resources, the recommendation of fish and wildlife agency that fish screens be installed at diversion structure in *Eugene Water and Electric Board*, 81 FERC ¶ 61,270, at 62,329-330 (1997)); *Upper Peninsula Power Company*, 85 FERC ¶ 61,245, at 62,017-19 (1998) (FERC denial of recommendation to install fish exclusion device based on balancing of beneficial public uses of the waterway under the Federal Power Act, which indicated that the "cost of implementing the measure would have a substantial effect on the economics of this small project without providing essential or commensurate resource benefits").

design of any interim . . . facility . . . must be approved in writing by the resource agencies"), or that the resource agencies expressly require based on the results of the diversion effectiveness studies pursuant to Section III(F) of the Agreement. *Id.* In short, Defendants cannot have "refused" to do what the resource agencies never asked them to do.

Plaintiffs' hindsight criticisms of Defendants' well-documented, ongoing, good-faith efforts to assess and improve fish bypass measures amount to impermissible conjecture unsupported by the facts in the record. Although they might serve as "background" information for the court to consider in evaluating Defendants' desire to divert fish, they are insufficient to carry Plaintiffs' burden of proof on summary judgment. None of the criticisms leveled by Plaintiffs regarding the sufficiency of Defendants' ongoing bypass efforts, taken separately or together with other evidence presented, suggests that Defendants chose to reverse course and began efforts to route fish through the turbines. If Defendants did reverse course as Plaintiffs allege, the change would be readily apparent – the diversion booms would no longer be in place and the bypass gates would now be closed.

b. Defendants have been timely in installing diversionary facilities and maintaining or repairing those facilities.

The undisputed record shows that Defendants installed new diversionary structures and/or improved existing structures at all four projects, and that Defendants continued to assess and improve the effectiveness of those structures. BFSF ¶¶ 7-9, 13, 14-18, 20-23, 25-37, 39-43; BFASF ¶¶ 48-49. Plaintiffs suggest, however, that Defendants should have been more timely in the installation and commencement of fish diversion measures, and in making repairs to fish diversion facilities when necessary. *See, e.g.*, Pl. Br. at 8 (Defendants waited until 2011 to install diversion facilities at Weston and until 2009 at Lockwood). Plaintiffs' inferences are once again unsupported and without merit. As a threshold matter, the timing of Defendants' initial

installation of diversion measures is outside the First Circuit's mandate of considering effectiveness of Defendants' diversion efforts and what Defendants did in response to knowledge of that effectiveness.[7] More fundamentally, the timing of Defendants' diversion measures is largely irrelevant to Defendants' desire because Defendants were following the schedule and prioritization of fish restoration activities that were established in the Agreement. Under the terms of the Agreement, the parties understood that interim downstream bypass measures were but one of several phases of prioritized work on the Kennebec River:

1. Removal of the Edwards Dam;
2. Upstream passage facilities at Lockwood project and two other facilities;
3. Interim downstream passage;
4. Upstream passage at the remaining facilities (Hydro Kennebec, Weston, and Shawmut); and
5. Permanent downstream passage.

BFASF ¶ 45 [HK715-733]; HK81 [HK1135, 1139] (MDMR Kennebec River Anadromous Fish Restoration Annual Progress Report – 2006) (reporting on the first and second phases, and discussing 2006 as the next phase in the fish restoration program after successfully moving fish "upriver for the first time since the inception of the Restoration Program"). Even

[7] Although Plaintiffs attempt to create a "totality of the circumstances" test for whether the Defendants desired downstream passage though the turbines, see Pl. Br. at 4-6, this was not the mandate from the First Circuit. The First Circuit found that evidence of the effectiveness of the chosen downstream passage method, as well as Defendants' actions and the feedback from resource agencies, are *relevant* to a determination on whether the Defendants actually desired such method. This does not open the evaluation of Defendants' desire to a totality of the circumstances test, which the dissent raised only in criticism of the majority opinion. *See* Slip Op. at 30 (Kayatta, J., dissenting) ("By deeming evidence of effectiveness 'relevant,' the majority allows the plaintiffs to act as though the term 'desire' . . . established a de facto tipping point (albeit one to be guessed at under the totality of the circumstances). . . ."). Plaintiffs should not be allowed to manufacture a more relaxed standard for summary judgment by attempting to put on equal footing what the First Circuit characterized as no more than "background information" with the ultimate determination on whether Defendants desired to send kelt and adult shad through the project turbines.

after the first two phases were complete, it took time to complete the process of studying fish passage at each of the four projects, to consult with the resource agencies, to develop draft design plans, to obtain resource agency approval of those plans, to review bids and contract with a selected vendor, and then to install the approved measures. Plaintiffs' allegations regarding the timing of the original diversion measures are simply without support in the record.

Plaintiffs' comments about the continued lack of a diversion boom at Shawmut are similarly without merit. *See* Pl. Br. at 7. The record is clear that Defendants, after consulting with the resource agencies, determined that it was not appropriate to install a diversion boom at Shawmut because of concerns with excess debris impacts. BFASF ¶ 49. The record is likewise clear that Defendants' manifested their continued desire to improve existing Shawmut bypass measures by completing the design consultation and permitting for a major facility upgrade in the fall of 2011. BFSF ¶ 37. This upgrade included full-depth, one-inch angled trash racks (more narrow than the current trash racks and specifically designed to further discourage fish from entering the turbines) and a new surface sluice and flume; installation was to be completed in 2012, but NMFS was not prepared to proceed because it wanted to first consider the impact of the Habitat Conservation Plan measures for the Shawmut Project. *Id.* Shawmut lacks more substantial diversion facilities today not because Defendants desired that fish pass through the turbines there, but because of the resource agencies' concerns and competing priorities.

Finally, Plaintiffs suggest that Defendants were less than prompt in their efforts to address issues that arose with the diversion devices and facilities. Again, the record evidence belies Plaintiffs' arguments. Defendants promptly corrected any problems that came up, and promptly re-installed fish booms when taken out either for servicing or seasonal conditions, as soon as river conditions allowed. *See, e.g.*, BFSF ¶¶ 19, 22, 28, 29, 33, 41, 43; HKMF ¶ 6.

Indeed, Defendants even went so far as to purchase a spare boom at the Hydro Kennebec Project to ensure that diversion structures remained in place if repairs were necessary. BFASF ¶ 48 [HK2891] (March 2011 letter from Defendants to FERC indicating that a spare fish boom is also now available in the event that the primary boom is ripped by high flows or debris). When safety concerns prohibited Defendants from re-installing booms from boats during periods of high flows at Hydro Kennebec, Defendants also constructed a platform from which to re-install the booms more expeditiously, thereby further expediting the return of bypass efforts. BFASF ¶ 48 [HK2891] (Bernier 3/31/11 letter to FERC).[8] Defendants took additional steps to further reduce downtime and avoid seasonal installation of the fabric-based diversion booms, by installing at three of the four facilities metal plate "Tuffbooms," which could be left in the water year-round. BFSF ¶¶ 20, 29. LSWJSF ¶¶ 201, 205, 206, 226 [LSW3900-01, 3904]. The resource agencies responsible for overseeing Defendants' efforts have even commended Defendants on the timeliness of their efforts. BFSF ¶ 6 [HK2038] (March 2008 letter from FWS) ("We were very pleased with your response to the submerged guidance device, which was corrected within days of the inspection.").

c. Defendants' Consultations with the Resource Agencies Confirm Defendants' Desire to Bypass the Turbines.

Finally, Plaintiffs misstate and mischaracterize resource agency communications regarding Defendants' ongoing efforts to improve fish bypass structures at the four projects. Plaintiffs take out of context certain limited concerns voiced by a couple of the resource agencies

[8] "Improvements have been made to the fish boom to allow its safe installation under a wider variety of river conditions . . . Previously, the boom could only be installed (due to worker safety concerns) under no-spill conditions. Modifications have been made to safely allow the boom's installation under higher flow conditions, including platforms on each end of the boom for workers to stand on in order to guide the boom into place. Previously, boom deployment had to wait until no-spill conditions to ensure worker safety, since a boat was required for installation and removal of the boom. This typically resulted in the boom not being installed until sometime in May."

with one of the bypass efficiency improvements proposed by Defendants – the Tuffboom. *See* Pl. Br. at 7, 9. Plaintiffs ignore that this type of boom was ultimately approved by the resource agencies at Hydro Kennebec, Weston, and Lockwood. BFSF ¶¶ 20, 29, 42.[9] Plaintiffs also conspicuously fail to mention that, after some initial startup issues were corrected, the Tuffboom has enhanced Defendants' diversion efforts at Hydro Kennebec, Lockwood and Weston.[10] Defendants do not deny that some repairs and adjustments had to be made, for such repairs and adjustments only evidence Defendants' ongoing efforts to maintain and improve bypass efficiency. Indeed, if Defendants did not desire to enhance their diversion measures, Defendants would have also abandoned efforts to make additional capital improvements; for example, Defendants would have simply maintained the originally-installed Kevlar boom at Hydro Kennebec and the Slickbooom at Lockwood, rather than seeking and obtaining permission to upgrade to the more effective Tuffbooms at these facilities, at a combined cost of roughly a half million dollars. BFSF ¶¶ 20, 34.

By questioning the diversionary measures ultimately approved by the resource agencies, Plaintiffs indirectly question not only those agencies with expertise in this area, but also the

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[9] In several places throughout their brief, Plaintiffs take quotes and facts out of context in a failed effort to manufacture a genuine issue of material fact. See, for example, Plaintiffs' statement on page 12 of their Brief, where Plaintiffs suggest that Defendants were acting unilaterally and against resource agency wishes. There, Plaintiffs cite to HK JSF ¶ 142 and state that that the National Marine Fisheries Service (NMFS) told Defendants that "effectiveness studies on fish booms in the [area where Maine endangered salmon are located] have not been very encouraging." Plaintiffs not only fail to acknowledge that constructive exchanges were contemplated as part of the consultation process, but also omit the preceding sentence, which reflects the critical fact that NMFS had nonetheless given a green light to Defendants to proceed with trying the diversion boom as an interim measure. ("NMFS does not have any objections with experimenting with the fish boom as interim protection at the HK project.") (emphasis added).

[10] Defendants do not disagree that their compliance must be evaluated at each of the four projects at issue, but maintain that due weight should be given to the fact that some of the evidence before the Court is common to more than one project. *See, e.g.*, BFASF ¶ 49 (consultations between NextEra and Brookfield regarding Tuffbooms); BFSF ¶ 13 (30(b)(6) Deposition of R. Richter regarding all three of the NextEra projects ("Our desire is not to pass [the fish] through the turbines, it's to bypass the turbines)); BFSF ¶ 3 (FERC states that "[W]e have determined that NextEra is complying with the salmon protection requirements of the Lockwood, Weston, and Shawmut Project Licenses").

terms of Defendants' Clean Water Act certifications, which vest with the resource agencies the discretion to require additional funding or measures if, based on their expertise, they deem such additional funds or measures to be appropriate. BFSF ¶ 1 [HK719] (Section III(F) of the Agreement). Of course, Plaintiffs may have chosen not to include the resource agencies in Plaintiffs' claims because they know the judicial deference that would be rightfully afforded the agencies' judgment. Instead, they attempt to second guess the sufficiency of Defendants' diversion efforts as if that agency oversight was not built into Defendants' Clean Water Act certifications and as if Defendants were acting unilaterally. Moreover, by raising isolated resource agency concerns that were aired at discrete points in the past, Plaintiffs ignore the overwhelming weight of evidence on Defendants' continuous consultations with the resource agencies, and the relatively strict oversight under which Defendants have proceeded. *See* BFSF ¶ 4 (MDMR reported that it visited the projects "as often as possible"); BFSF ¶¶ 3, 5 (continuous consultation and reporting to resource agencies); *see also* BFSF ¶ 1 [HK721] (Section III(F) of the Agreement) ("Continuous progress assessments will be undertaken through annual reports which will be filed with FERC, consistent with current practice by KHDG dam owners").

## CONCLUSION

After fighting for judicial consideration of the effectiveness of Defendants' fish diversion efforts, Plaintiffs have returned to this Court with nothing to offer in this regard. Instead of providing empirical evidence of kelts or adult shad bypass effectiveness, Plaintiffs attempt to extrapolate from flow estimates that were developed for other purposes, in reports that disclaim such flow data as evidence of actual bypass efficiency measurements. Because such extrapolations fail to demonstrate that Defendants had any actual knowledge of kelt bypass ineffectiveness, Plaintiffs have fallen far short of demonstrating their entitlement to summary

judgment.

To the contrary, this failure in Plaintiffs' brief only serves as additional support for Defendants' cross-motion for summary judgment. Plaintiffs' failed attempt demonstrates that they have not raised a triable issue as to the sufficiency of Defendants' efforts to divert kelt or adult shad. Indeed, there is a very good reason Plaintiffs have failed to provide any quantitative empirical data on kelt or shad bypass effectiveness – as the First Circuit recognized, no "particular objectively measurable level of effectiveness" was required to be demonstrated under the terms of the Agreement. Slip Op. at 12.

The same is true with respect to the other "background" information Plaintiffs allege as a basis for summary judgment in their favor. Plaintiffs have endeavored to manufacture concerns regarding both the timing of Defendants diversion efforts and isolated instances of resource agency caution on diversion measures that the agencies ultimately approved. There is no evidentiary basis to support Plaintiffs' contentions in these regards, however, and in any event Plaintiffs have failed to raise an issue of triable fact regarding a change of desire by Defendants to move from bypass to turbine passage for kelt or adult shad. Nor is there any evidentiary basis to support the allegation that Defendants abandoned their diversion efforts under the watchful eye of federal and state agencies.

Qualitatively, Defendants have undertaken an ongoing program of improved diversionary efforts by implementing, maintaining and in many ways enhancing the measures approved by the resource agencies with undisputed expertise in these matters. Defendants have pointed to uncontroverted evidence in this regard, all of which is consistent with their stated desire to divert kelts and adult shad. Instead of rebutting the evidence manifesting Defendants' stated desire to divert kelt and adult shad, Plaintiffs have offered only untenable inferences and unsupported

speculation about the sufficiency of Defendants' ongoing diversion efforts. As the First Circuit concluded in this case, "even when 'elusive concepts such as motive or intent are at issue, summary judgment is appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'" Slip Op. at 8 (citing *Vives,* 472 F.3d at 21 (1st Cir. 2007)).

Defendants therefore respectfully request that this Court deny Plaintiffs' motion for summary judgment in its entirety and grant Defendants' motion for summary judgment.

Dated at Portland, Maine, this 20th day of October, 2014.

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**CERTIFICATE OF SERVICE**

I certify that on October 20, 2014, I electronically filed this Opposition to Plaintiffs' Supplemental Memorandum with the Court's CM-ECF system, which automatically sends notification to all counsel of record.

*/s/ George T. Dilworth*
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