

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ATLANTIC SALMON FEDERATION U.S.,
CONSERVATION LAW FOUNDATION,
MAINE RIVERS, and NATURAL RESOURCES
COUNCIL OF MAINE,

Plaintiffs

v.

BROOKFIELD RENEWABLE PARTNERS, L.P.,
MERIMIL LIMITED PARTNERSHIP,
HYDRO-KENNEBEC LLC,
BROOKFIELD WHITE PINE HYDRO LLC,
BROOKFIELD POWER US ASSET MANAGEMENT
LLC, and BROOKFIELD POWER US HOLDING
AMERICA CO.

Defendants

Civil Action No.

**COMPLAINT FOR VIOLATION OF THE ENDANGERED SPECIES ACT, 16 U.S.C. §§
1531, *et seq.*, INCLUDING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

[INJUNCTIVE RELIEF SOUGHT – Local Rule 9(b)]

NOW COME Plaintiffs Atlantic Salmon Federation U.S., Conservation Law Foundation, Maine Rivers, and the Natural Resources Council of Maine, by and through undersigned counsel, and state the following in support of their Complaint for Declaratory Judgment and Injunctive Relief arising under Defendants' violations of the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*:

PRELIMINARY STATEMENT

1. This action asserts violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531, *et seq.*, by Defendants, resulting from Defendants’ activities, acts or omissions related to the ongoing operations of four hydropower projects on the Kennebec River in the State of Maine. The ongoing operations of each of these projects incontrovertibly “take” the ESA-listed species, the Gulf of Maine Distinct Population Segment of Atlantic salmon (*Salmo salar*) (“GOM DPS” of Atlantic salmon), in violation of section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B).

2. Under section 9 of the ESA, “with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of [the ESA] it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States.” 16 U.S.C. § 1538(a)(1)(B).

3. These four hydropower projects are:

(a) the Lockwood Project, located at river mile 63, the first hydropower project on the main stem of the Kennebec River, spanning the river at the US Route 201 Bridge in the cities of Waterville and Winslow, along the site originally known as Ticonic Falls;

(b) the Hydro-Kennebec Project, located at river mile 64 on the Kennebec River in the cities of Waterville and Winslow, and in the town of Benton, the second hydropower project on the main stem of the Kennebec River;

(c) the Shawmut Project, located at river mile 70, the third hydropower project on the main stem of the Kennebec River; and

(d) the Weston Project, located at river mile 83 in the town of Skowhegan, the fourth hydropower project on the main stem of the Kennebec River.

4. Each hydropower project is operating without authorization for the “take” of listed species, in direct violation of the ESA. 16 U.S.C. § 1538(a)(1)(B).

5. The ESA defines the term “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

6. “ ‘Harm’ in the definition of ‘take’ in the [ESA] means an act which actually kills or injures fish or wildlife. **Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.**” 50 C.F.R. § 222.102 (bold emphasis added).

7. The listed species is the Gulf of Maine Distinct Population Segment (“GOM DPS”) of Atlantic salmon.¹

8. The four hydropower projects are located within the critical habitat designation for the GOM DPS of Atlantic salmon.²

9. The lower Kennebec River main stem, where the four projects are located, is the critical migration corridor for GOM DPS of Atlantic salmon, between the ocean and the Sandy River spawning and rearing critical habitat units above the Sandy River/Kennebec River confluence, located above the fourth project, Weston in Skowhegan. Thus, the combination of the four hydropower projects of Lockwood, Hydro-Kennebec, Shawmut, and Weston on the lower Kennebec River main stem blocks Atlantic salmon access to the critical spawning and

¹ 74 Fed. Reg. 29,344 (June 19, 2009) 75 (Determination of Endangered Status for the Gulf of Maine Distinct Population Segment of Atlantic Salmon).

² 74 Fed. Reg. 29,300 (Designation of Critical Habitat for Atlantic Salmon (*Salmo salar*) Gulf of Maine Distinct Population Segment) (June 19, 2009).

rearing habitat in the Sandy River area, which is located upstream from the 4-project barrier and impediment.³

10. The ongoing operations of the projects therefore “take” the species, 16 U.S.C. § 1538(a)(1)(B) and 50 C.F.R. § 222.102, with respect to both upstream and downstream migrations, for nearly nine months of every year. The seasonal upstream migration period for Atlantic salmon adults is generally May 1 to October 31; the Spring downstream migration period for smolts and kelts is generally April 1 to June 30;⁴ the Fall downstream migration period for kelts is generally October 15 to December 31. Therefore, combined, migration periods in the Atlantic salmon species lifecycle take up nine months of the year – April 1 through December 31. Downstream outmigration alone takes up five and a half months of the year (April 1 to June 30, and October 15 to December 31).

11. “Takes” occur as the result of failures or delays in upstream passage at the first project, Lockwood; and “takes” occur at all four projects as the result of failures or delays in downstream passage – including delayed mortality. The project operations harm, injure, trap, and kill the GOM DPS of Atlantic salmon over the course of a combined nine months of each year.

12. In addition, other specific operations at the projects involve additional occurrences of unauthorized “takes.” For example, at the Lockwood Project, false attraction to the bypass channel, combined with annual fluctuations in station discharge caused by flashboard installation, require a “fish rescue” every time flashboards are installed. In 2021, hydropower project

³ The hydropower projects also block effective migrations of other species, such as American shad and river herring. As explained further herein, the failure to effectively pass these other co-evolved species has a direct correlation to Atlantic salmon increased mortality in the critical habitat area.

⁴ As explained further herein, “kelts” are post-spawn adults, which need to migrate back downstream to the ocean for eventual repeat spawning; “smolts” are young salmon after the “parr” stage, which are ready to migrate downstream to the ocean for the first time.

operations resulted in harming, injuring and stranding nearly two dozen smolts,⁵ and at least three adult Atlantic salmon were stranded in isolated pools in the Lockwood bypass channel. One of these salmon suffered extensive injuries, including “scraped up body dorsally, scraped up sides (both left and right), an abrasion ventrally, a bruise on its left side, a lamprey wound scar on its right side, a split dorsal fin, a split caudal fin and a bruised snout.”⁶ At least two other adult Atlantic salmon, one with “significant scars located dorsally on its body”⁷ were also trapped in a deep pool in ledges under the Route 100 bridge as a result of this event, but these salmon could not be rescued for transport upstream to the Sandy River critical habitat.

PARTIES AND STATEMENT OF INTEREST

13. This action is brought pursuant to the “citizen suits” provisions of the ESA, which allow a civil suit by any person on her own behalf “to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.”

16 U.S.C. § 1540(g)(1)(a).

14. Each Plaintiff in the above-captioned matter has given prior sixty days’ written notice of these violations to the Secretary of Commerce⁸ and to the alleged violators. 16 U.S.C.

⁵ National Marine Fisheries Service (“NMFS”) correspondence to Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission (August 26, 2021) at page 3, first bullet point; FERC Accession No. 20210826-5106. (All public documents filed on the relevant project docket of the Federal Energy Regulatory Commission contain a document identification “Accession Number.” When relevant for reference purposes, the FERC Accession No. citation of a public document is provided here.)

⁶ Maine Department of Marine Resources (“MDMR”) (Jennifer Noll). June 17, 2021. Field Summary of Atlantic Salmon Stranding Rescue at Lockwood Dam. (This report was included as Attachment 1 to a filing about the event submitted on July 1, 2021: FERC Accession No. 20210701-5242.)

⁷ Ibid.

⁸ National Marine Fisheries Service (“NMFS”) is an office of the National Oceanic and Atmospheric Administration within the Department of Commerce. NMFS is the federal wildlife agency with the

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