

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. 1:21-cv-00257-JDL

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
WITH INCORPORATED MEMORANDUM OF LAW

[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 (“Plaintiffs”), by and through undersigned counsel, and pursuant to Rule 65(a) of the Federal Rules of Civil Procedure hereby move for a preliminary injunction. The Plaintiffs bring to the Court’s and the Defendants’ attention that the fall downstream migration of the ESA-listed species – the Gulf of Maine Distinct Population Segment (“GOM DPS”) of Atlantic salmon – has begun, as of October 15th, and will continue through the seasonal range of December 31st. *See* Complaint, ECF No. 1, ¶¶

10 & 47; Lusardi Decl. ¶ 9 at p.4. And further, spring outmigration will begin this coming April 1, 2022. *Id.* Each project “takes” migrating salmon, within the definition of “take” under the Endangered Species Act (“ESA”), 16 U.S.C. § 1532(19). The Kennebec River is the migration corridor to the ocean from the Sandy River spawning and rearing habitat area, which is located above the Weston project in Skowhegan. Each project – and the four of them cumulatively – block the migration and result in an array of related impediments and adverse impacts that “take” Atlantic salmon. Lusardi Decl. ¶¶ 8 & 10.

Each project lacks authorization to “take” salmon under any incidental take permit issued by the National Marine Fisheries Service (“NMFS”) under the ESA. Defendants are therefore in present and ongoing violation of the ESA. 16 U.S.C. § 1538(a)(1)(B). Indeed, Defendants have allowed this noncompliance with the ESA to exist continuously during all upstream and downstream migration seasons since December 31, 2019, when Defendants’ last temporary incidental “take” permit unequivocally expired.¹

This noncompliance is not a technical failing – Atlantic salmon are on the brink of extinction. Complaint ¶ 49; Lusardi Decl. ¶ 9. The Kennebec River plays a pivotal role in ever achieving survival and recovery of the species. *Id.*; *see* Complaint ¶ 50. The numbers within the Kennebec population are precariously low. *Id.* ¶ 60 (and references therein).

¹ And Defendants had been on advance notice of the December 31, 2019 expiration date for at least six and a half years prior (even seven and a half years considering the 2012 issuance of the Hydro-Kennebec Project’s temporary take permit). The take permits were issued with two interim biological opinions of NMFS that had been issued following a section 7 consultation (16 U.S.C. § 1536), a consultation that – by way of background – was prompted by previous litigation in this Court claiming dam operators’ violations of the ESA, including one common Defendant here: *Friends of Merrymeeting Bay v. Brookfield Power U.S. Asset Management, LLC*, No. 2:11-cv-35-GZS, 2013 WL 145506 (January 14, 2013). The 2012 Biological Opinion referenced in the *Friends* case, 2013 WL 145506 at *4, is the very same temporary incidental take authorization and interim Biological Opinion at issue here, and that by its terms expired on December 31, 2019. This puts Defendants today right back to where they were in 2012 before the temporary take authorizations had issued – i.e., in violation of section 9 of the ESA for operating the projects without take authorization under the Act.

Defendants have not taken adequate measures to reduce “takes” to the fullest extent possible, which would include immediately shutting down the turbines at three of the projects for the length of the downstream migration season, and operating at maximum capacity a sluice-passage facility at the problematic fourth Weston Project site. Pugh Decl. ¶ 10; Lusardi Decl. ¶ 11. These measures should be undertaken until and unless Defendants comply with the ESA by reacquiring valid incidental take authorization, if indeed such authorization can ever issue.

Plaintiffs rely upon the uncontroverted material facts of this matter, together with the expert opinions set forth in the declarations under oath of Donald H. Pugh Jr. and Robert A. Lusardi, and the exhibits attached to both declarations.²

Plaintiffs therefore respectfully request that this Court grant this preliminary injunction to decree that Defendants shall immediately undertake the measures of turbine shutdowns at Shawmut, Hydro-Kennebec, and Lockwood (and, at Lockwood, according to the sunset-to-sunrise schedule for the window of time coinciding with complications in upstream migration “take”), while continuing operations at maximum flows of each bypass facility at Shawmut, Hydro-Kennebec, and Lockwood (Pugh Decl. ¶ 10.A.i–C.i; Lusardi Decl. ¶ 11.A.i–C.i); and to immediately undertake the measures prioritizing the sluice bypass facility at Weston, with opening gates or operating units as options as set forth in the Pugh and Lusardi declarations. Pugh Decl. ¶ 10.D.i; Lusardi Decl. ¶ 11.D.i. This will reduce the percentage of takes caused by project operations and habitat degradation caused by the projects, under current conditions and status of project operations. Pugh Decl. ¶ 10; Lusardi Decl. ¶ 11.

² As noted in his declaration Don Pugh is an expert in fish passage, formerly with S.O. Conte Anadromous Fish Research Laboratory, with more than 20 years of experience, study, and expertise in analyzing fish passage at hydroelectric projects. Pugh Decl. ¶ 1. Dr. Rob Lusardi is an aquatic research ecologist and applied conservation biologist at the Center for Watershed Sciences, and Adjunct Faculty in the Department of Wildlife, Fish, and Conservation Biology at the University of California, Davis, with more than 15 years of experience, study, and expertise in analyzing the adverse impacts of hydroelectric projects on diadromous fish species. Lusardi Decl. ¶ 1.

MEMORANDUM OF LAW

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Defendants act as operators and/or licensees of four hydropower projects on the Kennebec River. *See* Complaint, ECF No. 1, ¶¶ 1-3, 19-25. These four hydropower projects are: (1) the Lockwood Project, located at river mile 63, the first dam/hydroproject on the main stem of the Kennebec River, along the site originally known as Ticonic Falls; (2) the Hydro-Kennebec Project, located at river mile 64, the second dam/hydroproject on the main stem of the Kennebec River; (3) the Shawmut Project, located at river mile 70, the third dam/hydroproject on the main stem of the Kennebec River; and (4) the Weston Project, located at river mile 83, the fourth dam/hydroproject on the main stem of the Kennebec River. *Id.* ¶ 3. The lower Kennebec River watershed, where the four projects are located, is completely within designated critical habitat for the migrating GOM DPS of Atlantic salmon, the listed species in issue.³ The combination of these four hydropower projects on the Kennebec River totally blocks Atlantic salmon access to the critical spawning and rearing habitat in the Sandy River area, located upstream from the four projects. *Id.* ¶ 9; Lusardi Decl. ¶ 10. The existence and operations of each project and each impoundment in issue are entirely within the designated critical habitat of the GOM DPS of Atlantic salmon, and adversely impact that critical habitat, resulting in unauthorized “takes” by death, injury, delayed mortality or harm by “significantly impair[ing] essential behavioral patterns including, breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102; 16 U.S.C. §§ 1532(19) & 1538(a). *Id.* ¶¶ 5-6, 10; Lusardi Decl. ¶ 10.

³ 74 Fed. Reg. 29344 (June 19, 2009) (ESA listing); 74 Fed. Reg. 29,300 (Designation of Critical Habitat for Atlantic Salmon (*Salmo salar*) Gulf of Maine Distinct Population Segment) (June 19, 2009).

Each hydropower project is operating without authorization for each incidental “take” of the listed species. 16 U.S.C. § 1538(a)(1)(B). *Id.* ¶ 4. While it is impossible to eliminate all incidental takes at each project or over all four projects collectively in the near term, and while incidental “takes” will continue under any scenario for so long as the projects exist in operation in the Kennebec watershed (and the species remains listed as endangered), the measures urged by the Plaintiffs in this motion are the only adequate remedy to reduce to the fullest extent possible the ESA violations of incidental take at each project and by the four projects collectively, under the current circumstances. Lusardi Decl. ¶¶ 8 & 12; Pugh Decl. ¶¶ 8 & 11.

A. Atlantic Salmon Life Cycle

The seasonal migration periods in issue are April 1 through June 30, and October 15 through December 31 (the latter period involving post-spawn adults returning to the ocean as potential repeat spawners or kelts). Lusardi Decl. ¶ 9. The full upstream migration season is May 1 through November 10. *Id.* ¶ 9 at p.3. The GOM DPS Atlantic salmon life cycle in issue is detailed in the Complaint and contained in the Lusardi Declaration. Lusardi Decl. ¶ 9; Complaint, ECF No. 1, ¶¶ 39-50.

Atlantic salmon are anadromous fish, spending most of their adult life in the ocean but returning to freshwater to spawn. Lusardi Decl. ¶ 9. Atlantic salmon’s life history includes spawning and rearing in rivers and extensive feeding migrations during their marine phase. *Id.* During their life cycle, Atlantic salmon go through several distinct phases that are identified by specific changes in behavior, physiology, morphology, and habitat requirements. *Id.* Adult Atlantic salmon return to the rivers from the ocean and migrate to their natal stream to spawn; a small percentage (1-2%) of returning adults in Maine will stray to a new river. *Id.* Adults ascend rivers within the GOM DPS beginning in spring, and the ascent of adult salmon continues

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