

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ATLANTIC SALMON)	
FEDERATION U.S., et al.,)	
)	
Plaintiffs,)	
)	
v.)	1:21-cv-00257-JDL
)	
MERIMIL LIMITED)	
PARTNERSHIP, et al.,)	
)	
Defendants.)	

ORDER ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

This citizen suit brought under the Endangered Species Act (“ESA”) targets the operation of four hydroelectric dams on Maine’s Kennebec River that allegedly interfere with the migration of Atlantic salmon. Plaintiffs Atlantic Salmon Federation U.S., Conservation Law Foundation, Maine Rivers, and the Natural Resources Council of Maine initiated this case on September 9, 2021 (ECF No. 1) on behalf of their members. The Defendants—the licensees or manager of one or more of the four dams at issue—are Merimil Limited Partnership, Hydro-Kennebec LLC, Brookfield White Pine Hydro LLC, Brookfield Power US Asset Management LLC, and Brookfield Renewable US.¹

The Plaintiffs contend that the Defendants are unlawfully “taking” Atlantic salmon in the Kennebec River in violation of the ESA, and, on October 21, 2021, the

¹ Defendant Merimil Limited Partnership is the licensee for one of the dams, Lockwood Project. Defendant Hydro-Kennebec LLC is the licensee for another, Hydro-Kennebec Project. Defendant Brookfield White Pine Hydro LLC is the licensee for the final two dams, Shawmut and Weston Projects. Defendant Brookfield Power US Asset Management LLC is involved in the management of the four dams. The Plaintiffs allege that Brookfield Renewable US owns and operates the dams, but the Defendants claim that this is a moniker referring to a group of companies, not a legal entity.

Plaintiffs moved for a preliminary injunction (ECF No. 10). Under the ESA, “take” means “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.A. § 1532(19) (West 2022). The Plaintiffs seek a preliminary injunction that would require the Defendants to operate the dams differently when the salmon are migrating in order to minimize take, particularly the take of Atlantic salmon by the dams’ turbines, unless and until the Defendants gain the governmental approvals needed to lawfully take the salmon. For the reasons that follow, I deny the Plaintiffs’ motion.

I. BACKGROUND

I begin by (A) providing the necessary background information regarding the migration patterns and the endangered status of the Gulf of Maine Distinct Population Segment of Atlantic salmon, and then address (B) the history of the Defendants’ authority to incidentally take Atlantic salmon at the four dams and (C) the preliminary injunctive relief sought by the Plaintiffs.

A. Atlantic Salmon

Atlantic salmon hatch in fresh water, migrate to the ocean, and return to their natal rivers to spawn. Atlantic salmon can restart their migratory loop after spawning, by swimming back to the ocean. A young salmon migrating to the ocean is a “smolt,” and post-spawn adults completing that same journey are “kelts.” From April 1 to June 30, smolts and kelts both migrate downstream. From May 1 to November 10, adult salmon migrate upstream. From October 15 to December 31, kelts migrate downstream.

The ESA empowers the National Marine Fisheries Service (“NMFS”) to protect not only species, 16 U.S.C.A. § 1533(a) (West 2022), but also “distinct population segment[s]” of vertebrate species, 16 U.S.C.A. § 1532(16): groups of animals that are discrete and significant in relation to the species, Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996). When NMFS finds that a distinct population segment is in danger of extinction throughout all or a significant portion of its geographic range, the agency may list it as “endangered.” 16 U.S.C.A. §§ 1532(6), 1533(a). If NMFS classifies a species or a distinct population segment as endangered, the ESA’s prohibition against “take” springs into effect. *Id.* § 1538(a)(1)(B), (C) (West 2022). That prohibition is at the center of this lawsuit. As already noted, “take” includes “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” *Id.* § 1532(19). The second item on that list, harm, includes “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 (2021).

NMFS has listed the Gulf of Maine Distinct Population Segment of Atlantic salmon (the “GOM DPS”) as endangered, which includes those Atlantic salmon originating from the Gulf of Maine. *Id.* § 224.101 (2021). Historically, hundreds of thousands of GOM DPS adults returned annually to Maine’s Kennebec River to spawn. By 2009, abundance levels of Atlantic salmon within the GOM DPS had diminished by several orders of magnitude. Determination of Endangered Status for the Gulf of Maine Distinct Population Segment of Atlantic Salmon, 74 Fed. Reg.

29344, 29349 (June 19, 2009). In 2021, adults returning to the Kennebec River represented less than 4% of GOM DPS returns.

According to NMFS, dams are a leading cause “of both historical declines and contemporary low abundance of the GOM DPS of Atlantic salmon.” *Id.* at 29366. Dams “directly kill and injure a significant number of salmon on both upstream and downstream migrations”; “directly limit access to otherwise suitable habitat”; and “degrade the productive capacity of habitats upstream by inundating formerly free-flowing rivers, reducing water quality, and changing fish communities.” *Id.* at 29367. Other threats to Atlantic salmon include land use practices that have reduced habitat complexity, loss of habitat connectivity in part from road crossings, a reduction in water flows due to consumption, water pollution, poaching and incidental capture, predation, starvation, disease, parasites, abiotic ocean conditions, the depletion of coevolved fish species, and competition from invasive species. *Id.* at 29367-76.

B. The Dams

The Defendants own and operate the four hydroelectric dams at issue: Lockwood Project, Hydro-Kennebec Project, Shawmut Project, and Weston Project. The dams are located on the Kennebec River at river miles 63, 64, 70, and 83, respectively. At Lockwood Project, the first dam that in-migrating Atlantic salmon encounter on the Kennebec, the Defendants trap in-migrating adults in Lockwood’s “fish lift” so that the Maine Department of Marine Resources can capture them and then drive them in a truck to the Sandy River, a tributary of the Kennebec located upstream of the four dams, where the salmon spawn. With respect to downstream migration, Atlantic salmon utilize various routes through, over, and around the four

dams, including through the turbines. To be clear, in-migrating adults interact with only Lockwood Project before they are trucked to the Sandy River above the four dams and thus do not encounter the other three dams during their upstream migration, but out-migrating smolts and kelts must pass all four dams on their journey to the ocean. This case involves the alleged take of Atlantic salmon migrating both upstream and downstream.

Until recently, the Defendants were authorized to incidentally take GOM DPS Atlantic salmon through the operation of these dams, notwithstanding the take prohibition that applies to endangered distinct population segments. That incidental take authority was the product of “consultation,” a process under the ESA by which NMFS reviews federal agencies’ proposed actions, including the granting of permits, to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species.” 16 U.S.C.A. § 1536(a)(2) (West 2022). Consultation culminates in a “biological opinion” containing NMFS’s conclusion as to whether an agency action would jeopardize the continued existence of endangered species. *See id.* § 1536(b). If an agency action is not likely to do so but will nonetheless incidentally take members of a protected species with reasonable certainty, the biological opinion must include an “incidental take statement”: a prediction of the incidental take that the proposed action will cause plus “terms and conditions” to “minimize” that take. *Id.* § 1536(b)(4)(i)-(ii), (iv); 50 C.F.R. § 402.14(g)(7), (i) (2021). Compliance with those terms and conditions provides a government agency or permittee (such as a dam operator) with authority

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