

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY AND)
ENVIRONMENT MAINE,)
)
Plaintiffs,)
)
v.)
)
HYDRO KENNEBEC, LLC, and BROOKFIELD)
POWER US ASSET MANAGEMENT, LLC,)
)
and)
)
MERIMIL LIMITED PARTNERSHIP, FPL ENERGY)
MAINE HYDRO, LLC, and BROOKFIELD)
RENEWABLE SERVICES MAINE, LLC,)
)
Defendants.)

Docket No. 11-cv-00035-GZS

**PLAINTIFFS’ SUPPLEMENTAL OPPOSITION TO
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

Defendants Hydro Kennebec, LLC, Brookfield Power US Asset Management, LLC, Brookfield Renewable Services Maine, LLC, Merimil Limited Partnership, and FPL Energy Maine Hydro, LLC (collectively, “Defendants”) own and operate the Lockwood, Hydro Kennebec, Shawmut, and Weston hydroelectric projects on the Kennebec River (collectively, “Projects”).¹ Plaintiffs bring this action under 33 U.S.C. § 1365 to enforce the terms of Clean

¹ The license for Hydro Kennebec is held by defendant Hydro Kennebec, LLC; the license for Lockwood is held by defendant Merimil Limited Partnership; and the licenses for Shawmut and Weston are held by defendant FPL Energy Maine Hydro, LLC. These entities are now all affiliated with defendants Brookfield Power US Asset Management, LLC, and Brookfield Renewable Services Maine, LLC. Lockwood, Shawmut, and Weston were originally owned and operated by NextEra Energy Resources, LLC, and its affiliates, who were defendants in a suit (No. 11-cv-38) separate from the suit against Brookfield that covered alleged violations at the Hydro Kennebec facility (No. 11-cv-35). NextEra’s interest in Lockwood, Shawmut, and Weston, and in Merimil and FPL Energy Maine, was bought by Brookfield entities, and the two cases were consolidated under 11-cv-35. 11-cv-35 ECF No. 158 and 11-cv-38 ECF No. 182

Water Act (“CWA”) water quality certifications governing the Projects. The certifications incorporate the terms of the Kennebec Hydro Developers Group Settlement Agreement (“KHDG Agreement” or, as the First Circuit referred to it, the “Settlement Agreement”). Plaintiffs claim Defendants have violated the following provision of the KHDG Agreement, common to all four certifications:

In the event that adult shad and/or 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).

Stipulations of Fact for Lockwood, Shawmut and Weston (11-cv-38 ECF No. 85) (“LSW SF”) ¶ 196 (pageID #3899); Stipulations of Fact for Hydro Kennebec (11-cv-35 ECF No. 95) (“HK SF”) HK SF ¶ 134 (pageID #5871) (emphasis added).

Plaintiffs submit this memorandum in further opposition to Defendants’ motion for summary judgment and in response to Defendants’ Supplemental Memorandum of Law in Support of Motion for Summary Judgment (ECF No. 164) (“Def. Supp. Mem.”). Detailed responses to misstated and misleading factual representations are also set forth in Plaintiffs’ Opposition to Defendants’ Supplemental Statement of Undisputed Material Facts (“Pl. Supp. Opp. SUMF”).

(consolidation orders); 11-cv-35 ECF No. 184 (directing further entries to be made under 11-cv-35).

ARGUMENT

I. DEFENDANTS' BUSINESS DECISION TO RUN THEIR TURBINES WHEN FISH CAN ACCESS THEM PROVES THEIR "DESIRE" TO ALLOW TURBINES TO SERVE AS A PRIMARY DOWNSTREAM PASSAGE ROUTE.

Defendants offer a baseball analogy in an attempt to illustrate that they do not desire to pass adult fish through turbines. "Using Plaintiffs' logic," they argue, "the batting averages of most major league baseball players would suggest a desire to strike out, rather than get a hit, despite the players' efforts to improve with input from their coaches and managers." Def. Supp. Mem., p. 18. This analogy actually proves Plaintiffs' point, as Defendants' situation is far different from that of the baseball player.

A major league batter only partially controls his own fate. There is another party, the pitcher, who is *trying* to strike him out. The batter has no control over the skill and determination of the pitcher, who may throw 100 miles per hour, have a nasty curve ball, or throw a deceptive change-up or splitter. Another independent party, the umpire, calls balls and strikes with greater or lesser degrees of accuracy, and also exerts control over the batter's fate.

In stark contrast, Defendants in the case at bar *are* in control of their own fate. If Defendants actually desired to keep adult salmon and shad out of turbines, it is well within their power to make it so. They are not forced to rely on ineffective diversionary devices which allow fish to access turbines, or forced to run their turbines every hour of every day of the year. They can, if they so choose, install impassable screening in front of their turbine entrances or temporarily shut the turbines down during downstream migration season.

The only reasonable inference to be drawn from Defendants' choice of interim passage measures is that it would cost more to effectively keep fish from using turbines for downstream passage. It is Defendants' own desire to maximize profits that ensures that turbines continue to

serve as a primary passage route. The more time Defendants operate their turbines, and the fewer physical obstructions to water flow directly in front of the turbine entrances, the more revenue they generate. Defendants' decision to rely on ineffective bypass systems, rather than on effective but more expensive measures to keep salmon and shad out of the turbines, is a business decision that unambiguously expresses a clear desire to allow turbines to serve as a primary route of downstream passage. See e.g. Pl. Supp. Opp. SUMF ¶ 13 (Defendants' Robert Richter testified that Defendants' "business people" have calculated the cost of employing temporary turbine shutdowns as a means of providing "additional passage" for salmon at Weston, Shawmut, and Lockwood).

The KHDG Agreement, however, prohibits Defendants from making this business decision unless they can first prove that the degree of turbine passage they mean to allow will not cause "significant" injury or mortality to adult salmon or shad.

II. DEFENDANTS' CONSTRUCTION OF THE KHDG AGREEMENT IS AT ODDS WITH THE FIRST CIRCUIT'S.

Defendants' construction of the KHDG Agreement is inconsistent with the First Circuit's construction of that document.

First, Defendants argue that they elected to divert adult salmon and shad away from turbines, and that "[t]he question to be considered on remand is therefore whether Defendants knew or did things during and after the design and construction of the diversion methods, which, collectively, amounted to a conscious re-election to instead pass adult salmon and shad through the turbines of these projects." Def. Supp. Mem., p. 2; see also Def. Supp. Mem., p. 4 (denying that Defendants "made an affirmative *re-election* to route fish through the projects' turbines") (emphasis added). According to Defendants, the KHDG Agreement takes an all or nothing

approach: either Defendants want to divert adults away from turbines, or they want to pass adults through turbines.

Even putting aside the fact that there has been *no* “design and construction of . . . diversion methods” at Shawmut, and none at Weston until months after Plaintiffs filed suit, the First Circuit has expressly rejected Defendants’ proffered construction of the KHDG Agreement. The First Circuit held that the Agreement “does more than offer Defendants a binary choice between two methods of downstream passage.” 11-cv-35 ECF No. 149, p. 11. See also id. at p. 10 (rejecting the argument that the court “should assess [Defendants’] ‘desire’ from the vantage point of a fork in the road – at a certain point in time, [Defendants] could choose to go either down the path of turbine passage or down the path of the bypass method”). Instead, the First Circuit held, the KHDG Agreement “specifically contemplates the possibility that Defendants might desire downstream passage through the turbines *in the event that interim bypass facilities prove ineffective.*” Id. at 11 (emphasis added).

Defendants’ litany, in their Supplemental Memorandum, of diversion system failures and subsequent corrective efforts is thus beside the point, because it is what Defendants desired when their efforts “proved ineffective” that is at issue here. When diversion systems do not keep fish out of the turbines, or have to be pulled out of the river because they break, or have not even been installed, Defendants evidence their desire to pass fish through the turbines when they fail to then effectively screen or temporarily shut down those turbines. And, at each Project, “to the extent” (this is the phrase the KHDG Agreement uses) Defendants desire to allow adult salmon or shad to pass downstream via the turbines, Defendants must first prove the safety of such passage with a site-specific quantitative study.

Second, Defendants focus on the word “interim” in the KHDG Agreement to suggest that the Agreement contemplates that bypasses will not be fully effective, that adult salmon and shad will thus inevitably pass through turbines, and that such turbine passage is therefore allowed. Def. Opp. Mem., pp. 3 (“As one would expect for measures that were understood by Defendants and the resource agencies to be only *interim* in nature, the initial diversion measures may not have succeeded in diverting all of the adult salmon or shad...” [emphasis in original]) and 17 (same). But as the First Circuit held, the Agreement provides just the opposite: if bypass facilities prove to be ineffective, Defendants cannot then allow turbine passage without first conducting studies demonstrating turbine passage is safe. 11-cv-35 ECF No. 149, p. 11. It is precisely *because* the current bypasses and sluices are interim downstream passageways that the KHDG Agreement provides an extra layer of protection for adults. If the interim passageways do not work well, Defendants are not permitted to simply pass adults through turbines for a period of years while a safer, permanent passage solution is sought.²

Third, Defendants seem to suggest that the language of the KHDG Agreement at issue here is ambiguous and the Court should look to Defendants’ “history of interactions with the resource agencies” to interpret it. Def. Supp. Mem., pp. 5-6. Defendants cite to Tarrant Reg’l Water Dist. v. Hermann, ___ U.S. ___, 133 S.Ct. 2120, 2135 (2013), for the proposition that a party’s course of performance under a contract “is highly significant evidence of the understanding” of the contract’s terms. Def. Supp. Mem., p. 6. In Tarrant, the Court had to construe an interstate compact that was ambiguous on the issue of cross-border rights.

Defendants also cite Reed & Reed, Inc. v. Weeks Marine, Inc., 431 F.3d 384, 388 (1st Cir.

² Similarly, Defendants’ citation to other sections of the KHDG Agreement, e.g., Def. Supp. Mem., p. 15, is inapposite, as these more general provisions of the Agreement do not obviate or override Defendants’ obligations to comply with the specific provisions at issue regulating the passage of adult salmon and shad through turbines.

2005), for the proposition that “[t]he parties to an agreement know best what they mean.” Def. Supp. Mem., p. 16. These citations represent a proverbial red herring, because the First Circuit has held, as did this Court before it, that the language of the KHDG Agreement at issue here is “unambiguous.” 11-cv-35 ECF No. 149, p. 7.

III. DEFENDANTS’ “INTERACTIONS” WITH GOVERNMENT AGENCIES DO NOT PROVIDE “COMPELLING EVIDENCE” THAT THEY DO NOT DESIRE TO PASS ADULT SALMON OR SHAD THROUGH THEIR TURBINES.

Defendants contend that if their actions evidenced a desire to pass adult fish through turbines, government agencies would have told them to do something different or would have taken enforcement action. See e.g. Def. Supp. Mem., pp. 14 (“[a]gency interactions have a tremendous impact on how Defendants perceive the efficacy of their diversion efforts and which improvements they consider as appropriate responses to such efficacy”) and 15 (“Defendants believed that they were acting consistently with their desire to divert fish, and gave great weight not only to the absence of enforcement or any request for additional measures or funding, but also to the feedback that Defendants received from governmental agencies”). For a number of reasons, this contention is without merit.

A. Defendants’ Own “Scientifically Defensible” Analyses and Studies Confirm That Turbines Are a Significant Downstream Passage Route at All Four Projects.

As set forth in more detail in the Supplemental Memorandum in Support of Plaintiffs in the Parties’ Cross-Motions for Summary Judgment (ECF No. 162) (“Pl. Supp. Mem.”), studies and analyses Defendants themselves conducted and submitted to the agencies indicate that a significant percentage of downstream migrating fish attempt turbine passage at each Project, and that, where tested (at Lockwood and Hydro Kennebec), diversionary guidance booms have not proven sufficient to keep fish out of the turbines. Pl. Supp. Mem., pp. 8-15. See description of

results at LSW SF ¶¶ 231, 232 (LSW page ID #3905) (Weston); LSW SF ¶¶ 235, 236 (LSW pageID #3905-06) (Shawmut); HK SF ¶¶ 143, 146, 147 (HK pageID #5873-74) (Hydro Kennebec); LSW SF ¶¶ 213, 220, 221, 222 (LSW page ID #3902-03) (Lockwood). The lack of agency enforcement of the KHDG Agreement's adult passage provisions does not erase the findings of these studies and analyses, and does not change the fact that Defendants have continued to operate their turbines during downstream migration season with full knowledge of these poor results.

Defendants cannot now dismiss these results as “misplaced estimates and projections.” Def. Supp. Mem., p. 5. Defendants are on record as having deemed these results “scientifically defensible.” LSW SF ¶ 43 (LSW pageID #3876). Nor can Defendants now question the probity of conclusions drawn from studies of juvenile salmon (smolts) at Lockwood and Hydro Kennebec, Def. Supp. Mem., p. 5, as Defendants themselves relied on these same studies. See LSW SF ¶ 220 (LSW pageID #3903) (Defendants' Lockwood White Paper, which Defendants believe is “scientifically defensible,” id. ¶ 43 [LSW pageID #3876], “assumed that the Tuffboom at Lockwood has the same level of effectiveness at guiding downstream migrating kelts towards the bypass and away from the turbines as it does for downstream migrating smolts.”); HK SF ¶ 143 (HK pageID #5873) (the 2011 radio telemetry study of smolts conducted at Hydro Kennebec was performed “to determine the effectiveness of fish passage system [including the Kevlar boom] and *to determine what routes salmon were using to move downstream.*”) (emphasis added). Studies of salmon smolts are also relevant to determining passage routes of adult shad, which are closer in size to juvenile salmon. LSW SF ¶ 78 (LSW pageID #3879).

B. The Agencies Have Been Openly Critical Of Defendants' Efforts.

As detailed in Pl. Supp. Mem. pp. 8-15 (but not acknowledged by Defendants in their Def. Supp. Mem.), the agencies *have* in fact been critical of Defendants' efforts, and have told them their diversionary devices would not, and do not, work. In February 2011, United States Fish and Wildlife Service ("USFWS") and Maine Department of Marine Resources ("MDMR") told Defendants that the "Tuffboom" guidance boom – in place at Lockwood since mid-2010 – was not adequate. This was months *before* Defendants installed such a boom at Weston (in the summer of 2011) or Hydro Kennebec (in December 2011 and January 2012). LSW SF ¶ 225 (pageID #3904) (Weston boom³); HK SF ¶ 139 (HK pageID #5873) (Hydro Kennebec boom). See also LSW SF ¶ 229 (LSW pageID #3904) (USFWS told Defendants in February 2011 that Tuffbooms are ineffective); LSW SF ¶ 230 (LSW pageID # 3905) (MDMR told Defendants in February 2011 that Tuffbooms "are prone to failure, debris loading, and overtopping, thus reducing their effectiveness as a guidance device"); HK SF ¶ 142 (HK pageID #5873) (in late 2011 NMFS told Defendants with regard to the Hydro Kennebec diversion system, "Please know that effectiveness studies to date on fish booms in the [area where Maine endangered salmon are located] have not been very encouraging"); LSW SF ¶ 218 (LSW pageID #3902-03) (NMFS criticized a proposal by Defendants to address the ineffectiveness of the Lockwood Tuffboom, stating, "[w]e are not confident that the proposed modifications will significantly improve effectiveness of the downstream bypass or reduce turbine entrainment," and instead recommending "physical exclusion" [e.g., screening the turbine entrances]).

³ USFWS and MDMR approved the use of the boom at Weston only on a "test" basis, "since no fish guidance device or screening is in place at the Weston Project for anadromous fish." Pl. Supp. Opp. SUMF ¶¶ 2; 39.

Indeed, this was at least the second time that Defendants had been told by an agency to adopt physical exclusion as a means of keeping adults out of their turbines. In 2007, MDMR told Defendants that they should narrow the spacing between the bars on the trash rack screening the large propeller-type turbine at Lockwood, “[t]o prevent mortality/injuries from kelt [adult salmon] passage through [that turbine].” Pl. Supp. Opp. SUMF ¶ 13. To date, Defendants have not done so, *id.*, even though the spacing of the bars on Defendants’ trash racks is wide enough to provide adult salmon (and adult shad) access to some or all of the turbines at each of the four Projects, Pl. Supp. Mem., pp. 8, 10, 12, 15. If, as Defendants maintain, they “gave great weight” to agency feedback in formulating their “desire to divert fish,” Def. Supp. Mem., p. 15, this surely indicates a desire to keep passing adult fish through their turbines. Moreover, if, as Defendants also suggest, “deference is owed to the resource agencies’ expertise in evaluating the sufficiency of protective measures,” *id.*, Defendants surely know their current measures are insufficient.⁴ Despite their insistence that they have worked in synch with the agencies, Defendants have ignored a fundamental issue made clear by the agencies: guidance boom technology is not effective. See also Pl. Supp. Opp. SUMF ¶ 29; LSW SF ¶ 217 (pageID #3902) (NMFS told Defendants that the bypass system at Lockwood is “not effective”).

C. Citizen Suits Exist Precisely To Fill In Gaps In Government Enforcement.

The government’s failure to enforce the provisions of the water quality certifications and KHDG Agreement at issue here is precisely why Plaintiffs are suing. As noted by the Seventh Circuit, “Congress...chose not to place absolute faith in state and federal agencies. It provided

⁴ Plaintiffs note that Defendants’ citation to cases giving deference to agency action in a *judicial review* setting, in which the court is reviewing a challenged agency action as part of an administrative appeal, is wholly inapposite to the entirely different setting of the case at bar. See Def. Supp. Mem., p. 15, citing Associated Fisheries of Maine, Inc. v. Daley, 127 F.3d 104 (1st Cir. 1997) (judicial review of agency rulemaking); Bays’ Legal Fund v. Browner, 828 F. Supp. 102 (D. Mass. 1993) (review of agency action under the Administrative Procedure Act).

for citizen suits to enable affected citizens to push for vigorous law enforcement even when government agencies are more inclined to compromise or go slowly.” Adkins v. VIM Recycling, Inc., (7th Cir. 2011) (construing similar citizen enforcement provision of the federal Resource Conservation and Recovery Act [“RCRA”]); Conservation Law Found. v. Browner, 840 F. Supp. 171, 175 (D. Mass. 1993) (same, for Clean Air Act). To say that the agencies here have been inclined to compromise or go slowly would be an understatement; they have abdicated enforcement of the adult passage provisions altogether.

Shawmut still does not have a diversionary device even though it has been seven migration seasons since the KHDG Agreement requirements went into effect.⁵ LSW SF ¶¶ 81 (pageID #3880) (adult salmon transported upstream of Shawmut in 2006); LSW SF ¶ 234 (pageID #3905) (no diversionary device); Def. Supp. Mem., p. 12 (no diversionary device). (As Defendants themselves noted in June 2010, “adult Atlantic salmon...probably pass the [Shawmut] project via ...the turbines,” and “[b]ased on...qualitative river herring studies [done at Shawmut], it is probable that the existing sluice will not pass fish in sufficient numbers to get agency approval.” Pl. Supp. Opp. SUMF ¶ 35.) Defendants did not install a diversionary device at Weston until six migration seasons after the KHDG Agreement requirements had gone into effect, LSW SF ¶ 225 (pageID #3904), and at Lockwood until four migration seasons after the requirements had gone into effect LSW ¶ 200 (pageID #3900). Further, as the agencies themselves have concluded, the diversionary devices that have been installed have been plagued with problems, Def. Supp. Mem., pp. 9-15 (discussing many of those problems), have had to be removed on occasion, Defendants’ Opposition to Plaintiffs’ Statement of Undisputed Material Facts in 11-cv-35 (ECF Doc. 113-1) ¶ 38 (HK pageID #6689-6690); LSW SF ¶¶ 201 and 204

⁵ Seven years is calculated based on the summer 2012 close of the summary judgment record.

(LSW pageID #3900-3901), and simply are not up to the job of keeping fish out of the turbines on a fast-flowing river like the Kennebec, e.g. LSW SF ¶ 218 (pageID #3902-03) (“NMFS questions whether this technology can be effective behavioral guidance for migratory fish species” on the Kennebec River).

The fact that the signatory agencies to the KHDG Agreement have nonetheless chosen not to take up the cudgel and enforce the adult passage provisions of the Agreement has, as the First Circuit held in its review of this case, no bearing on Plaintiffs’ independent right to enforce those provisions. In the words of the First Circuit: “The parties to the Agreement cannot negotiate away the role that Congress intended for the court to play under the statute when it provided for citizen suits.” 11-cv-35 ECF No. 149, p. 16.⁶

IV. THE HYDRO KENNEBEC BIOLOGICAL ASSESSMENT DOES NOT ESTABLISH DEFENDANTS’ COMPLIANCE AT THAT PROJECT.

For Hydro Kennebec – unlike for Weston, Shawmut, and Lockwood – Defendants made no quantitative assessment as to the routes taken by adult salmon passing the Project. See Def.

⁶ Defendants also reference a July 2010 letter from a representative of the Federal Energy Regulatory Commission (“FERC”) opining, “NextEra is complying with the salmon [the letter does not mention shad] protection requirements of the Lockwood, Weston, and Shawmut licenses.” Def. Supp. Mem., pp. 15, 19. FERC was not a party to the KHDG Agreement, is not one of the “resource agencies” named in the Agreement, and is not entitled to deference on the issue because it has no role either in issuing water quality certifications or in administering the CWA. American Rivers, Inc. v. Federal Energy Regulatory Comm’n, 129 F.3d 99, 107 (2nd Cir. 1997). Further, the letter was not the product of rulemaking, and provides no interpretation or analysis of the language, structure, or purpose of the water quality certifications or the KHDG Agreement. It appears that the author simply accepted at face value NextEra’s assurance that it did not “desire” to pass salmon through its turbines. Ironically, just one month earlier, NextEra’s Robert Richter had stated in an internal memo that adult salmon likely pass through the turbines at the Shawmut Project, and that the existing debris sluice used for downstream passage likely “will not pass fish in sufficient numbers.” Pl. Supp. Opp. SUMF ¶ 35. See Christensen v. Harris Cnty., 529 U.S. 576, 586-87 (2000) (agency opinion letter is not entitled to deference, and is “entitled to respect” only to the extent it has the “power to persuade”) (citation omitted); Castro-Soto v. Holder, 596 F.3d 68, 73 (1st Cir. 2010) (agency guidance memorandum entitled to respect only “to the extent that it is persuasive.”).

Supp. Mem., pp. 7-8. Rather, in the Biological Assessment for Hydro Kennebec that they submitted to the FERC as part of the ESA process for salmon, Defendants cited to studies from the Penobscot River indicating that “[k]elts that approached powerhouse intakes” at the dams under study on that river “were deterred by trash racks” and thus did not enter the turbines. Plaintiffs’ Reply Statement of Undisputed Material Facts in 11-cv-35 (ECF Doc. 131) (“Pl. HK Reply SUMF”) ¶ 31 (HK pageID #7315-16). Defendants then “estimated ... 100% survival of *kelts which avoid turbines*” at Hydro Kennebec. Defendants’ Statement of Undisputed Material Facts in 11-cv-35 (HK ECF Doc. 106) ¶ 10 (HK pageID #6291) (emphasis added).

However, Defendants did not assert, much less demonstrate, that the spacing between the bars on the trash racks at the Penobscot dams is as wide as the spacing between the bars on the trash racks at Hydro Kennebec. Instead, the Defendants conceded in the Biological Assessment that the Hydro Kennebec trash racks “may not prevent entrainment of ... kelts.” Pl. HK Reply SUMF ¶ 31 (HK pageID #7315-16). The Hydro Kennebec Biological Assessment also cites to a kelt passage study done a mile downstream at Lockwood in 2007, in which 50% (3 of 6) of the kelts entering the Project’s forebay passed through Lockwood’s Kaplan (propeller-type) turbine. The trash rack screening the intake at that Lockwood turbine – like the trash racks screening the intakes at Hydro Kennebec’s Kaplan turbines – has a space of 3.5 inches between the bars. Id. While the adult salmon used in that 2007 study were hatchery-raised, and thus smaller than the wild-origin adult salmon that also come down the Kennebec, this study confirms that adult salmon (and adult shad, which are smaller, and closer to the size of hatchery-reared adult salmon) can access the Hydro Kennebec turbines. Pl. Supp. Opp. SUMF ¶ 24. And the fact that this study was cited in the Hydro Kennebec Biological Assessment demonstrates that Defendants know this is the case.

Defendants also assert that their employee Kevin Bernier stated that Defendants did not desire to pass salmon or shad through turbines. Def. Supp. Mem., p. 7. However, Mr. Bernier's actual testimony does not support this claim. Pl. Supp. Opp. SUMF ¶ 8. Indeed, when asked in deposition what downstream routes are taken by salmon and shad at Hydro Kennebec, his first answer, on both occasions, was "turbines." Id.

V. BURLINGTON NORTHERN DOES NOT SHIELD DEFENDANTS FROM LIABILITY.

Citing to Burlington Northern & Santa Fe Ry. Co. v. United States, 556 U.S. 599, (2009), Defendants argue that "[t]he fact that some fish may have gone through the turbines[] does not mean that Defendants desired that result." Def. Supp. Mem., p. 18. As outlined above, it is not simply the passage of fish through the turbines that evidences Defendants' desire. Moreover, Burlington Northern is of no help to Defendants. In Burlington Northern, a case dealing with "arranger" liability under the federal Superfund statute, the Supreme Court noted that "an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes." 556 U.S. at 605. Citing this language, the First Circuit (in an opinion cited with approval in that Court's decision in the case at bar, 11-cv-35 ECF No. 149, p. 9) has held that a company's knowledge that a purchaser of its scrap product would later dispose of that product as waste was one factor helping to establish that the company intended such disposal to occur. United States v. Gen. Elec. Co., 670 F.3d 377, 383 (1st Cir. 2012).

And while the Supreme Court concluded in Burlington Northern that a seller's knowledge that a purchaser of its chemicals likely would spill some quantities of them was not sufficient to make the seller an "arranger" of waste disposal under the circumstances of that case, the Supreme Court also made clear that its inquiry was very much fact-specific – and the critical

facts there differ markedly from Defendants' situation here. In Burlington Northern, the disposal of the chemical occurred "as a peripheral result" of its sale, and was caused by a third party. 556 U.S. at 612. Here, in contrast, fish go through Defendants' turbines as a *direct* result of Defendants' *own* decisions to utilize ineffective diversionary devices and to nonetheless operate their turbines during migration seasons without effective screening. In Burlington Northern, the only "disposal" of the product occurred as a result of "minor" and "accidental" spills. Id. Here, in contrast, Defendants' own studies and analyses indicate that passage through turbines is not a "minor" route of passage at Defendants' projects, but rather is a (and often *the*) principal means by which fish are passed downstream.

"In order to qualify as an arranger" of the disposal of a chemical product, the Supreme Court noted in Burlington Northern, the seller "must have entered into the sale...with the intention that at least a portion of the product be disposed of." Id. The undisputed record here indicates that Defendants *do* intend "at least a portion" of the fish to pass downstream through the turbines.

VI. THIS CASE EXTENDS TO BOTH ADULT SALMON AND ADULT SHAD.

Defendants assert that "this case concerns only adult Atlantic salmon," and that Plaintiffs "have offered no evidence relevant to shad." Def. Supp. Mem., p. 4, n.3. This is patently untrue. Defendants do not dispute that adult shad returning to the Kennebec from the ocean are trapped at Lockwood and trucked to spawning grounds upstream of Hydro Kennebec. Nor do Defendants dispute that these fish migrate back downstream after spawning. See Hydro Kennebec Answer (ECF No. 24) ¶ 39 (pageID #118); HK SF ¶¶ 66, 70 (pageID #5861]; LSW SF ¶ 82 (pageID #3880); Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts in 11-cv-38 (ECF No. 107) ¶ 12 (LSW pageID #4288-89) (starting in 2007, returning adult

American shad have been trucked to, and deposited in, spawning areas in the Kennebec River upstream of the Hydro Kennebec Project; adult shad swim down the Kennebec to the ocean after spawning, and must pass Hydro Kennebec and Lockwood to do so).

Moreover, there is direct evidence in the record that adult shad access the turbines at Hydro Kennebec and Lockwood. In June 2007, Normandeau Associates conducted a radio telemetry study of adult shad at the Lockwood Project on behalf of Defendants to evaluate downstream passage of those fish at Lockwood. Pl. Supp. SUMF ¶ 3 (pageID #7675). This study showed that adult shad accessed both the Francis and propeller-type turbines at Lockwood. Id. Since, as discussed above, the turbines at Hydro Kennebec are screened by trash racks with the same spacing as the trash racks screening the propeller-type turbine at Lockwood, adult shad can similarly be expected to access the turbines at Hydro Kennebec.

VII. THE PARTICIPATION OF ONE OF THE PLAINTIFFS IN A PRIOR ADMINISTRATIVE PROCEEDING HAS NO RELEVANCE TO THIS CASE.

Finally, Defendants claim one of the Plaintiffs previously and unsuccessfully “challenge[d] the sincerity of Defendants’ desire to pursue downstream passage by bypass and diversion” in a 2007 administrative proceeding before the Maine Board of Environmental Protection (“BEP”). Def. Supp. Mem., p. 19. In fact, that proceeding was not an action to enforce the KHDG Agreement provision at issue here – or to enforce the Agreement at all (indeed, the CWA does not authorize citizens to bring such an action before the BEP). Rather, Friends of Merrymeeting Bay, a Plaintiff in the case at bar, had petitioned the BEP to *amend* the water quality certifications for these dams. See Friedman v. Board of Envntl. Prot., 956 A.2d 97 (2008). Defendants, in fact, acknowledge as much. Def. Supp. Mem., p. 19 (describing the administrative action as arising from “a petition filed by Plaintiffs [sic] to...modify... the water

quality certifications”). This prior state administrative proceeding on a separate topic is simply irrelevant to the federal enforcement action now before the Court.

CONCLUSION

For the reasons set forth above and in previous filings, Defendants’ motion for summary judgment should be denied, and Plaintiffs’ motion for summary judgment should be granted.

Dated: October 20, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2014, I electronically filed Plaintiffs' Supplemental Opposition to Defendants' Motion for Summary with the Clerk of the Court using the CM/ECF system which will send notification of this filing to Defendants' counsel:

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