

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

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

**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ SUPPLEMENTAL
STATEMENT OF UNDISPUTED MATERIAL FACTS AND
DEFENDANTS’ ADDITIONAL SUPPLEMENTAL STATEMENT
OF UNDISPUTED MATERIAL FACTS**

Pursuant to Local Rule 56, and this Court’s Orders of September 8, 2014 (ECF 157 in 11-cv-35, and ECF 181 in 11-cv-38), Defendants submit the following Opposition to Plaintiffs’ Supplemental Statement of Undisputed Material Facts, and also submit their Additional Supplemental Statement of Undisputed Material Facts.¹

1. In December 2007, Normandeau Associates conducted a radio telemetry study of salmon adults at the Lockwood Project on behalf of Defendants to evaluate downstream passage of those fish at Lockwood. The immediate survival rate calculated from this study for salmon passing downriver through the Project’s “propeller” type turbine was 67% (2 of 3 fish), while the immediate mortality rate was 33% (1 of 3 fish). No measurement of injury or long-term (delayed) mortality was provided in this study. Rule 30(b)(6) Deposition of NextEra Energy Resources, LLC; NextEra Energy Maine Operating Services, LLC; FPL Energy Maine Hydro, LLC; and The Merimil Partnership by Robert

¹ Pursuant to Local Rule 56(g), any fact admitted herein is admitted for the sole purpose of resolving these matters on summary judgment.

Richter III in 11-cv-38, Vol. I (ECF 82-4) (“Richter Dep. I”) at 238:10-240:24 (pageID #3119) (describing study results); 245:12-15 (page ID #3120) (salmon study done by Normandeau for Defendants).

QUALIFIED. The study was conducted to determine routes used by kelts migrating downstream; it was never intended as a mortality study. It is suspect because a very limited number of kelts were used in the study, so the percentages do not necessarily reflect immediate survival for two out of every three fish or immediate mortality for one out of every three fish. The 2007 kelt telemetry study at Lockwood, which Plaintiffs fail to cite, was prepared before Defendants implemented diversion measures approved by the resource agencies for that facility.

2. Defendants believe that the results of this 2007 study of adult salmon at Lockwood are “suspect.” Hatchery-reared adult salmon, which were smaller than adult salmon that have returned from the sea, were used in the study, and the tags used were too big for these fish. Richter Dep. I at 49:14-51:3 (pageID #3071-72) (discussing 2007 adult salmon passage study, and also clarifying that the discussion pertains to this study and not to a 2011 salmon smolt passage study at Lockwood).

ADMITTED.

3. 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. The immediate survival rate calculated from this study for shad passing downriver through the Project’s “propeller” type turbine was 70% (7 of 10 fish), while the immediate mortality rate was 30% (3 of 10 fish). The immediate survival rate calculated from this study for shad passing downriver through the Project’s “Francis” type turbines was 73% (11 of 15 fish), while the immediate mortality rate was 27% (4 of 15 fish). No measurement of injury or long-term (delayed) mortality was provided in this study. Richter Dep. I at 241:24 - 243:4 (pageID #3119-20 (describing study results);

245:12-15 (pageID #3120) (study done by Normandeau for Defendants).

Qualified. This was not Mr. Richter's testimony. Plaintiffs' counsel was reading from a document that is not in the summary judgment record. Plaintiffs' statement of fact further mischaracterizes the deposition record, which does not include percentages of immediate mortality.

4. As of March 2012, the bypass flow at the Weston Project was kept at 2% of the flow through the project's turbines at all times during salmon migration season. Rule 30(b)(6) Deposition of NextEra Energy Resources, LLC; NextEra Energy Maine Operating Services, LLC; FPL Energy Maine Hydro, LLC; and The Merimil Partnership by Robert Richter III in 11- cv-38, Vol. II (ECF 82-5) at 553:25-554:7 (pageID #3199).

QUALIFIED. Since May of 2012, the flow rate at Weston has been at least 6% of the flow through the project's turbines, [LSWSF 113-114 (LSW3884)], 50% greater than the U.S. Fish & Wildlife Service standard of 4% of the turbine flow. [HK4593 Stetson Dep. 201:14-21].

5. The trash racks in front (upstream) of the turbine intakes at the Hydro Kennebec Project have a spacing of "three inches plus" between the bars. Rule 30(b)(6) Deposition of Brookfield Power US Asset Management, LLC; and Hydro Kennebec, LLC by Kevin Bernier in 11-cv-35 (ECF 89-8) at 99:9-100:1 (pageID # 4256-57).

QUALIFIED. Mr. Bernier's deposition indicates that he only "believes" the spacing to be "three inches plus" and does not know when the trash racks were installed. [HK4256 Bernier Dep. 99:12-21].

**DEFENDANTS' ADDITIONAL SUPPLEMENTAL STATEMENT
OF UNDISPUTED MATERIAL FACTS**

44. Section II of the 1998 Agreement Between Members of the Kennebec Hydro Developers Group ("Agreement) states:

"Purposes. This Agreement is intended to accomplish the following purposes: to achieve

a comprehensive settlement governing fisheries restoration, for numerous anadromous and catadromous species, that will rapidly assist in the restoration of these species in the Kennebec River after the termination on December 31, 1998 of the existing agreement between the State of Maine and the Kennebec Hydro Developers Group; to avoid extensive litigation over fish passage methodologies, timetables and funding; to assist in achieving the removal of the Edwards dam; and to fund the next phase of a restoration program for these species on the Kennebec River.”

Section III (B) of the Agreement states in part:

“The parties agree that, immediately after this Agreement . . . become[s] effective, they will make joint, formal filings to FERC, requesting that FERC:

1. incorporate all applicable terms of this Agreement into existing or proposed FERC licenses for hydropower facilities owned by the KHDG members;
2. only issue amended or new licenses for the KHDG facilities incorporating all applicable terms of this Agreement if, and at the same time, as FERC approves the transfer of the FERC license for the Edwards Dam . . . to the State of Maine; . . .
5. stay action on fish passage installation obligations at the . . . Lockwood and UAH-Hydro Kennebec facilities pending its decision on transfer of the FERC license for the Edwards Dam and incorporation of applicable terms of this Agreement into existing or proposed KHDG licenses.”

[HK716-17] (Agreement); [HK5609, 5639-42, 5657] (Natural Resources Policy Division, Maine State Planning Office, 2/93, “Kennebec Resource Management Plan, Balancing Hydropower Generation and Other Uses”).

45. Under the terms of the Agreement interim downstream measures were one of several phases of prioritized work that included removal of the Edwards Dam, upstream passage facilities at Lockwood project and two other facilities, interim downstream passage; upstream passage at the remaining facilities (Hydro Kennebec, Weston, and Shawmut) and permanent downstream passage. [HK715-733]; HK81 [HK1135, 1139] MDMR Kennebec River Anadromous Fish Restoration Annual Progress Report – 2006 (reporting that 2006 was the next phase in the fish restoration program after successfully moving fish “upriver for the first time since the inception of the Restoration Program; 1998 Agreement established new timelines for fish restoration than those previously established in a 1986 Agreement provided for seven hydropower facilities above Augusta).

46. Trash racks can also have a deterrent effect on fish entering turbines, even where the spacing between the trash rack bars exceeds the opening that fish might need to swim through. [HK4258] (Bernier Dep. 101:1-3) (“I know on our hydro-acoustic and camera studies, there were fish resisting going through the trash racks.”); [HK3116, 3112] (HK Draft BA) (“Kelts that approached powerhouse intakes were deterred by trashracks and sought alternative routes of passage, typically passing via spillage after hours to days at the site (GNP 1989, Hall and Shepard 1990).”); (“No adult fish were observed passing through the trashracks.”).

47. At hydro projects where diversion structures are in place, such as fish booms and trashracks, percentage of flow passed is not a proxy for the number of fish passed through turbines because fewer fish enter a project’s powerhouse area. Design criteria established by the USFWS suggest that a 4% rate is sufficient to provide adequate flows for bypass structures. Avoiding turbulence in bypass structures is important because fish avoid turbulence. [LSW3072-73] (Richter Dep. 53:9-12; 54:9-56:11); [LSW1157] (Weston White Paper) (“A basic

implication of the deviation from the 1:1 assumption is that if a proportionally smaller percentage of Smolts relative to the river flow enter the Project powerhouse area then the calculated station-related Smolt survival would be higher. Under these conditions, a greater percentage of smolts would pass the project via spill and would avoid impacts associated with turbine passage.”); [HK4593] (Stetson Dep. 201:14-21); [HK 3120, 3112]; (HK Draft BA) (“Hydraulics are particularly important in the design of passage structures, since smolts avoid hydraulic breaks, turbulence, and areas of very high velocity.”); (modifications made to boom to minimize turbulence).

48. When safety concerns prohibited Defendants from re-installing booms by boats during periods of high flows, Defendants also constructed a platform from which to re-install the booms more expeditiously, thereby further expediting the return of bypass efforts. HK63 [2890-91] (3/31/11 Bernier letter to FERC) (“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. A spare fish boom is also now available in the event that the primary boom is ripped by high flows or debris.” 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.”)

49. Employees from NextEra and Brookfield discussed the Tuffbooms at various projects. 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. [LSW3080] (Richter Dep. 82:21-83:15); [HK4247-48] (Bernier Dep. 90:23-91:25); [LSW3100] (Richter Dep. 165:15-24; [LSW3101] (Richter Dep. 166:8-20).

50. The White Papers noted the “lack of downstream bypass efficiency studies for Atlantic salmon kelts” and instead relied primarily on extrapolations and figures developed at other facilities. [LSW907-08] (Lockwood White Paper); [LSW1033-34] (Shawmut White Paper) (same); [LSW1162-63] (Weston White Paper) (same).

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

/s/ Matthew W. Morrison

Matthew W. Morrison
Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, N.W.
Washington, D.C. 20037-1122
matthew.morrison@pillsburylaw.com

/s/ George T. Dilworth

George T. Dilworth
Drummond Woodsum & MacMahon
84 Marginal Way
Portland, Maine 04101
(207) 772-1941
tdilworth@dwmlaw.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

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

/s/ George T. Dilworth

George T. Dilworth