

Ms. Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission (FERC)  
888 First Street, NE  
Washington, DC 20426

FILED ELECTRONICALLY

**RE: Petition for Commission Action to Protect Migrating Adult Atlantic salmon at the Benton Falls Hydroelectric Project, Sebasticook River, Benton, Maine. FERC Project No. 5073.**

May 1, 2010

Dear Secretary Bose,

Pursuant to Commission Rule 207 (§385.207(a)(5)), Friends of the Kennebec Salmon and Douglas H. Watts, as an individual citizen, Friends of Merrymeeting Bay and Ed Friedman, as an individual citizen, hereby petition the Commission to require the turbine screens installed at the Benton Falls Project to remain in place year-round to protect migrating adult Atlantic salmon, as required by the U.S. Endangered Species Act.

**United States of America**  
**before the**  
**Federal Energy Regulatory Commission**

Benton Falls Associates

Project No. 5073

PETITION FOR YEAR-ROUND PROTECTION of ATLANTIC SALMON  
at BENTON FALLS PROJECT, SEBASTICOOK RIVER, Maine.

Pursuant to Commission Rule 207 (§385.207(a)(5)), Friends of the Kennebec Salmon, Douglas H. Watts, Friends of Merrymeeting Bay and Ed Friedman file this Petition requesting the Commission require the licensee keep in place turbine screens at the project year-round to protect downstream migrating adult Atlantic salmon. Rule 207 allows Petitioners to file a petition when seeking "any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading."<sup>1</sup>

**I. Description of Parties.**

Friends of the Kennebec Salmon is a volunteer organization founded in 1996 to

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<sup>1</sup> Petitioners have a right to appeal and judicial review if the Commission denies or declines to take action on a Petition filed under §385.207(a)(5). See: *In re: American Rivers and Idaho Rivers United*, 03-1122; *Southwest Center for Biological Diversity v. FERC*, 967 F. Supp. 1166: "Clearly, Plaintiff has avenues by which the opportunity to appeal a denial may be created. See 18 C.F.R. § 385.207(a)(5) (providing for the petitioning of any action which is in the discretion of the Commission and for which the Code of Federal Regulations prescribes no other form of pleading); *United States Dept. of Interior v. FERC*, 952 F.2d at 547. The Commission's action or inaction accordingly is then subject to judicial review." See also: *United States Dept. of Interior v. FERC*, 952 F.2d at 547: "When conditions are inserted into the license by FERC, they become integral, substantive parts of the license. As contemplated by the plain language of the license clause, any party, including petitioners here, may petition FERC to enforce the license conditions or exercise its retained authority under the reopener clause. The Commission's action, or lack thereof, would then be subject to judicial review."

protect and restore the native Atlantic salmon of the Kennebec River. The organization is based in Augusta, Maine and has been an active participant in Commission licensing and other regulatory proceedings at the Benton Falls Dam and other nearby dams in regards to the effects of these dams on the welfare of Atlantic salmon and other native fish species.

Douglas H. Watts is a resident of Augusta, Maine and a member of Friends of the Kennebec Salmon. He is an avid user of the Kennebec and Sebasticook Rivers and has demonstrated a long-term interest in the welfare of Atlantic salmon and other native fish species in these rivers and has been an active participant in Commission licensing and other regulatory proceedings at the Benton Falls Dam and the Fort Halifax Dam regarding the impact of these dams on native migratory fish species including American eel, alewives and Atlantic salmon in the Sebasticook River.

Friends of Merrymeeting Bay (“FOMB”) is a Maine non-profit corporation dedicated to protecting the ecological, aesthetic, historical, recreational and commercial values of Merrymeeting Bay (the “Bay”). FOMB works to preserve and protect ecosystems of the Bay through education, land conservation, research, advocacy, and membership events. The geographic area of concern for FOMB is the mid-coast Maine riverine delta and watershed consisting of the Kennebec, five other Maine rivers and their tributaries including the Sebasticook. FOMB has over 450 members who use and enjoy these rivers. FOMB members are concerned about the declining American eel and Atlantic salmon populations and have worked actively through educational, regulatory and legal means to halt threats to these and other diadromous species in the Merrymeeting Bay watershed. FOMB first contacted FERC on October 17, 2004 regarding eel kills on the Sebasticook at Benton Falls [ RE: Ongoing Killing of Adult American Eels at the Benton Falls Project, Sebasticook River, Maine. FERC No. 5073. Ref. Original Docket # P-11472-017]. The group has also engaged in costly

contaminant analyses of eels killed by Benton turbines.

FOMB member and Chairman Ed Friedman is a long-time Maine guide with a kayaking business along Merrymeeting Bay. He has conducted kayaking tours and instruction in Merrymeeting Bay and on the Kennebec River since the mid 1980s. He has also conducted tours by skiff and provided interpretive guiding services for various groups such as Maine Audubon and Mid-Coast Senior College on charter boats coming up the river. These services Mr. Friedman conducts on the Bay and rivers are a significant part of his business. The negative effects of hydroelectric dams on migratory fish native to the Kennebec River adversely affects his livelihood, which is based in large part on a healthy population of native fish present in the unique system of Merrymeeting Bay.

## **II. Statement of Issues.**

Protective fish screens at the Benton Falls Dam were first installed in 2006 after the Petitioners, state fisheries agencies, the licensee and others repeatedly documented large numbers of adult American eels, juvenile alewives and other fish killed and injured by the turbines of the dam.<sup>2</sup>

Until 2009, anadromous Atlantic salmon did not have access to the Benton Falls dam because the Fort Halifax Dam, five and one half miles below, had no passage for Atlantic salmon. In the late summer of 2008, the Fort Halifax Dam was removed from the Sebasticook River. 2009 was the first year that Atlantic salmon had access to the Benton Falls Dam, which is equipped with an upstream fishlift and sorting facility.

In June 2009, anadromous Atlantic salmon in the Kennebec and Sebasticook

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<sup>2</sup> A full documentary history of fish kills at the Benton Falls project is included in the Evidentiary Appendices attached to this filing.

Rivers were declared an endangered species under the U.S. Endangered Species Act by the Depts. of Interior and Commerce (74 FR 29344, 06/19/2009).

During the summer of 2009, Benton Falls project personnel and state fisheries agencies passed four adult anadromous Atlantic salmon at the Benton Falls fishlift and sorting facility.<sup>3</sup> These were the first four Atlantic salmon to have passed Benton Falls in more than 170 years.<sup>4</sup>

These four adult salmon were captured in the lift, measured, had scale samples and genetic data taken, and were released above the dam to spawn in the fall. These salmon will migrate back downstream past the Benton Falls dam to the Atlantic Ocean in the spring of 2010 as post-spawned kelts. Downstream kelt migration typically occurs in Maine in the spring, from April to early June.<sup>5</sup>

Past experience at the Benton Falls project shows the project turbines, when not fully screened, are lethal to large-bodied fish (American eel) and small bodied fish (juvenile alewives).<sup>6</sup> Past experience shows the surface bypass weir installed at the dam does not prevent large-bodied fish from swimming through the turbines and being killed. This is the reason why the licensee in 2006 installed protective screening at the Benton Falls dam turbines to prevent large fish such as adult American eel from coming in contact with the blades of the project turbines (Order Approving Upstream and Downstream Eel Passage Plan and Effectiveness Study, Nov. 7, 2006, 117 FERC ¶ 62,131).

<sup>3</sup> Maine Atlantic Salmon Commission 2009 run count at [http://www.maine.gov/asc/research/trap\\_count\\_stats.shtml](http://www.maine.gov/asc/research/trap_count_stats.shtml).

<sup>4</sup> The Fort Halifax Dam was fully breached and removed in late 2008, after the upstream Atlantic salmon migration season had passed.

<sup>5</sup> Historic records show that prior to overfishing and damming in the early to mid 19th century, the Kennebec River Atlantic salmon population contained a large number of repeat spawning Atlantic salmon, ranging in size from 18 to 22 pounds or more. In the late 18th century, Col. William Lithgow of Winslow identified Ticonic Falls at Waterville, at the mouth of the Sebasticook River, as a winter refugia for post-spawned Atlantic salmon. Salmon of eight pounds in the Sebasticook were considered “small salmon” by early settlers. *See*: Watts, D.H. et al. 2005. Petition to List Kennebec River Atlantic Salmon as an Endangered Species under the U.S. Endangered Species Act, attached in the Evidentiary Appendices; also, Fisher, C.E. 1970. History of Clinton, Maine. Kennebec Journal Press. Augusta, Maine. accessed at Atlantic Salmon History Project, <http://www.kennebecriverartisans.com/kennebec.org/fks/sebasticook.html>

<sup>6</sup> *See*: In the Matter of Benton Falls Associates ..., 2000 Me. ENV. LEXIS 40 (Aug. 17, 2000).

Without the protective screens in place at the turbine intakes year-round, it is likely that the adult Atlantic salmon passed above the dam in summer 2009 will enter the turbines this spring and be killed; and adult salmon passing the dam in summer 2010 and subsequent years will be killed as they attempt to migrate downstream during the spring.

If the protective screens now put in place during the fall eel migration season are left in place year-round, the risk of down-migrating adult Atlantic salmon being killed in the turbines at Benton Falls will be zero, since the salmon will be physically unable to contact the turbines.

### **III. Need for This Action.**

Petitioners support the licensee's 2009 plan to fully screen both turbines at the Benton Falls project to protect migrating fish from contact with the dam turbines . The one omission in the Commission's Feb. 24, 2010 Order and licensee's plan is that the protective screens at the Benton Falls turbines are only required to be installed and operated from Sept. 1 to Nov. 30 annually (130 FERC ¶ 62,161)

Petitioners attempted in March 2010 to seek the schedule changes requested here by filing a timely Motion for Rehearing of the Commission's 2010 Order approving screening of Turbine Intake #2. This Motion was denied by the Commission because it held Petitioners lacked standing to file a Motion for Rehearing, or to even intervene in that proceeding. (131 FERC ¶ 61,038)<sup>7</sup>

This Feb. 24, 2010 Commission Order approves the licensee's installation of protective screening over turbine unit 2 so it can be operated at night during the fall American eel migration season. Although the turbine screening at Unit #1 was

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<sup>7</sup> Because of the Commission's recent denial of our Motion for Rehearing, Petitioners meet the standard of §385.207(a)(5) which states they may file a petition when seeking "any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading."

first installed in response to the death of significant numbers of American eel in the project turbines, it is obvious that all downstream migrating fish require protection from these turbines and will benefit from the turbine screens, including anadromous Atlantic salmon and adult American shad.<sup>8</sup>

The Commission approved Sept. 1 to Nov. 30 operation schedule for the protective screens provides no protection to Atlantic salmon kelts during their downstream migration period to the Atlantic Ocean and allows them free access to the project turbines, where past experience with adult American eel shows they will be entrained and killed.

Petitioners request the Commission amend its Feb. 24, 2010 Order to require the protective screens at turbine units 1 and 2 be installed and operated year-round to protect downstream migrating anadromous Atlantic salmon which now inhabit the Sebasticook River above the Benton Falls project.

The Commission has authority to change the installation and removal dates of the turbine screens. In its 2006 administrative order approving the plan to install the screens, the Commission reserved authority to alter the schedule, stating: "Please note that a substantial or permanent alteration of the dates would require an amendment of the schedule, but modifying the schedule several days or a week based on migratory patterns, streamflows, weather conditions, etc. should not affect the overall rationale of the plan." (117 FERC ¶62,131 at 5)

Changing the installation and operation dates for the turbine screens from Sept. 1 to Nov. 30 to year-round does not require any amendment to the federal license issued to Benton Falls Associates. Licensee's request to install the turbine screens in 2006 and 2010 did not require any amendment to the underlying license.

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<sup>8</sup> In 2009, eight adult American shad were passed at the Benton Falls Dam requiring safe downstream passage at the dam after spawning in mid-summer: <http://www.maine.gov/dmr/searunfish/kennebec/index.htm>

Instead, these proposals, which Petitioners strongly support, only required an administrative order from the Commission under its reserved licensing authority pursuant to Ordering Paragraph D of the Benton Falls license and the Kennebec Hydro Developers Group Settlement Accord as approved by the Commission in 1998. *See*: 117 FERC ¶ 62,131.

Year-round installation and operation of the turbine screens at Benton Falls will physically prevent any adult Atlantic salmon from contacting the project turbines and eliminate any chance they will be killed in them. This schedule will also protect post-spawned adult alewives, blueback herring and American shad which migrate above the dam in spring and early summer and migrate back downstream in June and July. Petitioners submit photographic evidence that some adult silver-phase American eels begin their downstream migration prior to Sept. 1. We include a photograph of a severely injured silver-phase American eel found in a back eddy of the Sebasticook River several miles below the Benton Falls Dam on August 20, 2008.

#### **V. Licensee's March 26, 2010 Response**

In its March 26, 2010 Reply Comments to the Commission, the Benton Falls licensee states the 2006 and 2010 Commission approvals for turbine screening were not intended to address downstream Atlantic salmon passage and as such, the fate of adult Atlantic salmon swimming downstream past the Benton Falls Dam is not “germane.”

To address Benton's procedural concerns, we submit this Rule 207 petition. Benton Falls Associates are aware there were no Atlantic salmon in the Sebasticook River to be passed at the Benton Falls Dam in 2006, or 2007 or 2008, due to the lack of fish passage at the Fort Halifax Dam and at the Benton Falls

Dam during these years. We admitted this fact in our March 19 letter. The sole subject of our March 2010 letter was to note there are adult Atlantic salmon in the Sebasticook River above the Benton Falls Dam right now, as the licensee is well aware, since its employees passed these salmon over its dam this past summer, and these salmon require safe downstream passage at the Benton Falls Dam pursuant to the U.S. Endangered Species Act to return to the Kennebec River and the Atlantic Ocean to continue their natural lifecycle.

In their March 26, 2010 response, Benton states: “Mr. Watts has not shown that what Benton Falls proposes is inconsistent with the Plan, License or Settlement – because he cannot. Mr. Watts must not be permitted to pursue his agenda without regard to the processes and scope of proceedings and without regard to the rights of licensees to operate their projects pursuant to a validly issued and effective license.”

Benton misses the sole purpose of our March 19, 2010 letter to the Commission: we want to keep adult Atlantic salmon now above the Benton Falls Dam from being killed in the Benton Falls Dam turbines as the salmon migrate back downstream.

This feint by Benton does not absolve them from their legal duty under the U.S. Endangered Species Act to not kill these federally protected animals in their turbines. Petitioners here, and in our March 19 letter, propose a simple, cost-effective method to protect the lives of these Atlantic salmon: leave the turbine screens in place at the Benton Falls Dam during the spring Atlantic salmon kelt migration.

Benton does not explain why this is not a feasible solution, does not explain why or how adult Atlantic salmon are not susceptible to turbine mortality if the

turbines are unscreened, and does not explain why it is so hostile to such a simple remedy, which would avoid killing these Atlantic salmon and avoid a criminal violation of the U.S. Endangered Species Act.

## **VI. Evidentiary Appendices included as attachments.**

1. Photographs of a severely dam-injured female American eel two miles below Benton Falls Dam, Sebasticook River, August 20, 2008. The female pregnant eel was still breathing but could not move when we found her during a Sunday canoe trip with my family. Photos taken by Douglas and Lori Watts.
2. Letter of Friends of Kennebec Salmon dated August 20, 2004 on fish kills at Benton Falls Dam.
3. Letter of Commission to Benton Hydro Associates dated September 8, 2004 on fish kills at Benton Falls Dam.
4. Letter of Friends of Kennebec Salmon dated October 16, 2004 on severe fish kills at Benton Falls Dam.
5. Letter of Friends of Merrymeeting Bay dated October 17, 2004 on severe fish kills at Benton Falls Dam.
6. Letter of Kennebec Coalition dated Nov. 1, 2004 on severe fish kills at Benton Falls Dam.
7. Letter of Friends of Kennebec Salmon dated July 1, 2005 on inadequacy of downstream fish passage protection measures at Benton Falls Dam.

8. Letter from Maine DEP dated April 4, 2005 on severe eel kills at Benton Falls Dam.

9. Letter from Maine Congressman Tom Allen dated April 19, 2005 on FERC's failure to answer letter of Friends of Merrymeeting Bay dated October 17, 2004 on severe fish kills at Benton Falls Dam.

10. Watts, D.H. et al. 2005. Petition to List Kennebec River Atlantic Salmon as an Endangered Species under the U.S. Endangered Species Act,

## **VII. Conclusion.**

Petitioners request the Commission use its reserved authority to instruct the Benton Falls licensee to leave its turbine screens in place year-round to prevent the maiming and killing of endangered adult Atlantic salmon in the Benton Falls project turbines to prevent violations of the United States Endangered Species Act at the Benton Falls dam.

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Ed Friedman, chair  
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Douglas H. Watts, as an individual, acting in this matter *pro se*.

Ed Friedman, as an individual, acting in this matter *pro se*.