

DAVID A. NICHOLAS
ATTORNEY AT LAW

20 WHITNEY ROAD
NEWTON, MASSACHUSETTS 02460
TELEPHONE (617) 964-1548 FAX (617) 663-6233
EMAIL: dnicholas@verizon.net

November 5, 2010

BY CERTIFIED MAIL - RETURN RECEIPT REQUESTED

F. Mitchell Davidson
President and Chief Executive Officer
NextEra Energy Resources, Inc.
700 Universe Boulevard
Juno Beach, Florida 33408

Kirk Toth
General Manager
NextEra Energy Maine Operating Services, LLC
26 Katherine Drive
Hallowell, Maine 04347

The Merimil Limited Partnership
c/o Charles S. Schultz
Kennebec Hydro Resources, Inc.
700 Universe Boulevard
Juno Beach, Florida 33408

Dear Sirs:

This letter is written on behalf of Friends of Merrymeeting Bay, Douglas Watts, and Environment Maine (collectively, "Citizens"). It supplements letters sent by Friends of Merrymeeting Bay and Mr. Watts (along with Ed Friedman) on July 9, 2010 and August 27, 2010 letter.

Citizens write this letter to notify NextEra Energy Resources, Inc. and NextEra Energy Maine Operating Services, LLC (collectively, "NextEra") that they are (1) violating the "take prohibition" provision of the Endangered Species Act ("ESA") at hydroelectric dams they own and operate on the Kennebec River and the Androscoggin River, and (2) violating water quality certifications issued under section 401 of the Clean Water Act ("CWA") for hydroelectric dams they own and operate on the Kennebec River. This letter also notifies The Merimil Limited Partnership ("Merimil") that it is violating the take prohibition provision of the ESA at the dam it owns on the Kennebec River, and is also violating the CWA section 401 water quality certification issued to that dam.

I. ENDANGERED SPECIES ACT VIOLATIONS AT
KENNEBEC RIVER AND ANDROSCOGGIN RIVER DAMS

The Gulf of Maine Distinct Population Segment (“GOM DPS”) of Atlantic salmon is on the Endangered Species List because it is in danger of becoming extinct. The Atlantic salmon population of the Kennebec and Androscoggin Rivers are part of the GOM DPS and thus are protected under the ESA. The portions of the Kennebec and Androscoggin Rivers where the Weston, Shawmut, Lockwood and Brunswick dams are located are so important to the recovery of Atlantic salmon that the U.S. Fish and Wildlife Service (“USFWS”) and the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (“NMFS”) included them in the area designated as “critical habitat” for the salmon. 74 Fed. Reg. 29,300 (June 19, 2009).

As detailed below, NextEra is violating the ESA’s prohibition against a “take” of endangered species, 16 U.S.C. § 1538(a)(1)(B), by taking Atlantic salmon at three dams on the Kennebec River -- Weston dam in Skowhegan, Shawmut dam in Fairfield, and Lockwood dam in Waterville -- and at the Brunswick dam on the Androscoggin River, in Brunswick. NextEra owns and operates the Weston, Shawmut and Brunswick dams, and operates the Lockwood dam. Merimil is violating the ESA’s prohibition against a take of endangered species by taking Atlantic salmon at the Lockwood dam, which it owns.

“Take” is defined in the ESA as follows: “The term ‘take’ means to harass, harm, pursue, hunt, shoot, kill, trap, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). By USFWS regulation,

Harass in the definition of “take” in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

50 C.F.R. § 17.3. Also by USFWS regulation,

Harm in the definition of “take” in the Act means an act which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

Id. Further, NMFS has defined “harm” to include habitat modification when a causal link is established between the habitat modification and the injury or death of listed species. 40 C.F.R. § 222.102. In publishing that rule, NMFS gave examples of activities that may cause harm and thus a take:

1. Constructing or maintaining barriers that eliminate or impede a listed species’ access to habitat or ability to migrate;

* * *

4. Removing or altering rocks, soil, gravel, vegetation or other physical structures that are essential to the integrity and function of a listed species' habitat;

* * *

5. Removing water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding or other essential behavior patterns;

* * *

7. Constructing or operating dams or water diversion structures with inadequate fish screens or fish passage facilities in a listed species habitat...

64 Fed. Reg. 60,727, 60,730 (Nov. 8, 1999).

NextEra's and Merimil's Kennebec and Androscoggin River dams harass, harm and kill - and thus take - Atlantic salmon in a number of ways. Among these are the following:

1. The dams' turbines kill and injure salmon when the salmon attempt to pass through them.
2. The dams severely limit passage of salmon, preventing access to significant amounts of spawning and rearing habitat.
3. Passage facilities cause delays resulting in incremental losses of salmon smolts, pre-spawn adults, and adults.
4. The dams are barriers to migration of other diadromous species whose presence is necessary for the salmon to complete their life cycle.
5. The dams adversely alter predator-prey assemblages, and negatively affect predator detection and avoidance.
6. The dams create slow-moving impoundments in formerly free-flowing reaches. These altered habitats are less suitable for spawning and rearing of salmon and contribute to the dams' significant impairment of essential behavior patterns. In addition, these conditions may favor non-native competitors at the expense of the native salmon.
7. The dams result in adverse hydrological and geomorphological changes, interruption of natural sediment and debris transport, and changes in water temperature, all of which contribute to the dams' significant impairment of essential behavior patterns.

In their decision to include the Kennebec and Androscoggin River populations of Atlantic salmon on the Endangered Species List, the USFWS and NMFS (collectively, the “Services”) emphasized the role of dams in imperiling the salmon. The Services stated: “The National Research Council stated in 2004 that the greatest impediment to self-sustaining Atlantic salmon populations in Maine is obstructed fish passage and degraded habitat caused by dams...Dams are known to typically kill or injure between 10 and 30 percent of all fish entrained at turbines [cite omitted]. With rivers containing multiple hydropower dams, these cumulative losses could compromise entire year classes of Atlantic salmon...Thus, cumulative losses at passage facilities can be significant...Dams remain a direct and significant threat to Atlantic salmon.” 74 Fed. Reg. at 29362. Similarly, the Services stated: “Dams are among the leading causes of both historical declines and contemporary low abundance of the GOM DPS of Atlantic salmon [cite omitted].” The Services also stated that the “effects [of dams] have led to a situation where salmon abundance and distribution has been greatly reduced, and thus the species is more vulnerable to extinction...Therefore, dams represent a significant threat to the survival and recovery of the GOM DPS.” 74 Fed. Reg. at 29366-29367.

The ESA allows the Services, under certain circumstances, to permit “any taking otherwise prohibited by 16 U.S.C. § 1538(a)(1)(B)...if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). Neither NextEra nor Merimil has permits for their dams nor even applied for them yet.

The take prohibition in the ESA is enforceable in the United States District Court by citizens. 16 U.S.C. § 1540(g)(1)(A). The Citizens intend to file suit against you to secure appropriate relief for your violations of the ESA take prohibition.

II. SECTION 401 WATER QUALITY CERTIFICATION VIOLATIONS AT KENNEBEC RIVER DAMS.

Under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, hydroelectric dams must obtain a state “water quality certification” before obtaining a license to operate from the Federal Energy Regulatory Commission (“FERC”). A water quality certification must contain conditions that ensure the licensee will comply with state water quality requirements. 33 U.S.C. 1341(d). A violation of a water quality certification is enforceable in United States District Court by citizens. 33 U.S.C. § 1365(a) and (f)(5).

NextEra is violating the water quality certifications issued for the Lockwood, Weston and Shawmut dams, on the Kennebec River. Merimil is violating the water quality certification issued for the Lockwood dam. Specifically, NextEra and Merimil are violating the following provision, which is in each of the water quality certifications for the three dams:

INTERIM DOWNSTREAM FISH PASSAGE: The applicant [dam owner] shall continue and where needed improve existing operational measures to diminish entrainment, allow downstream passage, and eliminate significant injury to out-

migrating anadromous fish in accordance with the terms of the KHDG [Kennebec Hydro Developers Group] Settlement Agreement.

The KHDG Settlement Agreement, in turn, provides:

In the event that adult shad and/or adult Atlantic salmon begin to inhabit the impoundment above the [dam], and to the extent that [the dam owner] desires to achieve interim downstream passage of out-migrating adult Atlantic salmon and/or adult shad by means of passage through turbine(s), [the dam owner] must first demonstrate through site-specific quantitative studies designed and conducted in consultation with the resource agencies [which include the National Marine Fisheries Service and the U.S. Fish and Wildlife Service], that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed).

In every year starting in 2006, adult salmon returning from the ocean have been trapped below the Lockwood dam (the most downstream dam on the Kennebec River) and transported in trucks upstream to the Sandy River, a tributary to the Kennebec River above the Weston dam. After spawning, these salmon attempt to “out-migrate” down the Kennebec toward the sea. During this out-migration, the adult salmon inhabit the impoundments above the Weston, Shawmut and Lockwood dams. At each of these dams, NextEra and (with respect to the Lockwood dam) Merimil have chosen to achieve (or attempt to achieve) downstream passage of adult salmon through the dams’ turbines.¹ However, NextEra and Merimil have not first demonstrated with site-specific studies that turbine passage will not cause “significant injury and/or mortality (immediate or delayed).” Thus, NextEra and Merimil are violating the above-referenced terms of the CWA water quality certifications. It is likely that these violations have been ongoing since 2006, when some of the transported salmon likely started to migrate downstream.

Similarly, starting in 2010, adult shad have been trapped below the Lockwood dam and transported in trucks to a point in the Kennebec River below the Shawmut dam. Like salmon, shad out-migrate down the Kennebec after spawning, and NextEra and Merimil have likewise chosen to pass these shad through the Lockwood dam turbines without first demonstrating with site-specific studies that turbine passage will not cause “significant injury and/or mortality (immediate or delayed).” This constitutes a separate violation of the terms of the CWA water quality certifications.

It should be noted that the Citizens do not believe that the required site-specific studies would show that turbine passage at any of the dams can be accomplished without significant injury or mortality.

The Citizens intend to file suit against NextEra and Merimil to secure the appropriate relief under federal law for these violations of the CWA.

¹ Installation of a partial deflection curtain at Lockwood is insufficient to preclude turbine passage.

If you believe any of the above information is in error, or if you believe you are in compliance with the Endangered Species Act, or if you believe you are in compliance with your Clean Water Act water quality certifications, or if you have any questions concerning this letter or the described violations, please contact me as soon as possible. In addition, the Citizens are available to meet to discuss the issues raised in this letter on November 17, 19, 23, and November 30-December 3.

Sincerely,



David A. Nicholas

Additional Legal Counsel

Joshua R. Kratka
National Environmental Law Center
44 Winter Street 4th Floor
Boston, Massachusetts 02108
(617) 747-4333

Bruce M. Merrill
225 Commercial Street 5th Floor
Portland, Maine 04101
(207) 775-3333

Addresses of Citizens

Friends of Merrymeeting Bay
P.O. Box 233
Richmond, Maine 04357
(207) 666-3372

Douglas H. Watts
131 Cony Street
Augusta, Maine 04330
(207) 622-1003

Environment Maine
142 High Street Suite 421
Portland, Maine 04101
(207) 253-1965

cc by certified mail return receipt requested

Secretary Gary Locke
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

Secretary Ken Salazar
U.S. Department of Interior
1849 C Street, NW
Washington, D.C. 20240

Administrator Lisa Jackson
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Curt Spalding, Regional Administrator
U.S. EPA, Region 1
5 Post Office Square, Suite 100
Boston, Massachusetts 02109-3912

Acting Commissioner Beth Nagusky
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

CT Corporation
One Portland Square
Portland, Maine 04101 (registered agent for NextEra
Energy Maine Operating Services, LLC and
The Merimil Limited Partnership)

The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, Delaware 19801
(registered agent for NextEra Energy Resources, Inc.)