

Friends of Merrymeeting Bay

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FEDERAL APPEALS COURT DEALS SETBACK TO MAINE HYDRO DAM OWNER, IN SALMON PROTECTION LAWSUIT

First Circuit Court Of Appeals Reverses Dismissal Of Conservation Groups' Suit Against Brookfield Asset Management Affiliates

Suit To Protect Fish From Hydro Turbines At Four Dams On The Kennebec River Sent Back To Trial Court In Portland

The federal First Circuit Court of Appeals in Boston yesterday reversed the dismissal of a Clean Water Act (CWA) lawsuit brought by two conservation groups to save Atlantic salmon and American shad from the turbines of four hydroelectric dams on the Kennebec River.

The lawsuit is being brought by Friends of Merrymeeting Bay (FOMB) and Environment Maine, against affiliates of Brookfield Asset Management. The CWA allows citizens to directly sue alleged violators of the Act.

The groups' lawsuit claims Brookfield is violating the requirements of "water quality certifications" governing the operations at four of its Kennebec River hydroelectric facilities: Lockwood, Hydro Kennebec, Shawmut, and Weston. The certifications state to the extent Brookfield "desires" to provide downstream passage of migrating adult Atlantic salmon (on the Endangered Species List) or adult American shad through turbines, Brookfield must first demonstrate through on-site studies turbine passage will not result in "significant injury and/or mortality (immediate or delayed)."

As Ed Friedman, Chair of FOMB, explained: "The certifications take the common sense view it is unsafe for adult salmon and shad to swim through rapidly spinning turbine blades, and the burden is on Brookfield to prove otherwise with scientific evidence."

The groups claim Brookfield knowingly allows (and thus "desires") adult salmon and shad to pass downstream through the turbines at all four dams, and Brookfield admits it has not conducted the necessary studies to prove that turbine passage is safe. United States District

Judge George Z. Singal nonetheless granted “summary judgment” against the groups in 2013, ruling that Plaintiffs could not prove their case. At the time, he also then ruled against the groups Endangered Species Act claims of illegal take on both Kennebec and Androscoggin rivers. This despite such evidence as the only downstream passage at the Brunswick’s 935’ dam besides the turbines, is an 18” round hole. The two groups only appealed the Clean Water Act portion of their suit which applied just to the Kennebec dams.

The First Circuit Court of Appeals, however, reversed the CWA decision, ruling that Judge Singal failed to consider evidence relevant to Plaintiffs’ claim. Judge Singal failed to take into account evidence Brookfield’s turbine bypass systems are, in fact, ineffective, and evidence that Brookfield knows they are ineffective, yet continues to rely on them. The Court of Appeals sent the case back to Judge Singal for further proceedings.

“If Brookfield simply can’t keep adult fish out of its turbines, they should shut off the turbines during migration season,” said Friedman. “Without safe dam passage for salmon and shad, these species will not recover,” he added.

Emily Figdor, director of Environment Maine, said, “Brookfield is required to operate its dams in strict compliance with all federal laws, including the ones designed to protect Maine’s precious natural resources. As long as Brookfield continues to violate its water quality certifications, we will be in court to fight for strict enforcement on behalf of the public.”

Brookfield Asset Management is a Canadian company with nearly \$200 billion in assets under management. Its affiliates own nearly half of the hydroelectric generating capacity in Maine.

Friends of Merrymeeting Bay is a non-profit organization dedicated to preserving through research, advocacy, land conservation and education the ecological, aesthetic, historical, recreational and commercial values of Maine’s Merrymeeting Bay and its watershed, which includes the Kennebec and Androscoggin Rivers.

Environment Maine is a citizen-based environmental advocacy organization with more than 20,000 current members and supporters that works to preserve Maine’s open spaces, protect clean air and water, and move the state toward a clean energy future.

The groups are represented by David A. Nicholas of Newton, Massachusetts; Joshua R. Kratka, and Charles C. Caldart of the National Environmental Law Center; and Bruce M. Merrill, of Portland, Maine.

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