

DISTRICT OF MAINE  
UNITED STATES DISTRICT COURT

FRIENDS OF MERRYMEETING BAY AND	)	
ENVIRONMENT MAINE,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Docket No. 11-cv-00035-GZS
	)	
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.	)	

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

Plaintiffs have the following responses and objections to Defendants’ Supplemental Statement of Undisputed Material Facts; each of Defendants’ numbered statements is reproduced verbatim, and Plaintiffs’ response (and, where applicable, objection) follows. Plaintiffs use herein the same abbreviations set forth in their supplemental summary judgment memorandum.

1. Section III of the 1998 Agreement Between Members of the Kennebec Hydro Developers Group (the “Agreement”), which provides for consultation, effectiveness studies and reporting, states in part:

E. Consultation process

The functional and final design of any interim or permanent upstream or downstream fish passage or collection facility discussed herein must be approved in writing by the resource agencies prior to filing that design with the Federal Energy Regulatory Commission and Maine Department of Environmental Protection. Any disputes will be handled through the FERC process.

#### F. Effectiveness studies

KHDG dam owners will conduct effectiveness studies of all newly constructed interim and permanent upstream and downstream fish passage facilities at project sites. Study plans for these effectiveness studies will be filed with FERC and Maine DEP no later than the date on which passage at a particular project becomes operational, and will be subject to a consultation process with, and written approval from the resource agencies. In the event that effectiveness studies show that passage at individual projects is less than the targeted passage efficiency goals, KHDG dam owners will make a good faith effort to achieve these goals through modification of facilities and/or operations, following consultation with the resource agencies. In the event that studies show that, subsequent to said modifications, passage at individual projects continues to be less than the targeted efficiency goals, resource agencies may seek continued funding for trap and truck or other programs, or other mitigation from KHDG dam owners. Any disputes will be handled through the FERC process.

#### H. Reporting

Continuous progress assessments will be undertaken through annual reports which will be filed with FERC by KHDG dam owners, consistent with current practice by KHDG dam owners.

[HK719; 721].

**Response:** Qualified.

Plaintiffs admit that Defendants have quoted three (non-sequential) subsections of Section III of the KHDG Agreement, but deny that Defendants have accurately characterized Section III (which speaks for itself).

2. Defendants were required to and did consult with and obtain the approval of the resource agencies prior to constructing the diversion structures and measures. (The following government agencies are also referred to herein: Federal Energy Regulatory Commission

(“FERC”); U.S. Fish and Wildlife Service (“USFWS” or “FWS”); National Marine Fisheries Service (“NMFS” or “NOAA”); Maine Department of Marine Resources (“MDMR”); Maine Department of Environmental Protection (“MDEP”) and Maine Board of Environmental Protection (“MBEP”).) [HK719] (Agreement, Section (III) (E)) (“Functional and final design of any interim or permanent upstream or downstream fish passage . . . must be approved in writing by the resource agencies.”); [LSW3098-99] (Richter Dep. 157:10-19; 158:7-15); [HK4187-88; 4248-50; 4264; 142:3-8; 163:16-164:14]; [HK4593] (Stetson Dep. 201:14-21) (bypass was designed to accommodate USFWS requirements); [LSW3461-3464] (3/3/06 letter from MDEP to Clark) (2006 description of ongoing design and operational plans at Lockwood being prepared in consultation with resources agencies); [LSW3270-71] (7/30/09 letter to Colligan) (affirming NextEra’s commitment to consult with the resource agencies and develop draft study plans to assess downstream passage at Shawmut and Weston and to continue to perform ongoing salmon protection efforts with the NMFS and FWS, including fulfilling obligations under the Agreement); [HK3184-86] (FERC 4/30/12 letter) (FERC confirmed NextEra’s ongoing consultation with the agencies to address fish protection measures at the projects); [LSW4789-91] (2/14/11 letter from Fred Seavey (FWS) to Richter); [LSW4794-95] (2/15/11 Keliher letter to Richter); [HK164] (MDMR Kennebec River Anadromous Fish Restoration Annual Progress Report – 2006); [HK1309-11] (2/2/06 Bernier letter to FWS and MDMR); [HK1330-35; 1336; 1337-38 ] (2006 HKP Downstream Fish Bypass Study Plan) (Brookfield intended to install these bypass measures on an interim basis and sought FWS approval of its plans to study the effectiveness of the bypass system; FWS gave its approval and MDMR concurred in June and July, respectively); [HK1665-73] (9/18/06 letter and order from MDEP approving fish passage design and operation); [HK1318; 1329] (2/28/06 Brookfield letter seeking FERC approval of

conceptual plans for interim downstream fish passage, with attached correspondence and approvals from resource agencies); [HK1653-62] (8/04/06 email from Bernier to MDMR); [HK1853-56] (3/5/07 letter from Brookfield to FERC submitting as built exhibit drawings of interim downstream fish passage); [HK4285] (Bernier Dep. 128:2-23) (describing 2008 letter reporting on Interim Downstream Fish Passage 2007 Report and 2008 Study Plan); [HK5146-56] (5/13/08 Brookfield letter to FERC submitting Interim Downstream Fish Passage 2007 Report and 2008 Study Plan describing documentation of consultation with resource agencies regarding plans to improve fish passage); [LSW3277-80] (July 23, 2010 letter from the Biological Resources Branch in the Hydropower Division of FERC) (“[W]e have determined that NextEra is complying with the salmon protection requirements of the Lockwood, Weston and Shawmut Project Licenses” and “the agency appreciates your work to comply with the ESA and to protect Atlantic Salmon at these projects.”); HKJSF ¶ 117 [HK5868].

**Objection:** Plaintiffs object to this statement as vague and impossible to fairly answer because the phrase “the diversion structures and measures” is not defined or otherwise limited or clarified, and it is thus unclear which particular structures and/or measures are referenced by this statement. Plaintiffs further object to this statement because it effectively contains numerous separate individual statements, and thus violates the requirement that each statement of fact be distinct.

**Response (Subject to Objection):** Qualified.

Plaintiffs admit that subsection E of Section III of the KHDG Agreement states, in pertinent part: “The functional and final design of any interim or permanent upstream or *downstream fish passage* or collection *facility discussed herein* must be approved in writing by the resource agencies” (emphasis added). Plaintiffs deny that this language, which pertains only

to “facilit[ies] discussed herein,” requires approval of “measures.” As more specifically detailed below, Plaintiffs deny that the cited materials establish that Defendants obtained approval from “the resource agencies” for downstream fish passage facilities (or measures) at any of the four Projects at issue. Further, Plaintiffs deny that any “diversion structures or measures” have been installed at the Shawmut Project, which uses an existing debris sluice as a downstream fish passage route. Finally, Plaintiffs admit that Defendants use in this statement the acronyms listed in the statement (and Plaintiffs will use those same acronyms herein). More specifically, as to each of the documents cited by Defendants in this statement:

Plaintiffs admit that Mr. Richter testified that the installation of guidance booms at Lockwood and Weston was approved by NMFS, USFWS, and MDMR (LSW pageID #3098-99), but deny that these three agencies comprise all of the “resource agencies” referenced in the referenced passage from the KHDG Agreement. LSW SF ¶ 196 (pageID #3899) (“Resource agencies” means “the Services [NMFS and USFWS], MDMR, Maine Department [of] Inland Fisheries and Wildlife, and Maine Atlantic Salmon Authority”).

Plaintiffs admit that Mr. Stetson testified that the downstream fish bypass at Hydro Kennebec was designed to accommodate the flow rate designated by USFWS (HK pageID #4593), but deny that this establishes that Defendants obtained approval from “the resource agencies” for the design of the bypass.

Plaintiffs admit that Dana Paul Murch of MDEP (which is not one of the “resource agencies” identified in the KHDG Agreement) wrote to Mr. Clark of NextEra Energy on March 3, 2006, and that the letter discussed, among other things, downstream fish passage at Lockwood (LSW ECF Doc. 83-8; page ID# 3461-3464), but Plaintiffs deny that this letter discusses (much

less establishes) approval by the resource agencies of any downstream fish passage facility or measure at Lockwood.

Plaintiffs admit that Christopher L. Allen of NextEra Energy wrote to Mary Colligan of NMFS on July 30, 2009, regarding, among other things, downstream fish passage at Lockwood, Shawmut, and Weston (LSW ECF Doc. 83-1; pageID #3269-71), but Plaintiffs deny that this letter discusses (much less establishes) approval by the resource agencies of any downstream fish passage facility or measure at these Projects, and Plaintiffs further object to the extent that any representations in this letter regarding statements made by third parties, or regarding actions to be taken in the future, are offered as evidence as to the truth or falsity of the representations, as these representations are inadmissible hearsay.

Plaintiffs admit that Steve Hocking of FERC (which is not one of the “resource agencies” identified in the KHDG Agreement) wrote to Daniel Morris of NMFS on April 30, 2012, regarding Endangered Species Act consultation regarding Hydro Kennebec (HK ECF Doc. 87-8 pageID #3184-86), but Plaintiffs deny that the letter discusses (much less establishes) approval by the resource agencies of any downstream fish passage facility or measure at Hydro Kennebec. Further, Plaintiffs object to the extent that this letter is offered in support of any communications between Defendants and any of the resource agencies, as it is inadmissible hearsay for this purpose (as it is not based on Mr. Hocking’s personal knowledge).

Plaintiffs admit that Fred Seavey of USFWS wrote to Mr. Richter on February 14, 2011, to discuss downstream fish passage at Weston, that Mr. Seavey indicated in the letter that USFWS had reviewed a conceptual design for a guidance boom to be installed at Weston, and that he “support[s] installing and testing the device this year since no fish guidance device or screening is in place at the Weston Project for anadromous fish” (LSW ECF Doc. 124-7; pageID

#4789-91). However, Plaintiffs deny that this letter establishes approval of the Weston boom by the resource agencies. Plaintiffs note that in this letter Mr. Seavey characterized the type of boom in question as “prone to failure, debris loading and overtopping,” stated that this “is of concern because fish passage facilities need to be reliable,” and further stated that the boom “will need to be demonstrated to: 1) be stable at the maximum flow, 2) be installed and operational between April 1 and December 31 (the downstream migration period), 3) provide safe and effective downstream passage for anadromous fish, 4) minimize take of Atlantic salmon, 5) prevent fish from sounding under the net, and 6) be highly resistan[t] to debris loading that could result in its failure or an increase in the net’s approach velocity.”

Plaintiffs admit that Patrick Keliher of MDMR wrote to Mr. Richter on February 15, 2011, to discuss downstream fish passage at Weston, that Mr. Keliher indicated in the letter that MDMR had reviewed a conceptual design for a guidance boom to be installed at Weston, and that he “support[s] installing and testing the device this year” (LSW ECF Doc. 124-8; pageID #4794-95). However, Plaintiffs deny that this letter establishes approval of the Weston boom by the resource agencies. Plaintiffs note that in this letter Mr. Keliher stated that “[s]tudies completed to date have demonstrated that these devices [booms of the type installed at Weston] are prone to failure, debris loading, and overtopping, thus reducing their effectiveness as a guidance device,” and further stated that the boom “will need to: 1) be stable at the maximum flow; 2) be installed and operational during the downstream migration period of April 1 through December 31; 3) provide safe and effective passage downstream passage for anadromous species ... 4) minimize take of Atlantic salmon; 5) prevent fish from sounding under the guidance curtain and 6) be resistant to debris loading.”

Plaintiffs deny that the document at HK pageID# 164 (HK ECF Doc. 33, a Joint Motion to Amend Scheduling Order) provides any support for the statement offered.

Plaintiffs admit that Mr. Bernier wrote to Lawrence Miller of USFWS and Gail Wippelhauser of MDMR on February 2, 2006, to outline plans for the installation of a fish bypass at Hydro Kennebec ([HK ECF Doc. 81-3; pageID #1309-11), but deny that this establishes approval by the resource agencies for the Hydro Kennebec bypass.

Plaintiffs admit that HK ECF Docs. 81-8 and 81-9 (pageID #1330-38) are a 2006 Bypass Study Plan for Hydro Kennebec prepared by Defendants and a letter from Mr. Bernier forwarding this plan to USFWS, and that Mr. Bernier characterizes the plan as “a study plan to evaluate [monitoring] methods and equipment,” but Plaintiffs deny that these sources establish approval by the resource agencies for the Hydro Kennebec bypass.

Plaintiffs admit that HK ECF Doc. 82-7 (pageID #1665-73] demonstrates that MDEP (which is not one of the “resource agencies” identified in the KHDG Agreement) approved the Hydro Kennebec fish bypass in 2006. Plaintiffs also admit that HK ECF Doc. 81-7 (page ID# 1318-29) demonstrates that four of the five “resource agencies” identified under the KHDG Agreement (but not NMFS) approved the Hydro Kennebec fish bypass in 2006.

Plaintiffs admit that HK ECF Doc. 82-5 (page ID# 1653-62) evidences 2006 communications between Mr. Bernier and various agencies regarding the Hydro Kennebec fish bypass.

Plaintiffs admit that HK ECF Doc. 83-4 (pageID #1853-56) is a March 5, 2007, letter from Mr. Bernier to FERC (which is not one of the “resource agencies” identified in the KHDG Agreement) submitting as built exhibit drawings of the Hydro Kennebec bypass.

Plaintiffs admit that Mr. Bernier testified (Bernier Dep. at 128-133; pageID #4285-90) regarding a letter he had written to FERC (which is not one of the “resource agencies” identified in the KHDG Agreement) on May 13, 2008 (HK ECF Doc. 91-9; pageID #5146-56) submitting an Interim Downstream Fish Passage 2007 Report and 2008 Study Plan for Hydro Kennebec, and that this letter reflects comments on the performance of the Hydro Kennebec fish bypass by NMFS, MDEP (which is not one of the “resource agencies” identified in the KHDG Agreement), MDMR, and USFWS, but Plaintiffs deny that this testimony or letter reflects prior approval of the bypass by the resource agencies. The USFWS comments noted: “Turbulence from the floating boom on the fish guidance device appeared to create a barrier to fish that prevented them from moving into the bypass gate,” and Mr. Bernier responded that this happens when “overtopping” occurs (when the boom is submerged) (pageID #5154-55), a problem that has persisted. The USFWS comments also requested that Defendants perform a “mark and recapture” study to evaluate fish injury and mortality at Hydro Kenebec (pageID #5152) (USFWS “believes that this study id still necessary”); the summary judgment record does not reflect that any such study has been done at Hydro Kennebec.

Plaintiffs admit that Steve Hocking of FERC (which is not one of the “resource agencies” identified in the KHDG Agreement) wrote to Kirk Toth of NextEra Energy on July 23, 2010, regarding efforts to protect Atlantic salmon at Lockwood, Shawmut, and Weston (LSW ECF Doc. 83-3; pageID #3277-80), but Plaintiffs deny that this letter discusses (much less establishes) approval by the resource agencies of any downstream fish passage facility or measure at these Projects. Further, to the extent that this letter is offered as proof of statements made or actions taken by any of the resource agencies, Plaintiffs object to its admissibility, as it is inadmissible hearsay, and is not based on the first-hand knowledge of Mr. Hocking.

Finally, HK SF ¶ 117 (page ID# 5868) states only that “Brookfield has consulted with the Services on the effectiveness of its fish passage,” which does not establish approval of particular facilities or measures.

3. Defendants consulted with the resource agencies and obtained the requisite approvals for studies to evaluate the efficiency of their downstream fish passage facilities and have consulted with the resource on the effectiveness of their fish passage. [HK719] (Agreement) (“Study plans . . . will be subject to a consultation process with, and written approval from the resource agencies”); [HK4433] (Stetson Dep. 41:1-5) (“[W]e have been performing studies at the request of the agencies both during our lease period and since we purchased the asset in March of ‘10. The goal is to identify safe and effective fish passage.”); [HK1674-87] (11/29/06 Bernier letter to FERC reporting on interim downstream passage); [LSW3461-64] (3/3/06 letter MDEP to Clark) (MDEP approved the interim downstream fish passage effectiveness study plan); [HK1857-64] (4/26/07 Bernier letter to FERC); [LSW3270] (7/30/09 letter) (Downstream passage studies planned for 2010 in consultation with Maine Resource Agencies); [HK4187-88] (Bernier Dep. 31:24-32:5); [HK5146-56] (5/13/08 Bernier letter to FERC); [LSW4791] (2/14/11 letter from USFWS to Richter); [LSW4795] (2/15/11 letter from MDMR to Richter); [HK5146-5205] (HKP Interim Downstream Fish Passage 2007 Report and 2008 Study Plan); [HK2339-2397] (NextEra Fish Passage Report for 2010); [HK2398-2554] (NextEra Fish Passage Report for 2009); [HK1260-1308] (FPL Energy Maine Hydro LLC Fish Passage Report for 2006); [HK1732] (MDMR 2007 Annual Progress Report); [HK19171] (MDMR 2008 Annual Progress Report ); [HK2114] (MDMR 2009 Annual Progress Report); [HK2303; 2305] (MDMR 2010 Annual Progress Report); HKJSF ¶ 117 [HK5868].

**Response:** Qualified.

Plaintiffs admit that the sources cited indicate that Defendants have conferred with some agencies on at least some aspects of the effectiveness of downstream fish passage at all four Projects, but Plaintiffs deny that “Defendants consulted with the resource agencies and obtained the requisite approvals for studies to evaluate the efficiency of their downstream fish passage facilities” at all of the Projects. Plaintiffs admit that Defendants (and their consultants) conducted studies to evaluate the efficacy of the downstream fish passage facilities at Lockwood and at Hydro Kennebec, but the sources referenced do not appear to establish that the “resource agencies,” as that term is used in the KHDG Agreement (LSW SF ¶ 196; LSW pageID #3899), approved those studies. Nor do these sources appear to conclusively establish formal FERC or MDEP approval for these studies. The referenced May 3, 2006, letter from MDEP to Mr. Clark of NextEra (LSW pageID #3462) does indicate that MDEP (which is not one of the “resource agencies”) had approved an interim downstream anadromous fish passage effectiveness study plan for Lockwood on February 2, 2006, but it is not clear that this plan was implemented (although the record does reflect that radio telemetry studies of downstream passage were done at Lockwood in 2007).

Further, the summary judgment record does not establish that any study to assess downstream fish passage effectiveness for salmon adults or smolts was conducted at Shawmut or Weston, and Defendants take the position (see ¶ 11, below) that there are no “empirical data” on “fish passage efficiency” at Shawmut or Weston.

Plaintiffs also deny that Defendants’ selective quotation from subsection F. of Section III of the KHDG Agreement accurately reflects that subsection, which begins as follows: “KHDG dam owners will conduct effectiveness studies of all newly constructed interim and permanent

upstream and downstream fish passage facilities at project sites. Study plans . . . will be subject to a consultation process with, and written approval from the resource agencies.” (HK pageID #719). Plaintiffs also deny any intended implication that this provision in any way affects Defendants’ independent obligation under the KHDG Agreement to “first demonstrate” the safety of turbines as a downstream passage route “to the extent that” Defendants desire to use turbines as one of the downstream passage routes for adult salmon or shad at any of these Projects. And Plaintiffs deny any intended implication that any of the studies referenced in the cited sources were “site-specific quantitative studies” of “injury” and “mortality” (both “immediate” and “delayed”) as is required by the adult turbine-passage provisions of KHDG Agreement. See Supplemental Memorandum in Support of Plaintiffs in the Parties’ Cross-Motions for Summary Judgment at 3 n. 2 (pageID #7659).

4. Defendants provided the resource agencies with annual updates and reports regarding the status of diversion efforts, as well as plans for the upcoming year. [HK721] (Agreement, Section (III)) (“Continuous progress assessments will be undertaken through annual reports which will be filed with FERC by KHDG dam owners, consistent with current practice by KHDG dam owners.”) [HK5146-5205] (HK Interim Downstream Fish Passage 2007 Report and 2008 Study Plan); [HK2339-2397] (NextEra Fish Passage Report for 2010); [HK2398-2554] ((NextEra Fish Passage Report for 2009); [HK1260-1308] (FPL Energy Maine Hydro LLC Fish Passage Report for 2006); [HK1732] (MDMR 2007 Annual Progress Report) (MDMR “visited both the Lockwood and Hydro-Kennebec dams as often as possible”) [HK19171] (MDMR 2008 Annual Progress Report) (same); [HK2114] (MDMR 2009 Annual Progress Report) (same); [HK2303; 2305] (MDMR 2010 Annual Progress Report) (same).

**Response:** Qualified.

Plaintiffs admit that among the cited documents are a 2007 downstream fish passage report and 2008 study plan submitted by Brookfield Power to FERC regarding Hydro Kennebec, and a 2006 diadromous fish passage report submitted by FPL Energy Maine Hydro to FERC regarding Weston, Shawmut, and Lockwood, but Plaintiffs deny that the documents at HK Page ID #2239-2397 are a NextEra fish passage report, and note that the referenced pages from the three reports issued by MDMR do not reference any reports submitted by Defendants. Plaintiffs further deny that the referenced documents establish that Defendants provided all of the resource agencies with annual updates and reports regarding the status of diversion efforts, as well as plans for the upcoming year, regarding the four Projects at issue. Plaintiffs also deny any intended implication that the quoted passage from the KHDG Agreement in any way affects Defendants' independent obligation under the KHDG Agreement to "first demonstrate" the safety of turbines as a downstream passage route "to the extent that" Defendants desire to use turbines as one of the downstream passage routes for adult salmon or shad at any of these Projects.

5. The Agreement vests with the resource agencies the ability to seek additional funds or to require additional measures if they believe that Defendants' desires are not manifest in their actions. [HK719] (Agreement, Section (III) (F)); [HK4347] (Bernier Dep. 189:5-11) (noting that the companies do the studies, confer with the resource agencies about the results and then take any measures that the studies indicate).

**Objection:** Plaintiffs object to this statement as vague and impossible to fairly answer because the phrase "Defendants' desires are not manifest in their actions" is not defined or

otherwise limited or clarified, and it thus is unclear which particular desires and actions are referenced by this statement.

**Response (Subject to Objection):** Denied.

While the KHDG Agreement does provide in the referenced section that the resource agencies “may seek additional funding for trap and truck or other programs,” it says nothing about Defendants’ desire; nor does the referenced passage from Mr. Bernier’s deposition.

6. The resource agencies have commended Defendants on their efforts to repair and improve the diversion devices. [HK2038] (March 2008 letter from FWS) (“We were very pleased with your response to the submerged fish guidance device, which was corrected within days of the inspection.”); [HK1665] (September 18, 2006 letter from DEP to Stetson) (MDEP “commends Hydro-Kennebec L.P. for its commitment to providing improved downstream passage at the project for post-spawner adult anadromous fish”); [LSW3277-80] (July 23, 2010 letter from the Biological Resources Branch in the Hydropower Division of FERC).

**Response:** Denied.

While the first referenced document contains the quoted statement from Mr. Seavey of USFWS to Mr. Bernier of Brookfield regarding actions taken to repair the Hydro Kennebec guidance boom in early 2008 in response to a USFWS inspection, it does not support the broad statement that “the resource agencies have commended Defendants on their efforts to repair and improve the diversion devices” at the four Projects. Further, Plaintiffs note that neither MDEP nor FERC was a signatory to the KHDG Agreement, and that neither is identified as a “resource agency” under that Agreement.

7. At all relevant times, Kevin Bernier (Hydro Kennebec project), Brian Stetson (Hydro Kennebec project), and Robert Richter (Lockwood, Shawmut and Weston projects) were primarily responsible for making decisions regarding Defendants' ongoing compliance with the Clean Water Act and Water Quality Certifications issued by the State of Maine. [HK4165; 4171] (Bernier Dep. 9:15-25; 15:11-16); [LSW3062] (Richter Dep. 11:19-12:3; 12:14-13:17); LSWJSF ¶ 50 [LSW3876].

**Response:** Qualified.

Plaintiffs admit that Mr. Bernier testified that he and Mr. Stetson were primarily responsible for making decisions regarding compliance with the Clean Water Act and Water Quality Certifications at Hydro Kennebec, but Plaintiffs deny that he testified (much less established) that such compliance is "ongoing." Nor did Mr. Bernier testify that he or Mr. Stetson has the bottom-line authority to decide how much to spend (either in terms of an outlay of money or resources or in terms of forgone revenues from reducing flow through the turbines) to secure compliance. And, as the referenced paragraph from the LSW Stipulated Facts states, Mr. Richter testified that he "manages" environmental compliance at Lockwood, Shawmut, and Weston; Mr. Richter did not testify that has the bottom-line authority to decide how much to spend (either in terms of an outlay of money or resources or in terms of forgone revenues from reducing flow through the turbines) to secure compliance.

8. Kevin Bernier testified under oath that Defendants did not, and do not, desire to pass salmon or shad through the turbines at Hydro Kennebec and instead have always desired to pass the fish through downstream fishways. [HK4215; 4218-20] (Bernier Dep. 59:10-21; 62:19-63:5; 64:2-8).

**Response:** Denied.

In the cited passages, Mr. Bernier testified that the function of the bypass and guidance boom at Hydro Kennebec is to “pass migrating fish downstream,” and that the bypass “provides [the fish] a route other than the turbines,” but he did not testify as to Defendants’ desire. Moreover, this testimony does not establish that Defendants ever believed that the bypass and boom would allow all, or even most, of the downstream-migrating fish to pass by means other than the turbines. And, this cannot fairly be said to be Defendants’ belief, given their knowledge that a significant percentage of fish travel through the turbines even with the bypass and boom in place. HK SF ¶¶ 143-48 (PageID #5873-74). Elsewhere in his deposition, when asked what downstream routes are taken by salmon and shad at Hydro Kennebec, his first answer, on both occasions, was “turbines.” Bernier Dep. at 54:25- 55:10 (HK pageID #4210) (salmon); *id.* at 95:12-17 (HK pageID #4252) and 96:3-25 (HK pageID #4253) (shad).

9. Brookfield’s focus was on *improving* fish passage efficiency. [HK4319; 4329-30] (Bernier Dep. 161: 5-11; 171:18-172:3) (“A [T]he focus has been on determining fish passage efficiency in our discussions with the agencies. Q And improving fish passage efficiency? A Yes. Q And that is so that smolts pass the facility through means other than the turbines? A Yes.”).

**Response:** Denied.

The cited testimony does not establish that the overall *focus* of Brookfield, *as a company*, was improving fish passage at Hydro Kennebec.

10. Beginning with the development and execution of the Agreement, the signatory resource agencies were well aware that the diversionary structures might not achieve their design objectives, and that some fish might pass through the turbines. NMFS concluded that it “does not anticipate the bypass to be 100% efficient, however our goal is to maximize the overall efficiency for the protection of the resource.” After approval of Defendants’ design of diversion methods for Hydro Kennebec, MDEP noted that it “understands there is no guarantee that the proposed (and now installed) angled fish guidance boom and gated bypass will prove effective” and that it may prove difficult to keep the booms in place given the expected flows. [HK5197] (3/6/08 email from NOAA); [HK1671] (6/13/06 MDEP Order approving interim downstream fish passage design and operational plans for HKP, citing to Section IV of the Agreement).

**Response:** Qualified.

Plaintiffs admit that NMFS, USFWS, and MDMR have concerns about the effectiveness of diversionary devices as a means of keeping fish out of the turbines at the Projects. However, the sources cited do not establish the status “[b]eginning with the development and execution of the Agreement,” and Plaintiffs thus deny the first sentence. Further, Plaintiffs deny that the statement of MDEP, which was not one of the signatory resource agencies, says anything about the understanding of the signatory resource agencies. Plaintiffs also deny that NMFS speaks for all of the signatory resource agencies. Finally, Plaintiffs deny any intended implication that this relieved Defendants of their obligation under the KHDG to “first demonstrate” safety “to the extent that” they desired that adult salmon or shad pass downstream by means of the turbines, and also deny any implication that the resource agencies are satisfied with the degree of turbine passage at any of the four Projects.

11. The White Papers were not based on empirical data of fish passage efficiency measurements at the projects, and instead relied primarily on extrapolations and figures developed at other facilities. [LSW885] (Lockwood White Paper); [LSW1011] (Shawmut White Paper); [LSW1141] (Weston White Paper).

**Response:** Denied.

The referenced page of the White Paper prepared by Defendants for Lockwood states that “estimates of turbine passage *survival* of Atlantic salmon smolts at Lockwood were developed using a combination of existing empirical studies and modeled calculations” (emphasis added), but does not state that passage routes (“fish passage efficiency”) were determined by reference to such studies and models. Rather, the Lockwood White Paper predicts passage routes for downstream-migrating fish – whether they pass via turbines, via bypass, or via spill (when spill is occurring) – based on a 2011 radio-telemetry study of fish passage conducted at Lockwood. LSW SF ¶¶ 221-22 (pageID #3903); LSW ECF Doc. 78-2 (Lockwood White Paper) (pageID #892) (Section entitled “Smolt Downstream Bypass Efficiency”) (“For all radio-tagged Atlantic salmon released into or entering the powerhouse canal [during the 2011 study at Lockwood], approximately 18.8% passed via the downstream bypass with the remainder (81.2%) passing via the turbine units.”) and (pageID #908) (Section entitled “Kelt Downstream Bypass Efficiency”) (Based on 2011 radio-telemetry study at Lockwood, “[i]t was assumed that for Atlantic salmon kelts entering the powerhouse canal, approximately 18.8% were passed via the surface sluice with the remainder (81.2%) passing via the turbine.”). The Defendants believe that the results of the 2011 radio telemetry study at Lockwood are “scientifically defensible.” Richter Dep. at 112:22-25 (LSW pageID #3087) and 116:1-3 (LSW pageID #3088).

The referenced page of the White Paper prepared by Defendants for Shawmut states that “downstream bypass efficiency” was determined based the downstream flows measured at the Shawmut Project; see also LSW SF ¶¶ 235-36 (PageID #3905-06) (downstream routes of adult salmon were determined “[b]ased on the relative flows of water passing through the bypass and turbines at Shawmut”) (70% to the turbines when spill is occurring; 99% to the turbines during times of no spill).

The referenced page of the White Paper prepared by Defendants for Weston states that “downstream bypass efficiency” was determined based the downstream flows measured at the Weston Project; see also LSW SF ¶¶ 231-32 (PageID #3905) (downstream routes of adult salmon were determined “[b]ased on the relative flows of water passing through the bypass and turbines at Weston”) (without a guidance boom, 66% to the turbines when spill is occurring, and 98% to the turbines during times of no spill).

12. The survival estimates in the draft Biological Assessment that Hydro Kennebec prepared for the Hydro Kennebec Project were not based on empirical data specific to that facility. The estimates were based only on extrapolations at other facilities, which can be useful in planning-level exercises or in the development of study plans, but drawing conclusions about direct resource impacts to ESA-listed species based solely on data from other projects or other rivers introduces considerable uncertainty and potential for error. [HK7081-82] (Declaration of John Devine, dated July 16, 2012).

**Response:** Qualified.

Plaintiffs admit that the salmon survival estimates in the draft Biological Assessment that Defendants prepared for the Hydro Kennebec Project were based on extrapolations from

empirical data from other hydroelectric facilities that Defendants deemed sufficiently similar to Hydro Kennebec, and not on empirical data specific to Hydro Kennebec. However, Plaintiffs deny the remainder of this statement. See LSW SF ¶¶ 177-78 (pageID #3895) (“NMFS believes (and the Licensees [Defendants] agree) that [analyses based on such extrapolations] ‘are a well-accepted method for modeling the expected survival of migratory fishes at hydroelectric facilities,’ so long as they account for all project-related impacts on such fish.”).

13. Robert Richter, manager for environmental regulatory compliance at the Lockwood, Shawmut and Weston projects, testified under oath that Defendants did not, and do not, desire to pass salmon or shad through the turbines at the three projects and instead have always desired to pass the fish through downstream fishways. [LSW3073; 3093-94; 3124; 3155-56] (Richter Dep. 56:6-16; 137:22-138-4; 259:18-260:8 (“Our desire is not to pass them through the turbines, it’s to bypass the turbines.”); 378:22-379:1 9 (“And again, like we talked about yesterday, you know, our desire is not to pass these fish through the turbines. It’s to bypass the turbines and get them out through sluices”); 381:5-7 (“That’s why we’re installing those bypasses to try to keep them out of the turbines.”)).

**Response:** Qualified.

Plaintiffs admit that Mr. Richter made the statements quoted here, but deny that they go either to what Defendants “did” desire at these Projects or to what Defendants “always” desired at these Projects. Moreover, this testimony does not establish that Defendants ever believed that the measures in place at Weston (an existing log sluice and a boom installed in the late summer of 2011), Shawmut (an existing debris sluice), Lockwood (a bypass and a boom since the summer of 2009) would allow all, or even most, of the downstream-migrating fish to pass by

means other than the turbines. And, this cannot fairly be said to be Defendants' belief, given their own estimates that a significant percentage of fish travel through the turbines. LSW SF ¶¶ 231-32 (during times of no spill, "roughly 98%" of adult salmon passing Weston do so through the turbines when the boom is not functioning, and "roughly 66%" do so during median flow conditions); ¶ 236 ("more than 99%" of the adult salmon passing Shawmut via the power canal – which, during periods of no spill, is all of them – may attempt to pass through the turbines); ¶ 222 (81.2% of the adult salmon passing Lockwood via the power canal – which, during periods of no spill, is all of them – "attempt to pass via the turbines." Further, Mr. Richter acknowledged in his deposition that he had determined in 2010 that the surface sluice at Shawmut would not be adequate to keep adult salmon out of that project's turbines. Richter Dep. at 170:19-171:7 (LSW pageID #3102) (an internal NextEra memo written by Mr. Richter in June 2010 states: "The state of Maine is presently stocking adult Atlantic salmon above the project and no studies have been conducted to date. These Atlantic salmon probably pass the [Shawmut] project via spillage, via an existing sluice gate and the turbines."); see also id. at 160:21-161:23 (LSW pageID #3101) (Mr. Richter identifying the document). And Mr. Richter also testified in his deposition that Defendants' "business people" were at that time (March 2012) investigating the costs of temporary turbine shutdowns at Weston, Shawmut, and Lockwood, as Defendants recognized that shutting down the turbines at critical migration periods would "provide additional passage" for salmon. Richter Dep. at 548:11-549:25 (LSW pageID #3198). If Defendants truly desired to pass no adult salmon or shad through their turbines, they would have implemented temporary turbine shutdowns to afford safe passage for these fish. They have not done so. LSW SF ¶¶ 224, 233, 237 (LSW pageID #3904-06). Mr. Richter also testified that Defendants had been told by MDMR in 2007 that they needed to narrow the spacing between the bars of the trash rack

upstream of the intake for the large propeller-type turbine at Lockwood (known as Unit 7) in order “[t]o prevent mortality/injuries from kelt [adult salmon] passage through Unit 7.” Richter Dep. at 231:24-232:17 (LSW pageID #3117). Mr. Richter further acknowledged that Defendants had not acted on this recommendation, and had not reduced the spacing of the bars on this trash rack:

Q: ... MDMR recommended that the bar spacing on Unit 7 be decreased from what was then presently in place?

A: That's what their comment said, yes.

Q: Has NextEra narrowed the trash racks at Unit 7 from the width they were at in 2007?

A: No.

Id. at 232:25-233:2. Had they desired to keep adult salmon and shad out of the Unit 7 turbine, Defendants would have narrowed the trash rack spacing in accordance with MDMR's recommendations.

14. In 2005 and 2006, Defendants designed and installed a downstream fish bypass at the Hydro Kennebec Project at a cost of approximately \$400,000, in consultation with FERC and the resource agencies that were signatories to the Agreement. [HK4215] (Bernier Dep. 59:6-9); HKJSF ¶¶ 24, 137 [HK5854; 5872]; HKMF ¶ 17 [HK6293].

**Response:** Qualified.

The sources cited do not support the statement that this was done in 2005, and Mr. Bernier testified that the cost was “in the three to \$400,000 range” (HK pageID #4215, 4218).

15. Defendants intended the fish passageway and guidance booms at the Hydro Kennebec Project to keep fish away from the turbines and to allow fish to bypass the turbines. [HK4215; 4215-16; 4218-19; 4220; 4243; 4254] (Bernier Dep. 59:10-21; 59:22-60:8; 62:19-63:5)

(“Q But was the curtain itself meant to be impassable to salmon? A Yes.”); 64:2-8; 86:3-11 (“Q And the new boom is intended to keep fish away from the turbines? A Yes.”); 97:5-15).

**Response:** Qualified.

Plaintiffs agree that the purpose of installing the bypass and boom in 2006 was to permit passage by means other than through the turbines, but the source cited does not indicate that Defendants ever believed that the bypass and boom would allow all, or even most, of the downstream-migrating fish to pass by means other than the turbines. And, this cannot fairly be said to be the present purpose of the downstream bypass, given Defendants’ knowledge that a significant percentage of fish travel through the turbines even with the bypass and boom functioning as intended. HK SF ¶¶ 143-48 (Page ID #: 5873-74).

16. In 2007, Defendants made several improvements to the fish passageway at the Hydro Kennebec Project, including the installation of a weir in the plunge pool to increase its depth and minimize the potential for fish injury and the completion of the operating mechanism for the gate structure. [HK1860] (4/4/07 Bernier email to MDMR *et al.*) (weir added); [HK2011-23] (1/31/08 Bernier letter to FERC); [HK5156] (HKP Interim Downstream Fish Passage 2007 Report and 2008 Study Plan); [HK6396] (2009 Downstream Atlantic Salmon Smolt Passage Study Draft Report for Madison Paper).

**Response:** Qualified.

The cited sources reference three such improvements. Plaintiffs admit that Defendants added a weir in the plunge pool in 2007 as referenced in Mr. Bernier’s April 4, 2007, but note that in a subsequent email six days later (page ID #1859-60), Mr. Bernier acknowledged that “[d]espite the addition of the weir,” USFWS had “expressed concern over fish injury in this

plunge pool area of the fishway” (HK pageID #1860). Plaintiffs note that this modification had nothing to do with improving the efficiency of the Hydro Kennebec bypass at keeping downstream-migrating fish out of the turbines. Plaintiffs also admit that in 2007 Defendants completed an operating mechanism for the gate structure and raised the boom in an effort to prevent over-topping after an inspection by USFWS (HK pageID #2011).

17. At the Hydro Kennebec Project, Defendants raised the fish boom to prevent overtopping and installed a flashboard system to increase water depth at the fishway exit to minimize the potential for descaling or injury; Defendants also arranged for the boom manufacturer to install additional reinforcing cables, reshaped the Kevlar fabric and added additional flotation to the device to improve its buoyancy. [HK2011] (1/31/08 Bernier letter to FERC); [HK5146-56] (Brookfield letter to FERC submitting HKP Interim Downstream Fish Passage 2007 Report and 2008 Study Plan); [HK6396] (2009 Downstream Atlantic Salmon Smolt Passage Study); [HK4227-28] (Bernier Dep. 71:19-72:6) (noting, “[a]lthough overtopping was still occasionally observed during high water events, these actions reduced the problem”); [HK4229] (Bernier Dep. 73:14-16) (modifications were made to rectify overtopping).

**Response:** Qualified.

Plaintiffs admit that Defendants installed a flashboard system at Hydro Kennebec, but deny that it necessarily minimized fish damage (see HK PageID #1860, discussed in Plaintiffs’ response to ¶ 16, above). Plaintiffs also admit that Defendants raised the guidance boom at Hydro Kennebec, but deny that this ended overtopping of the boom. See Bernier Dep. 73:18-21 (HK PageID #4229) (explaining that “[t]he Kevlar boom is like a big sail,” and “when the current catches it,” it tends to “make it in the shape of a sail” and “pull down” the top); 74:3-14

(explaining that two causes of overtopping are “high flows or debris [coming down the river]” and noting that the adjustments made to the boom did not eradicate overtopping of the Hydro Kennebec boom).

18. In 2008, Defendants considered changing the curtain material at the Hydro Kennebec Project based on feedback from the resource agencies, but based on representations and assurances from the Kevlar curtain manufacturer, decided to build a platform to repair and reinforce the Kevlar curtain. [HK2036] (3/2008 email exchange with Bernier and NMFS); [HK2885] (2/7/11 meeting notes); [HK4586] (Stetson Dep. 194:19-22) (each time the curtain tore, it was repaired).

**Response:** Admitted.

19. In 2010, Defendants reported that a hydraulic line to one of its spill gates had broken at the Hydro Kennebec Project, resulting in a hydraulic oil spill and loss of gate control; the gate slowly opened as a result of water pressure, however, and emptied the headpond. Defendants halted hydropower generation and allowed all flow to pass through the disabled gate and mobilized a contractor to correct the situation. [HK2595] (Bernier email to resource agencies, 7/6/10); [HK2597] (9/2/10 Bernier email to resource agencies).

**Response:** Admitted.

Plaintiffs note that this had nothing to do with improving the efficiency of the Hydro Kennebec bypass at keeping downstream-migrating fish out of the turbines.

20. In about December 2011, after further consultation with the agencies, Defendants decided to replace the original boom at the Hydro Kennebec Project with a new boom, called a Tuffboom, which was designed to be employed year-round, and incorporated a perforated metal plate to divert the fish. The Tuffboom cost approximately \$250,000 to install and made significant improvements over the Kevlar curtain boom; it was made of much stronger materials to prevent ripping and included much better floatation to prevent overtopping. The Tuffboom has not malfunctioned. [HK4239-40; 4240-41; 4242; 4244-45] (Bernier Dep. 82:18-83:1; 84:13-85:2; 85:7-23; 87:25-88:12); HKJSF ¶¶ 139, 141-42 [HK5873].

**Response:** Qualified.

Plaintiffs admit that a Tuffboom was installed at Hydro Kennebec, this approximate cost, “[i]n December 2011 and January 2012,” that this boom is “more buoyant” and “sturdier” than the previous boom at Hydro Kennebec, and that it has “a curtain made of perforated metal plate.” HK SF ¶ 139 (HK pageID #5873). Plaintiffs admit that the boom was “designed” to be used year-round, but note that Mr. Bernier testified that he did not know whether it would be. Bernier Dep. at 84:21-85:6 (HK pageID #4241-42) (Mr. Bernier agreed that “Brookfield won't know until [the boom] actually is put to the test under true operating conditions.”). Finally, Plaintiffs note that while Mr. Bernier testified that he was not aware of any malfunction with the newly-installed Tuffboom, his deposition was taken in February 2012, only a month after the boom was installed, and it cannot fairly be said that Br. Bernier had sufficient information on which to base an assessment of the performance of the new boom. Plaintiffs thus deny this portion of the statement.

21. Also in 2012, Defendants further deepened the plunge pool at the Hydro Kennebec Project and planned to install a stoplog structure at the plunge pool downstream of the bypass reach. [HK3952-54] (Simmons Dep.); [HK3217-18] (Hydro Kennebec Project Draft Biological Assessment).

**Response:** Admitted.

Plaintiffs note that this had nothing to do with improving the efficiency of the Hydro Kennebec bypass at keeping downstream-migrating fish out of the turbines.

22. In addition to all of these ongoing improvements at the Hydro Kennebec Project, Defendants have continually worked to keep the fishway cleared of any debris; maintenance activities on the downstream fish bypass facility, including debris removal, are performed as soon as possible to sustain optimal downstream passage conditions. [HK4343-44] (Bernier Dep. 185:18-186:2); [HK2964; 2971] (1/31/12 letter from Bernier to NMFS attaching HKP Draft BA).

**Response:** Qualified.

Plaintiffs deny the characterization that these are “ongoing” improvements, as this is not supported by the sources cited. Plaintiffs admit that Defendants do work to keep the fishway clear of debris, but the sources cited do not support the representation that this is done “continually.” Further, the cited testimony from Mr. Bernier does not establish that maintenance activities at the Hydro Kennebec bypass is performed “as soon as possible,” and the cited pages of the draft Biological Assessment drafted by Brookfield include two different variations of the same sentence regarding “maintenance activities, including debris removal,” the first indicating

that such activities are “performed,” and the second indicating that such activities are performed “as soon as possible” (compare HK pageID #2964 and #2971). Plaintiffs also note that other sources indicate that there have been maintenance activities on the Hydro Kennebec bypass and boom that have not been done “as soon as possible.”

23. In 2005, Defendants began working with the signatory resource agencies and FERC to develop bypass and diversion methods for the Lockwood Project; after resource agency review and comments, Defendants obtained approval of their Interim Downstream Passage Effectiveness Evaluation Plan. [LSW3465-69] (FERC 3/8/06 Order Approving Interim Downstream Passage Effectiveness Evaluation Plan Pursuant to Article 401); [LSW3461-64] (3/3/06 letter from MDEP to Clark).

**Response:** Qualified.

Plaintiffs admit that the first of these sources (a 2006 FERC order) is an approval by FERC of an Interim Downstream Passage Effectiveness Evaluation Plan for Lockwood, whereby Defendants proposed to study the effectiveness of existing passage routes (including turbines) at Lockwood. Plaintiffs also admit that this source indicates that Defendants sought and received input from the resource agencies on this plan. However, the report indicates that this information was provided to FERC by Defendants, and thus is inadmissible hearsay on this point. Plaintiffs deny that either of the cited sources supports the representation that Defendants were “working with the signatory resource agencies and FERC to develop *bypass and diversion methods* for the Lockwood Project” in 2005, and Plaintiffs deny this part of the statement.

24. In 2007, Defendants conducted a study of adult salmon passage at the Lockwood Project using radio telemetry. It was difficult to extrapolate from the study, however, because it used smaller hatchery-raised salmon and involved a very limited number of fish. In addition, the study was done before any diversionary facilities were installed. [HK6860, 6868] (Evaluation of Atlantic Salmon Kelt Downstream Passage at the Lockwood Project); [LSW3072-73; 3114-15] (Richter Dep. 50:1-15; 55:7-14; 220:3-19; 221:2-17; 222:9-223:13).

**Response:** Qualified.

Plaintiffs admit that the radio telemetry study of adult Atlantic salmon conducted at Lockwood in December 2007 had the drawbacks cited in the second sentence, that it was done before any diversionary facilities were installed at Lockwood, and that Mr. Richter testified that Defendants believe that the results of this portion of the study are “suspect.” However, the study clearly shows that fish of the size of the hatchery-raised salmon used in the study, including adult shad, which generally are smaller than adult salmon, LSW SF ¶ 78 (pageID #3879), have access to the large propeller type turbine (Unit 7) at Lockwood.

25. The Lockwood bypass facility was installed to allow fish to bypass the turbines; the downstream bypass and boom cost approximately \$375,000 to install. [LSW3073] (Richter Dep. 56:1-16) (“Q And what is the function of the downstream bypass at Lockwood? A It’s to get migrating fish out to the river and bypass the turbines.”)

**Response:** Qualified.

Plaintiffs agree that the purpose of installing the bypass (also described in some documents as a “surface sluice”) and boom at a cost of approximately \$375,000 in 2009 was to permit downstream passage by means other than through the turbines, but the source cited does

not indicate that Defendants ever believed that the bypass and boom would allow all, or even most, of the downstream-migrating fish to pass by means other than the turbines. And, this cannot fairly be said to be the present purpose of the downstream bypass, given Defendants' knowledge that a significant percentage of fish travel through the turbines even with the bypass and boom in place. LSW ECF Doc. 78-2 (Lockwood White Paper) (pageID #892) (Section entitled "Smolt Downstream Bypass Efficiency") ("For all radio-tagged Atlantic salmon released into or entering the powerhouse canal [during a 2011 fish passage study at Lockwood], approximately 18.8% passed via the downstream bypass with the remainder (81.2%) passing via the turbine units.") and (pageID #908) (Section entitled "Kelt Downstream Bypass Efficiency") (Based on 2011 radio-telemetry study at Lockwood, "[i]t was assumed that for Atlantic salmon kelts entering the powerhouse canal, approximately 18.8% were passed via the surface sluice with the remainder (81.2%) passing via the turbine."); see also: LSW SF ¶¶ 213-223 (LSW pageID #3902-04) (describing passage rates at Lockwood and agency criticism of the effectiveness of the bypass system).

26. Several other sluices at the Lockwood Project are used for downstream fish passage. [LSW3072] (Richter Dep. 52:9-16); [HK2356-57] (Diadromous Fish Passage Report for the Lower Kennebec River Watershed During the 2010 Migration Period).

**Response:** Denied.

Mr. Richter testified that there are two sluices (in addition to the downstream fish bypass), which he described as follows:

Q: Are there other sluices that pass water downstream at the Lockwood Project?

A: Yes. If they're open.

Q: And do these sluices also allow for downstream fish passage at the Lockwood Project?

A: They could.

Q: Do you know if they do?

A: Fish have used, yes.

Q: Are these sluices designed as downstream fishways?

A: Not specifically.

Richter Dep. at 152:9-19 (LSW pageID \$ 3072). Mr. Richter also testified that only one of these sluices is located in the forebay, while the other is on the spillway side, *id.* at 53:13-20, which means that, even if it is open, it cannot be accessed by fish going through the Lockwood forebay (which, during no-spill conditions, is all of them). Finally, Defendants' report on the 2010 season indicates that these sluices are not being used for fish passage. *See* HK ECF Doc. 85-2 (pageID #2357) ("NextEra is presently using the new guidance boom, new sluice [the bypass], and unregulated spill as a means of providing downstream passage for anadromous species.").

27. After installation of the diversion facilities at the Lockwood Project, during the "shakedown" period, Defendants evaluated the operation of the Slickbar boom that had been installed, and identified the need for additional flotation and upstream facing tether lines securing the boom and possibly removing some of the unwanted billowing in the curtain, which created a so-called "belly" in the curtain. [HK2356] (Diadromous Fish Passage Report for the Lower Kennebec River Watershed During the 2010 Migration Period); [HK2417] (3/15/10 Evaluation of Atlantic Salmon and Kelt Downstream Passage at Lockwood); [LSW3074; 3075-76] (Richter Dep. 58:10-16; 65:8-66:5).

**Response:** Admitted.

Mr. Richter's testimony identifies "sagging" as one of the problems compromising the effectiveness of the "Slickbar" boom deployed at Lockwood in 2009, and explains that such sagging is a problem because it pulls the guidance boom down beneath the surface of the water,

thus allowing “overtopping,” a condition which allows downstream migrating fish to swim over the top of the boom. Richter Dep. at 63:17-64:17 (LSW pageId #3075); see also LSW SF ¶¶ 200-204 (detailing problems compromising the effectiveness of the Slickbar boom at Lockwood).

28. Modifications were made at Lockwood, including additional flotation and tether lines and removal of some of the billowing. Defendants continued to work with the manufacturer to eliminate any risk of tearing and at the same time consulted with the resource agencies to evaluate other boom options. [LSW3075] (Richter Dep. 64:17-22; 65:8-12).

**Response:** Qualified.

Plaintiffs admit that the Slickbar boom at Lockwood was removed for repairs, and that flotation and tether lines were added “to try to...keep it from overtopping.” Richter Dep. 65:10-12 (pageID # 3075). However, the cited passages from Mr. Richter’s deposition do not support the remaining portions of this statement, and Plaintiffs deny those portions of the statement.

29. In May 2010, Defendants replaced the existing Slickbar boom with a Tuffboom which was more buoyant and rugged and which has a metal punch plate. Any issue that arose with the Tuffboom at the Lockwood Project was addressed as soon as river conditions allowed. [LSW3077; 3081-82; 3090] (Richter Dep. 71:2-3; 86:1-93:9; 122:2-123:17).

**Response:** Qualified.

Plaintiffs admit that Defendants replaced the Slickbar boom with a Tuffboom in May 2010, that the Tuffboom has a metal punch plate, and that it is considered more buoyant and more rugged than the Slickbar boom. Plaintiffs also admit that, as outlined in Mr. Richter’s

testimony, a number of issues arose with the Tuffboom after its installation at Lockwood that compromised its effectiveness at keeping fish out of the turbines. See also LSW SF ¶¶ 208-210 (pageID #3901) (summarizing problems with the Tuffboom). However, Plaintiffs deny that “[a]ny issue that arose with the Tuffboom at the Lockwood Project was addressed as soon as river conditions allowed.” The cited passages from Mr. Richter’s deposition testimony do not support this sweeping statement, and other facts indicate otherwise. For example, the results of the 2011 fish passage study at Lockwood indicated that the Tuffboom was not effective at keeping fish out of the Project’s turbines, LSW SF ¶¶ 213-16 (LSW pageID #3902), and both NMFS and MDMR informed Defendants in December 2011 that the bypass and boom at Lockwood were not effective at keeping fish out of the Project’s turbines, id. ¶ 217 (NMFS told Defendants that “the downstream bypass system was not effective”); id. ¶ 219 (MDMR informing Defendants of the “poor guidance and bypass utilization observed [at Lockwood] in 2011”) (pageID # 3903). Further, NMFS told Defendants in December 2011 that, even with the changes Defendants were planning to make to the Tuffboom, the bypass and boom at Lockwood would be unlikely to be effective at keeping fish out of the turbines, and NMFS suggested that Defendants instead “consider physical exclusion [e.g., screening of the turbines] at the site.” NMFS informed Defendants that “[p]hysical exclusion has been proven effective at significantly reducing turbine entrainment of Atlantic salmon and other diadromous fish species.” Id. ¶ 218 (pageID #3902-03). Yet Defendants did not address the basic issue raised by NMFS and MDMR – that the Tuffboom was not and would not be effective – and did not utilize physical exclusion at the site.

30. In addition to the Tuffboom, Defendants added a new surface sluice gate at Lockwood which included three orifices along the spillway to pass an additional 50 cfs minimum flow for protection of downstream fisheries and for potentially providing downstream passage even when there is no spill over the spillway at the facility. [HK2356-57] (Diadromous Fish Passage Report for the Lower Kennebec River Watershed During the 2010 Migration Period).

**Response:** Qualified.

Plaintiffs admit that Defendants installed what is described in this source as a “surface sluice gate” in the Lockwood forebay in 2009, but deny any intended implication that this is different from the “downstream bypass” referenced in ¶ 25 above; in fact, they are one and the same. Plaintiffs also deny that the “three orifices along the spillway” are part of this bypass. Plaintiffs admit that the referenced source states that the orifices “may” provide a downstream passage route when no spill is occurring, but note that this source also states that they are not used for that purpose. HK ECF Doc. 85-2 (pageID #2357) (“NextEra is presently using the new guidance boom, new sluice [the bypass], and unregulated spill as a means of providing downstream passage for anadromous species.”).

31. The Lockwood Tuffboom, which cost approximately \$150,000, was installed to stop fish from going through it and to allow fish to bypass the turbines. It also made significant improvements over the previous boom in terms of decreasing the risk of having fish go over the top of the boom. [LSW3076-77; 3093-94; 3078] (Richter Dep. 69:17-71:22; 76:7-10; 137:22-138:4).

**Response:** Qualified.

Plaintiffs admit that the Tuffboom installed at Lockwood in May 2010 cost “somewhere around” \$150,000. Richter Dep. at 69:13-16 (LSW pageID #3076). Plaintiffs deny the statement that the Tuffboom “was installed to stop fish from going through it,” because no fish were going through it *until* it was installed at Lockwood. Plaintiffs agree that the purpose of installing the Tuffboom was to encourage fish to bypass the turbines, but the source cited does not indicate that Defendants ever believed that the Tuffboom would allow all, or even most, of the downstream-migrating fish to pass by means other than the turbines. And, this cannot fairly be said to be the present purpose of the downstream bypass, given Defendants’ knowledge that a significant percentage of fish continued to travel through the turbines even after the Tuffboom was installed. LSW ECF Doc. 78-2 (Lockwood White Paper) (pageID #892) (Section entitled “Smolt Downstream Bypass Efficiency”) (“For all radio-tagged Atlantic salmon released into or entering the powerhouse canal [during a 2011 fish passage study at Lockwood], approximately 18.8% passed via the downstream bypass with the remainder (81.2%) passing via the turbine units.”) and (pageID #908) (Section entitled “Kelt Downstream Bypass Efficiency”) (Based on 2011 radio-telemetry study at Lockwood, “[i]t was assumed that for Atlantic salmon kelts entering the powerhouse canal, approximately 18.8% were passed via the surface sluice with the remainder (81.2%) passing via the turbine.”); see also: LSW SF ¶¶ 213-223 (LSW pageID #3902-04) (describing passage rates at Lockwood and agency criticism of the effectiveness of the bypass system). Finally, the source cited does not establish that the Tuffboom at Lockwood, as it actually functioned, “made significant improvements over the previous boom in terms of decreasing the risk of having fish go over the top of the boom,” and the facts discussed above indicate that the improvement, if any, was not significant. Rather, Defendants were told by USFWS and MDMR in February 2011 that this type of boom is “prone to failure,” LSW SF ¶¶

229-30 (LSW pageID #3904-05), and were told by NMFS and MDMR in December 2011 that the results of a spring 2011 salmon passage study at Lockwood showed that the boom failed to keep a significant percentage of fish out of the turbines, and that further improvements to the boom were unlikely to produce acceptable results, id. ¶¶ 217-19 (LSW pageID #3902-03). See also id. ¶ 220 (LSW pageID #3903) (the Lockwood White Paper, which Defendants believe is “scientifically defensible,” id. ¶ 43, “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.”).

32. Modifications were made to the Lockwood Tuffboom in June 2010 to increase buoyancy [and] strength and add new screening. The original floats were replaced with “Tuffboom” brand flotation with attached 4.0 ft. deep, 5/16 in metal punch plate panels and 6.0 ft. deep, 5/16 netting attached to the punch plate. It was designed to be deployed year round. [LSW3076-77] (Richter Dep. 69:17-71:22); [HK892] (Lockwood Project White Paper).

**Response:** Qualified.

(Plaintiffs note that the pageID reference for the Lockwood White Paper is incorrect; the referenced page of the White Paper is found at LSW pageID #892.) Plaintiffs admit that the referenced modifications were made to the Lockwood Tuffboom in June 2010 and that the boom was designed to be deployed year round, but Plaintiffs deny any intended implication that these modifications actually increased the buoyancy or strength of the boom. The referenced sources do not support tis representation, and the boom’s performance indicates otherwise. LSW SF ¶¶ 213-223 (LSW pageID #3902-04) (describing 2011 passage rates at Lockwood and agency criticism of the effectiveness of the bypass system).

33. When the curtain at the bottom of the boom ripped at Lockwood, Defendants sent divers in to fix it. When the trash rack near the bypass was found to be rattling, Defendants inserted wedges, and then mapped out a permanent solution. [LSW3089; 3091-92] (Richter Dep. 121:15-22; 122:13-19; 128:20-130:12).

**Response:** Qualified.

Plaintiffs admit this statement except for the representation that Defendants “mapped out a permanent solution;” Mr. Richter’s testimony does not support the representation that a permanent solution has been found.

34. In early 2012, Defendants began planning a complete overhaul of the Lockwood Tuffboom to create stronger attachment point, to further improve flotation and to replace the netting with a metal punch plate, at a cost of approximately \$125,000. [LSW3082; 3089-92] (Richter Dep. 90:6-24; 91:9-24; 93:2-9; 121:15-122:18; 122:13-19; 126:11-17; 128:6-19; 130:9-12; 130:25-131:16); LSWJSF ¶ 212 [LSW3901].

**Response:** Qualified.

Plaintiffs admit that Defendants planned in 2012 to make changes to the Tuffboom, and that Mr. Richter testified that these changes would cost “\$125,00[,] [s]omething in that rough ballpark,” Richter Dep. at 93:7-8, but the cited sources do not establish that any of these improvements were made. Further, Defendants were told by NMFS in December 2011 that these changes were not likely to be successful:

We understand that the Licensee plans several modifications to the existing downstream bypass in an attempt to increase its[] effectiveness. We are not

confident that the proposed modifications will significantly improve effectiveness of the downstream bypass or reduce turbine entrainment. Based upon the results of studies evaluating the effectiveness of floating booms at the Lockwood and Hydro-Project in the Kennebec River, NMFS questions whether this technology can be an effective behavioral guidance for migratory fish species.

LSW SF ¶ 218 (LSW pageID #3902-03).

35. The downstream fishway at Shawmut allows fish to bypass the turbines, and includes a four-foot wide sluiceway that discharges into a three-foot deep plunge pool. [LSW3100] (Richter Dep. 164:11-18; 165:3-7); [HK2357; 2359] (Diadromous Fish Passage Report for the Lower Kennebec River Watershed during the 2010 Migration Period); [HK2416] (Diadromous Fish Passage Report for the Lower Kennebec River Watershed during the 2009 Migration Period); [HK1289] (2006 Diadromous Fish Passage Report); [LSW1009] (Shawmut White Paper).

**Response:** Qualified.

Plaintiffs admit that Defendants utilize a sluice that is also used to pass debris at Shawmut as a means of passing fish downstream, and that the sluice is “about” the size indicated in the statement. Richter Dep. at 164:11-165:2 (LSW pageID #3100). Plaintiffs also admit that “[f]lows from this sluice discharge over the face of the dam and drain into a man-made 3-foot-deep plunge pool connected to the river.” HK ECF Doc. 85-3 (HK pageID #2416). Plaintiffs further admit that the sluice, when open, provides a route for downstream-migrating fish other than the turbines, but Plaintiffs deny any intended implication that the sluice allows all, or even most, of the downstream-migrating fish to pass by means other than the turbines, and note that Defendants themselves believe that most adult salmon pass the project via the turbines. LSW SF ¶¶ 235-36 (LSW pageID #3905-06). Plaintiffs also note that an internal NextEra memo written

by Mr. Richter in June 2010 stated that “adult Atlantic salmon...probably pass the [Shawmut] project via spillage, via an existing sluice gate *and the turbines*,” and further stated that “[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.*” Richter Dep. at 170:19-171:7; 171:19-172:16 (LSW pageID #3102) (emphasis added); see also id. at 160:21-161:23 (LSW pageID #3101) (Mr. Richter identifying the document). Mr. Richter also testified that the sluice does not presently meet “the existing design criteria” of MDMR, NMFS, or USFWS for fish passage. Id. at 172:17-23.

36. In 2009, Defendants worked with the signatory resource agencies and FERC to develop bypass and diversion methods for Shawmut. The options studied would address major debris issues as well as downstream fish passage. A team of consultants was hired to design the new facility. [LSW3270-71] (7/30/09 letter from NextEra to NMFS); [HK2357-58] (Diadromous Fish Passage Report for the Lower Kennebec River Watershed during the 2010 Migration Period); [LSW3100-01] (Richter Dep. 165:8-24; 166:8-20).

**Response:** Qualified.

The cited page from Defendants’ Fish Passage report states that “[i]n 2009, NextEra engineers and operations personnel were beginning to look at options to resolve some ongoing major debris issues at Shawmut,” that Defendants eventually determined that “the options for debris resolution should be designed to also address downstream fish passage needs,” and that Defendants retained a team of consultants for this purpose. However, the report does not indicate that “Defendants worked with the signatory resource agencies and FERC to develop bypass and diversion methods for Shawmut.”

Further, Plaintiffs admit that Christopher L. Allen of NextEra Energy wrote to Mary Colligan of NMFS on July 30, 2009, but deny that this letter concerned any debris/fish passage concept for Shawmut. Plaintiffs admit that Mr. Clark stated in that letter: that “MDMR recently... indicated that they would like to see study plans for the assessment of downstream passage for smolts and kelts developed for both the Shawmut and Weston projects;” that “MDMR [also] indicated that they released the largest number of adults above the Kennebec dams in 2008;” and that “NextEra Energy companies committed to consult with resource agencies and develop study plans by September 30, 2009...to assess downstream passage for adults and smolts at Shawmut and Weston.” However, Plaintiffs deny that this establishes that Defendants “worked with the signatory resource agencies and FERC to develop bypass and diversion methods for Weston,” and further note that the summary judgment record does not establish that any study to assess downstream passage for salmon adults or smolts was conducted at Shawmut or Weston, and that Defendants take the position (see ¶ 11, above) that there are no “empirical data” on “fish passage efficiency” at Shawmut or Weston.

Finally, Plaintiffs admit that Mr. Richter testified that Defendants had spoken with unidentified “agencies” at some unidentified time regarding a debris/fish passage concept for Shawmut, but deny that this establishes that “[i]n 2009, Defendants worked with the signatory resource agencies and FERC to develop bypass and diversion methods for Shawmut.”

37. In 2011 at Shawmut, Defendants developed plans to use full-depth one-inch angled trashracks and a new surface sluice and flume, all to be designed in consultation with and approved by the resource agencies. Defendants were scheduled to complete the design consultation and permitting for this installation in the fall of 2011 and to complete installation in

2012, but NMFS was not prepared to proceed because it wanted to first consider the impact of the Habitat Conservation Plan measures for the Shawmut Project. [LSW1009] (Shawmut Project White Paper); [3103-04] (Richter Dep. 174:22-175:22; 176:4-20; 181:11-22); [3241] (HCP Technical Advisory Committee Meeting Summary, 9/7/11).

**Response:** Qualified.

Plaintiffs admit that Defendants developed plans for a debris/fish passage system at Shawmut which has not been installed, but deny that NMFS was the primary reason for the delay implementation. The NextEra Technical Advisory Committee Meeting Summary and Mr. Richter's testimony indicate that the delay was caused by Defendants:

Q: ...The document [the Meeting Summary] indicates starting at the second sentence, "At Shawmut, Bob [Mr. Richter] told the group that plans to install a new trash rack/bypass system have been postponed temporarily. He explained that the planned trash rack system would have required a FERC license amendment to construct. In turn, that would trigger the need for Section 7 consultation [one form of Endangered Species Act consultation] which would have forced NMFS to deal with ESA issues at Shawmut outside the Section 10 HCP process [another form of ESA consultation]. *Since NextEra preferred to keep Shawmut in the HCP, they decided to postpone the trash rack installation until later.*" And this accurately reflects what you said at the meeting?

A: Yes.

...

Q: And why did NextEra prefer to keep Shawmut in the HCP process rather than undergoing the Section 7 process at Shawmut?

A: Because we felt that we wanted to deal with all these projects in one process, in the Section 10 process. And we felt that it just wasn't a good idea to separate and basically carve out Shawmut and then have to go through that whole other process. It would fragment our HCP process.

Richter Dep. at 179:17-181:16 (LSW pageID # 3104) (emphasis added). Mr. Richter also testified that this was consistent with the recommendation of NMFS, but his statement to the HCP Advisory Committee clearly indicates that this was Defendants' decision.

38. The provisions of Section IV of the Agreement for the Lockwood, Shawmut and Weston Projects include a statement that “Construction of new diversionary structures to achieve success is not required by this Agreement.” [LSW3220; 3223; 3225] (Agreement, Section (IV)).

**Response:** Qualified.

Plaintiffs admit that this language is contained in a footnote appended to the subsections of Section IV of the KHDG Agreement addressing “Downstream passage” at, respectively. Lockwood, Shawmut, and Weston. However, in each instance the footnote is appended to the paragraph in that subsection addressing “interim downstream passage of out-migrating alewife, and/or *juvenile* Atlantic salmon or shad,” and not to the separate paragraph in that subsection addressing “interim downstream passage of out-migrating *adult* Atlantic salmon and/or *adult* shad” (emphasis added). Further, the footnote is specifically appended to the word “successful,” in a sentence describing the requirements that must be met regarding passage of *juvenile* fish “[i]n the event that fish passage using [sluiceways and controlled spills] is not successful.” Plaintiffs deny any intended implication that this footnote has any bearing on the separate paragraph in these subsections specifying the requirements that must be met “[i]n the event that adult shad and/or adult Atlantic salmon begin to inhabit the impoundment.”

39. In 2009, Defendants worked with the signatory resource agencies and FERC to develop bypass and diversion methods for Weston. [LSW3270-71] (7/30/09 letter from NextEra to NMFS discussing collaborative process); [LSW3098] (Richter Dep. 157:10-25) (boom at Weston required agency approval before installation, which included MDMR, NMFS and FWS)

[LSW3099] (Richter Dep. 158:10-12) (“[A]s part of the fish passage process . . . we collaborate with them on these designs.”).

**Response:** Qualified.

Plaintiffs admit that Christopher L. Allen of NextEra Energy wrote to Mary Colligan of NMFS on July 30, 2009, that he stated in that letter: that “MDMR recently . . . indicated that they would like to see study plans for the assessment of downstream passage for smolts and kelts developed for both the Shawmut and Weston projects,” that “MDMR [also] indicated that they released the largest number of adults above the Kennebec dams in 2008,” and that “NextEra Energy companies committed to consult with resource agencies and develop study plans by September 30, 2009 . . . to assess downstream passage for adults and smolts at Shawmut and Weston.” However, Plaintiffs deny that this establishes that Defendants “worked with the signatory resource agencies and FERC to develop bypass and diversion methods for Weston,” and further note that the summary judgment record does not establish that any study to assess downstream passage for salmon adults or smolts was conducted at Shawmut or Weston, and that Defendants take the position (see ¶ 11, above) that there are no “empirical data” on “fish passage efficiency” at Shawmut or Weston.

Plaintiffs admit that Mr. Richter testified that the installation of a guidance boom at Weston was approved by NMFS, USFWS, and MDMR (LSW pageID #3098-99), but deny that these three agencies comprise all of the “resource agencies” referenced in the referenced passage from the KHDG Agreement. LSW SF ¶ 196 (pageID #3899) (“Resource agencies” means “the Services [NMFS and USFWS], MDMR, Maine Department [of] Inland Fisheries and Wildlife, and Maine Atlantic Salmon Authority”). Further, Plaintiffs deny that any of these three agencies gave final approval to the Weston boom, as the record indicates only that they only approved

“testing” the device, see LSW ECF Doc. 124-7 (pageID #4789-91) (USFWS) and LSW ECF Doc. 124-8 (pageID #4794-95) (MDMR), that they warned that the type of boom in question is “prone to failure, debris loading and overtopping,” id., and they stressed that the boom “will need to be demonstrated to: 1) be stable at the maximum flow, 2) be installed and operational between April 1 and December 31 (the downstream migration period), 3) provide safe and effective downstream passage for anadromous fish, 4) minimize take of Atlantic salmon, 5) prevent fish from sounding under the net, and 6) be highly resistan[t] to debris loading that could result in its failure or an increase in the net’s approach velocity,” id. (this language is from USFWS; MDMR makes the same points using slightly different language).

40. In 2009, Defendants evaluated options for improving downstream fish passage at the Weston Project while resolving some ongoing issues they were experiencing with the accumulation of significant downstream debris. [HK2357] (Diadromous Fish Passage Report for the Lower Kennebec River Watershed during the 2010 Migration Period); [LSW3096] (Richter Dep. 146:12-21).

**Response:** Qualified.

Plaintiffs admit that Mr. Richter testified in the referenced section of his deposition that Defendants “started thinking about” “the boom concept” in relationship to Weston in 2009, and that the referenced page from Defendants’ Diadromous Fish Passage Report for 2010 states that “In 2009, NextEra engineers and operations personnel were beginning to look at options to resolve some ongoing debris issues at Weston.” However, the referenced sources do not support the assertion that Defendants “evaluated *options* [beyond the boom concept] for improving

downstream fish passage at the Weston Project” in 2009, and do not support the characterization of the debris issues as “significant,” and Plaintiffs thus deny these portions of the statement.

41. In 2010, Defendants made major structural repairs to the existing sluice gate structure at Weston and resurfaced the sluice to make it safer for fish. [LSW3095] (Richter Dep. 143:22-144:6); [HK2358] (Diadromous Fish Passage Report for the Lower Kennebec River Watershed during the 2010 Migration Period).

**Response:** Qualified.

Plaintiffs admit that Defendants resurfaced the flume at the downstream end of the sluice at Weston in 2010, and that they characterized this in the referenced report as a “major project.” However, Plaintiffs deny that this was done “to make [the sluice] safer for fish.” Mr. Richter testified as follows in the referenced portion of his deposition: “Q: And what was the purpose of resurfacing the flume? A: Had some structural issues with it.” He also testified that he “believe[s]” that the resurfacing also made the flume safer for fish. Richter Dep. at 144:1-3 (LSW pageID # 3095). (Mr. Richter testified that the sluice, which was originally installed to pass logs, is now used to pass debris, *id.* at 143:16-18, and referenced report makes clear that the project was designed to address the “ongoing debris issues” referenced in ¶ 40, above.) Plaintiffs also deny any intended implication that the resurfacing of the flume, which is downstream of the point at which debris or fish may enter the sluice, resulted in any improvement to the efficacy of the sluice as means of keeping fish from downstream through the turbines at Weston.

42. The downstream fishway at Weston allows the fish to bypass the dam without swimming through the turbines. Defendants also installed a Tuffboom which is fairly rugged,

cost approximately \$400,000 to install, is deployed year-round and is intended to keep fish out of the turbines. [LSW3095-96] (Richter Dep. 143:2-5; 144:7-10; 145:17-146:11).

**Response:** Qualified.

Plaintiffs admit that fish that pass downstream through the sluiceway at Weston do not pass downstream through the turbines, but deny any intended implication that the sluice and boom keep all, or even most, downstream migrating fish from swimming through one of the four turbines at Weston. See LSW SF ¶108 (number of turbines at Weston); ¶¶ 231-32 (as many as 98% of adult salmon pass downstream through the turbines at Weston when there is no spill and the guidance boom is not functioning). The cited source provides no information regarding how well the guidance boom works when it is functioning.

Plaintiffs also admit that Defendants installed a Tuffboom at Weston in the late summer of 2011 (Mr. Richter testified it was in “[e]arly fall” of 2011) at a cost of “around \$400,000” and that this type of boom is generally considered “more rugged” than the Kevlar boom that was in place at Lockwood at the time. Richter Dep. at 143:3-19 (LSW pageId #3095). However, Plaintiffs deny that the boom is deployed year-round at Weston; the cited testimony from Mr. Richter states only that the boom was “designed” to be deployed year-round. Id. at 145:24-146:1. Finally, Plaintiffs admit that the boom was installed to serve as a means of keeping fish out of the Weston turbines, but deny any intended implication that Defendants believed that the boom would keep all, or even most, of the fish out of the turbines. As discussed in Plaintiffs responses to several of Defendants’ supplemental statements of fact herein, Defendants were told by USFWS and MDMR months before the installation of the boom that this type of boom “is experimental,” has not been “demonstrated [to be] effective,” is “prone to failure, debris loading and overtopping,” and that these features “reduc[e] [its] effectiveness as a guidance device.”

LSW SF ¶¶ 229-30 (LSW pageID #3904-05). Moreover, the device began to experience failures immediately after its installation. *Id.* ¶¶ 227-28 (malfunctions in August and October 2011 created openings that provided fish additional access to the turbines).

43. After the new Tuffboom was installed at Weston, a problem arose with one of the welds. As soon as the river flows subsided, and it was safe, Defendants inspected the damage and determined the problem had occurred at the factory. Defendants arranged to have the manufacturer come out to fix the bad weld and replace two panels and planned further testing to ensure the efficacy of the Tuffboom. [LSW3097-98] (Richter Dep. 151:22-25; 154:2-12); *see also* [LSW3097-98] (Richter Dep. 150:4-152:3; 155:3-15) (at same time, Defendants repaired spacers between the Tuffboom floatation devices).

**Response:** Qualified.

Plaintiffs agree that Mr. Richter's testimony describes two malfunctions of the Weston boom occurring in 2011, one the result of a bad weld (which caused the boom to open, Mr. Richter agreed, "like the proverbial barn door" in early October, Richter Dep. at 154:23-155:2), and the other the result of damage caused by river flow in late August (which left a space large enough for downstream migrating fish to get through), *id.* at 150:22-151:4. Plaintiffs also agree that Mr. Richter testified that he believes both were addressed in repairs done at the same time "sometime after October 5th" and "probably ...before November" (Richter Dep. 155:3-15), after the river flow subsided and they (and the manufacturer) were able to make the repairs. Plaintiffs also agree that Defendants planned to test the efficacy of the Weston boom in the spring of 2012, but Plaintiffs deny that Mr. Richter's testimony indicates (much less establishes) that Defendants believed that such testing would "ensure the efficacy of the Tuffboom."

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' Opposition to Defendants' Supplemental Statement of Undisputed Material Facts 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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