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November 5, 2010

BY CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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Brookfield Power New England LLC  
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Kim Osmars  
Chief Operating Officer, U.S. Operations  
Brookfield Renewable Power, Inc.  
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Dear Sirs:

This letter is written on behalf of Friends of Merrymeeting Bay, Douglas Watts, and Environment Maine (collectively, "Citizens"). It supplements a letter sent to Brookfield Renewable Power, Inc. by Friends of Merrymeeting Bay and Mr. Watts (along with Ed Friedman) on July 9, 2010.

It is Citizens' understanding that Hydro Kennebec LLC, Brookfield Power New England LLC, and Brookfield Renewable Power, Inc. (collectively, "Brookfield") own and operate the Hydro Kennebec dam on the Kennebec River at Winslow.<sup>1</sup> Citizens write this letter to notify Brookfield that at the Hydro Kennebec dam they are violating (1) the "take prohibition" provision of the Endangered Species Act ("ESA"), and (2) the

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<sup>1</sup> The Citizens did their best to determine which entities own and operate the Hydro Kennebec dam. The three entities to whom this letter is addressed are affiliated with Brookfield Asset Management, Inc., a Canadian corporation, which appears to have a bewildering array of affiliates involved in power generation in Maine. This notice is also being sent to Brookfield Asset Management (US), Inc., the United States subsidiary of Brookfield Asset Management, Inc.

water quality certification issued under section 401 of the Clean Water Act (“CWA”) for the dam.

I. ENDANGERED SPECIES ACT VIOLATIONS.

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 in the Kennebec River is part of the GOM DPS and thus is protected under the ESA. The portion of the Kennebec River where the Hydro Kennebec dam is located is 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 it in the area designated as “critical habitat” for the salmon. 74 Fed. Reg. 29,300 (June 19, 2009).

The ESA prohibits a “take” of endangered species. 16 U.S.C. § 1538(a)(1)(B). “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).

Brookfield's Hydro Kennebec dam harasses, harms and kills - and thus takes - Atlantic salmon in a number of ways. Among these are the following:

1. The dam's turbines kill and injure salmon when the salmon attempt to pass through them.
2. The dam severely limits 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 dam is a barrier to migration of other diadromous species whose presence is necessary for the salmon to complete their life cycle.
5. The dam adversely alters predator-prey assemblages, and negatively affects predator detection and avoidance.
6. The dam creates a slow-moving impoundment in a formerly free-flowing reach. This altered habitat is less suitable for spawning and rearing of salmon and contributes to the dam's significant impairment of essential behavior patterns. In addition, these conditions may favor non-native competitors at the expense of the native salmon.
7. The dam results in adverse hydrological and geomorphological changes, interruption of natural sediment and debris transport, and changes in water temperature, all of which contribute to the dam's significant impairment of essential behavior patterns.

In their decision to include the Kennebec population 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 Hydro Kennebec LLC, Brookfield Power New England, nor Brookfield Renewable Power has such a permit, nor even applied for one 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 to secure appropriate relief for your violations of the ESA take prohibition.

## II. SECTION 401 WATER QUALITY CERTIFICATION VIOLATIONS.

Under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, a hydroelectric dam 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).

Brookfield is violating the water quality certification issued for the Hydro Kennebec dam. Specifically, Brookfield is violating the following provision of the water quality certification:

**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 impoundment above the Hydro Kennebec dam. Brookfield has chosen to achieve (or attempt to achieve) downstream passage of adult salmon through the dam’s turbines.<sup>2</sup> However, Brookfield has not first demonstrated with site-specific studies that turbine passage will not cause “significant injury and/or mortality (immediate or delayed).” Thus, Brookfield is 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 Brookfield has likewise chosen to pass these shad through Hydro Kennebec 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 certification.

It should be noted that the Citizens do not believe that the required site-specific studies would show that turbine passage at the Hydro Kennebec dam could be accomplished without significant injury or mortality.

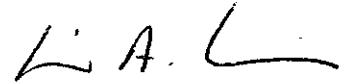
The Citizens intend to file suit against Hydro Kennebec LLC, Brookfield Power New England, and Brookfield Renewable Power to secure appropriate relief under federal law for these CWA violations.

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<sup>2</sup> Installation of a kevlar net at Hydro Kennebec 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 certification, 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,



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