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April 1, 2021

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

**RE: Lockwood Project FERC No. 2574, Hydro-Kennebec Project FERC No. 2611,
Shawmut Project FERC No. 2322 and Weston Project FERC No. 2325**

Dear Secretary Bose,

The Kennebec Coalition¹ submits this letter in support of the February 19, 2021 letter and attachment to the Commission from Julia E. Crocker, Endangered Fish Recovery Branch Chief, Protected Resources Division, National Oceanic and Atmospheric Administration, U.S. Department of Commerce (“the NOAA letter”).² The NOAA letter clarifies further the Endangered Species Act (“ESA”) standards and procedural mandates for application of the ESA

¹ The Kennebec Coalition consists of the Atlantic Salmon Federation (including the Maine Council of the Atlantic Salmon Federation), Maine Rivers, the Natural Resources Council of Maine, and Trout Unlimited by its Kennebec Valley Chapter. A joint Motion to Intervene was timely filed by the members of the Kennebec Coalition with this Commission on September 4, 2020. FERC Accession No. 20200904-5099. In addition, these organizations, with the exception of Maine Rivers, are signatories to the 1998 Kennebec Hydro Developers Group (“KHDG”) Agreement,¹ an agreement incorporated into the current license terms of the each of the projects. For an overview of the KHDG Agreement and the procedures leading to its incorporation into the licenses in issue, see 155 FERC ¶61,185 at PP 4 & n.10.

² FERC Accession No. 20210219-5184.

to the operations of the four hydropower projects in issue. 16 U.S.C. §§ 1536, 1538, 1539.³ The NOAA letter adequately clarified “misconceptions”⁴ about these procedural mandates – misconceptions which we contend are primarily reflected by Brookfield Renewable – US’s (“Brookfield”) filing another request for extension on February 1, 2021, which functionally seeks to delay further and, indeed, avoid altogether, the basin-wide formal section 7 ESA consultation that this Commission granted and initiated on *March 14, 2018* with its designation of non-federal representative status to Brookfield for this pending comprehensive section 7 ESA consultation.⁵

The following ESA consultation history and overview for this case will assist further in showing how the Commission’s licensee, Brookfield, in this matter has been both late and deficient in meeting its ESA obligations for now *over two years* since the Commission initiated this mandatory comprehensive review under section 7 of the ESA on March 14, 2018.⁶

I. RELEVANT ESA CONSULTATION HISTORY

Brookfield’s February 1, 2021 request for extension omits completely its *February 12, 2018* request that this Commission designate Brookfield as the Commission’s non-federal representative for the purpose of undertaking consultation with the National Marine Fisheries Service (“NMFS”), “pursuant to § 7 of the Endangered Species Act (ESA) **regarding potential Project effects to Atlantic salmon.**”⁷ A fuller account of the consultation history, and the

³ These statutory sections are specifically referred to as sections 7, 9, and 10, of the ESA.

⁴ FERC Accession No. 20210219-5184 at p. 1.

⁵ FERC Accession No. 20180314-3001.

⁶ *Id.*

⁷ FERC Accession No. 20180212-5110 at p. 1 (bold emphasis added).

mandate for this reinitiated consultation on February 12, 2018, regrettably appears to be necessary at this time. NMFS should not have to write letters to this Commission or consult with it on procedure in order to explain Brookfield's present obligations under the ESA to Brookfield. It is our hope that this fuller explanation of the procedural consultation background will assist with providing needed clarity on the matter at this time.

1. June 19, 2009: In June of 2009, the determinations of endangered status and designation of critical habitat for Atlantic salmon GOM-DPS were finalized.⁸
2. July 30, 2009; and May 21, 2010 & January 5, 2011: The Project licensees (now Brookfield), were facing claims in the United States District Court for the District of Maine, brought by citizens pursuant to the citizen suit provisions of section 11 of the ESA, asserting that upon finalization of the June 2009 listing, operation of the Projects violated section 9 of the ESA without permitted terms and conditions for the incidental take of Atlantic salmon at each Project (which permits would be issued pursuant to section 10 of the ESA). At the time, with respect to Brookfield's predecessors for the Lockwood, Shawmut, and Weston Projects (FPL Energy), these aspects of the citizen suit claims were mooted when FPL Energy submitted a letter to this Commission "indicating their intent to obtain an Incidental Take Permit through a Habitat Conservation Plan under section 10 of the ESA."⁹

⁸ 74 Fed. Reg. 29,345; 74 Fed. Reg. 29,300. The consulting agency with jurisdiction over this listing is NOAA's National Marine Fisheries Service ("NMFS") within the Department of Commerce. 16 U.S.C. §§ 1532(15), 1533(a)(2); 50 C.F.R. § 402.01(b).; 74 Fed. Reg. 29,344, 29,358 (June 19, 2009).

⁹ FERC Accession No. 20130723-0012 at p.6 (2013 Biological Opinion, 1.1 Consultation History, first bullet point on page 6) (July 23, 2013). *See also* 155 FERC ¶ 61,185 P. 9 & n.18-20.

3. January 5, 2011: Brookfield, for its part, but at the time only with respect to its ownership and control of the Hydro Kennebec Project (FERC No. 2611), initiated consultation by letter dated January 5, 2011, requesting this Commission designate [Brookfield] “as a non-federal representative for the purpose of informal consultation with NMFS pursuant to Section 7 of the ESA.”¹⁰
4. January 31, 2013: On the other three Projects (Lockwood, Shawmut, and Weston), after initial discussions with NMFS and the submission of a draft Habitat Conservation Plan, FPL Energy announced its intention to proceed with developing an “interim species protection plan,” which would involve requesting that the Commission modify the project licenses to incorporate the proposed provisions.¹¹ On January 31, 2013, FPL Energy submitted a letter to the Commission “requesting designation as a non-federal representative for the purposes of informal consultation on Atlantic salmon.”¹²
5. September 17, 2012; July 23, 2013: As a result of the above formal section 7 consultations, NMFS issued two Biological Opinions, relevant to Atlantic salmon and these four Projects.¹³ The Biological Opinions reviewed an “Interim Species Protection Plan” or “ISPP.”

¹⁰ FERC Accession No. 20120917-5041 at p.4 (2012 Biological Opinion, 1.1 Consultation History, first bullet point on page 4) (September 17, 2012).

¹¹ FERC Accession No. 20130723-0012 at p. 6 (2013 Biological Opinion, 1.1 Consultation History, corresponding bullet points on page 6) (July 23, 2013).

¹² *Id.*

¹³ FERC Accession No. 20120917-5041; FERC Accession No. 20130723-0012.

6. The Time Limitations of the Biological Opinions: The ISPP reviewed by the Biological Opinions was a project involving a process of studying and testing fish passage facilities at the Projects over a period of seven years.

As has been repeated throughout these proceedings, and as emphasized in the recent February 19, 2021 NOAA letter, the Biological Opinions and the terms and conditions of their associated incidental take authorizations, planned for the “relatively short-term ISPP’s” in order to “gather information necessary to understand the effects of the projects on Atlantic salmon,” in contemplation of a reinitiated section 7 consultation upon expiration of the Biological Opinions.¹⁴ The ultimate purpose was in order for “an anticipated ‘final’ long-term species protection plan to be incorporated for the duration of the project licenses.”¹⁵

The Biological Opinions expressly expired over 15 months ago, on **December 31, 2019**.¹⁶ These expirations are not reasonably in dispute, but it is important to emphasize them now, in order to shed some light on the danger of allowing Brookfield to continue operating these Projects while delaying reinitiated consultation on the Projects’ operations under the ESA. The submission of a final plan to replace the “interim plan” that was the subject of the Biological Opinions, and the *reinitiation* of section 7 consultation thereon, was expressly envisioned and stated as terms of the short-term Biological Opinions. The 2013 Biological Opinion’s sections addressing the Lockwood,

¹⁴ FERC Accession No. 20210219-5184 (NOAA letter, attachment at page 2).

¹⁵ *Id.*

¹⁶ *Id.* at p. 3 (“December 31, 2019, the date of the expiration of the existing [Biological] Opinions . . .”); and *id.* at p. 2 (describing, among other points, that the previous December 2016 expiration date of the Hydro Kennebec Biological Opinion was extended to December 31, 2019 “in order to align it with the ISPP expiration date of the other three mainstem projects.”).

Shawmut, and Weston Project state: “At the end of the seven year period (2019), the licensee will file a final SPP for Atlantic salmon in consultation with FERC. **The final SPP will reinitiate formal section 7 consultation under the ESA.**”¹⁷ The section on Weston is the same with slight variation in wording: “At the end of the seven year period (2019), the licensee will file a final SPP for Atlantic salmon in consultation with FERC. **With the submission of the final SPP, FERC will reinitiate formal section 7 consultation under the ESA.**”¹⁸ Lest there be any question, NMFS repeated this time-limitation at the end of its Biological Opinion: “**In 2019, this Opinion will no longer be valid and consultation under section 7 will need to be reinitiated by FERC.**”¹⁹

The incidental take authorization at all four Projects also lapsed at the end of 2019: “We anticipate that the continued operation of the Lockwood, Shawmut, Weston [] Projects could potentially harm Atlantic Salmon adults and smolts in the mainstem of the

¹⁷ FERC Accession No. 20130723-0012 at pp. 19, 23 (2013 Biological Opinion, section 2.1.2.1. [Lockwood]; 2.2.2.1 [Shawmut]) (bold emphasis added).

¹⁸ *Id.* at p. 26 (2013 Biological Opinion, 2.3.2.1. [Weston]) (bold emphases added).

¹⁹ *Id.* at p. 136 (bold emphasis added). Even the May 25, 2017 extension of the expiration date of the Hydro Kennebec Biological Opinion, to align it with the December 31, 2019 expirations, re-emphasized the critical nature of this expiration deadline: “[o]n December 31, 2019, this Opinion will no longer be valid; we expect that the licensee will submit a new Species Protection Plan (SPP) and request for license amendment to you in advance of that date so that we can complete a new consultation considering effects of ongoing operations pursuant to a final SPP.” 2017 Biological Opinion cover letter (Kimberly B. Damon-Randall, Assistant Regional Administrator for Protected Resources (NMFS) to Secretary Bose, Federal Energy Regulatory Commission (May 25, 2017). This Commission’s reliance on that term of the Biological Opinion is clear. 162 FERC ¶ 62,158 (March 14, 2018) (Order Approving Extension of Interim Species Protection Plan for Atlantic Salmon) at PP 14-17. This Commission recognized that “NMFS indicated [in the 2017 Biological Opinion] that the reasonable and prudent measure and terms and conditions **would be in effect until December 31, 2019, and that the Commission would need to initiate consultation on the effects of a Final SPP before the end of 2019.**” *Id.* (bold emphasis added). One naturally questions whether this Commission would have granted this extension to Brookfield, had it been known that Brookfield would fail to perform its obligations as non-Federal representative (designated that very same day, March 14, 2018) in order to effectuate the Commission’s “need to initiate consultation on the effects of a Final SPP before the end of 2019” as stated. *Id.*

Kennebec The exempted take includes only take incidental to the proposed action.

The incidental take provided by this Opinion is valid until 2019. In 2020 this Opinion will no longer be valid for Atlantic salmon.²⁰

7. February 12, 2018. In anticipation of this critical December 31, 2019 deadline, therefore, Brookfield requested that this Commission “designate non-federal representative status” to Brookfield, for purposes of undertaking this critical reinitiated consultation with NMFS. In that formal request, Brookfield files “on behalf of the following Projects and licensees,” and requests designation as non-federal representative for the purpose of consultation “pursuant to § 7 of the Endangered Species Act (ESA) **regarding potential Project effects to Atlantic salmon:**

- **Lockwood Project (FERC No. 2574)**, licensed to Merimil Limited Partnership (MLP)
- **Hydro Kennebec Project (FERC No. 2611)**, licensed to Hydro-Kennebec LLC (HK LLC)
- **Shawmut Project (FERC No. 2322)**, licensed to Brookfield White Pine Hydro LLC (BWPH)
- **Weston Project (FERC No. 2325)**, licensed to Brookfield White Pine Hydro LLC (BWPH)”

See Brookfield to Secretary Bose, Federal Energy Regulatory Commission (February 12, 2018)

(bold and bullet points in original).²¹

By this request, Brookfield also fully acknowledged “[a]s per the ISPP’s” [as an aside, it is actually “as per” the Biological Opinions], that

the licensees will need to re-initiate section 7 consultation under the ESA and develop a final Species Protection Plan **that will cover the period from January 1, 2020 license expiration for the three Projects not currently undergoing relicensing** (Hydro Kennebec in September 2036; and Lockwood and Weston in

²⁰ *Id.* at p. 149 (bold emphasis added).

²¹ FERC Accession No. 20180212-5110 at p. 1.

October 2036). **Brookfield intends to file a basin-wide SPP in January 2019**, concurrent with the Final License Application submission for the Shawmut Project. This should allow sufficient time to complete the FERC Section 7 consultation process and the BO issuance **prior to the December 2019 expiration**.

Id. at 2 (bold emphasis added).²²

8. March 14, 2018: The Commission granted Brookfield's request for non-federal representative status on March 14, 2018, emphasizing that "the role of the non-federal representative may include . . . developing a draft Biological Assessment," which the Commission would review and approve for reinitiating the formal consultation under section 7 of the ESA, as planned by the interim Biological Opinions.²³
9. December 31, 2019: Brookfield never filed "a basin-wide SPP in January 2019" as it had represented to this Commission that it would in its request for non-Federal representative status.²⁴ That left the Projects operating without a valid governing Biological Opinion, or take authorization under either Sections 7 or 10 of the ESA, with Brookfield having failed to effectuate the re-initiated formal consultation under Section 7 on a basin-wide final SPP for all four projects, as had been planned. Instead, nearly a full year after "January 2019," and on the very date of expiration of the Biological Opinions (December

²² *Id.* at p. 2.

²³ FERC Accession No. 20180314-3001 at p. 2. *See also* 50 C.F.R. § 402.08 ("A Federal agency may designate a non-Federal representative to conduct informal consultation or prepare a biological assessment by giving written notice to the Director of such designation. . . . If a biological assessment is prepared by the designated non-Federal representative, the Federal agency shall furnish guidance and supervision and shall independently review and evaluate the scope and contents of the biological assessment. The ultimate responsibility for compliance with section 7 remains with the Federal agency.").

²⁴ FERC Accession No. 20180212-5110 at p. 2.

31, 2019), Brookfield filed a basin-wide SPP which was ultimately deemed deficient, and rejected by this Commission's orders of July 13, 2020 applicable to all four projects.²⁵

- II. THIS COMMISSION SHOULD REINITIATE FORMAL CONSULTATION AS REQUIRED BY SECTION 7 OF THE ESA BY REQUIRING BROOKFIELD (AS NON-FEDERAL REPRESENTATIVE) TO FILE A BASIN-WIDE FINAL SPP AND DRAFT BIOLOGICAL ASSESSMENT THEREON BY APRIL 15, 2021;
- and further, THIS COMMISSION SHOULD SUSPEND ANY LICENSE AMENDMENTS REQUIRING IMPLEMENTATION OF THE NOW-EXPIRED INTERIM PLANS UNTIL THIS FORMAL BASIN-WIDE CONSULTATION AND NEW ESA JEOPARDY ANALYSIS ARE COMPLETED.

The procedural mandates of the ESA are not a mystery to Brookfield and have been abundantly clear and apparent on this record for years. *See* 50 C.F.R. § 402.08. On December 2, 2020, this Commission ordered Brookfield to file the draft Biological Assessment, in compliance with and “as further described in schedule A” of that order, and further ordered that filing to take place “no later than 60 days from the date of this letter” [i.e., February 1, 2021].²⁶

On February 1, 2021, Brookfield filed a draft Biological Assessment which was, yet again, insufficient to meet requirements demanded by both this Commission and NMFS for the

²⁵ FERC Accession No. 20200713-3022 & 3023. As the Kennebec Coalition has emphasized before, the deficient basin-wide SPP and draft Biological Assessment were rejected by this Commission upon receipt and review of letters from NMFS and the Maine Department of Marine Resources (MDMR), and USFWS, who all filed letters on the Commission record stating (as described by this Commission) “that while NMFS did participate in informal consultation, the Final Plan and draft BA do not represent the agency’s agreement or concurrence with the scope, magnitude, or range of potential measures necessary for the protection of endangered Atlantic Salmon in the Kennebec River and, by extension, the Gulf of Maine Distinct Population Segment as a whole.” FERC Accession No. 20200713-3023. The MDMR and USFWS letters contained their support for these comments of NMFS. And MDMR stated further “that the plan filed is nearly identical to the draft version of the plan submitted for comment, in which MDMR and the Maine Department of Environmental Protection had significant concerns” and that “while the agency did participate in multiple meetings and discussed aspects of the proposal, this participation did not represent agency concurrence with the proposed actions regarding the protection of federally listed Atlantic salmon and other species.” *Id.*

²⁶ FERC Accession No. 20201202-3038 at p.2.

comprehensive basin-wide section 7 consultation. These requirements have been in place continuously since February/March 2018. Because it is ultimately this Commission's obligation under section 7 [*see* 50 C.F.R. § 402.08], this Commission should – as recommended by the NOAA letter of February 19, 2021 – either i) immediately initiate formal consultation on the Biological Assessment filed by Brookfield on February 1, 2021, regardless of its merits *vel non*, or ii) require Brookfield to file its now seriously overdue draft Biological Assessment and Final SPP on or before April 15, 2021, so that the basin-wide formal section 7 consultation which is long overdue can be reinitiated and completed. This reinitiated formal section 7 consultation must take place – it must be initiated *and* completed to final Biological Opinion – *before* any further fish passage installation is undertaken pursuant to any aspect of an expired interim plan. 16 U.S.C. § 1536(d) (prohibiting “irreversible or irretrievable commitment of resources” “after initiation of consultation required under subsection (a)(2) of this section” which has the “effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures”). Furthermore, as this Commission has noted, most significantly, the only regulatory means by which Section 7(o)(2) incidental take authorizations can be restored at the Projects would be the associated authorizations, if any, that would issue as part of a new valid Biological Opinion entered after the reinitiated formal consultation.²⁷

We also emphasize that while Brookfield was ordered to implement the time-limited ISPP when this Commission amended the project licenses by order dated May 19, 2016, this Commission was also quite careful in requiring that any and all construction designs and

²⁷ *Id.* at p. 2 (noting that without formal consultation pursuant to section 7 of the ESA, “the projects would continue to operate without having the effects considered in a BO and there will be no incidental take coverage in place.”).

schedules for ISPP implementation have the concurrent approval of NMFS (*and* receive recommendations from state agencies):

Prior to the start of construction, the licensee must file, for Commission approval, final plans and a schedule for construction of upstream fish passage facilities at the Lockwood, Shawmut and Weston Projects. **The plans and schedules shall be accompanied by evidence that the National Marine Fisheries Service has approved them.** The filing shall include copies of comments and recommendations from [USFWS, MDMR], or evidence that these agencies were given at least 30 days to provide comments and chose not to do so. **If the licensee does not adopt an agency recommendation, the plan should include the licensee's reasons, based on site-specific information.**

155 FERC ¶ 61,185 (Order Amending Licenses (D)).²⁸

The recent NOAA letter states clearly that NMFS's mandatory approval of any design or construction, or any schedule, at any of the Projects, now must follow, and be based upon, the formal basin-wide four-project section 7 consultation procedure begun by this Commission's order of March 14, 2018 described above. NMFS has stated that the expiration of the ISPP and the expiration of the Biological Opinions that reviewed it, and the lapse of take authorization contained in those Biological Opinions, now requires the comprehensive four-project formal consultation before any further construction, designing or redesigning, or schedules can continue. This position makes logical sense, both procedurally and substantively – it is the most efficient way of proceeding, and substantively this Commission and Brookfield cannot assume that NMFS's jeopardy analysis performed now will have the same results as the formal consultation that took place back in 2013 (and which was expressly understood to result in interim, time-

²⁸ FERC Accession No. 20160519-3059 at p. 29 (Order at ¶ (D)). As the Commission has recognized, and as we have repeatedly emphasized, NMFS has not approved any of the construction designs or schedules, and last year wrote affirmatively to this Commission to ensure that those objections were on record and not eclipsed by Brookfield's filings. FERC Accession Nos. 20200713-3022 & 3023; *and see* footnote 25, above.

limited, temporary findings that would be revisited upon reinitiation of formal consult after the December 31, 2019 expiration). Indeed, that was the whole point behind including express expiration dates in the Biological Opinions and associated take authorizations of 2013. This Commission should therefore suspend any license amendment requiring that Brookfield implement the now-expired ISPP (as this Commission has already done with respect to the remaining year of the Shawmut license,²⁹) to ensure that Brookfield focuses now on the basin-wide Final SPP to trigger the reinitiated formal section 7 consultation for Biological Opinion jeopardy and take authorization analyses that had been pre-set to occur when all of these interim decisions were made back in 2013.

In conclusion: The “interim plan” (ISPP) is expired. The 2012-13 Biological Opinions reviewing the ISPP are no longer valid. The Final Plan (SPP) and basin-wide draft Biological Assessment which were meant to replace them, were rejected by this Commission on July 13, 2020. The ISPP cannot be retroactively revived and extended without reinitiated formal section 7 consultation under the ESA on the basin-wide final plan. Brookfield was designated as this Commission’s non-federal representative under section 7 for purposes of consultation of the impacts of operations of these four Projects together – in Brookfield’s own words, “regarding potential Project effects to Atlantic salmon” for all four Projects, pursuant to its own request for non-federal representative designation of February 12, 2018.³⁰ As the recent NOAA letter sufficiently documents, that has been the section 7 requirement that has been in place since early 2018, and formal consultation needs to reach a conclusion. It is long overdue and more than a year has transpired since the Biological Opinions expired. The Projects are all without a final

²⁹ FERC Accession No. 20200723-3022 at p. 3.

³⁰ FERC Accession No. 20180212-5110 at p. 1.

Species Protection Plan, which was required before the December 31, 2019 expiration and which Brookfield originally told this Commission and all parties it would submit one year before that deadline.³¹ And the Projects have been operating without any associated incidental take authorizations under Sections 7 or 10 of the ESA, while a listed species – an iconic listed species in Maine, the Atlantic salmon – is present in the action areas of each of the Projects at critical seasonal periods within the species’ lifecycle.

Brookfield should be required to submit a draft Biological Assessment for this Commission’s compliance with Section 7 ESA mandates by April 15, 2021, and this Commission should initiate the planned basin-wide formal Section 7 consultation thereon immediately, beginning the 135-day regulatory Biological Opinion process. This timeline is not a burden to Brookfield – as stated above, Brookfield has had since at least its letter of February 12, 2018 to work on this issue. The reinitiated basin-wide section 7 consultation envisioned by the 2012 and 2013 Biological Opinions must occur as the next, exclusive vital step towards meeting the ESA mandates in this case regarding the ongoing operations of these Projects. 50 C.F.R. § 402.08; 16 U.S.C. § 1536.

DATED: March 31, 2021

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³¹ FERC Accession No. 20180212-5110 at p. 2 (“Brookfield intends to file a basin-wide SPP in January 2019”).

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The Atlantic Salmon Federation,
Maine Council of the Atlantic Salmon Federation,
Kennebec Valley Chapter of Trout Unlimited,
Natural Resources Council of Maine, and
Maine Rivers

CERTIFICATE OF SERVICE

I hereby certify that I have, this 1st day of April 2021, served by electronic mail a copy of the foregoing correspondence to all persons on the service list maintained by the Secretary of the Commission.

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