

Appendix 20
BWPH Legal Complaint

Matthew S. Warner
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September 27, 2021

VIA HAND DELIVERY

Michele Lumbert, Clerk
Kennebec Superior Court
One Court Street, Suite 101
Augusta, ME 04330

RE: Brookfield Power US Holding America, Co; The Merimil Limited Partnership; Hydro Kennebec LLC; and Brookfield White Pine Hydro, LLC v. Maine Department of Marine Resources; Patrick Keliher, in his official capacity as Commissioner of Maine Department of Environmental Protection; Melanie Loyzim, in her official capacity as Commissioner of Maine Department of Environmental Protection

Dear Ms. Lumbert:

Enclosed for filing in the referenced matter please find the following:

- Complaint;
- Civil Summary Sheet; and
- \$175 check for the filing fee.

Thank you for your assistance with this.

Sincerely,



Matthew Warner

MSW:smw

Enclosures

cc: Scott Boak, Assistant Attorney General
Mark Randlett, Assistant Attorney General

SUMMARY SHEET

M.R. Civ. P. 5(h)

This summary sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by the Maine Rules of Court or by law. This form is required for the use of the Clerk of Court for the purpose of initiating or updating the civil docket. (SEE ATTACHED INSTRUCTIONS)

I. County of Filing or District Court Jurisdiction: **Kennebec**

II. CAUSE OF ACTION (Cite the primary civil statutes under which you are filing, if any.)

14 M.R.S. Sec. 5951

III. NATURE OF FILING

- Initial Complaint
- Third-Party Complaint
- Cross-Claim or Counterclaim
- If Reinstated or Reopened case, give original Docket Number** _____
(If filing a second or subsequent Money Judgment Disclosure, give docket number of first disclosure)

IV. **TITLE TO REAL ESTATE IS INVOLVED**

V. MOST DEFINITIVE NATURE OF ACTION. (Place an X in one box only) Check the box that most closely describes your case.

GENERAL CIVIL (CV)

- | | | |
|--|--|--|
| <input type="checkbox"/> Personal Injury Tort | <input checked="" type="checkbox"/> Contract | <input type="checkbox"/> Other Forfeitures/Property Libels |
| <input type="checkbox"/> Property Negligence | <input checked="" type="checkbox"/> Contract | <input type="checkbox"/> Land Use Enforcement (80K) |
| <input type="checkbox"/> Auto Negligence | <input type="checkbox"/> Declaratory/Equitable Relief | <input type="checkbox"/> Administrative Warrant |
| <input type="checkbox"/> Medical Malpractice | <input type="checkbox"/> General Injunctive Relief | <input type="checkbox"/> HIV Testing |
| <input type="checkbox"/> Product Liability | <input type="checkbox"/> Declaratory Judgment | <input type="checkbox"/> Arbitration Awards |
| <input type="checkbox"/> Assault/Battery | <input type="checkbox"/> Other Equitable Relief | <input type="checkbox"/> Appointment of Receiver |
| <input type="checkbox"/> Domestic Torts | <input type="checkbox"/> Constitutional/Civil Rights | <input type="checkbox"/> Shareholders' Derivative Actions |
| <input type="checkbox"/> Other Negligence | <input type="checkbox"/> Constitutional/Civil Rights | <input type="checkbox"/> Foreign Deposition |
| <input type="checkbox"/> Other Personal Injury Tort | <input type="checkbox"/> Statutory Actions | <input type="checkbox"/> Pre-action Discovery |
| <input type="checkbox"/> Non-Personal Injury Tort | <input type="checkbox"/> Unfair Trade Practices | <input type="checkbox"/> Common Law Habeas Corpus |
| <input type="checkbox"/> Libel/Defamation | <input type="checkbox"/> Freedom of Access | <input type="checkbox"/> Prisoner Transfers |
| <input type="checkbox"/> Auto Negligence | <input type="checkbox"/> Other Statutory Actions | <input type="checkbox"/> Foreign Judgments |
| <input type="checkbox"/> Other Negligence | <input type="checkbox"/> Miscellaneous Civil | <input type="checkbox"/> Minor Settlements |
| <input type="checkbox"/> Other Non-Personal Injury Tort | <input type="checkbox"/> Drug Forfeitures | <input type="checkbox"/> Other Civil |

CHILD PROTECTIVE CUSTODY (PC)

Non-DHS Protective Custody

SPECIAL ACTIONS (SA)

Money Judgment
 Money Judgment Request Disclosure

REAL ESTATE (RE)

- | | | |
|---|---|---|
| <input type="checkbox"/> Title Actions | <input type="checkbox"/> Foreclosure | <input type="checkbox"/> Misc. Real Estate |
| <input type="checkbox"/> Quiet Title | <input type="checkbox"/> Foreclosure (ADR exempt) | <input type="checkbox"/> Equitable Remedies |
| <input type="checkbox"/> Eminent Domain | <input type="checkbox"/> Foreclosure (Diversion eligible) | <input type="checkbox"/> Mechanics Lien |
| <input type="checkbox"/> Easements | <input type="checkbox"/> Foreclosure - Other | <input type="checkbox"/> Partition |
| <input type="checkbox"/> Boundaries | | <input type="checkbox"/> Adverse Possession |
| | | <input type="checkbox"/> Nuisance |
| | | <input type="checkbox"/> Abandoned Roads |
| | | <input type="checkbox"/> Trespass |
| | | <input type="checkbox"/> Other Real Estate |

APPEALS (AP) (To be filed in Superior Court) (ADR exempt)

Governmental Body (80B) Administrative Agency (80C) Other Appeals

VI. M.R. Civ. P. 16B Alternative Dispute Resolution (ADR):

- I certify that pursuant to M.R. Civ. P. 16B(b), this case is exempt from a required ADR process because:
 - It falls within an exemption listed above (i.e., an appeal or an action for non-payment of a note in a secured transaction).
 - The plaintiff or defendant is incarcerated in a local, state or federal facility.
 - The parties have participated in a statutory pre-litigation screening process with _____
 - The parties have participated in a formal ADR process with _____ on _____ (date).
- This is an action in which the plaintiff's likely damages will not exceed \$50,000, and the plaintiff requests an exemption from ADR pursuant to M.R. Civ. P. 16C(g).

VII. (a) **PLAINTIFFS (Name & Address including county)**

or Third-Party, Counterclaim or Cross-Claim Plaintiffs

The plaintiff is a prisoner in a local, state or federal facility.

Brookfield Power US Holding America Co;
The Merimil Limited Partnership;
Hydro Kennebec LLC; and
Brookfield White Pine Hydro, LLC

(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number) **If all counsel listed do NOT represent all plaintiffs, specify who the listed attorney(s) represent.**

Matthew S. Warner, Bar # 4823
Jonathan Mermin, Bar # 9313
Preti Flaherty
One City Center - P.O. Box 9546
Portland, ME 04112-9546
(207) 791-3000

VIII. (a) **DEFENDANTS (Name & Address including county)**

and/or Third-Party, Counterclaim or Cross-Claim Defendants

The defendant is a prisoner in a local, state or federal facility.

Maine Department of Marine Resources; (KENNEBEC, ss)
Patrick Keliher, in his official capacity as Commissioner of Maine Department of Marine Resources;
32 Blossom Lane
Augusta, ME 04330

Melanie Loyzim, in her official capacity as Commissioner of Maine Department of Environmental Protection
17 State House Station, Augusta, ME 04333

(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number) **If all counsel listed do NOT represent all defendants, specify who the listed attorney(s) represents.**
(If known)

IX. (a) **PARTIES OF INTEREST (Name & Address including county)**

(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number) **If all counsel listed do NOT represent all parties, specify who the listed attorney(s) represents.**
(If known)

X. **RELATED CASE(S) IF ANY**

Assigned Judge/Justice _____

Docket Number _____

Date: 09-27-2021

Matthew S. Warner, Bar # 4823

Signature of Plaintiff or Lead Attorney of Record

Signature of Plaintiff or Attorney

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

Brookfield Power US Holding America Co.;)
The Merimil Limited Partnership; Hydro)
Kennebec LLC; and Brookfield White Pine)
Hydro LLC,)

Plaintiffs,)

v.)

Maine Department of Marine Resources;)
Patrick Keliher, in his official capacity as)
Commissioner of Maine Department of)
Marine Resources; Maine Department of)
Environmental Protection; Melanie)
Loyzim, in her official capacity as)
Commissioner of Maine Department of)
Environmental Protection,)

Defendants.)

COMPLAINT

Plaintiffs (collectively “Brookfield”) complain against the Maine Department of Marine Resources and Patrick Keliher, in his official capacity as the Commissioner of the Maine Department of Marine Resources (collectively “DMR”); and the Maine Department of Environmental Protection and Melanie Loyzim, in her official capacity as the Commissioner of the Maine Department of Environmental Protection (collectively “DEP”), as follows:

1. The State of Maine is intent on demolishing Brookfield’s four dams on the lower Kennebec River. DMR, in its own words, “recommends that the Shawmut Project and the Lockwood Project be decommissioned, and the dams removed,” and “that the Hydro-Kennebec and Weston projects be considered for decommissioning and removal.” Earlier this year DMR tried to create a comprehensive river resource

management plan that called for the removal of Brookfield's dams, but the agency had to withdraw that plan after Brookfield sued because DMR had no authority to create it.

2. This lawsuit is about DMR repeatedly exceeding its authority under state law in an effort to compel Brookfield to remove its dams. DMR's ongoing efforts are nothing more than a repackaging of the illegal plan it withdrew earlier this year. DMR continues to violate both state law and its contractual obligation to work with Brookfield on fish passage.

3. This lawsuit is also about DEP's erroneous view that it can adopt DMR's illegal regulations wholesale when acting on applications for water quality certification for hydropower facilities. DMR's lawless requirements are not somehow legitimized by passing them through a different agency.

PARTIES AND JURISDICTION

4. Plaintiff Brookfield Power US Holding America Co. is a Delaware corporation that, through its subsidiaries, owns interests in and operates renewable energy projects, including hydroelectric and wind projects, throughout Maine. These include the Lockwood project, the Hydro-Kennebec project, the Shawmut project, and the Weston project, all of which are located on the lower Kennebec River and licensed by the Federal Energy Regulatory Agency ("FERC"). Combined, these four hydroelectric projects generate more than 250 million kw/h of carbon-free, renewable energy annually for the State of Maine.

5. Plaintiff The Merimil Limited Partnership is a Delaware limited partnership and holds FERC license No. 2574 for the Lockwood project. Brookfield Power US Holding America Co. holds an equity interest in, and through its subsidiaries operates and manages, The Merimil Limited Partnership.

6. Plaintiff Hydro Kennebec LLC is a Delaware limited liability company and holds FERC license No. 2611 for the Hydro-Kennebec project. Brookfield Power US Holding America Co. holds an equity interest in, and through its subsidiaries operates and manages, Hydro Kennebec LLC.

7. Plaintiff Brookfield White Pine Hydro LLC is a Delaware limited liability company and holds FERC license No. 2322 for the Shawmut project and FERC license No. 2325 for the Weston project. Brookfield Power US Holding America Co. holds an equity interest in, and through its subsidiaries operates and manages, Brookfield White Pine Hydro LLC.

8. The Plaintiffs are all harmed by DMR's and DEP's efforts to illegally, and contrary to DMR's contractual obligations, create and adopt fish passage standards and fishway requirements for the Lockwood, Hydro-Kennebec, Shawmut, and Weston projects.

9. Defendant Maine Department of Marine Resources is the administrative department of the State of Maine that is leading the state's efforts to remove Brookfield's dams. The department's stated policy is to restore Maine's native diadromous fish to their historical habitat. To that end, as recently as March 2021, the department called for removal of all four dams on the lower Kennebec River as its preferred strategy for fish restoration.

10. Defendant Patrick Keliher is the Commissioner of the Department of Marine Resources.

11. Defendant Maine Department of Environmental Protection is the administrative department of the State of Maine that has sole authority to "approve a

water quality certification pursuant to the United States Clean Water Act, Section 401.”
38 M.R.S. § 464(4)(F)(1-A).

12. Defendant Melanie Loyzim is the Commissioner of the Department of Environmental Protection.

13. This Court has jurisdiction to hear this dispute under 4 M.R.S. § 105.

THE LEGISLATIVE FRAMEWORK FOR MAINE’S RIVERS

14. Hydropower has been an important piece of Maine’s landscape for well over a century.

15. Since 1983, with the passage of LD 1296, *An Act to Promote the Wise Use and Management of Maine’s Outstanding River Resources* (1983), a key part of Maine’s official policy with respect to its rivers and streams has been to promote hydropower production in the state.

16. The Legislature has repeatedly acknowledged the importance of hydropower, declaring that “the well-being of the citizens of this State depends on striking a carefully considered and well-reasoned balance among the competing uses of the state’s rivers and streams.” 12 M.R.S. § 402. The Legislature has made clear that among its goals in striking this balance are to “[i]ncrease the hydroelectric power available to replace foreign oil in the State” and to “[s]treamline procedures to facilitate hydropower development under reasonable environmental, technical and public safety constraints.” *Id.*

17. The Legislature has recognized that Maine’s “rivers and streams afford the state’s people with major opportunities . . . for economic expansion through the development of hydropower. . . .” 12 M.R.S. § 401(3).

18. The Legislature has also declared that “the surface waters of the State constitute a valuable indigenous and renewable energy resource; and that hydropower development utilizing these waters is unique in its benefits and impacts to the natural environment, and makes a significant contribution to the general welfare of the citizens of the State” 38 M.R.S. § 631(1).

19. To achieve a “carefully considered and well-reasoned balance among the competing uses of the state’s rivers,” 12 M.R.S. § 402, the Legislature has created specific processes that agencies must follow to regulate dams and other infrastructure on Maine’s rivers.

20. To set standards for upstream and downstream fish passage, the Legislature requires the Department of Agriculture, Conservation and Forestry, with assistance from DMR, DEP, and other state agencies, to create comprehensive river resource management plans “for each watershed with a hydropower project licensed under the Federal Power Act.” 12 M.R.S. § 407. These plans must be created through rulemaking under the Maine Administrative Procedures Act (“MAPA”) and must “provide a basis for state agency comments, recommendations and permitting decisions and at a minimum include, as applicable, minimum flows, impoundment level regimes, upstream and downstream fish passage, maintenance of aquatic habitat and habitat productivity, public access and recreational opportunities.” *Id.*

21. The Legislature has also created a specific process the state must follow before it can consider or require the “construction, repair or alteration of fishways in existing dams.” 12 M.R.S. §§ 6121 & 12760. This process requires DMR and the Department of Inland Fisheries and Wildlife (“DIFW”) to jointly hold an adjudicatory proceeding to consider construction, repair or alteration of fishways in existing dams.

The process is detailed through mirror image statutes in each department's respective part of Maine's statutory code, Section 6121 for DMR and Section 12760 for DIFW.

22. The Legislature enacted Sections 6121 and 12760 to "provide for standards which the agencies shall apply in making decisions concerning fish passage," and to "provide for greater public involvement in the decision-making process regarding fishway needs." L.D. 1253, Statement of Fact (111th Legis. 1983).

23. Proceedings under Sections 6121 and 12760 must be adjudicatory and allow for discovery and an evidentiary hearing, and the commissioners "shall accept testimony from the owner, lessee or other person in control of the dam . . . on alternative fishway designs to those proposed by the commissioners for that dam." 12 M.R.S. §§ 6121 & 12760.

24. If DMR and DIFW "decide that a fishway should be constructed, repaired, altered or maintained," this decision "must be supported by a finding" that either (a) "[o]ne or more species of anadromous or migratory fish can be restored in substantial numbers to the watershed by construction, alteration, repair or maintenance of a fishway, and habitat anywhere in the watershed above the dam . . . is sufficient and suitable to support a substantial commercial or recreational fishery for one or more species of anadromous or migratory fish," or (b) "[t]he construction, repair or maintenance of a fishway is necessary to protect or enhance rare, threatened or endangered fish species." *Id.*

LEGAL FRAMEWORK GOVERNING THE LOWER KENNEBEC

25. There have been dams on the lower Kennebec River for generations, including the dams at the Lockwood, Hydro-Kennebec, Shawmut, and Weston projects.

26. In 1993, the State of Maine, through an interagency process led by the former State Planning Office, created the first comprehensive river resource management plan for the Kennebec River. *See* 01-000 C.M.R. ch. 1 (1993) (the “Kennebec Plan”). The Kennebec Plan recognized that “[o]ne of the most important historical uses of the Kennebec River has been the generation of electricity through hydropower facilities.”

27. The Kennebec Plan recognized the value of the Lockwood, Hydro-Kennebec, Shawmut, and Weston projects and “assumed . . . as a general premise . . . that the dams in the Kennebec River basin,” including those four, “will continue to play a significant role in supplying a predictable quantity of energy at a predictable price to the State’s energy consumers.”

28. The Kennebec Plan remains the controlling comprehensive river resource management plan for the Kennebec River and must “provide a basis for state agency comments, recommendations and permitting decisions” related to the Kennebec. 12 M.R.S. § 407.

29. After the state adopted the Kennebec Plan, Brookfield’s predecessors-in-interest to the Lockwood, Hydro-Kennebec, Shawmut, and Weston dams entered into an agreement with the Kennebec Coalition; the U.S. Department of Commerce, National Marine Fisheries Service (“NMFS”); the U.S. Department of the Interior U.S. Fish & Wildlife Service (“USFWS”); DIFW; DMR; and the former State Planning Office (the “KHDG Agreement” is attached as Exhibit A). NMFS, USFWS, DIFW, and DMR are referred to in the KHDG Agreement as “the resource agencies.” Ex. A, § II.

30. The purpose of the KHDG Agreement, according to the parties, is “to achieve a comprehensive settlement governing fisheries restoration, for numerous

anadromous and catadromous species, that will rapidly assist in the restoration of these species in the Kennebec River,” and “to avoid extensive litigation over fish passage facilities.” *Id.*

31. The KHDG Agreement required installation of upstream and downstream fish passage in stages at the Lockwood, Hydro-Kennebec, Shawmut, and Weston dams if either of two “biological triggers” occur. The first trigger depends on a specified number of shad being captured at a trap, lift and sort facility; the second is a “biological assessment trigger initiated for Atlantic salmon, alewife or blueback herring.” *Id.* § IV(B)(2).

32. The KHDG Agreement also provides that if it becomes “necessary to adopt an alternative approach for triggering fishway installation (i.e., one not based on the project specific, biologically-based trigger number for shad), the resource agencies will meet with the licensee(s) to attempt to reach consensus on the need, timing and design of permanent upstream fish passage facilities at the Lockwood, Hydro-Kennebec, Shawmut, and Weston projects.” *Id.* § IV(A).

33. The KHDG Agreement further provides that “[i]f by December 2014 the biological triggers for permanent upstream passage facilities discussed herein have not been met at one or more of the dams covered by this agreement, the parties will meet to assess the progress in restoring species covered by this agreement (alewife, American shad, blueback herring, Atlantic salmon, and American eel), and will attempt to reach consensus on future fish passage measures.” *Id.* § III(D).

34. If the licensee and resource agencies (including DMR) are not able to reach agreement on the design of upstream fish passage under any of the contingencies in the KHDG Agreement, the agreement includes a dispute resolution provision:

“Disputes will be handled through the FERC process.” *Id.* §§ III(D), III(E), and IV(A).

In other words, to avoid further litigation, the signatories to the KHDG Agreement agreed that where consensus could not be reached regarding fish passage to be installed at any of the four Brookfield facilities, the decision would be made through applicable FERC processes. Thus FERC, in consultation with the relevant resource agencies, was to be the final arbiter.

DMR BREACHES THE KHDG AGREEMENT AND VIOLATES STATE LAW WITH ITS EFFORTS TO REMOVE THE DAMS

35. For a number of reasons, including the listing of Atlantic salmon as endangered on the Kennebec River in 2009, and the fact that the biological trigger for shad established by the Agreement had not been met by December 2014, Brookfield and the resource agencies have met repeatedly since 2010 in an effort to reach consensus on the need, timing, and design of fish passage facilities on the lower Kennebec River. DMR has been involved in these discussions from the beginning. This lengthy and complex process resulted in agreement on, and the installation of, a state-of-the-art fishway at the Hydro-Kennebec project. However, due to certain recent changes in DMR’s positions that are detailed below, consensus has not been reached on fish passage for the Lockwood, Weston and Shawmut projects, and so Brookfield has—consistent with the KHDG Agreement—submitted final plans for fishways at those projects to FERC for review and acceptance.

36. From 2010 until 2019, DMR worked alongside the other resource agencies with Brookfield (and Brookfield’s predecessor) as the parties attempted to reach consensus on the need, timing, and design of fish passage facilities on the lower Kennebec River. During that time, DMR offered comments on the designs, but never

took the position that the facilities should be removed, that alternative designs should be considered, or that more onerous standards than those presently sought by federal wildlife agencies should be imposed. The process was largely successful, as evidenced by the inclusion of many DMR recommendations in Brookfield's submissions to FERC, and by the fishway completed at the Hydro-Kennebec project.

37. In 2019, however, after nearly a decade of working with Brookfield and the other resource agencies, DMR abruptly changed course. For the first time, DMR expressed opposition to Brookfield's upstream fishway design for Shawmut, a design that Brookfield had created in close consultation with DMR and the other resource agencies, over a period of three years, with innumerable opportunities for DMR to weigh in.

38. DMR ramped up its opposition to Brookfield's efforts on the lower Kennebec in 2020 when the agency opposed Brookfield's upstream fishway design for Lockwood, another design Brookfield and DMR had created together, along with the other resource agencies, over the preceding two years.

39. DMR also announced in 2020, for the first time in the ten years of negotiations between Brookfield and the resource agencies, through filings with FERC (in August) and DEP (in October), that it intended to require Brookfield to install fish passage that would allow at least 99 percent of Atlantic salmon to continue upstream and downstream past all four of Brookfield's dams on the lower Kennebec River.

40. At the very end of 2020, and into 2021, as detailed below, DMR repurposed its 99 percent standard into a proposed illegal amendment to the Kennebec Plan. That effort, which also endorsed dam removal, was abandoned in April 2021 as a

result of a lawsuit by Brookfield challenging DMR's authority to unilaterally amend the Kennebec Plan.

41. DMR's proposed requirement that fish passage facilities at each of Brookfield's dams on the lower Kennebec River must allow 99 percent of Atlantic salmon to pass upstream and downstream is a standard found nowhere else in the country and is infeasible to the point that it is tantamount to requiring dam removal. Even natural features on rivers with no dams, like rapids or waterfalls, may not meet the 99 percent survival standard.

42. Even if a 99 percent performance standard were theoretically achievable, which it is not, it would impose extraordinary costs that are far out of proportion to the expected benefits. Brookfield's current plans for upstream fish passage at Shawmut, for example, are expected to achieve a 96 percent passage rate. Designing and constructing the additional infrastructure DMR is demanding, with the goal of achieving 99 percent fish passage for salmon, would cost tens of millions of dollars while (according to studies cited by FERC in its recent draft Environmental Assessment) allowing for passage of just five additional Atlantic salmon annually.

43. In addition to pushing for an infeasible 99 percent performance standard in 2020, DMR also began explicitly calling for the removal of Brookfield's dams, all while continuing to ignore the state laws requiring state agencies to use specific processes to regulate dams and fishways.

44. DMR's illegal efforts continued into mid-2021 when the agency created, without input from other agencies or Brookfield and without any public process whatsoever, its own design for an additional and costly "nature-like" fishway at the Shawmut Project. DMR proposed that the nature-like fishway be installed as a second

fishway at Shawmut, alongside the state-of-the-art traditional fishway that Brookfield was proposing. DMR attempted to impose this design on Brookfield by submitting the design to FERC but also, outside of the FERC process, by asking DEP to require Brookfield to install this second fishway at Shawmut.

DMR IGNORES STATE LAW AND SUBMITS FISHWAY DESIGNS AND REQUIREMENTS TO FERC THAT WERE CREATED WITHOUT ANY PUBLIC PROCESS

45. Since 2020, DMR has repeatedly submitted its illegal fishway requirements to FERC in opposition to Brookfield's application to relicense the Shawmut project. This is another example of why the Court should require DMR to follow the processes established by the Legislature to regulate hydropower and fishways.

46. During the process of renewing the FERC license for Shawmut, a process that has been ongoing for well over five years, Brookfield worked with the state and federal resource agencies that are parties to the KHDG Agreement to attempt to reach consensus on the design of upstream fish passage for Atlantic salmon at the Shawmut dam. The federal resource agency responsible for endangered Atlantic salmon, NMFS, recommended, and Brookfield is amenable to, fish passage infrastructure that would allow for a 96 percent upstream passage rate for the species.

47. On August 28, 2020, for the first time in the ten-year period that Brookfield and its predecessors have been engaging with the resource agencies over fish passage, DMR submitted comments encouraging FERC to reject the 96 percent upstream and 97 percent downstream Atlantic salmon passage standard for Shawmut in favor of a 99 percent upstream and downstream passage rate. In these comments, DMR also asked FERC to consider decommissioning Shawmut.

48. A year later, in August 2021, DMR reiterated its demand that FERC require a 99 percent passage rate for Atlantic salmon and added the demand that FERC also require Brookfield to install the second nature-like fishway alongside the proposed fish lift.

49. While submission of comments to FERC is consistent with DMR's obligations under the KHDG Agreement to resolve disputes over fish passage "through the FERC process," DMR failed to use the Section 6121 and 12760 process (the sole source of the agency's authority with respect to fish passage) to establish the 99 percent standard or the requirement for a nature-like fishway at Shawmut.

50. By submitting comments to FERC calling for dam removal, DMR also acted contrary to the Kennebec Plan, which explicitly recognizes the value of the lower Kennebec dams to the State of Maine. This is yet another way that DMR's efforts to remove Brookfield's dams have violated state law.

51. FERC has thus far not adopted DMR's proposed 99 performance standard, DMR's proposed nature-like fishway, or DMR's calls for dam removal, but that has not stopped DMR from attempting to impose the 99 percent standard and nature-like fishway or from seeking dam removal in multiple other ways outside of the FERC process, such as by attempting to unilaterally amend the Kennebec Plan and asking DEP to impose the 99 percent standard on Brookfield. In so doing DMR has breached the KHDG Agreement by taking steps to resolve its dispute with Brookfield over fish passage outside of the FERC process.

DMR BYPASSES THE FERC PROCESS AND THE REQUIREMENTS OF STATE LAW BY ATTEMPTING TO AMEND THE KENNEBEC PLAN

52. After leaving the Kennebec Plan untouched for nearly three decades, DMR circumvented the FERC process by attempting to rewrite the Kennebec Plan over a period from late 2020 into early 2021 via rulemaking to force the removal of Brookfield's dams on the lower Kennebec River. This proposed rule, which was never promulgated, is referred to here as the "Plan Amendment."

53. As explained by DMR in its rulemaking notice, the Plan Amendment provided "a rationale for the decommissioning and removal of dams; and provide[d] performance standards for target species."

54. Among the performance standards set forth in the Plan Amendment were the requirements that "[a]t least 99% of the adult Atlantic salmon that pass upstream at the next downstream dam . . . pass upstream at the project within 48 hours" and that "[a]t least 99% of the Atlantic salmon . . . that pass downstream at the next upstream dam . . . pass the project within 24 hours"

55. DMR was forced to abandon the Plan Amendment after Brookfield sued DMR in March 2021 arguing that the agency did not have the authority under Maine law to unilaterally amend the Kennebec Plan or to regulate the hydropower facilities in the ways the Plan Amendment proposed.

56. In response to Brookfield's lawsuit, DMR acknowledged that it did not have authority to enact the Plan Amendment. But it has continued its efforts—outside of the FERC process, and without adhering to the requirements of Sections 6121 and 12760—to impose the substance of the Plan Amendment on Brookfield's lower

Kennebec River dams, including its fish passage policies and performance standards (all designed to achieve dam removal).

57. After Brookfield successfully sued DMR earlier this year and DMR withdrew its Plan Amendment in April 2021, a DMR official informed a representative of Brookfield in May 2021 that “lawsuits can go both ways,” that “the political reaction is not to take a step back” and that the parties were on a mutually destructive path. The DMR official emphasized that DMR wanted dam removals and, to this end, intended to “lean into” Shawmut’s water quality certification application and water quality certification applications at other Brookfield projects. The DMR official also explained that Brookfield might be required to construct a second fishway at Shawmut and to “spill everywhere”, meaning allow water to pass over the dam and through the fishways, reducing power generation.

DMR BYPASSES THE FERC PROCESS AND THE REQUIREMENTS OF STATE LAW BY ASKING DEP TO IMPOSE DMR’S ILLEGAL FISH PASSAGE STANDARD

58. As promised, DMR did indeed “lean into” Brookfield’s application with the DEP for water quality certification for the Shawmut project, asking DEP to impose the 99 percent standard and the requirement for a nature-like fishway, both illegally promulgated by DMR. DMR’s intent in doing so was to gain leverage over Brookfield and compel dam removal, which is clear from the May 2021 dialogue with DMR staff described above, and from an e-mail from the Director of DMR’s Sea-Run Fisheries Division sent to DMR staff in October 2020 explaining that “[i]f they [Brookfield] don’t meet the standard, we have a lot of leverage as we condition the [water quality certification under Section] 401 and possibly if FERC accepts the standard.”

59. Section 401 of the Clean Water Act requires Brookfield to obtain a state water quality certification as a condition to securing a new license from FERC. The Maine Legislature has given DEP sole authority among state agencies to “approve a water quality certification pursuant to the United States Clean Water Act, Section 401.” 38 M.R.S. § 464(4)(F)(1-A). In August 2020, in connection with its FERC license renewal application, Brookfield applied to DEP for water quality certification for the Shawmut project.

60. Bypassing formal rulemaking or any other type of formal legal process, DMR sent essentially the same Plan Amendment to DEP in October 2020 as a “comment” for DEP to incorporate into its order on Brookfield’s application for water quality certification for the Shawmut dam. This action violated 12 M.R.S. §§ 6121 & 12760 and breached the KHDG Agreement by seeking to resolve a dispute over fish passage standards outside the FERC process.

61. After DMR withdrew the Plan Amendment in April 2021, it filed new comments with DEP in July 2021 that contained the very same fish passage performance standards and recommendations as the Plan Amendment, just in a slightly different format. This action again violated 12 M.R.S. §§ 6121 & 12760 and breached the KHDG Agreement by seeking to resolve a dispute over fish passage standards outside the FERC process.

62. DEP issued a draft order denying Brookfield’s application for water quality certification for Shawmut on August 11, 2021. This draft order incorporated DMR’s illegally created fish passage conditions wholesale, though it attempted to distinguish between the fish passage conditions in DMR’s abandoned Plan Amendment and the identical conditions in DMR’s 2021 comments by claiming that “[t]he July 2021

comments reflect MDMR's professional assessment separate and apart from the draft 2020 Kennebec River Fish Restoration Management Plan that MDMR was working on at the time of its October 2020 comments but subsequently withdrew."

63. DEP's draft denial order stated that Brookfield met all the requirements to obtain water quality certification for Shawmut other than the requirements related to fish passage.

64. The only basis in the draft order for denying water quality certification for Shawmut was that Brookfield did not supply evidence that it could meet DMR's illegally adopted fish passage performance standards. The draft denial order states, for example, that "[i]n light of the significant concerns raised by MDMR about the ability of the proposed fish lift at the Shawmut Dam to function as proposed by Brookfield with respect to the passage of Atlantic salmon and to function at all with respect to American shad, the Department finds that the applicant has not carried its burden because it has not demonstrated that the proposed fish lift will provide safe, timely, and effective upstream fish passage of indigenous anadromous fish."

65. Because DEP's draft order denying water quality certification contained numerous errors and failed to account for significant developments since the water quality certification application was submitted, Brookfield withdrew its application and notified DEP that it intended to file a new and materially different application for water quality certification for Shawmut within 60 days.

66. Brookfield expects that in response to its new application DEP will again look to DMR for guidance on fish passage issues, and that DMR will continue to insist on an unrealistic 99 percent salmon passage standard outside of the FERC process and outside of its statutory authority.

67. As Brookfield prepares to submit a new application for water quality certification, this lawsuit is necessary to prevent DMR from continuing to breach its contractual obligations to Brookfield and to prevent DMR and DEP from exceeding the authority given to them by the Legislature.

68. All of DMR's efforts since 2019 to impose unachievable fish passage performance standards on Brookfield have coincided with, and were intended to support, an ongoing effort by the highest level of Maine government to pressure Brookfield to sell its hydropower projects on the lower Kennebec to an environmental group that would take down the projects. Since that plan has not progressed, DMR has called for the removal of the dams, pressed FERC to impose a 99 percent performance standard, proposed the Plan Amendment, demanded that Brookfield be required to install two fishways at Shawmut, asked DEP to incorporate DMR's 99 percent performance standards and threatened to apply similar pressure at other Brookfield facilities.

COUNT I
(Declaratory Judgment - Breach of Contract)

69. Brookfield repeats the preceding paragraphs as if fully set forth herein.

70. Under 14 M.R.S. § 5953, this Court has the “power to declare rights, status and other legal relations whether or not further relief is or could be claimed,” and “[s]uch declarations shall have the force and effect of a final judgment or decree.”

71. Under 14 M.R.S. § 5954 this Court may determine “any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder.”

72. DMR is a party to the KHDG Agreement.

73. Brookfield is a party to the KHDG Agreement as successor-in-interest to signatories Central Maine Power Company, Kennebec Hydro Resources, Inc., and UAH-Hydro Kennebec Limited Partnership.

74. The KHDG Agreement requires that if “the growth of salmon or river herring makes it necessary to adopt an alternative approach for triggering fishway installation,” the “resource agencies” (including DMR) and the “licensee” (Brookfield) must “meet” and “attempt to reach consensus on the need, timing and design of permanent upstream fish passage facilities at the Lockwood, Hydro-Kennebec, Shawmut and Weston projects.” Ex. A, § IV(A).

75. If the resource agencies and Brookfield cannot agree on the “need, timing and design of permanent upstream fish passage facilities” at the dams on the lower Kennebec River, the KHDG Agreement requires that “[d]isputes will be handled through the FERC process.” *Id.*

76. By 2009, the status of Atlantic salmon had triggered the requirement that the resource agencies and the licensee attempt to reach consensus on the design of permanent upstream fish passage for Atlantic salmon at the four dams on the lower Kennebec River.

77. The KHDG Agreement also requires that “[i]f by December 2014 the biological triggers for permanent upstream passage facilities discussed herein have not been met at one or more of the dams covered by this agreement, the parties will meet to assess the progress in restoring species covered by this agreement (alewife, American shad, blueback herring, Atlantic salmon, and American eel), and will attempt to reach consensus on future fish passage measures.” *Id.* § III(D).

78. The biological triggers for permanent upstream passage facilities established by the KHDG Agreement were not met by December 2014, and so the parties were required by the KHDG Agreement to attempt to reach consensus on future fish passage measures.

79. After a lengthy and complex process, Brookfield and the resource agencies, including DMR, DIFW, NMFS and USFWS, agreed on designs for permanent upstream fish passage at the Lockwood, Hydro-Kennebec, Shawmut, and Weston dams. These designs include elements specifically requested by DMR during the process. Only after the process was completed and after Brookfield filed the Shawmut final design with FERC in 2019 and was preparing to file final designs for Lockwood and Weston in late 2020, did DMR change its position and dissent, demanding fishways that would achieve 99 percent passage of salmon rather than the 96 percent upstream and 97 percent downstream as preliminarily prescribed by NMFS and to which Brookfield and NMFS have agreed. Brookfield submitted this dispute with DMR for resolution through the FERC process as required by Section IV.A of the KHDG Agreement.

80. Under the KHDG Agreement, FERC must resolve the dispute over fish passage performance standards between DMR, on the one hand, and Brookfield and NMFS on the other. DMR cannot seek to impose its standards by other means. Separately from submitting comments to FERC, however, DMR has attempted to resolve its dispute with Brookfield over fish passage by imposing its conditions and requirements for upstream and downstream fish passage outside of the FERC process.

81. One way DMR has done this is by asking DEP to impose DMR's fish passage requirements on Brookfield through the state water quality certification process. This process is entirely outside of the FERC process, because DEP, not FERC,

has sole responsibility for developing and adopting any water quality certification conditions imposed on a licensee.

82. DMR has breached the dispute resolution provision in the KHDG Agreement by attempting to impose fish passage requirements outside of the FERC process rather than resolving the dispute through the FERC process.

83. Brookfield has been and will continue to be damaged by DMR's breach of the KHDG Agreement.

84. The KHDG Agreement provides that "any party shall be entitled to obtain specific performance of any other party's breach hereof, in addition to and without waiver of any other available remedy." *Id.* § VI.

85. The Court should declare that DMR is bound by the dispute resolution clause in the KHDG Agreement, and enjoin DMR from taking any steps to impose fish passage measures or to require particular fish passage facilities at any of the dams on the lower Kennebec River other than through the FERC process or by agreement with Brookfield and the federal resources agencies that are parties to the KHDG Agreement.

COUNT II
(Declaratory Judgment – 12 M.R.S. §§ 6121 & 12760)

86. Brookfield repeats the preceding paragraphs as if fully set forth herein.

87. DMR has considered and created fish passage performance standards and requirements through a closed process conducted without public notice or public participation.

88. DMR has asked DEP and FERC to adopt its fish passage performance standards and requirements for Shawmut and other dams on the lower Kennebec River.

89. DMR's authority to consider the construction, repair, or alteration of fishways in existing dams in Maine is limited to the authority created by 12 M.R.S. §§ 6121 and 12760. Sections 6121 and 12760 require that DMR, jointly with DIFW, hold an adjudicatory proceeding to consider construction, repair or alteration of fishways.

90. A fishway proceeding under Sections 6121 and 12760 is an adjudicatory proceeding, conducted consistent with MAPA, that includes opportunity for discovery and an evidentiary hearing with witnesses and the presentation of evidence. *Id.* The point of this hearing is for the agencies to receive evidence that can be used to evaluate competing fish passage designs.

91. DMR has considered and developed fish passage performance standards and fishway requirements for the Lockwood, Hydro-Kennebec, Shawmut, and Weston dams unilaterally, without the required fishway proceeding or the required participation of DIFW. Instead, DMR has asked DEP and FERC to impose its illegal fish passage requirements.

92. The fish passage performance standards and fishway requirements advanced by DMR for the dams on the lower Kennebec River are unlawful because they were not created through the process required by Sections 6121 and 12760.

93. Brookfield is aggrieved by DMR's unlawful creation of fish passage performance standards and fishway requirements for Brookfield's dams on the lower Kennebec River because Brookfield should not be required to meet fish passage standards that have not been lawfully promulgated and that Brookfield was not afforded a meaningful opportunity to critique through an adjudicatory proceeding.

94. An actual and ripe controversy exists between the parties concerning the legality of the fish passage standards and fishway requirements created by DMR for the dams on the lower Kennebec River.

95. Brookfield is entitled to a declaratory judgment that DMR cannot create fish passage performance standards or fishway requirements outside the process required by Sections 6121 and 12760, and DMR should be enjoined from doing so.

96. Brookfield is entitled to a declaratory judgment that all fish passage performance standards or fishway requirements developed by DMR for the dams on the lower Kennebec River are invalid because they were not created through the process required by Section 6121 and 12760, and the Court should issue an injunction requiring DMR to withdraw any invalid fish passage performance standards or fishway requirements that it has submitted to FERC, DEP or any other government body.

COUNT III

(Declaratory Judgment – DMR’s failure to use rulemaking procedures)

97. Brookfield repeats the preceding paragraphs as if fully set forth herein.

98. Even if DMR can create fish passage performance standards and fishway requirements outside of the process established by 12 M.R.S. §§ 6121 & 12760, DMR still must comply with MAPA when creating fish passage standards and fishway requirements.

99. The fish passage performance standards and fishway requirements created by DMR for the dams on the lower Kennebec River qualify as a “rule” under MAPA and must be created through formal rulemaking.

100. One way we know that DMR’s fish passage performance standards and fishway requirements qualify as a rule under MAPA is that DMR tried to enact these

standards and requirements as a rule last winter. DMR abandoned that rulemaking effort only after Brookfield sued the agency, challenging its authority to unilaterally update the Kennebec Plan or to regulate the hydropower facilities in the ways the Plan Amendment proposed.

101. Another way we know that DMR's fish passage performance standards and fishway requirements qualify as a rule under MAPA is that DMR claimed, in its submission to DEP in July 2021, that these standards and requirements "provide[] a framework that balances restoration of diadromous fishes and the need for sustainable energy production." Such a framework would qualify as a comprehensive river resource management plan under 12 M.R.S. § 407, a plan that must be adopted under formal rulemaking.

102. Yet another way we know that DMR's fish passage performance standards and fishway requirements qualify as a rule under MAPA is that DMR called the document containing these standards and requirements, in its submission to DEP in July 2021, a "comprehensive fisheries management plan." But DMR can only create a comprehensive fisheries management plan under 12 M.R.S. § 6171 with "advice and consent" of the DMR advisory council and using the procedures required for rulemaking under MAPA (*see* 12 M.R.S. § 6171(4) & 12 M.R.S. § 6191), including prior notice and public comment, that would have allowed for participation by concerned stakeholders, affected industries, and adjacent communities.

103. An actual and ripe controversy exists between the parties concerning the legality of DMR's fish passage performance standards and fishway requirements for the lower Kennebec River dams.

104. The fish passage performance standards and fishway requirements created by DMR for the dams on the lower Kennebec River are so onerous as to be impossible to meet as a practical matter and are calculated to achieve removal of Brookfield's dams.

105. Brookfield is entitled to a declaration that even if DMR can create fish passage performance standards and fishway requirements outside of the process established by Sections 6121 and 12760, the fish passage standards and fishway requirements DMR has purported to create for the dams on the lower Kennebec River are invalid because they were not created under the formal rulemaking process required by MAPA, and DMR failed to follow key requirements of MAPA, including the requirement that it conduct an analysis of the financial impact and benefits of the proposed rule.

COUNT IV
(Declaratory Judgment – Authority of DEP)

106. Brookfield repeats the preceding paragraphs as if fully set forth herein.

107. DEP has taken the position that it can include fish passage performance standards or require construction, alteration, or repair of fishways in orders addressing applications for water quality certification.

108. DEP does not have the expertise or legislative mandate to create fish passage performance standards or fishway designs and so must rely on the expertise of other agencies.

109. 12 M.R.S. §§ 6121 & 12760 give DMR and DIFW exclusive joint authority to require construction, alteration, or repair of fishways for dams in Maine. The Legislature has not given DEP authority to require construction, alteration, or repair of fishways.

110. Assuming DEP can require construction, alteration, or repair of fishways in water quality certification orders, it can only do so by incorporating requirements created through the adjudicatory proceeding required by Sections 6121 and 12760.

111. An actual and ripe controversy exists between the parties concerning DEP's authority to require construction, alteration, or repair of fishways independent of DMR, DIFW, and the process established by Sections 6121 and 12760.

112. DEP orders on water quality certification must also be consistent with comprehensive river resource management plans created under 12 M.R.S. § 407, and DEP cannot incorporate standards, conditions or any other aspect of a plan created by a state agency that purports to regulate, inter alia, upstream and downstream fish passage and maintenance of aquatic habitat, unless the plan is adopted through the rulemaking procedure required by Section 407.

113. An actual and ripe controversy exists between the parties concerning DEP's authority to adopt or incorporate fish passage standards that were not created through formal rulemaking under 12 M.R.S. § 407.

114. DEP also cannot incorporate any portion of a comprehensive fisheries management plan created by DMR unless that comprehensive fisheries management plan was adopted through the process required by 12 M.R.S. § 6171(4).

115. An actual and ripe controversy exists between the parties concerning DEP's authority to adopt or incorporate any portion of a so-called comprehensive fisheries management plan into an order on water quality certification unless that plan was adopted through the process required by 12 M.R.S. § 6171(4).

116. Brookfield is entitled to a declaration that DEP cannot adopt fish passage standards or fishway requirements that have not been lawfully created under state law, and DEP should be enjoined from doing so.

117. Brookfield is entitled to a declaration that DEP cannot require construction, alteration, or repair of fishways independent of DMR, DIFW, and the process established by Sections 6121 and 12760, and DEP should be enjoined from doing so.

118. Brookfield is entitled to a declaration that DEP cannot adopt or incorporate fish passage standards or conditions created by another state agency through a process other than formal rulemaking under 12 M.R.S. § 6171(4) or § 407, and DEP should be enjoined from doing so.

PRAYER FOR RELIEF

WHEREFORE, Brookfield respectfully requests that this Court enter judgment:

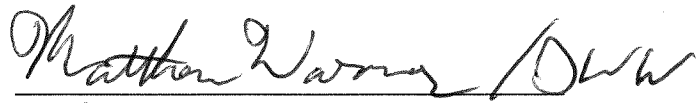
- A. Declaring that DMR is bound by the dispute resolution provision in the KHDG Agreement and must resolve any disputes over fish passage performance standards or fishway requirements through the FERC process, which process does not include state water quality certifications.
- B. Declaring that the fish passage performance standards and fishway requirements developed by DMR for the lower Kennebec River are illegal and unenforceable because they were not developed through the process required by 12 M.R.S. § 407 or 12 M.R.S. §§ 6121 & 12760;
- C. Declaring that DMR's so-called comprehensive fisheries management plan provided to DEP in July 2021 is illegal and unenforceable because it purports to regulate hydropower in a way that is not permitted by 12 M.R.S. § 6171(4)

and was not created through formal rulemaking as required by 12 M.R.S. § 6171(4) or 12 M.R.S. § 407;

- D. Declaring that DEP's authority to incorporate or rely on fish passage performance standards and fishway requirements in orders on water quality certification, or any other final agency action, is limited to those fish passage standards and fishway requirements developed through the processes required by 12 M.R.S. §§ 6121 & 12760 and 12 M.R.S. § 407;
- E. Enjoining DMR from taking any steps to impose fish passage performance standards or fishway requirements on the Lockwood, Hydro-Kennebec, Shawmut, and Weston projects other than through agreement with Brookfield and the resource agencies identified in the KHDG Agreement or through the FERC process;
- F. Enjoining DMR from developing plans to require the construction, alteration, or repair of fishways through any process other than the adjudicatory proceeding required by 12 M.R.S. §§ 6121 & 12760;
- G. Enjoining DMR from providing or recommending fish passage performance standards or fishway requirements for any of the dams on the lower Kennebec River to DEP, FERC or any other agency in any form whatsoever, unless these fish passage standards or fishway requirements are created through the processes required by 12 M.R.S. § 407 or 12 M.R.S. §§ 6121 & 12760;
- H. Requiring DMR to withdraw any submissions to FERC, DEP or any other government agency that include fish passage performance standards or fishway requirements that were not created through the processes required by 12 M.R.S. § 407 or 12 M.R.S. §§ 6121 & 12760.

- I. Enjoining DEP from relying on or incorporating fish passage performance standards or fishway requirements illegally created by any agency, including DMR, in violation of the KHDG Agreement or statute, into any DEP order or final agency action;
- J. Ordering DEP and DMR to pay Brookfield's costs; and
- K. Granting such further relief as the Court considers just.

September 27, 2021



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**AGREEMENT BETWEEN
MEMBERS OF THE KENNEBEC HYDRO DEVELOPERS GROUP,
THE KENNEBEC COALITION,
THE NATIONAL MARINE FISHERIES SERVICE,
THE STATE OF MAINE
AND
THE U.S. FISH AND WILDLIFE SERVICE**

I. Parties.

This Agreement (hereinafter "Agreement") is by and between:

A. each member of the association known as the Kennebec Hydro Developers Group ("KH DG"), to wit:

1. Central Maine Power Company, owner of the following hydroelectric facilities that are the subject of this Agreement: Fort Halifax (Federal Energy Regulatory Commission ("FERC") Project No. 2552); Shawmut (FERC Project No. 2322); and Weston (FERC Project No. 2325);

2. Kennebec Hydro Resources, Inc., on behalf of Merimil Limited Partnership, owner of the following hydropower facility that is the subject of this Agreement: Lockwood (FERC Project No. 2574);

3. UAH-Hydro Kennebec Limited Partnership, owner/agent of the following hydropower facility that is the subject of this Agreement: Hydro-Kennebec (FERC Project No. 2611);

4. Ridgewood Maine Hydro Partners, L.P., owner of the following hydropower facility that is the subject of this Agreement: Burnham (FERC Project No. 11472);

5. Benton Falls Associates, owner of the following hydropower facility that is the subject of this Agreement: Benton Falls (FERC Project No. 5073);

B. each member of the association known as the Kennebec Coalition, to wit: American Rivers, Inc; the Atlantic Salmon Federation; Kennebec Valley Chapter of Trout Unlimited; the Natural Resources Council of Maine; and Trout Unlimited;

C. the National Marine Fisheries Service, U.S. Department of Commerce;

D. the following agencies of the State of Maine:

Maine Department of Inland Fisheries and Wildlife; Maine Department of Marine Resources; and the Maine State Planning Office; and

E. the United States Fish and Wildlife Service, U.S. Department of the Interior.

In this Agreement, reference to "the resource agencies" hereinafter is understood to mean the following parties: the Maine Department of Inland Fisheries and Wildlife, Maine Department of Marine Resources, Maine Atlantic Salmon Authority, National Marine Fisheries Service and United States Fish and Wildlife Service.

II. Purposes.

This Agreement is intended to accomplish the following purposes: to achieve a comprehensive settlement governing fisheries restoration, for numerous anadromous and catadromous species, that will rapidly assist in the restoration of these species in the Kennebec River after the termination on December 31, 1998 of the existing agreement between the State of Maine and the Kennebec Hydro Developers Group; to avoid extensive litigation over fish passage methodologies, timetables and funding; to assist in achieving the removal of the Edwards dam; and to fund the next phase of a restoration program for these species on the Kennebec River.

III. Elements that apply to all parts of this agreement:

A. Effective Date.

This Agreement will become effective upon:

1. signature by all parties of it; and
2. signature by all parties to this Agreement, and signature of Edwards Manufacturing Company, the City of Augusta, Maine, and the National Fish and Wildlife Foundation of appropriate settlement documents to be submitted to FERC pursuant to 18 C.F.R. §385.602.

B. Required Filings with Regulatory Agencies

The parties agree that, immediately after this Agreement and the Lower Kennebec River Comprehensive Hydropower Settlement Accord become effective, they will make joint, formal filings to FERC requesting that FERC:

1. incorporate all applicable terms of this Agreement into existing or proposed FERC licenses for hydropower facilities owned by KHDG

members;

2. only issue amended or new licenses for the KHDG facilities incorporating all applicable terms of this Agreement if, and at the same time as, FERC approves the transfer of the FERC license for the Edwards Dam from Edwards Manufacturing Company and the City of Augusta to the State of Maine;
3. defer action on the motion by Central Maine Power Company for rehearing of the Fort Halifax license, issued by FERC in November 1997, pending FERC's decision on both the transfer of the FERC license for the Edwards Dam to the State of Maine and FERC's incorporation of the applicable terms of this Agreement into existing or proposed FERC licenses for hydropower facilities owned by KHDG members;
4. allow Central Maine Power Company to withdraw its motion for rehearing of the Fort Halifax license in the event that FERC incorporates all of the applicable terms of this Agreement into existing or proposed FERC licenses for hydropower facilities owned by KHDG members; and
5. stay action on fish passage installation obligations at the Fort Halifax, Benton Falls, Lockwood and UAH-Hydro Kennebec facilities pending its decision on transfer of the FERC license for the Edwards Dam and incorporation of applicable terms of this Agreement into existing or proposed KHDG licenses.

The parties also agree that, immediately after the two aforementioned agreements become effective, they will make joint, formal filings to the Maine DEP requesting that the Maine DEP immediately incorporate all applicable terms of the final settlement Agreement into existing or proposed water quality certifications for the hydropower facilities owned by KHDG members.

KHDG members shall withdraw all motions and appeals upon the issuance of final non-appealable orders from FERC and the Maine DEP incorporating the terms of this Agreement into KHDG licenses.

C. Failure to Achieve Timely Approvals.

1. In the event that FERC or Maine DEP choose to alter or prohibit execution of any term and condition contained in this Agreement considered essential to any party (including all dates for performance) or have not issued final, non-appealable, FERC licenses and DEP water quality certifications (amended or new) for all KHDG projects by June 1, 1999; or

2. in the event that FERC does not approve the transfer of the FERC license for the Edwards Dam from Edwards Manufacturing Company and the City of Augusta to the State of Maine, or has not ruled on said transfer request by June 1, 1999, or FERC approves amendments or new licenses for the KHDG facilities prior to approving the transfer of the Edwards license,

then unless all parties agree to amend this Agreement to incorporate any changes made by FERC or the Maine DEP or agree to extend the final approval and transfer dates beyond June 1, 1999 or agree to waive the need for FERC approval of the transfer of the FERC license for the Edwards Dam, then this Agreement becomes null and void and all payments made by KHDG pursuant to paragraph III of this Agreement will be returned to KHDG, except for \$140,000.00, to be used by the State to pay for trapping and trucking of alewife during 1999.

Notwithstanding the foregoing, in the event that either FERC or Maine DEP has not issued a final, non-appealable license or water quality certification for the Burnham Project by June 1, 1999, this Agreement shall not become null and void so long as: FERC and Maine DEP have issued final, non-appealable licenses and water quality certifications to all the other KHDG projects incorporating the applicable terms of this Agreement; Maine DEP has issued a letter to the owner of the Burnham Project guaranteeing that any water quality certificate issued for the Project will incorporate the applicable terms of this Agreement and will not impose conditions regarding fish passage that are inconsistent with the applicable terms of this Agreement; and the Kennebec Coalition and the resource agencies have issued letters to Maine DEP and FERC supporting the incorporation of the applicable terms of this Agreement into the license and water quality certificate for the Burnham Project.

If this Agreement shall become null and void due to one of the aforementioned events, the parties agree that KHDG may submit, and the other parties to this Agreement will support, a motion to FERC seeking to extend the compliance dates for installation of permanent upstream fish passage in the Lockwood, Fort Halifax, UAH-Hydro Kennebec and Benton Falls licenses for the same period of time that lapsed between the date of filing of the joint motion to amend licenses and the date whereby this Agreement became null and void. In the event that KHDG seeks to extend the compliance dates for installation of permanent upstream fish passage for a period of time beyond the lapsed time, the other parties to this Agreement reserve the right to oppose extension of these compliance dates for any period beyond the aforementioned lapsed time.

D. Term of Agreement

If by December 2014 the biological triggers for permanent upstream passage

facilities discussed herein have not been met at one or more of the dams covered by this agreement, the parties will meet to assess the progress in restoring species covered by this agreement (alewife, American shad, blueback herring, Atlantic salmon, and American eel), and will attempt to reach consensus on future fish passage measures. Any disputes will be handled through the FERC process.

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.

G. For American eel at all projects:

1. KHDG dam owners and DMR, in consultation with NMFS and USFWS, and subject to approval by FERC, shall undertake a three-year research project designed to determine: (a) the appropriate placement of upstream passage for American eel at each of the seven KHDG facilities based upon field observations of where eel are passing or attempting to pass upstream at each facility; and (b) appropriate permanent downstream fish passage measures, based upon radio telemetry and other tracking mechanisms, and field observation. Consultation between KHDG and the resource agencies to design and coordinate the research project shall begin no later than June 1, 1998. Performance of the studies shall begin during the 1998 migration

season if possible, but in no case later than the 1999 migration season. The studies shall be in effect for three complete migration seasons, and shall be completed, including data compilation and analysis, by December 31, 2001.

2. The studies shall be supervised by DMR, based upon objectives and methods agreed to by KHDG and the resource agencies, and subject to approval by FERC. The studies shall cost no more than \$427,000, and shall be paid for by DMR.
3. Based on the results of these studies and beginning no later than January 1, 2002 and ending no later than June 30, 2002, KHDG dam owners and the resource agencies shall engage in consultation to attempt to reach agreement on the appropriate location of upstream eel passage at each facility, and the appropriate permanent downstream passage measures to apply to each facility.
 - a. Upstream passage. KHDG dam owners agree that, if agreement is reached on the location of upstream eel passage at each facility, KHDG dam owners will install said passage at each facility during 2002. The cost to KHDG dam owners of materials for each upstream eel passage facility shall not exceed \$10,000 and the total cost of materials to KHDG dam owners per dam shall not exceed \$20,000, in the event that construction of more than one upstream passage facility is required per dam. The parties shall jointly request FERC to amend licenses and insert the agreed-upon terms and conditions for upstream eel passage.
 - b. Downstream passage. If agreement is reached at consultation on the appropriate downstream passage measures, the parties shall jointly request FERC to amend licenses and insert the agreed-upon terms and conditions for downstream eel passage.

If consensus is not reached on either upstream passage location or downstream passage measures by June 30, 2002, any party shall be free to petition FERC to amend any license to insert appropriate terms and conditions.

4. In the event that, during the course of the eel tracking studies, it is revealed that certain interim downstream measures are needed to avoid significant downstream turbine injury and/or mortality (immediate or delayed) at a particular site, KHDG dam owners will consult with the resource agencies and agree to undertake cost-effective measures designed to minimize

mortality at that site.

5. In the event that DMR does not receive the necessary appropriation or legislative spending authorization required to fund the studies discussed in paragraph III.G.1. & 2. above, the provisions in this Agreement governing American eel, found in paragraphs III.G.1 through III.G. 4, are null and void, but all other provisions of this Agreement remain in full force and effect. In the event that paragraphs III.G.1 through III.G.4 become null and void, any party may petition FERC to amend any license regarding upstream and downstream passage of eel.

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.

I. Support on Edwards removal.

KHDG dam owners agree to publicly and actively support removal of Edwards dam, as recommended in the Kennebec River Basin Maine FEIS, including stating such support in filings to FERC and other governmental agencies with responsibility for granting regulatory approval of the removal. Other activities in support of removal of the Edwards dam will be undertaken if mutually agreed upon by parties.

J. Successors, Assignees or Purchasers; notification

KHDG dam owners agree that the terms and conditions contained in this Agreement shall bind and inure to the benefit of all entities that might become successors, assignees or purchasers of any licensee. Each KHDG dam owner agrees to provide notice of the existence of this Agreement, and a copy thereof, to any prospective buyer of its hydropower facility.

K. Termination of all prior agreements

The parties agree that this Agreement supercedes and terminates all prior agreements, whether written or oral, including specifically the *Agreement Between the State of Maine and Kennebec Hydro Developers Group*, dated January 22, 1987, relating to the subject matter herein. In the event that this Agreement becomes null and void pursuant to Paragraph III.C. of this Agreement, then the aforementioned *Agreement Between the State of Maine and Kennebec Hydro Developers Group* shall remain in effect pursuant to its terms and conditions, with

the exception that the obligation for installation of permanent upstream fish passage facilities at Lockwood, Fort Halifax, UAH-Hydro Kennebec and Benton Falls shall be extended as provided in Paragraph III.C. of this Agreement.

IV. Terms and conditions for specific projects:

A. BIOLOGICAL ASSESSMENT PROCESS FOR LOCKWOOD, UAH-HYDRO KENNEBEC, SHAWMUT AND WESTON

The schedule described herein for installing permanent upstream fishways at Lockwood, UAH-Hydro Kennebec, Shawmut and Weston projects is based primarily on the anticipated growth in the population of American shad in the Kennebec River. However, the State of Maine's goal is to restore anadromous species (with the exception of lamprey) to their historic range. This means restoring other anadromous species above Lockwood, UAH-Hydro Kennebec, Shawmut and Weston including Atlantic salmon, alewife, and blueback herring. The resource agencies will continue to assess the status and growth of the population of shad and other anadromous fish populations in the Kennebec River, as is being done on the Saco River and elsewhere in Maine. Should the growth of salmon or river herring runs make it necessary to adopt an alternative approach for triggering fishway installation (i.e., one not based on the project specific, biologically-based trigger number for shad), the resource agencies will meet with the licensee(s) to attempt to reach consensus on the need, timing and design of permanent upstream fish passage facilities at the Lockwood, Hydro-Kennebec, Shawmut, and Weston projects. Disputes will be handled through the FERC process.

B. LOCKWOOD AND UAH-HYDRO KENNEBEC

1. Interim upstream fish lift.

At the Lockwood facility, licensee shall install an interim trap, lift, and transfer facility for American shad, river herring, and Atlantic salmon at the powerhouse, to be operational by May 1, 2006. Licensee recognizes and acknowledges that the success of the resource agencies' and Kennebec Coalition's efforts to restore shad, and to begin the restoration of Atlantic salmon to the Kennebec River Basin and achieve established fisheries management goals is dependent upon: (a) the State's ability to collect sufficient quantities of healthy shad brood stock from the Sebasticook River at the Fort Halifax dam, and from the Kennebec River at the Lockwood dam to use in DMR's Waldoboro hatchery and for stocking in upstream waters; and (b) the resource agencies' and other interested

organizations' ability to collect available brood stock of Atlantic salmon from the Sebasticook River at the Fort Halifax dam, and from the Kennebec River at the Lockwood dam, to initiate a Kennebec River salmon hatchery operation. Licensee further recognizes and acknowledges that, assuming the prior removal of the Edwards dam, installation of an interim fish lift at the Lockwood dam in 2006 is needed, and Licensee will not seek to eliminate or defer this installation requirement before FERC or other regulatory bodies.

A part of the interim passage design and construction would include mechanisms (e.g., video monitoring) to allow operators and resource agencies to assess the effectiveness of the interim facility in trapping all species that seek passage. The interim lift shall be designed to empty into a trap and truck collection facility with adequate capacity for "holding" large quantities of fish, and not designed to discharge into the canal area.

In the event that the Edwards Dam has not been removed by May 1, 2006, any party to this Agreement retains the right to petition FERC to establish a new date for installation of an interim trap, lift, and transfer facility at Lockwood for American shad, Atlantic salmon and river herring. It is understood that this ability to petition for a new date in the event that Edwards has not been removed applies only to the installation of interim fish passage at Lockwood, and permanent fish passage at Fort Halifax, as specified at paragraph IV.E.1.d.2. herein.

2. Permanent upstream passage.

Permanent upstream passage at Lockwood and UAH-Hydro Kennebec shall be operational 2 years following the earlier to occur of either of the following biological triggers. In no event shall permanent upstream fish passage be required to be operational before May 1, 2010.

- a. 8000 American shad in any single season captured at the interim trap, lift, and sort facility at Lockwood; or
- b. a biological assessment trigger initiated for Atlantic salmon, alewife or blueback herring, as described in IV-A above.

3. Downstream passage at Lockwood

- a. Interim passage beginning upon the effective date of this Agreement:

(1) Generally. Licensee will continue and where needed improve

existing interim operational measures (e.g. controlled spills, temporary turbine shutdowns, sluiceways), to diminish entrainment, allow downstream passage of out-migrating alewife, Atlantic salmon, blueback herring and American shad, and eliminate significant injury or mortality (immediate or delayed) to out-migrating species. Licensee agrees to consult with state and federal agencies to develop an approved plan for interim downstream passage facilities and/or operational measures to minimize impacts on downstream migrating fish, with evaluation based on qualitative observations.

(2) Passage through turbines. Licensee and the resource agencies agree that fish passage by means of sluiceways and/or controlled spills are the first and preferred approach to interim downstream fish passage at Lockwood. In the event that fish passage using these methods is not successful¹, and to the extent that licensee desires to achieve or continue interim downstream passage of out-migrating alewife, and/or juvenile Atlantic salmon or shad by means of passage through turbine(s), licensee must demonstrate, through site-specific qualitative studies designed and conducted in consultation with the resource agencies, that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed). If, after three years of such studies, the resource agencies, based on good cause shown, do not believe that the qualitative studies conclusively demonstrate that turbine passage is not resulting in significant injury and/or mortality, and licensee desires to achieve interim downstream passage of these species through turbine(s), licensee must demonstrate through site-specific quantitative studies that turbine passage will not result in significant injury and/or mortality (immediate or delayed). The quantitative studies shall be designed and conducted in consultation with the resource agencies.

In the event that adult shad and/or adult Atlantic salmon begin to inhabit the impoundment above the Lockwood project, and to the extent that licensee desires to achieve interim downstream passage of out-migrating adult Atlantic salmon and/or adult shad by means of passage through turbine(s), licensee must first demonstrate, through site-specific quantitative studies designed and conducted in consultation with the resource agencies, that passage through

¹ Construction of new diversionary structures to achieve success is not required by this Agreement.

turbine (s) will not result in significant injury and/or mortality (immediate or delayed). In no event shall licensee be required to make this quantitative demonstration for adult shad and adult Atlantic salmon before May 1, 2006.

Licensee shall conduct studies (designed in consultation with the resource agencies) prior to the date by which permanent downstream passage facilities are to be operational to determine the effectiveness of various downstream passage techniques in preparation for the design and installation of permanent downstream facilities.

- b. Permanent passage: Permanent downstream facilities will be operational on the date that permanent upstream passage is operational. Licensee will be permitted to install permanent downstream passage at an earlier date if it so chooses.

4. Downstream passage at UAH-Hydro Kennebec

- a. Interim passage beginning upon the effective date of this Agreement:

(1) Generally. Licensee will continue and where needed improve existing interim operational measures (e.g. controlled spills, temporary turbine shutdowns), to diminish entrainment, allow downstream passage of out-migrating alewife, Atlantic salmon, blueback herring and American shad, and eliminate significant injury or mortality (immediate or delayed) to out-migrating species. Licensee agrees to consult with state and federal agencies to develop an approved plan for interim downstream passage facilities and/or operational measures to minimize impacts on downstream migrating fish, with evaluation based on qualitative observations.

(2) Passage through turbines. To the extent that licensee desires to achieve or continue interim downstream passage of out-migrating alewife, and/or juvenile Atlantic salmon or shad by means of passage through turbine(s), licensee must demonstrate, through site-specific qualitative studies designed and conducted in consultation with the resource agencies, that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed). In the event that adult shad and/or adult Atlantic salmon begin to inhabit the impoundment above the UAH-

Hydro Kennebec project, and to the extent that licensee desires to achieve interim downstream passage of out-migrating adult Atlantic salmon and/or adult shad by means of passage through turbine(s), licensee must first demonstrate, through site-specific quantitative studies designed and conducted in consultation with the resource agencies, that passage through turbine (s) will not result in significant injury and/or mortality (immediate or delayed). In no event shall licensee be required to make this quantitative demonstration before May 1, 2006.

Licensee shall conduct studies (designed in consultation with the resource agencies) prior to the date by which permanent downstream passage facilities are to be operational to determine the effectiveness of various downstream passage techniques in preparation for the design and installation of permanent downstream facilities.

- b. Permanent passage: Permanent downstream facilities will be operational on the date that permanent upstream passage is operational. Licensee will be permitted to install permanent downstream passage at an earlier date if it so chooses.
5. Applicability of this Agreement to FERC Relicensing of Lockwood.

The resource agencies and the Kennebec Coalition stipulate that the terms and conditions contained herein that are relevant to the relicensing at Lockwood (e.g., type of fish passage, dates for installation) will be the same terms and conditions that will be sought during relicensing, including the water quality certification process. Certain issues not covered in this Agreement (e.g. boat ramps, access, minimum flows) will still need to be resolved during the relicensing process.

C. SHAWMUT

- 1. Permanent upstream passage at Shawmut shall be operational 2 years following the earlier to occur of either of the following biological triggers. In no event shall permanent upstream fish passage be required to be operational before May 1, 2012.
 - a. 15,000 American shad passed in any single season in the permanent passage facility at UAH-Hydro Kennebec; or
 - b. a biological assessment trigger initiated for Atlantic salmon,

alewife or blueback herring as described in IV -A above.

2. Downstream passage:

a. Interim passage beginning upon the effective date of this Agreement:

(1) Generally. Licensee will continue and where needed improve existing interim operational measures (e.g. controlled spills, temporary turbine shutdowns, sluiceways), to diminish entrainment, allow downstream passage of out-migrating alewife, Atlantic salmon, blueback herring and American shad, and eliminate significant injury or mortality (immediate or delayed) to out-migrating species. Licensee agrees to consult with state and federal agencies to develop an approved plan for interim downstream passage facilities and/or operational measures to minimize impacts on downstream migrating fish, with evaluation based on qualitative observations.

(2) Passage through turbines. Licensee and the resource agencies agree that fish passage by means of sluiceways and/or controlled spills are the first and preferred approach to interim downstream fish passage at Shawmut. In the event that fish passage using these methods is not successful², and to the extent that licensee desires to achieve or continue interim downstream passage of out-migrating alewife, and/or juvenile Atlantic salmon or shad by means of passage through turbine(s), licensee must demonstrate, through site-specific qualitative studies designed and conducted in consultation with the resource agencies, that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed). If, after three years of such studies, the resource agencies, based on good cause shown, do not believe that the qualitative studies conclusively demonstrate that turbine passage is not resulting in significant injury and/or mortality, and licensee desires to achieve interim downstream passage of these species through turbine(s), licensee must demonstrate through site-specific quantitative studies that turbine passage will not result in significant injury and/or mortality (immediate or delayed). The quantitative studies shall be designed and conducted in consultation with the resource agencies.

² Construction of new diversionary structures to achieve success is not required by this Agreement.

In the event that adult shad and/or adult Atlantic salmon begin to inhabit the impoundment above the Shawmut project, and to the extent that licensee desires to achieve interim downstream passage of out-migrating adult Atlantic salmon and/or adult shad by means of passage through turbine(s), licensee must first demonstrate, through site-specific quantitative studies designed and conducted in consultation with the resource agencies, that passage through turbine (s) will not result in significant injury and/or mortality (immediate or delayed). In no event shall licensee be required to make this quantitative demonstration for adult shad and adult Atlantic salmon before May 1, 2006.

Licensee shall conduct studies (designed in consultation with the resource agencies) prior to the date by which permanent downstream passage facilities are to be operational to determine the effectiveness of various downstream passage techniques in preparation for the design and installation of permanent downstream facilities.

- b. Permanent passage: Permanent downstream facilities will be operational on the date that permanent upstream passage is operational. Licensees will be permitted to install permanent downstream passage at an earlier date if it so chooses.

D. WESTON

- 1. Permanent upstream passage at Weston shall be required to be operational 2 years following the earlier to occur of either of the following biological triggers. In no event shall permanent upstream fish passage be required to be operational before May 1, 2014.
 - a. 35,000 American shad captured in any single season in the permanent upstream facility at Shawmut; or
 - b. a biological assessment trigger initiated for Atlantic salmon, alewife or blueback herring as described in IV-A above.
- 2. Downstream passage:
 - a. Interim passage beginning upon the effective date of this Agreement:

(1) Generally. Licensee will continue and where needed improve existing interim operational measures (e.g. controlled spills, temporary turbine shutdowns, sluiceways), to diminish entrainment, allow downstream passage of out-migrating alewife, Atlantic salmon, blueback herring and American shad, and eliminate significant injury or mortality (immediate or delayed) to out-migrating species. Licensee agrees to consult with state and federal agencies to develop an approved plan for interim downstream passage facilities and/or operational measures to minimize impacts on downstream migrating fish, with evaluation based on qualitative observations.

(2) Passage through turbines. Licensee and the resource agencies agree that fish passage by means of sluiceways and/or controlled spills are the first and preferred approach to interim downstream fish passage at Weston. In the event that fish passage using these methods is not successful³, and to the extent that licensee desires to achieve or continue interim downstream passage of out-migrating alewife, and/or juvenile Atlantic salmon or shad by means of passage through turbine(s), licensee must demonstrate, through site-specific qualitative studies designed and conducted in consultation with the resource agencies, that passage through turbine(s) will not result in significant injury and/or mortality (immediate or delayed). If, after three years of such studies, the resource agencies, based on good cause shown, do not believe that the qualitative studies conclusively demonstrate that turbine passage is not resulting in significant injury and/or mortality, and licensee desires to achieve interim downstream passage of these species through turbine(s), licensee must demonstrate through site-specific quantitative studies that turbine passage will not result in significant injury and/or mortality (immediate or delayed). The quantitative studies shall be designed and conducted in consultation with the resource agencies.

In the event that adult shad and/or adult Atlantic salmon begin to inhabit the impoundment above the Weston project, and to the extent that licensee desires to achieve interim downstream passage of out-migrating adult Atlantic salmon and/or adult shad by means of passage through turbine(s), licensee must first demonstrate, through site-specific quantitative studies designed and conducted

³ Construction of new diversionary structures to achieve success is not required by this Agreement.

in consultation with the resource agencies, that passage through turbine (s) will not result in significant injury and/or mortality (immediate or delayed). In no event shall licensee be required to make this quantitative demonstration for adult shad and adult Atlantic salmon before May 1, 2006.

Licensee shall conduct studies (designed in consultation with the resource agencies) prior to the date by which permanent downstream passage facilities are to be operational to determine the effectiveness of various downstream passage techniques in preparation for the design and installation of permanent downstream facilities.

- b. Permanent passage: Permanent downstream facilities will be operational on the date that permanent upstream passage is operational. Licensee will be permitted to install permanent downstream passage at an earlier date if it so chooses.

E. SEBASTICOOK RIVER DAMS

1. FORT HALIFAX

- a. Purpose in establishing new dates for installation of permanent fish passage.

Licensee recognizes and acknowledges that the success of the resource agencies' and Kennebec Coalition's efforts to restore shad to the Kennebec River Basin and achieve established fisheries management goals is dependent upon the State's ability to collect sufficient quantities of healthy shad brood stock from the Sebasticook River and the Kennebec River below the Lockwood dam, to use in DMR's Waldoboro hatchery and for stocking in upstream waters. Licensee further recognizes and acknowledges that, assuming the continued operation of the Fort Halifax dam and the prior removal of the Edwards dam, permanent fish lift capable of passing, unharmed, sufficient quantities of alewife, shad, and Atlantic salmon to meet stated fisheries management goals shall be operational at Fort Halifax in 2003. Licensee further recognizes and acknowledges that resources agencies and the Kennebec Coalition are

agreeing to allow licensee to delay installation of such a lift until 2003⁴ in order to allow licensee sufficient time to decide if continued operation of the Fort Halifax dam is economically viable, and that the schedule of time for such decisionmaking allowed under this Agreement is sufficient for this decisionmaking.

b. Temporary Fish Pump for Alewife.

By no later than May 1st of the first migration season following the removal of the Edwards Dam, anticipated to be removed in 1999, licensee shall install and have fully operational a temporary fish pump and trap and transport facility, effective in safely capturing upstream migrating alewife in quantities sufficient to meet DMR's restoration goals for alewife. If at any time the temporary fish pump at Fort Halifax is not successfully passing alewife in quantities sufficient to meet these restoration goals, licensee agrees to undertake emergency interim measures (e.g., seining) to capture alewife and otherwise take immediate corrective actions.

In the event that the Edwards Dam is not removed in 1999 and river herring continue to be trapped at Edwards, the temporary fish pump at Fort Halifax shall be installed and operational prior to the first spring migration season for river herring following the removal of the Edwards Dam.

c. Temporary Capture of Shad

By no later than May 1st of the first migration season following the removal of the Edwards Dam, anticipated to be removed in 1999, licensee shall install, have fully operational and maintain and operate below the Fort Halifax dam all measures except for construction of permanent upstream passage facilities, necessary to capture shad unharmed⁵ in sufficient quantities to satisfy the needs of DMR for hatchery spawning of shad at its Waldoboro shad hatchery, so long as populations of shad have been sighted in the waters below the Fort Halifax dam.

d. Permanent Upstream Fish Passage

(1). Installation of Permanent Passage. Unless licensee has

⁴ Assuming licensee does not choose to remove or partially remove the dam.

⁵ KHDG and the resource agencies will evaluate whether measures such as installation of floating weir(s), angling, dip netting, seining, and gill netting are capable of capturing shad unharmed.

surrendered its FERC license at Fort Halifax and FERC has ordered the dam to be decommissioned by summer 2003, licensee shall, by May 1, 2003, remove the temporary fish pump and all temporary shad collection mechanisms, and install and have fully operational a lift facility capable of successfully trapping and trucking and passing upstream American shad and river herring in quantities sufficient to meet established fishery management goals, and Atlantic salmon in quantities sufficient to meet the Atlantic Salmon Commission's goals. Licensee will not seek to eliminate or defer beyond 2003 the requirement to provide permanent fish passage (whether by permanent fish lift, removal, or partial removal) before FERC or other regulatory bodies, except as provided in paragraph IV.E.1.d (2) below.

(2). Reopener if Edwards Dam Not Removed. In the event that the Edwards Dam has not been removed by 2001, any party to this Agreement retains the right to petition FERC to establish a new date for installation of permanent upstream fish passage at Fort Halifax for American shad, Atlantic salmon and river herring. It is understood that this ability to petition for a new date in the event that Edwards has not been removed applies only to the installation of permanent fish passage at Fort Halifax and interim fish passage at Lockwood, and as specified herein at paragraph IV.B.1.

2. **BENTON FALLS**

Permanent upstream passage capable of passing sufficient quantities of alewife, shad and Atlantic salmon to meet stated fisheries management goals shall be constructed one year following the occurrence of all of the following events: (1) passage upstream at Fort Halifax (by temporary or permanent mechanisms, including trapping, sorting and trucking) of alewife; and (2) installation of alewife fish passage, and/or the removal of dams, at all of the following four locations: the Newport Dam; the outlet of Seabasticook Lake; the outlet of Plymouth Lake at the head of Martin Stream in the town of Plymouth; and below the outlet of Pleasant Pond on Stetson Stream in the town of Stetson. In no event shall permanent upstream passage be required to be operational before May 2002.

3. **BURNHAM**

a. Upstream Passage. Permanent upstream passage capable of passing sufficient quantities of alewife, shad and Atlantic salmon to meet stated fisheries management goals shall be constructed one year following the occurrence of all of the following events: (1) passage upstream at Fort Halifax (by temporary or permanent mechanisms, including trapping, sorting and trucking) of alewife; and (2) installation of alewife fish passage, and/or the removal of dams, at all of the following four locations: the Newport Dam; the outlet of Sebasticook Lake; the outlet of Plymouth Lake at the head of Martin Stream in the town of Plymouth; and below the outlet of Pleasant Pond on Stetson Stream in the town of Stetson. In no event shall permanent upstream passage be required to be operational before May 2002.

b. Downstream Passage. Permanent downstream fish passage at the Burnham project shall be operational the second year following issuance of a FERC license. Beginning on the effective date of this Agreement in 1998 and continuing until the installation of permanent downstream passage, licensee shall install or otherwise undertake additional interim downstream passage measures needed to eliminate significant downstream injury or mortality (immediate or delayed) of river herring during downstream migration, upon direction by DMR based upon observation of downstream mortality. These interim measures are similar to interim measures undertaken at the dams at Damariscotta Mills and Pumpkin Hill.

V. Funds for Fisheries Restoration of the Kennebec.

KHDG dam owners will pay \$4,750,000 to the State of Maine, c/o the National Fish and Wildlife Foundation ("NFWF"), pursuant to an agreement entered into between NFWF and the State of Maine, at scheduled payment intervals listed below. KHDG dam owners' payments to the State will be used only for anadromous fisheries restoration in the Kennebec, including funding for restoration of alewife, shad, blueback herring, and salmon; the eel studies described herein; and costs incurred by the State in connection with removing the Edwards Dam.

The schedule of payments by KHDG dam owners to the NFWF is: \$2,375,000.00, received by NFWF on or before January 15, 1999; \$935,000.00, received by NFWF on or before January 15, 2000; and \$180,000.00 per year, received by NFWF on or before January 15, for each of the years beginning January 15, 2003 and continuing up to and including January 15, 2010.

KHDG dam owners that are signatories to this Agreement are jointly and severally liable for all payments listed herein.

VI. Enforceability

The parties to this Agreement acknowledge that there may be no adequate remedy at law for any breach of the terms of this Agreement and, therefore, that any party shall be entitled to obtain specific performance of any other party's breach hereof, in addition to and without waiver of any other available remedy should such relief be determined to be appropriate.

SEEN AND AGREED TO THE DAY OF , 1998, by:

Central Maine Power Company

By: 

Its: *President*

Dated: *26 May 98*

Kennebec Hydro Resources, Inc.

on behalf of:

Merimil Limited Partnership

By: 

Its: *President*

Dated: *26 MAY 98*

UAH-Hydro Kennebec Limited Partnership

By: 

Its: *General Manager*

Dated: *MAY 26, 1998*

Ridgewood Maine Hydro Partners, L.P.

By: _____

Its:

Dated:

Benton Falls Associates

By: _____

Its:

Dated:

American Rivers, Inc.

By: _____

Its:

Dated

The Atlantic Salmon Federation

By: John W. Knight

Its: V.P. Conservation Programs

Dated May 26, 1998

Kennebec Valley Chapter of Trout Unlimited

By: Bar W. Bunn

Its: President

Dated May 18, 1998

Ridgewood Maine Hydro Partners, L.P.

By: [Handwritten Signature]

Its:

Dated:

Benton Falls Associates

By: _____

Its:

Dated:

American Rivers, Inc.

By: Rebecca P. Wodden

Its: PRESIDENT

Dated MAY 18, 1998

The Atlantic Salmon Federation

By: _____

Its:

Dated

Kennebec Valley Chapter of Trout Unlimited

By: _____

Its:

Dated

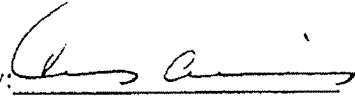
Ridgewood Maine Hydro Partners, L.P.

By: _____

Its:

Dated:

Benton Falls Associates

By:  _____

Thomas A. McNish

Its: Secretary and Treasurer

Dated: May 26, 1998

American Rivers, Inc.

By: _____

Its:

Dated

The Atlantic Salmon Federation

By: _____

Its:

Dated

Kennebec Valley Chapter of Trout Unlimited

By: _____

Its:

Dated

Natural Resources Council of Maine

By: James H. B. Coon

Its: Executive Director
Dated: May 26, 1998

Trout Unlimited

By: [Signature]

Its: President/CEO
Dated: 5/26/98

National Marine Fisheries Service, U.S. Department of Commerce

By: [Signature]

Its:
Dated: 5/26/98

State Planning Office, State of Maine

By: [Signature]

Its: Director
Dated: 5/26/98

Maine Department of Inland Fisheries and Wildlife

By: 

Its: *Commissioner*

Dated: *5/26/98*

Maine Department of Marine Resources

By: *Lewis M. Fellogg*

Its: *COMMISSIONER*

Dated: *5/26/98*

United States Fish and Wildlife Service, U.S. Department of the Interior

By: 
for Michael J. Bartlett

Its: *New England Field Office Supervisor*

Date: *5/26/98*