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Catherine St. John  
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# HOULTON BAND OF MALISEET INDIANS

**Administration**

(207) 532-4273

**In-State**

1-800-564-8524

**Out-of-State**

1-800-545-8524

**Fax**

(207) 532-2660

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May 4, 2023

Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street NE, Room 1A  
Washington, DC 20426

**RE: Comments on Species Protection Plan for Shawmut, Weston, Lockwood, and Hydro-Kennebec Hydroelectric Projects, docket numbers: P-2322-071; P-2325-100; P-2574-092; P-2611-091**

Dear Secretary Bose,

On behalf of the Houlton Band of Maliseet Indians (HBMI or Band), I submit these comments in response to the Species Protection Plan<sup>1</sup> for Shawmut, Weston, Lockwood, and Hydro-Kennebec Hydroelectric Projects, Project Nos. 2322-071; 2325-100; 2574-092; 2611-091. I thank the Federal Energy Regulatory Commission (Commission) for its consideration of our comments and look forward to further discussions on these hydroelectric projects and the need to protect Atlantic salmon.

## **I. The Importance of Atlantic Salmon Recovery to the Houlton Band of Maliseet Indians**

We Maliseets are riverine people who continue to traditionally fish, trap, hunt, and gather in our ancestral waters. Maliseet Nation citizens in northern Maine and New Brunswick, Canada have traditionally engaged in sustenance fishing of Atlantic salmon and other fish species in the Wolastoq (St. John River) as a key part of our diet for thousands of years. However, over time, these traditional practices have been negatively impacted by industrial development which has caused decreasing water quality, loss of fish habitat, and, in particular, obstacles to fish migration pathways. The loss of Atlantic salmon and other sea run fish to Maliseet people from the damming of the Meduxnekeag River in the 1800's, the construction of Mactaquac Dam on the Wolastoq/St John in 1968, and from the ongoing impacts of climate change has represented an ever-increasing loss of a central component of our traditional diet, traditional practices, and spiritual ceremonies.

Since federal recognition in 1980, the Houlton Band of Maliseet Indians has been purchasing trust lands in Aroostook County, Maine, including substantial trust holdings on both banks of the Meduxnekeag River, a tributary of the Wolastoq (St. John). A critical Tribal priority, and our Natural Resources Department's mission, is to maintain the natural environment that supports the fish, animals, and plants on our lands and territories in order to preserve and protect our culture and traditions or "common welfare" of the Tribe. With the absence of salmon in our waters, the Band seeks to develop an intervention program to re-introduce Atlantic salmon into Tribal waters. HBMI has taken significant steps towards the restoration of salmon in the watershed, including conducting water quality monitoring, restoring aquatic habitats and ecosystems, and partnering with U.S. Environmental Protection Agency and other entities to perform fish habitat assessments. Our Natural Resources Department, with funding

<sup>1</sup> Filed June 1, 2021 and supplemented by the licensee September 16, 2021, September 21, 2022, and October 20, 2022.

from U.S. Fish and Wildlife Service, has improved 2 miles of the Meduxnekeag Main Stem, over 1 mile of the North Branch, and 100 feet of Pearce Brook, an upstream tributary and fishing location. The Maliseet Nation, Restoring Sea-Run Fish in the Beautiful, Flowing River, U.S. Fish and Wildlife Service Northeast Region (Nov. 8, 2017), <https://usfwnortheast.wordpress.com/2017/11/08/the-maliseet-nation-restoring-sea-run-fish-in-the-beautiful-flowing-river/>. This restoration involves placing large boulders and trees within the river system to replicate natural habitat structures that would have been in the river before the timber industry removed them. Since 2017, we have improved an additional 1.8 miles of the Main Stem and plan another 1.75 miles during the summer of 2023.

In 2018, HBMI conducted an environmental DNA presence/absence study of salmon within the watershed. Results confirmed the presence of Atlantic salmon occurred only on the Canadian tributaries of the Meduxnekeag River, underscoring the importance of continued restoration efforts. *See Working with Tribal Partners to Restore Fisheries in Northern Maine*, U.S. Env'tl. Prot. Agency (Jan. 3, 2022), <https://www.epa.gov/sciencematters/working-tribal-partners-restore-fisheries-northern-maine>. We have been working with tribal, state, federal, and international partners to create an Atlantic salmon population diversity database using data obtained from a genetic analysis of fish tissue samples. Genetic Diversity Mapping for Restoration of Atlantic Salmon to Tribal Waters, Tribal Lands and Environment Forum (Aug. 2021), [https://mediaspace.nau.edu/media/Genetic+Diversity+Mapping+for+Restoration+of+Atlantic+Salmon+to+Tribal+Waters/1\\_oyzxiqv/73160672](https://mediaspace.nau.edu/media/Genetic+Diversity+Mapping+for+Restoration+of+Atlantic+Salmon+to+Tribal+Waters/1_oyzxiqv/73160672). The database will be used to establish genetic markers and provide key information on natural diversity, including the identification of the Meduxnekeag-specific genetic strain of Atlantic salmon. This genetic information will serve to inform future efforts for future live gene banking, captive rearing, and salmon stocking efforts by HBMI and others. As recognized by the National Oceanic and Atmospheric Administration, the U.S. Fish and Wildlife Service, and others throughout this docket, genetic diversity is critical for survival and resilience of Atlantic salmon. *See, e.g.*, Recovery Plan for the Gulf of Maine Distinct Population Segment of Atlantic Salmon (*Salmo salar*), U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration, at 19 (Jan. 31, 2019), [https://media.fisheries.noaa.gov/dam-migration/final\\_recovery\\_plan2.pdf](https://media.fisheries.noaa.gov/dam-migration/final_recovery_plan2.pdf). Similarly, those agencies and others have explained the importance of the Kennebec River population to the recovery of Atlantic salmon distinct population segment as a whole. The Recovery Plan recognizes that “limited straying (i.e., spawning in their non-natal river) does occur among salmon populations; this helps maintain population diversity through exchange of some genes between populations and allows for population expansion and recolonization of extirpated populations. Accommodating these life history characteristics and distributional needs should provide protection from demographic and environmental variation.” *Id.*

HBMI thus has a particular and unique concern regarding the Commission’s proper evaluation of the projects and Species Protection Plan to ensure the survival and restoration a genetically diverse Atlantic salmon population that will survive into the future, and to avoid jeopardizing our restoration efforts. We are also following the Commission’s current consideration of relicensing dams on the East Branch of the Penobscot River and Union River in Ellsworth, Maine. These and other dams throughout the region have cumulative impacts on fish migration, habitat, and recovery.

As our trustee, the U.S. Government must meet its trust obligation to the Band and ensure the protection of our reserved rights. As a matter of federal Indian law, the lands and natural resources held in trust by the United States for the benefit of the Houlton Band include water and fishing rights. Federal common law is clear that when Congress sets aside lands in trust for the use and benefit of an Indian tribe or individual Indians, as it did for the Houlton Band, Congress impliedly reserves water and fishing rights on those lands.

The federal government’s role as trustee carries with it the duty and power to protect tribal reserved rights. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886). The trust responsibility imposes upon the United States and all its agencies the obligation to follow “the most exacting fiduciary standards” in dealing with the tribes, including in the protection of tribal rights and property. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Parravano v. Babbitt*, 70 F.3d 539, 546-47 (9th Cir. 1995) (recognizing the United States’ trust obligation to protect impliedly reserved fishing rights). The Commission must use its authority to protect and restore Atlantic salmon and other important fish populations, as required by its role as trustee.

## II. The Band's Concerns with the Species Protection Plan

In addition to its trust obligations, under the Endangered Species Act, the Commission is required to “insure” that any action “authorized, funded, or carried out by [it] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . .” 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 222.102 (“*Harm* in the definition of ‘take’ in the Act means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.”).

The Band is concerned that the Commission’s authorization of continued operations of these projects with the licensee’s Species Protection Plan would jeopardize the continued existence and recovery of Atlantic salmon and impact the Band’s restoration efforts. The Commission must recognize that the importance of the Kennebec River to the survival and recovery of Atlantic salmon cannot be overstated: restoring a self-sustaining salmon population in the Kennebec is essential to the long-term persistence and sustainability of the species in the United States. But the Species Protection Plan before this Commission allows the projects to continue to imperil the existence and recovery of the Atlantic salmon and the habitat on which it depends.

The Band agrees with comments previously submitted to the docket by federal and state agencies and non-governmental organizations that the licensee’s Species Protection Plan are not based on current best available data and instead the current best available data demonstrate that the measures proposed will not work.<sup>2</sup> The Band agrees that no scientific data or experience support adherence to the 4-project engineered fish passage regime, which will continue to both “take” an unjustifiable segment of the listed species population every year and fail to meet critical restoration goals for the other diadromous species. Experience with what the Species Protection Plan proposes instead demonstrates failure, not success.

In particular, the licensee has not demonstrated any plausible pathway by which it could achieve its proposed performance standards for upstream Atlantic salmon passage. The plan to utilize fish passage facilities over four projects on the Kennebec has no scientific support. Likewise, the experience of agency experts across United States salmon rivers—and indeed, salmon rivers worldwide—does not support this. Nor does this Commission’s experience with this very licensee. The multi-dam passage rubric has already failed on these subject projects *since 1998*.

The Band also agrees with other commenters that even accepting the unsupported passage efficiencies claimed by the licensee for both up- and downstream measures, the projects will continue to “take” unacceptable numbers of the listed species each year. The combined impacts of these four projects will reduce the potential smolt run resulting from each returning generation of adult salmon by more than a quarter.<sup>3</sup> That is significant. This does not even account for the significant additional other physical harm that salmon experience as a result of passing through numerous turbines and impoundments *and* from lengthy delays in upstream passage. Both experiences lead to substantial decreases in the ability to spawn successfully.

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<sup>2</sup> *See, e.g.*, February 8, 2023 Maine Department of Marine Resources Letter; January 14, 2023 Kennebec Coalition and Conservation Law Foundation Letter; October 24, 2022 Kennebec Coalition and the Conservation Law Foundation Joint Comments; August 14, 2021 Kennebec Coalition and Conservation Law Foundation Joint Comments; August 16, 2021 Maine Department of Marine Resources Comments; February 7, 2020 National Marine Fisheries Service Letter.

<sup>3</sup> *See* January 14, 2023 Kennebec Coalition and Conservation Law Foundation Letter, at 1-3 (“Cumulatively, Brookfield’s dams will therefore reduce the potential smolt run resulting from each returning generation of adult salmon by 26.6% (15.1% fewer spawning salmon, redds, and eggs; 11.5% lower survival of whatever smolts result from those deposited eggs.”); November 4, 2022 Licensees Response, at 2-3; October 24, 2022 Kennebec Coalition and Conservation Law Foundation Joint Comments, at 3, 7-10.

Finally, the Band is concerned that the Species Protection Plan will not avoid destruction and adverse modification of habitat, but instead will perpetuate the significant adverse impacts of the dams and impoundments on the other co-evolved diadromous species, which are constituent elements of the listed critical habitat for Atlantic salmon. Failing to provide meaningful restoration of these species is a significant detriment to the watershed and the species it supports.

To conclude, the Band thanks the Commission for consideration of its comments. Overall, the Band believes the Species Protection Plan will continue to result in destruction and adverse modification of critical habitat, and simply will not avoid jeopardy to the survival and recovery of the listed species; nor will it remedy adverse environmental impacts to the river and river restoration efforts, which include the co-evolved diadromous species upon which the ecosystem (and salmon recovery itself) depends. We are available and more than happy to discuss this matter further should you have any questions about our comments. You may contact Sharri Venno at [envplanner@maliseets.com](mailto:envplanner@maliseets.com) and ext. 215 with any questions you might have or to coordinate further discussion.

Woliwon,

*Clarissa Sabattis*

Clarissa Sabattis

Chief, Houlton Band of Maliseet Indians

cc. David Cash, Regional Administrator, EPA New England  
Kyla Hastie, Acting Regional Director, USFWS, Northeast Region,  
Michael Pentony, Regional Administrator, NOAA Greater Atlantic Regional Fisheries Office

