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CITIZEN SUITS IN CONTRACT DISPUTES: FRIENDS OF MERRYMEETING BAY V. HYDRO KENNEBEC

Synopsis: This article examines the First Circuit Court of Appeals decision and reasoning in the 2014 case *Friends of Merrymeeting Bay v. Hydro Kennebec*. The underlying dispute was between an environmental group, Friends of Merrymeeting Bay, and various dam operators regarding the fate of the endangered Atlantic Salmon. According to the terms of the contract, the dam operators' intent as to how the fish would pass through the dams was relevant in determining whether the operators would have to conduct site-specific studies. The United States District Court for the District of Maine granted summary judgment in favor of the dam operators, reasoning that the operators intended fish to pass through diversions and not through the potentially deadly turbines of the dam. On appeal, the First Circuit Court of Appeals reversed the lower court decision holding that it failed to consider all the relevant evidence related to intent. To determine intent, a court should consider all the relevant circumstances, including evidence of knowledge, actions taken, results achieved, and any response to those results. Although the operators purported to intend that the fish pass through the diversions, evidence of their knowledge of fish passage through the turbines (and other evidence) was relevant in determining the operators' desire. This article argues that the facts of this case are idiosyncratic and that future application of the legal principles should be narrowly construed.

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I. INTRODUCTION

Under the Clean Water Act (CWA), a citizen suit may be used to enforce the terms of water quality certifications.[1] In *Friends of Merrymeeting Bay v. Hydro Kennebec*, the Plaintiffs brought a citizen suit to enforce certain provisions of the water quality certifications against the Defendants who were dam operators.[2] The

1. 33 U.S.C. § 1365 (2014).

2. Friends of Merrymeeting Bay v. Hydro Kennebec, LLC, 759 F.3d 30, 32 (1st Cir. 2014). Here the water quality certifications incorporated a contractual agreement between the Defendants and various agencies

Plaintiffs argued that the Defendants' dams were killing endangered Atlantic Salmon as they pass through the dam turbines in violation of the water quality certifications.[3] The water quality certifications incorporate a contract (the "Agreement") between various federal and state agencies and the dam operators, obligating the operators to conduct site-specific studies to the extent that they "desire" the fish to pass through the dam turbines.[4] The Plaintiffs argued that the Defendants desired fish to pass through the turbines but had not conducted the studies and were therefore in violation of the Agreement, the certifications that incorporate it, and thus the CWA.[5] The Defendants argued that they did not desire fish to pass through the turbine and the fact that they constructed diversionary facilities was conclusive proof of their desire that the fish not pass through the turbines.[6]

The United States District Court for the District of Maine granted summary judgment for the Defendants reasoning that the Defendants desired passage through diversionary facilities and not the turbines.[7]

The First Circuit Court of Appeals reversed the District Court for the District of Maine, reasoning that summary judgment was improper because certain relevant evidence was not considered.[8] The evidence the District Court failed to consider related to the Defendants' desire for downstream passage of endangered fish through the dam turbines.[9] The First Circuit Court required the same body of evidence necessary to adduce a party's intent, and found that the District Court erred by failing to consider such evidence.[10]

Part II herein discusses the procedural and factual background of the *Friends of Merrymeeting Bay v. Hydro Kennebec* case.[11] It also analyzes the reasoning of both the District Court for the District of Maine and the First Circuit Court of Appeals. Part III analyzes the First Circuit Court's reasoning and supports the holding of the First Circuit Court. In doing so, Part III also addresses the dissent's reasoning and argues that it is incorrect. The last subsection of Part III looks at

granting the certifications. Each dam operates under these certifications which agencies of the state of Maine granted to the Defendants pursuant to the CWA. 33 U.S.C. § 1341 (2015).

3. *Hydro Kennebec*, 759 F.3d at 32-33. Specifically, the Plaintiffs point to contractual language in the Agreement incorporated by the certifications which provides a condition that Defendants will conduct site specific qualitative studies to demonstrate that no significant injury or mortality will occur to fish. The studies need only be conducted to the extent that the Defendants "desire[] to achieve interim downstream passage of out-migrating adult Atlantic salmon and/or adult shad by means of passage through turbine(s)." *Id.* at 33.

4. *Id.* at 32-33.

5. *Id.* at 33.

6. *Id.* at 35.

7. Friends of Merrymeeting Bay v. Brookfield Power U.S. Asset Mgmt., No. 11-cv-38-GZS, 2013 WL 145506, at *3 (D. Me. Jan. 14, 2013); Friends of Merrymeeting Bay v. NextEra Energy Resources, LLC, No. 2:11-cv-38-GZS, 2013 WL 145733, at *1 (D. Me. Jan. 14, 2013). The two cases here cited were consolidated on appeal but the additional defendants, NextEra Energy Resources, LLC and NextEra Energy Maine Operating Services, LLC were not parties on appeal.

8. *Hydro Kennebec*, 759 F.3d at 33.

9. *Id.* at 34.

10. *Id.* at 32. The First Circuit Court required evidence of intent because the contractual language itself (the word desire) called into issue Defendants' intent regarding fish passage.

11. *Id.*

the broader implications of the First Circuit Court's decision and attempts to address a question the First Circuit Court did not rule upon: should plaintiffs in citizen suits be allowed to present extrinsic evidence to aid in contract construction if the terms of an agreement between government agencies and public works operators are ambiguous? The subsection argues that such plaintiffs should not be allowed to present extrinsic evidence because they are not signatories to the contract and have no knowledge of the circumstances and negotiations leading up to contract formation. Furthermore, a rule barring discovery and presentation of such evidence comports with the CWA.

II. BACKGROUND

Two conservation groups, Friends of Merrymeeting Bay and Environment Maine, brought two citizen enforcement suits against Hydro Kennebec, LLC, and four other operators (Defendants) of hydroelectric dams (Dams) on the Kennebec River in Maine.[12] The enforcement suits contained claims under the Endangered Species Act (ESA) and the CWA.[13] The United States District Court for the District of Maine entered summary judgment in favor of Defendants on the CWA claims in both cases, but the First Circuit Court of Appeals vacated and remanded for further proceedings.[14]

A. Factual Background

Certain species of endangered Atlantic salmon passed through the Defendants' Dams as they migrated down the Kennebec River to the Atlantic Ocean.[15] In their complaint, Plaintiffs alleged that passage through the Dams kills, harms, and harasses the salmon in numerous ways.[16] Each Dam operates under the terms of water-quality certifications issued by the state of Maine pursuant to the CWA.[17] These certifications provide in part that "[t]he applicant shall continue

12. The other Defendants, all operators of the four dams on the Kennebec River, were Brookfield Power U.S. Asset Management, LLC, Merimil Limited Partnership, FPL Energy Maine Hydro, LLC, and Brookfield Renewable Services Maine, LLC. *Hydro Kennebec*, 759 F.3d at 32.

13. Endangered Species Act, 33 U.S.C. §§ 1251-1387 (2014); Clean Water Act, 16 U.S.C. §§ 1531-1544 (2015); *Hydro Kennebec*, 759 F.3d at 32. The Atlantic Salmon was listed as an endangered species in 2000, by the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, U.S. Fish and Wildlife Services, and the Department of the Interior. Endangered and Threatened Species Rule, 65 Fed. Reg. 69459-01 (Dec. 18, 2000) (to be codified at 50 C.F.R. pt. 224).

14. *Hydro Kennebec*, 759 F.3d at 32.

15. *Id.*

16. *Brookfield Power*, 2013 WL 145506, at *3. According to the Plaintiff's substituted complaint, the dams' turbines kill and injure out-migrating salmon when they attempt to pass through the turbines; the dams severely limit upstream passage of salmon, preventing access to significant amounts of spawning and rearing habitat; the diversionary facilities cause delays in passage, resulting in incremental losses of salmon smolts, pre-spawn adults, and adults; the dams are barriers to the migration of other fish necessary for the completion of the salmon life cycle; the dams adversely affect predator-prey assemblages; the dams create slow-moving impoundments in formerly free-flowing reaches, making habitats less suitable for spawning; and the dams result in adverse hydrological changes. According to the National Oceanic and Atmospheric Administration Fisheries website, Atlantic Salmon move upstream to spawn and rear juveniles in river ecosystems before returning to the high seas for extensive feeding migrations. *Atlantic Salmon*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., http://www.fisheries.noaa.gov/pr/species/fish/atlantic-salmon.html (last updated Feb. 10, 2016).

17. *Hydro Kennebec*, 759 F.3d at 32; 33 U.S.C. § 1341 (2014).

and where needed improve existing operational measures to diminish entrainment, allow downstream fish passage, and eliminate significant injury to out-migrating anadromous fish in accordance with the terms of the KHDG [Kennebec Hydro Develops Group] Settlement Agreement."[18] Various state and federal agencies (the Agencies) entered into the Settlement Agreement (Agreement) with the Defendants.[19] The water quality certifications each incorporate the provisions of the Agreement between the Defendants and the Agencies.[20] The water quality certifications obligate the dam operators to "improve existing operational measures to diminish entrainment, allow downstream fish passage, and eliminate significant injury to out-migrating anadromous fish."[21]

The Agreement contemplates two basic methods for downstream fish passage.[22] Fish could either pass through the turbines of the Dams or travel around the turbines via various bypass methods.[23] The Agreement further provides that:

> 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 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).[24]

After entering into the Agreement, Defendants consulted with the Agencies and constructed diversionary facilities to allow fish to pass around the turbines at each of the four Dams.[25] Furthermore, at least two of the Dams had floating booms to aid in fish bypass.[26] Defendants did not assert that site-specific studies had been conducted to show that turbine passage would not result in injury or death of the fish.[27] Robert Charles Richter, III testified on the Defendants' behalf that the studies had not been completed because the Defendants desired the fish to pass through the diversionary facilities.[28]

It is important to note that the Plaintiffs were not a party to the Agreement in any way. Plaintiffs sued pursuant to the citizen suit power in the CWA which grants citizens the ability to commence a civil action on their own behalf against any person who is allegedly in violation of "an effluent standard or limitation," or, "an order issued by the Administrator or a State with respect to such a standard or

18. *NextEra Energy Resources*, 2013 WL 145733, at *13.

19. *Hydro Kennebec*, 759 F.3d at 32-33.

20. *Id.* at 32.

21. *NextEra Energy Resources*, 2013 WL 145733, at *13.

22. *Hydro Kennebec*, 759 F.3d at 33.

23. *Id.*

24. *NextEra Energy Resources*, 2013 WL 145733, at *13.

25. *Hydro Kennebec*, 759 F.3d at 33.

26. *NextEra Energy Resources*, 2013 WL 145733, at *3.

27. *Id.* at *14.

28. *Id.* Robert Charles Richter III testified that he was "employed by FPL Energy Maine Hydro as a Senior Environmental Specialist overseeing anadromous and catadromous fish passage operations and studies on the Kennebec, Sebasticook, and Androscoggin Rivers." STATE OF MAINE, DEP'T OF ENVTL. PROT., PRE-FILED DIRECT TESTIMONY OF ROBERT C. RICHTER 1 (2007), *available at* http://cybrary.friendsofmerrymeetingbay.org/BEP/Eel0506/Testimony1-07/FPLE%20Richter%20Testimony%201-17-07.pdf.

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limitation."[29] Because Defendants were allegedly in breach of the water quality certifications, Plaintiffs brought a claim under the CWA.[30]

B. *The United States District Court's Decisions*

In two separate cases, Plaintiffs filed a two-count complaint in the United States District Court for the District of Maine on January 31, 2011, alleging that endangered fish continue to pass through the turbines and as a result some are injured or killed.[31] In Count I, Plaintiffs claimed that the fish deaths amounted to an illegal "taking" of an endangered species in violation of the ESA.[32] Count II, the issue on appeal, alleged that the Defendants were in violation of the CWA because their water-quality certifications require "site-specific quantitative studies" (Studies) if Defendants desire passage of the fish through the turbines.[33]

The District Court granted summary judgment in favor of the Defendants on Count II in both cases.[34] In *Friends of Merrymeeting Bay v. NextEra Energy Resources*, the United States District Court for the District of Maine had reasoned that the relevant language from the Agreement, "to the extent licensee desires," was not ambiguous.[35] The District Court therefore reasoned that only the Defendants' subjective desire would trigger the conditional clause's requirements (i.e. the Studies).[36] The District Court turned to the plain meaning of the word "desire" and provided a definition.[37] The Plaintiffs claimed that the Defendants could simply shut the turbines down during fish migration in an effort to avoid

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29. 33 U.S.C. § 1365(a)(1) (2014). In this case the complaint alleges that the Defendants breached the terms of the water quality certifications issued by the state of Maine. *Hydro Kennebec*, 759 F.3d at 36. For another example of a citizen suit under the CWA see also Friends of the Boundary v. U.S. Army Corps of Engineers 24 F. Supp. 3d 105 (D. Me. 2014). In this case, the plaintiffs filed suit to challenge the decision of the Corps of Engineers to grant a development permit for a project which would disturb wetlands and vernal pools in Maine. The court held that plaintiff's allegations were not within the parameters of the citizen suit authorization of the CWA and thus dismissed the claims. The CWA permits citizen suits where a party has allegedly violated an effluent standard. 33 U.S.C. § 1365(a). However, the court found that the plaintiff's allegations were not related to an effluent standard.

30. *Hydro Kennebec*, 759 F.3d at 36; 33 U.S.C. § 1365(a)(1).

31. *Id.* at 33. The two cases were filed against different defendants by the same plaintiffs. The cases were consolidated on appeal.

32. *Id.* Under the ESA, "taking" an endangered species is a prohibited act. 33 U.S.C. § 1538(a)(1)(B) (2015). To "take" an endangered species means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 33 U.S.C. § 1532(19).

33. *Hydro Kennebec*, 759 F.3d at 33.

34. *Id.* at 32. In both district court cases, the ESA claim was Count I and the CWA claim was Count II. In case number 11-cv-35, the district court granted Defendants' motion to dismiss Count I. Friends of Merrymeeting Bay v. Brookfield Power U.S. Asset Mgmt., No. 11-cv-35-GZS, 2013 WL 145506, at *2–4 (D. Me. 2013). In case number 11-cv-38, the district court denied Defendants' motion for summary judgment as to Count I. Friends of Merrymeeting Bay v. NextEra Energy Res., LLC, No. 11-cv-38-GZS, 2013 WL 145733, at *2–4 (D. Me. 2013). On appeal to the First Circuit Court of Appeals, Plaintiffs only challenge the district court's rulings as to Count II, the CWA claim.

35. *NextEra Energy Resources*, 2013 WL 145733, at *14.

36. *Id.*

37. The definition the District Court gave was "[t]o wish or long for; want: *a reporter who desires an interview; a teen who desires to travel.*" The District Court disagreed with Plaintiffs' assertion that subjective intent was irrelevant. AMERICAN HERITAGE DICTIONARY 491 (5th ed. 2011); *NextEra Energy Resources*, 2013 WL 145733, at *14.

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conducting the Studies.[38] The District Court reasoned however, that such an interpretation of the Agreement would ignore the plain language therein.[39]

The Plaintiffs pointed to evidence in the record, which they argued showed that the diversionary facilities were ineffective and that Defendants knew they were ineffective.[40] According to Plaintiffs, if the diversionary facilities were ineffective, and Defendants had knowledge that they were ineffective, a question of fact arose as to whether Defendants actually desired at least some fish to pass through the turbines.[41] However, the District Court reasoned that the Plaintiffs' argument should fail because knowledge that some Atlantic salmon would pass through the turbines did not equate to a desire that they do so.[42] Therefore, summary judgment would not be appropriate.[43] Rather, the District Court found that the Defendants desired the fish to bypass the turbines and go through diversionary facilities.[44] Evidence of this desire could be found in floating booms at two Dam locations designed to aid in the bypass.[45] The District Court held that Plaintiffs' evidence that Atlantic salmon and/or shad were in fact passing through the turbines was "not germane to the Court's inquiry."[46] Even assuming that Defendants knew about the endangered fish passing through the turbines, the court refused to equate such knowledge with desire.[47] Finally, the District Court reasoned that Defendants demonstrated an absence of evidence to support the CWA claim and that the Plaintiffs failed to raise a genuine issue of material fact.[48]

C. *The First Circuit Court's Majority Decision*

On July 14, 2014, the United States Court of Appeals for the First Circuit vacated the United States District Court's summary judgment decision on Count II and remanded for further proceedings.[49] The First Circuit Court reversed the District Court's order on procedural grounds, holding that the lower court failed to consider all of the relevant evidence in a light most favorable to the Plaintiffs.[50]

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38. *Id.*

39. *Id.*

40. *Hydro Kennebec*, 759 F.3d at 33.

41. *Id.* at 33.

42. *NextEra Energy Resources*, 2013 WL 145733, at *14. The First Circuit Court of Appeals agreed with this reasoning, although reaching a different conclusion. *Hydro Kennebec*, 759 F.3d at 34.

43. On a motion for summary judgment a court should "examine the entire record in the light most flattering to the nonmovant and indulge all reasonable inferences in that party's favor." Cadle Co. v. Hayes, 116 F.3d 957, 959 (1st Cir. 1997). However, only evidence that would be admissible or usable at trial should be considered. Asociacion De Periodistas De Puero Rico v. Mueller, 680 F.3d 70, 78 (1st Cir. 2012). On appeal, decisions on summary judgment motions are reviewed de novo. Cracchiolo v. E. Fisheries, Inc. 740 F.3d 64, 69 (1st Cir. 2014). The Supreme Court standard is very similar. *See also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 244-252 (1986). The Supreme Judicial Court of Maine standard is likewise similar. Hayden-Tidd v. Cliff House & Motels, Inc., 52 A.3d 925, 929 (Me. 2012).

44. *NextEra Energy Resources*, 2013 WL 145733, at *14.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Hydro Kennebec*, 759 F.3d at 37.

50. *Id.* at 37.

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The First Circuit Court's majority delved directly into the language of the Agreement. The Court phrased the issue as whether the Defendants "desire[d] to achieve" passage of the endangered fish through the turbines.[51] If the Defendants did desire passage through the turbines, the Defendants would be required to conduct Studies in order to comply with the Agreement.[52] The First Circuit Court agreed with the lower court that the relevant language in the Agreement was unambiguous.[53] Specifically, the word desire means "to want," and corresponds to a party's subjective intent.[54] Furthermore, the "unambiguous contractual language in this case present[ed] a factual question regarding the subjective intent underlying Defendants' conduct pursuant to the contract."[55] The First Circuit Court said it had not found another case specifically analogous where a party's subjective desire would trigger the application of a contractual provision.[56]

Because a question existed as to a party's underlying intent, the Court stated that certain principles should apply at the summary judgment stage.[57] The Court warned that courts should "'use special caution in granting summary judgment as to intent. Intent is often proved by inference, after all, and on a motion for summary judgment, all reasonable inferences must be drawn in favor of the nonmoving party.'"[58] However, the First Circuit Court also opined that summary judgment is appropriate if "'the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'"[59]

The First Circuit Court stated that the District Court erred when it refused to admit evidence regarding Defendants' knowledge and the bypass measures' effectiveness because this was relevant and admissible evidence as to the Defendants' desire.[60] Summary judgment requires a court to examine the entire record in "the light most flattering to the nonmovant."[61] However, the record is limited to only evidence that would be admissible or usable at trial.[62] The District

51. *Id.* at 33. Count I was not appealed. The only issue on appeal were Count II from each of the District Court cases consolidated on appeal. The first circuit court reviewed the lower court decision on the summary judgment motion de novo. *Cracchiolo*, 740 F.3d at 69. When a district court considers a motion for summary judgment it must examine the record in the light most flattering to the nonmovant and indulge all reasonable inferences in that party's favor. *Cadle Co.*, 116 F.3d at 959.

52. *Id.* at 33. The Studies could demonstrate that fish were not substantially injured or killed while passing through the turbines. But the Studies need only be conducted "to the extent that licensee desires" passage of the fish through the turbines. *Id.*

53. *Id.* at 34. But see Part III herein for an exploration of how courts might handle ambiguous language in such a case.

54. *Hydro Kennebec*, 759 F.3d at 34.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 34 (quoting Daniels v. Agin, 736 F.3d 70, 83 (1st Cir. 2013)).

59. *Hydro Kennebec*, 759 F.3d at 34 (quoting Vives v. Fajardo, 472 F.3d 19, 21 (1st Cir. 2007)).

60. *Id.* at 34.

61. *Id.* (quoting *Cadle Co.*, 116 F.3d at 959 (internal quotations omitted)).

62. *Id.* at 34 (citing *Mueller*, 680 F.3d at 78). The passage here in the First Circuit Court's opinion has been subsequently cited in Shaw v. Bank of America, No. 10-cv-11021, 2015 WL 224666, at *1 (D. Mass. 2015). The United States District Court for the District of Massachusetts ruled that some evidence, which was inadmissible as hearsay or was irrelevant could not be considered in opposition to summary judgment.

Court's analysis that the evidence was "not germane to [its] inquiry" was in effect a ruling that the evidence was irrelevant and thus not admissible for review on summary judgment.[63] The First Circuit Court therefore held that the District Court erred by refusing to consider the evidence.[64]

The First Circuit Court noted that the District Court was correct not to substitute "knowledge" for "desire" in the Agreement.[65] However, the First Circuit Court found that the Defendants' knowledge and the effectiveness of the diversion systems were not necessarily irrelevant as a result.[66] To determine a party's desire, the First Circuit Court stated, "it makes sense to look at what they know about the situation, what steps they are taking, what results they are actually achieving, and how they respond to those results."[67]

Defendants maintained that Plaintiffs' evidence regarding the Defendants' knowledge and the effectiveness of the bypass system was nonetheless irrelevant in the context of the Agreement.[68] Defendants claimed that the Agreement contemplated two methods of downstream fish passage: bypass or through the turbines.[69] They argued that the fact that Defendants had installed diversionary facilities at each location was sufficient to preclude a finding that Defendants desired passage through the turbines.[70] The First Circuit Court analogized the Defendants' argument with a fork in the road.[71] At a certain point in time, the Defendants could have chosen either the path of turbine passage or the path of bypass passage.[72] Turbine passage could no longer be desired once the bypass path was selected by installing the diversionary facilities, regardless of their effectiveness.[73] The court presented a hypothetical where a dam operator under the Agreement might construct diversionary facilities that it suspected would be only one percent effective, and ninety-nine percent of the endangered fish would pass through the turbines in full knowledge of the dam operator.[74] In such a case, the Court reasoned, under Defendants' view, a jury could not infer that the dam operator desired passage through the turbines because the dam operator had constructed the very ineffective diversions.[75] The Court found that such a result would not be consistent with the language of the Agreement as a whole.[76]

The Court also noted, however, that the Agreement did more than offer two choices from which to choose for downstream passage.[77] According to the Court,

63. *Hydro Kennebec*, 759 F.3d at 34 (internal quotations omitted).
64. *Id.* at 34, 37.
65. *Id.* at 34.
66. *Id.*
67. *Id.*
68. *Hydro Kennebec*, 759 F.3d at 35.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Hydro Kennebec*, 759 F.3d at 35.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

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the Agreement also imposed obligations to study the effectiveness of any chosen downstream passage facilities and to make good faith efforts to reach certain efficiency goals.[78] These obligations furthered the stated purpose in the Agreement of restoring endangered fish populations through an ongoing series of assessments and necessary modifications to the Dams' facilities and operations.[79] Furthermore, the Court claimed that the Agreement specifically addressed the possibility that Defendants might desire downstream passage through the turbines if the bypass facilities proved ineffective.[80]

The First Circuit Court stated that Defendants' desire under the Agreement should be assessed by taking into account the context of the continuous efforts required of the Defendants, including evidence regarding the extent to which the bypass facilities actually work and Defendants' knowledge of the facilities' success or failure.[81] The Court found no requirement in the Agreement that the bypass facilities be completely effective, or that any level of ineffectiveness will trigger the obligation to conduct the Studies.[82] Furthermore, the Agreement does not even require an objective level of effectiveness of the bypass facilities.[83] The court reasoned, however, that evidence of effectiveness is relevant in forming a context to allow the fact finder to determine the Defendants' desire.[84] Such effectiveness should be taken into consideration alongside all other relevant information in determining desire.[85]

The First Circuit Court further stated that the fact that the Agencies that were party to the Agreement never sought to enforce the provisions requiring Defendants to conduct Studies was not dispositive on the issue of Defendants' desire.[86] The Court agreed with the Defendants that the conduct of the parties to an agreement often informs the court's interpretation of an agreement.[87] According to the Court, all parties agreed that the contract was unambiguous on the meaning of the word desire.[88] Therefore, the Court faced a factual determination of what the Defendants actually desired.[89] To determine that issue, the Court held that the Agencies' actions should be taken into account as evidence, but that this evidence alone does not settle the factual question regarding Defendants' subjective intent.[90]

Although Defendants argued that the lack of agency enforcement necessarily implied compliance with the CWA, the First Circuit Court reasoned that such an interpretation would place an undue restriction on the provision permitting citizen

78. *Hydro Kennebec*, 759 F.3d at 35.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 35.
83. *Hydro Kennebec*, 759 F.3d at 36.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Hydro Kennebec*, 759 F.3d at 36.
89. *Id.*
90. *Id.*

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suits.[91] The only possible claim against the Agencies would be for failure to bring discretionary enforcement actions.[92] Although the statute does not explicitly address this situation, courts should not deem evidence of a lack of agency action conclusive on the issue of compliance with the CWA.[93] If courts dismissed discretionary enforcement actions based solely on evidence of agency non-action, then only mandatory enforcement failures would be grounds for such citizen suits.[94] Courts must therefore look at the facts and cannot draw a conclusion based only on a lack of discretionary enforcement because non-enforcement could indicate either a defendant's compliance or failure by the agency to rein in a non-compliant defendant.[95]

III. ANALYSIS

A. *The Majority*

In *Friends of Merrymeeting Bay v. Hydro Kennebec*, the First Circuit Court reversed the United States District Court for the District of Maine because the lower court failed to consider all of the relevant evidence in deciding on the motion for summary judgment.[96] The First Circuit Court held that evidence related to Defendants' subjective desire should have been considered.

This case appears idiosyncratic because the terms of the contract itself created a condition which could be triggered by the desire of the Defendants.[97] According to the First Circuit Court, most contract provisions are not triggered by the subjective intent of the parties.[98] The Court pointed to the fact that they could not find a case analogous to this one where subjective intent triggers a contractual provision.[99] As such, any direct future application of this case should be limited to circumstances where the terms of a contract require an analysis of a party's intent or desire.

It is important to understand that the First Circuit Court in this case was not construing the contract because the meaning of the term "desire" was plain and agreed upon by the District Court, the Plaintiffs, and the Defendants.[100] Maine's parol evidence rule provides that a court may not consider extrinsic evidence in an

91. *Id.* The provision allows citizens to bring suits against anyone who is allegedly in violation of the CWA. The CWA also allows citizens to sue the Agencies themselves for failure to perform non-discretionary enforcement. 33 U.S.C. § 1365 (2014).

92. *Hydro Kennebec*, 759 F.3d at 36-37. For another example of a citizen suit case see Decker v. Northwest Environmental Defense Center, 133 S. Ct. 1326, 1334-35 (2013).

93. *Hydro Kennebec*, 759 F.3d at 37.

94. *Id.*

95. *Id.*

96. *Id.* at 33. The First Circuit Court reviewed the District Court's decision on the motion for summary judgment de novo. On appeal, questions of law, such as a decision on summary judgment, are reviewed de novo, giving no deference to the lower court. *Cracchiolo*, 740 F.3d at 69.

97. *Hydro Kennebec*, 759 F.3d at 34.

98. *Id.*

99. *Id.*

100. *Id.* at 36.

effort to construe an otherwise unambiguous contract.[101] Whether a contract is ambiguous or not is a question of law for the judge to decide.[102] Contractual language that is reasonably susceptible to different interpretations will be deemed ambiguous.[103] A facially ambiguous contract is not subject to the parol evidence rule and extrinsic evidence may be considered by the fact-finder to interpret the contract.[104] In Maine, these ambiguities will be interpreted against the drafter.[105] This case involved a contract that the First Circuit Court determined was unambiguous.[106] Therefore, the Court did not consider extrinsic evidence.[107]

However, the District Court failed to consider certain evidence that was relevant to a proper determination of the summary judgment question.[108] The unambiguous contractual language required a determination of the Defendants' intent.[109] Defendants' desire as to the method of downstream passage controlled whether the contract provision, which required Defendants to conduct the Studies, would be triggered or not.[110] To determine what the Defendants desired, the First Circuit Court employed the same standard by which courts normally adduce intent, requiring an analysis of all the relevant circumstances, including evidence of knowledge, actions taken, results achieved, and any response to those results.[111] Normally, this standard is applied where a contract has been deemed ambiguous and extrinsic evidence as to the parties' intent becomes relevant in construing the contract's meaning.[112] The Court made clear that no issue of contract interpretation was presented by this case.[113] The Court stated, "the unambiguous contractual language in this case presents a factual question regarding the subjective intent underlying Defendants' conduct pursuant to the contract."[114]

In acting on the motion for summary judgment, the United States District Court for the District of Maine should have considered evidence relating to Defendants' knowledge, actions taken, results achieved, and response to those results, because all of this evidence was relevant.[115] The evidence was relevant because it related to Defendants' desire which may or may not trigger the contractual provision requiring the Studies. In deciding on a motion for summary judgment, a court must consider all the evidence in the light most favorable to the

101. 2301 Congress Realty, LLC v. Wise Business Forms, Inc., 106 A.3d 1131, 1133-34 (Me. 2014).
102. Champagne v. Victory Homes, Inc., 897 A.2d 803, 805 (Me. 2006).
103. *Id.*
104. *Id.* at 806.
105. *Id.*
106. *Hydro Kennebec*, 759 F.3d at 34.
107. *Id.*
108. *Id.* at 37.
109. *Id.* at 34.
110. *Id.* at 33.
111. *Hydro Kennebec*, 759 F.3d at 34-35 (citing United States v. General Elec. Co., 670 F.3d 377, 387-88 (1st Cir. 2012)).
112. *Id.* at 34.
113. *Id.*
114. *Id.*
115. *Id.*

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nonmoving party.[116] A court may consider any evidence which would be admissible or usable at trial.[117] The First Circuit Court found that the District Court for the District of Maine failed to consider all of the relevant evidence because it failed to consider evidence regarding "Defendants' knowledge and the bypass measures' effectiveness."[118] Whether the Defendants intended downstream passage through the turbines or through the diversions required the District Court to consider Defendants' knowledge about the situation, what steps they were taking, what results they were achieving, and their response to those results.[119]

One of the implications of requiring the District Court to consider this evidence is that Defendants would have to investigate the effectiveness of the two downstream passage methods in order to effectively defend this suit. Ironically, the Studies that the Plaintiffs are seeking to force the Defendants to conduct concern the effectiveness of one method of downstream passage, the turbines.[120] In the event that Defendants desired passage through the turbines, they would have to prove via the Studies that the turbines would not result in injury or mortality to the endangered fish.[121] But for the Defendants to argue that they did not desire passage through the turbines they would also have to provide evidence of "what results they are actually achieving," a body of evidence that could include turbine passage mortality and injury rates.[122] In effect, the lawsuit itself forced the Defendants to produce evidence relating to effectiveness which, under the contract, would only be required if they were deemed to have desired downstream passage through the turbines.[123]

Despite this irony, the First Circuit Court was correct to require consideration of such evidence. Defendants urged the Court to consider only that they had constructed the diversionary facilities, without looking at the effectiveness of the facilities.[124] A hypothetical dam operator under the Agreement could construct completely ineffective diversions and then argue that the decision to build the diversions reflects a desire to move fish through them.[125] The condition in the contract focused on Defendants' desire for passage, not for a certain type of construction.[126]

B. The Dissent

The dissent reasoned that the question of whether or not to allow consideration of evidence of the effectiveness of the diversions should be

116. Cadle Co. v. Hayes, 116 F.3d 957, 959 (1st Cir. 1997).
117. Asociacion De Periodistas De Puerto Rico v. Mueller, 680 F.3d 70, 78 (1st Cir. 2012).
118. *Hydro Kennebec*, 759 F.3d at 34.
119. *Id.*
120. *Id.* at 33.
121. *Id.*
122. *Id.* at 34.
123. *Hydro Kennebec*, 759 F.3d at 33.
124. *Id.* at 35.
125. *Id.*
126. *Id.* at 35.

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determined by what significance the Agreement places on such evidence.[127] The Agreement obligated dam operators to take interim steps to protect migrating fish.[128] Since the question of effectiveness was addressed directly by the Agreement, the dissent reasoned that it should not be used as evidence of Defendants' desire under the terms of the contract.[129]

The Defendants were bound by the Agreement to improve their chosen measures to reduce the drawing of fish into the turbines, but this is not conclusive proof that the Defendants desired all fish passage to proceed through the diversions.[130] All parties agreed upon the plain meaning of the word desire.[131] However, the dissent essentially argues that the word desire takes on a special meaning; the close relationship between the Agencies and the dam operators meant that the Defendants would only desire passage through the turbines if they "proposed, chose, or requested—to rely on turbine passage to satisfy their fish protection obligations."[132] In other words, the Agencies would determine whether the operators had chosen one of two options: passage through the turbines or operational modifications via diversionary facilities.[133] However, such an interpretation would take resolution of this dispute out of the Courts' hands—a result that seems to conflict with the purpose of the CWA in allowing citizen suits.[134]

If the Agreement were intended to present Defendants with a binary choice between turbine passage and diversionary passage, the drafters of the contract could easily have included a provision stating that constructing the diversions would be conclusive evidence as to the operators' desire. However, all parties agreed that the meaning of desire was subjective intent.[135] The Court's consideration of evidence relating to Defendants' desire was unrelated to the issue of contract construction.[136]

In the event that a court deemed the word "desire" ambiguous, then the Defendants could have argued that the meaning placed on the word desire was idiosyncratic. To prove this point, the Defendants could have produced extrinsic evidence related to the negotiations between themselves and the Agencies to show that these parties considered the word to indicate that the operators of the Dams could choose one of the two downstream passage options.[137] Only if the

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127. *Id.* at 38. William J. Kayatta Jr. was the judge who wrote the dissenting opinion.

128. *Hydro Kennebec*, 759 F.3d at 38.

129. *Id.* at 40.

130. *Id.* at 38-39.

131. *Id.* at 36.

132. *Id.* at 42. The dam operators were required "to consult with the agencies in preparing their plans, which were subject to agency approval 'with evaluation based on qualitative observations.'" *Hydro Kennebec*, 759 F.3d at 35.

133. *Hydro Kennebec*, 759 F.3d at 39.

134. 33 U.S.C. § 1365 (2014).

135. *Hydro Kennebec*, 759 F.3d at 36.

136. *2301 Congress Realty*, 106 A.3d at 1133-34; *Hydro Kennebec*, 759 F.3d at 34.

137. *2301 Congress Realty*, 106 A.3d at 1133-34.

Defendants chose downstream passage through the turbines would the provision requiring the Studies be triggered.[138]

The dissent makes much of the fact that the Agreement set no required level of effectiveness for the diversionary facilities. Rather, the Agreement lays out the goal to "'diminish' entrainment, eliminate 'significant' injury or mortality, and 'minimize' impacts, 'with evaluation based on qualitative observations.'"[139] The diversions would be subject to "targeted passage efficiency goals," and if a newly constructed facility fell short of these goals, the operators had to make good faith mitigation efforts "at the behest of the agencies."[140] It appears that the agencies overseeing the effectiveness of the turbines never took action to order the operators to undertake mitigation efforts.[141] The majority correctly found that such a failure to act falls squarely within the purpose of the CWA's citizen suit provision.[142] The dissent may be correct in saying that the agencies acted properly in monitoring and approving diversionary facilities.[143] However, Defendants' desire is nonetheless at issue because agency non-action is not determinative of the issue.[144] This question cannot be answered by looking only to the Agencies' actions because they do not paint the whole picture as to Defendants' desire.[145] Rather, such a question must be answered by considering all of the relevant evidence, including the effectiveness of the diversions.[146]

C. *Implications*

Hypothetically, if the contract were deemed to be ambiguous, the question becomes whether citizens bringing suit may present extrinsic evidence to argue for a certain interpretation of the contract. Plaintiffs in a citizen suit should not be permitted to present extrinsic evidence related to ambiguous contracts between agencies and applicants to construct or operate facilities if the signatories to the contract agree on a meaning.

The decision of the First Circuit Court does not address this exact issue because this case does not involve contract interpretation.[147] The Court decided as a matter of law that the contract was unambiguous.[148] Rather, this case deals narrowly with what type of evidence must be considered to determine a party's intent at the summary judgment stage.[149] However, this case may serve as

138. *Hydro Kennebec*, 759 F.3d at 33.

139. *Id.* at 38.

140. *Id.* at 39.

141. *Id.* at 36.

142. *Id.*

143. *Hydro Kennebec*, 759 F.3d at 39-40. The dissent points to an example of a plan for one diversionary facility submitted by Hydro Kennebec in 2006. *Id*. The Maine Department of Environmental Protection determined that the plan "'satisfactorily address[ed]' the requirement in Hydro-Kennebec's water quality certification." *Id.* at 40.

144. *Hydro Kennebec*, 759 F.3d at 37.

145. *Id.* at 37.

146. *Id.*

147. *Id.* at 34.

148. *Id.*

149. *Hydro Kennebec*, 759 F.3d at 34-35.

persuasive authority that a plaintiff in a citizen suit can present extrinsic evidence as to a party's intent in a contract interpretation dispute.

Whether a contract is ambiguous or unambiguous is a question of law for the judge to decide.[150] A contractual provision is considered ambiguous if it is "'reasonably possible to give that provision at least two different meanings.'"[151] Under Maine law, evidence as to a party's intent may be relevant if the terms of the contract are ambiguous.[152] Also, ambiguities in contract will be interpreted against the drafter.[153]

If the terms of a water-quality certification are ambiguous as a matter of law, then extrinsic evidence as to the signatories' intent should be considered. It is possible that a plaintiff bringing a citizen suit could attempt to present such evidence. Plaintiffs in a citizen suit must not be allowed to present such evidence because they played no role in the formation of the contract and because such a rule will not conflict with the basic function of the citizen suits provision of the CWA.[154]

Plaintiffs in citizen suits should be barred from presenting extrinsic evidence as to the meaning of ambiguous terms where the signatories to an ambiguous contract agree on a certain meaning. For instance, in *Hydro Kennebec*, the various state and federal agencies and the companies constructing the dams all agreed that the terms of the contract were unambiguous.[155] Hypothetically, however, if the contract were deemed ambiguous by a court of law, the plaintiff could still argue for a meaning that differs from what any of the signatories purport to have intended.

In most contract cases, the signatories to the contract will be arguing among themselves and will have first-hand knowledge of the negotiations and circumstances leading up to the formation of the agreement.[156] If plaintiffs in citizen suits were allowed to present such evidence, the burden on defendants would be high. Extensive discovery could be allowed regarding negotiations and the circumstances leading up to an agreement or issuance of a water quality certification (or a similar certification or environmental permit). Also, because intent is a factor to consider when construing an ambiguous contract, discovery would be allowed to consider all the evidence regarding intent earlier discussed. Essentially, the result of allowing plaintiffs in citizen suits to discover such information would place the burden of conducting the types of studies envisioned by the Agreement in this case on any defendant who signs a contract with government agencies that is subsequently challenged with a citizen suit and deemed ambiguous by a judge.

The CWA provision that allows for citizen suits functions primarily "to enable private parties to assist in enforcement efforts where federal and state

150. Coastal Ventures v. Alsham Plaza, LLC., 1 A.3d 416, 424 (Me. 2010).
151. *Id.* (quoting Villas by the Sea Owners Ass'n v. Garrity, 748 A.2d 457 (Me. 2000)).
152. Office Max Inc. v. Sousa, 773 F. Supp. 2d 190, 216 (D. Me. 2011).
153. *Champagne*, 897 A.2d at 806.
154. 33 U.S.C. § 1365 (2014).
155. *Hydro Kennebec*, 759 F.3d at 36.
156. *Villas by the Sea*, 748 A.2d at 460-61.

authorities appear unwilling to act."[157] Any citizen may commence a civil action against any person alleged to be in violation of an effluent standard or limitation.[158] Citizens interested in bringing suit would be wise to look closely at the effluent standards and limitations laid out in the water certifications, such as those found in the Agreement. In the event that the terms of such an agreement are ambiguous, extrinsic evidence may be considered.[159] In Maine, the "'paramount principle in the construction of contracts is to give effect to the intention of the parties as gathered from the language of the agreement viewed in light of all the circumstances under which it was made.'"[160] Effluent standards should be heavily informed by the intent of the parties to the agreement. Courts should look primarily to what the parties to the contract agreed upon in determining which standards should actually be applied. Only if a breach occurs that runs contrary to the meaning intended by the signatories to the contract should an enforcement action be considered in court.

IV. CONCLUSION

Parties hoping to prevail in a citizen suit should consider arguing that the contract between agencies and operators contains ambiguous terms. This would force operators to produce evidence related to their intent in contract formation. However, because the evidence considered when a court determines intent includes all of the relevant circumstances, such production could be time consuming and costly. Therefore, the First Circuit Court's holding in *Hydro Kennebec* should be narrowly construed and applied only to cases where unambiguous contractual provisions require an analysis of a party's intent or desire. It should not be understood as a means to allow plaintiffs in citizen suits to provide evidence of a party's intent when the plaintiffs were not signatories to the contract. Also, the standard for determining intent under the First Circuit Court's analysis should not be used as a reason to allow plaintiffs in citizen suits to present extrinsic evidence to inform construction of ambiguous contracts to which they were not signatories.

The facts of *Hydro Kennebec* are extremely unusual in that a contract provision called for analysis of a party's intent.[161] However, courts routinely analyze parties' intents when construing ambiguous contracts.[162] The First Circuit Court in this case held that evidence of the Defendants' intent should have been considered in deciding the motion for summary judgment.[163] Potentially, this case could be used as persuasive authority that plaintiffs in citizen suits can use extrinsic evidence to help courts construe ambiguous contracts. However, such

157. 33 U.S.C. § 1365 (2014); North and South Rivers Watershed Association, Inc. v. Town of Scituate, 949 F.2d 552 (1st Cir. 1991).

158. 33 U.S.C. § 1365 (2014).

159. *Office Max*, 773 F. Supp. 2d at 216.

160. Penn-America Ins. Co. v. Lavingne, 617 F.3d 82, 84 (1st Cir. 2010) (quoting Greenly v. Mariner Mgmt. Group, Inc., 192 F.3d 22, 26 (1st Cir. 1999)).

161. *Hydro Kennebec*, 759 F.3d at 34.

162. *Id.*

163. *Id.* at 37.

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an understanding of this case would not only stretch the reasoning of the First Circuit Court's decision, but would also undermine basic concepts of contract construction and unnecessarily expand the scope of discovery for plaintiffs bringing citizen suits under the CWA.

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