UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY
and ENVIRONMENT MAINE,

Plaintiffs,

C.A. No. 2:11-cv-00276-GZS

v.

UNITED STATES DEPARTMENT OF COMMERCE
and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

PLAINTIFFS' REPLY BRIEF ON MOTION FOR PRELIMINARY INJUNCTION

David A. Nicholas
20 Whitney Road
Newton, Massachusetts 02460
(617) 964-1548
dnicholas@verizon.net

Bruce M. Merrill
225 Commercial Street, Suite 501
Portland, Maine 04101
(207) 775-3333
mainelaw@maine.rr.com

Joshua R. Kratka
National Environmental Law Center
44 Winter Street, 4th Floor
Boston, Massachusetts 02108
(617) 747-4333
josh.kratka@verizon.net
(pro hac vice)

Charles C. Caldart
National Environmental Law Center
1402 Third Avenue, Suite 715
Seattle, Washington 98101
(206) 568-2853
cccnelc@aol.com
(pro hac vice)

Counsel for Plaintiffs

I. THE FEDERAL POWER ACT REVIEW PROVISION IS NOT APPLICABLE.

In an attempt to avoid review in this (or any) Court, NMFS argues that Plaintiffs' sole remedy would be to avail themselves of the administrative and judicial review procedures specified in a section of the Federal Power Act ("FPA"). Opp. at 11-15. NMFS is wrong. The FPA section in question, 16 U.S.C. § 825l, which dates back to 1935, does not provide a right to challenge decisions made by NMFS. Rather, it specifies the procedure to be followed by those seeking to challenge "an order *issued by the Commission* [FERC] in a proceeding *under this chapter* [the Federal Power Act]." Id. § 825l(a) (emphasis added). See City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 335-36 (1958) (16 U.S.C. § 825l(b) "is written in simple words of plain meaning and leaves no room to doubt the congressional purpose," which was to stipulate the mechanism "for judicial review of *the Commission's* orders.") (emphasis added).

In this case, Plaintiffs neither challenge an order issued by FERC nor invoke the requirements of the FPA. Instead, they seek an order declaring that NMFS abdicated its statutory obligations under the ESA when it determined that reconstruction of the Worumbo dam could proceed under the "emergency" consultation procedures specified in 50 C.F.R. § 402.05, a regulation issued by NMFS and the U.S. Fish and Wildlife Service ("the Services") under the ESA. Plaintiffs could not do this in the context of a FERC appeal, especially since there would be no right under the FPA to join NMFS in such an appeal.[1] (Indeed, the FERC order from which NMFS argues Plaintiffs should be appealing – the July 12, 2011, letter from Gerald E. Cross of FERC to Bearl S. Keith of Miller Hydro Group ("Miller") – does not mention, let alone discuss, NMFS, the ESA consultation process, or the NMFS emergency regulation. See Ex. 1 to NMFS's Request for Judicial Notice.) In effect, NMFS asks this Court to conclude that the FPA

[1] The absence of NMFS would materially affect Plaintiffs' position, as FERC could claim the mantle of approval from the expert ESA agency – NMFS – yet Plaintiffs could not directly confront that agency with the arguments against its determination.

jurisdictional provision, which by its terms governs appeals of FERC orders, also operates to insulate all other federal government agencies from suits seeking to compel their allegiance to federal law in their regulation of FERC-regulated facilities. Had this been congressional intent, surely Congress would have said as much in the "simple words" of the statute itself. To the contrary, the law is clear that the FPA neither obviates the need for FERC-regulated facilities, such as hydroelectric dams, to comply with federal environmental laws, nor excuses other federal regulatory agencies from implementing those laws at such facilities. See Monangahela Power Co. v. Marsh, 809 F.2d 41 (D.C. Cir. 1987) (Army Corps of Engineers has regulatory authority under Clean Water Act over discharge of fill material to navigable waters from hydroelectric dam construction project); cf. Tennessee Valley Auth. ("TVA") v. Hill, 437 U.S. 153 (1978) (operation of hydroelectric dam halted by suit brought under Section 7 of the ESA).

Moreover, even if, as NMFS suggests, one *were* to treat Plaintiffs' claim against NMFS as a challenge to "an order issued by the Commission," it is clear from the terms of 16 U.S.C. § 825l that it does not apply here. This provision governs judicial review of FERC orders by "[a]ny party to a proceeding under this Act." Plaintiffs are not a party to any FERC proceeding; indeed, there is no "proceeding" of which to be a party. As the cases cited by NMFS show, a proceeding is one in which there are hearings, or other opportunities for the public to participate and be a "party" (usually by intervention).[2] Here, FERC provided no notice of any decision (to invoke emergency ESA consultation procedures or regarding the dam replacement project in general). Nor did FERC seek comments, or hold hearings (or even public meetings). In short,

[2] See Opp. at 12 (citing Missouri Coal. For Env't v. FERC, 544 F.3d 955 (8th Cir 2008) (public meetings and comment on Environmental Assessment ("EA") documents under the National Environmental Policy Act ("NEPA")); Save Our Streams Council v. Yeutter, 887 F.2d 908 (9th Cir. 1989) (FERC licensing proceeding); City of Tacoma v. NMFS, 383 F. Supp. 2d 89 (D.D.C. 2005) (FERC licensing proceeding)). A FERC order in the underlying administrative proceeding in Missouri Coal. shows that FERC had issued a scoping document for the project in question, held two public scoping meetings, issued a draft EA, and taken comments on the scoping document and EA. In re Ameren UE, 2007 FERC LEXIS 2325 (Dec. 20, 2007).

there was no "proceeding" in which Plaintiffs could have intervened.[3]

Further, FERC takes the position that members of the general public may intervene in "post-licensing" proceedings (those that take place after the dam has been licensed) only where the FERC decision "entails a material change in the plan of project development or in the terms and conditions of the license." Notice Rejecting Request for Rehearing, 115 F.E.R.C. P61,087; 2006 FERC LEXIS 928 (Apr. 21, 2006).[4] In fact, FERC has used this rationale to deny an intervention request by an environmental organization in Maine even where that organization had been a party to the earlier licensing proceeding for the dam in question. Id. As FERC has already determined that the Worumbo reconstruction project "will not require an amendment" to the dam's license,[5] an intervention request by Plaintiffs doubtless would have been similarly rejected here.[6]

II. NMFS, NOT FERC, DECIDES WHEN CIRCUMSTANCES PRESENT AN "EMERGENCY" UNDER 50 C.F.R. § 402.05.

NMFS claims it is powerless to invoke the emergency consultation procedures of 50 C.F.R. § 402.05, and argues that only the action agency can do this. Opp. at 15. This claim rings

[3] NMFS cites to a FERC regulation, 18 C.F.R. § 385.1902(a), which provides that any "staff action" taken pursuant to delegated authority is "subject to a request for rehearing under Rule 713," and argues that the July 12 letter falls within this provision. Opp. at 3, 12. However, Rule 713 provides that "A request for rehearing by a *party* must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding." 18 C.F.R. § 385.713(b) (emphasis added). This, of course, is consistent with the language of the statute itself, and it begs the question of how Plaintiffs, or any other member of the public, might "intervene" in that letter, especially after it has already been issued.

[4] The other exceptions are where the decision "could adversely affect the rights of a property holder in a manner not contemplated by the license, or is being appealed by an agency or entity specifically given a consultation role with the respect to the filing." Id.

[5] FERC made this statement in a May 19, 2010, letter to Miller. Plaintiffs will file that document with the Court and request judicial notice of its contents.

[6] Finally, the FERC appeal process, even where available, would be unlikely to accommodate the kind of fast-moving situation as is presented by true emergencies. A request for intervention must first be made and granted, and FERC then has thirty days to respond to a request for intervention/rehearing, and judicial review is not available in the interim. See 16 U.S.C. §§ 825l(a)&(b). As FERC need not stay its order while that request is pending, see id. § 825l(c), any challenge to the invocation of "emergency" consultation is likely to be moot by the time the case is actually heard by the Court of Appeals.

hollow, given that the record shows FERC *requested* that NMFS use emergency consultation procedures (Am. Compl. Ex. 1) and NMFS *granted that request* (Am. Compl. Ex. 10). At issue here, as in Washington Toxics Coal. ("WTC") v. U.S. Dep't of Interior, 457 F. Supp. 2d 1158, 1194-96 (W.D. Wash. 2006), is a finding of emergency circumstances *declared by NMFS*.

As a matter of law, the Services have the duty to decide whether the emergency consultation procedures of 50 C.F.R. § 402.05, which they promulgated, are to be used.[7] (Thus, in WTC, NMFS *asked the court for deference* in interpreting this regulation. Id. at 1175-76, 1181.)[8] This is a regulation governing formal consultation, and its emergency consultation procedures can be invoked only after formal consultation is triggered (which happened here once FERC asked for formal consultation on the Worumbo project). The *Services* – not the action agency – are in charge of conducting formal consultation and ultimately writing a biological opinion. Only the *Services* can promulgate regulations implementing Section 7 (see, e.g., 50 C.F.R. § 402.14(g), which details the Services' "responsibilities during formal consultation"). For NMFS to claim now that it has "no authority" to implement *its own regulation* is fundamentally to abdicate the crucial role Congress assigned to it.[9]

---

[7] NMFS cites to its own "Endangered Species Consultation Handbook" (March 1998) about not "stand[ing] in the way of the [emergency] response efforts." Opp. at 16. This *presupposes* that an emergency exists; it does not suggest that NMFS has no say in that initial determination.

[8] Ultimately, however, the court rejected NMFS's construction as running contrary to the unambiguous terms of 50 C.F.R. § 402.05. See id. at 1194-96. Similarly, under NEPA's analogous "emergency" exception (see Motion at 12 n.10), the *consulting agency* gets whatever judicial deference may be accorded – not the action agency – even where technical considerations abound. Thus, in Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658 (9th Cir. 2008), the court looked only to the possibility (which it rejected) that the Counsel for Environmental Quality might get deference in determining whether the Navy's "long-planned, routine training exercises" were "emergencies" under 40 C.F.R. § 1506.11 – it did not look to *the Navy's* view. Id. at 680-82, rev'd on other grounds, 555 U.S. 7 (2008).

[9] Nor can NMFS avoid its legal responsibility to implement 50 C.F.R. § 402.05 by claiming that it is not an expert in hydroelectric dam engineering. Opp. at 15-16. One does not need to be an engineer to know that no Act of God, disaster, casualty, or national defense or security emergency has taken place. 50 C.F.R. § 402.05(a); see, e.g., WTC, 457 F. Supp. 2d at 1195 (looking to ordinary dictionary definitions of those terms). Nor does NMFS need to have engineering expertise to determine that under applicable regulations Miller has certified that Worumbo is a "low hazard structure," or to determine that FERC exempted Miller from filing Emergency Action Plans because the dam would cause no loss of life and minimal property damage if it failed. See Motion at 14-15. And finally, since no

III. NMFS'S APPROVAL OF THE WORUMBO DAM REPLACEMENT PROJECT AS AN "EMERGENCY" IS REVIEWABLE UNDER THE APA.

NMFS claims that its determination under 50 C.F.R. § 402.05(a) is not a "final agency action" under Bennett v. Spear, 520 U.S.154, 178 (1997), because there will be further decision-making culminating in the Biological Opinion once the "emergency" is over, and because only that Biological Opinion has "legal consequences." Opp. at 16-17. But allowing the complete replacement of the dam is not simply an "interlocutory step" along the basepaths – it is the whole ballgame. To note that a Biological Opinion will issue at some uncertain date "after the emergency is under control," 50 C.F.R. § 402.05(b), ignores the central thrust of Plaintiffs' claim: that by allowing the project to occur without the full protections of Section 7 consultation, NMFS will be unlikely – or worse, unable – to impose meaningful restrictions at a later date.[10] See Motion at 18-19. And NMFS does not appear to dispute that any exigencies created by the potential failure of the dam can be brought "under control" by drawing down the water behind the dam or by deconstructing the dam without immediately rebuilding it, either of which would allow proper consultation to then take place. See Motion at 15-16. Thus, the unlawful determination made by NMFS on May 9, 2011, is having adverse consequences *now*.

NMFS concedes that "a shift in the timing of the Biological Opinion may be a practical effect of emergency consultation," but protests that "it is not a legal consequence" because "FERC's and its licensee's rights and obligations to comply with the ESA remain unchanged." Opp. at 17 & n.21. This is simply not true. Any determination made by NMFS about whether the emergency exception applies would be given due deference by any federal court that might

---

engineering (or any other) reason was proffered to justify treating the need to *rebuild* the dam as an emergency once the old section is taken down, any lack of engineering expertise was not relevant to that determination.

[10] Thus, NMFS's admission that the Biological Opinion *will* satisfy Bennett effectively concedes the point: this is the analysis that the agency should have done *prior* to allowing the rebuild, and will never again be in a position to do as effectively *after* the rebuild is complete. (The Biological Opinion must evaluate all impacts of Worumbo dam, not merely the construction project, see discussion at p. 8, below, and Murphy Decl. ¶ 22.)

later review FERC's action. See generally Hill v. TVA, 549 F.2d 1064, 1070 (6th Cir. 1977) (noting that, although "[t]he Secretary [of the Services] is not empowered to veto the final actions of [federal] agencies, … his compliance standards may properly influence final judicial review of such actions"), aff'd, 437 U.S. 153 (1978).[11]

IV. THE DECISION TO INVOKE EMERGENCY CONSULTATION WAS ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION, AND NOT IN ACCORDANCE WITH LAW.

NMFS claims that it acted rationally in deciding to delay formal consultation until after the entire Worumbo reconstruction project is completed. Opp. at 18-20. NMFS can only make this claim, however, by completely ignoring the very part of the Worumbo reconstruction project that is the focus of this proceeding: the construction of a brand new dam after the old one – *and any purported emergency* – has been removed. See Motion at 16.

The fact that NMFS's expertise is in fish biology and not dam engineering is beside the point, because the only "emergency" for which FERC provided it *any* rationale was the urgency of removing (but not of replacing) the aging timber crib dam. Tellingly, in its brief NMFS focuses solely on evidence regarding the probability of the dam's failure and the possible effects of such failure, Opp. at 7-8, 19-20, and not on any need, urgent or otherwise, for dam replacement once the threat of failure has been abated. NMFS's decision to extend the emergency consultation period past the point at which the emergency is brought "under control" by removal of the old structure not only violates the express terms of its own regulation, 50 C.F.R. § 402.05(b), but has no basis whatsoever in the administrative record. The decision is, on

[11] The case cited by NMFS on this point, Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586 (9th Cir. 2008), does not assist it. Opp. at 17. There, the Court found no "legal effect" to a *jurisdictional* determination by the Corps – since "the federal courts have the final say" on such matters, later reviewing courts would not give "any particular deference" to this finding. Id. at 594-95. As Fairbanks also noted, federal courts "do not defer to the agency's position on whether agency action is final" under the APA. Id. at 591.

its face, irrational.[12]

V. THE DECISION TO REPLACE WORUBO DAM WITHOUT FULL PRIOR CONSULTATION IS LIKELY TO CAUSE IRREPARABLE HARM.

NMFS's analysis of the irreparable harm prong of the preliminary injunction analysis is deeply flawed.

First, NMFS attempts to hold Plaintiffs to a showing of harm that is inapplicable to most cases, including this one, involving improper consultation under ESA Section 7. While Plaintiffs must indeed demonstrate that irreparable harm is "likely," they need not, as NMFS argues, prove that such harm "rises to the level of injury to the species as a whole." Opp. at 20. The principal authority NMFS cites for this proposition, Water Keeper Alliance v. U.S. Dep't of Defense, 271 F.3d 21 (1st Cir. 2001), expressly limits its holding on irreparable harm to the facts of that case, which placed it "outside of [TVA v.] Hill and outside of the reach of Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983)." 271 F.3d at 34 (plaintiff was unlikely to succeed on merits, and Navy may already have produced the "functional equivalent" of the biological assessment plaintiff sought). Here, in contrast, Plaintiffs have made a strong showing of likelihood of success, and the federal agencies agree that formal consultation is required – they simply want to wait to conduct it until after it is too late to have any meaning. Accordingly, cases like TVA v. Hill

[12] NMFS is also wrong in claiming that FERC's faulty analysis regarding whether the failure of the timber crib would pose an "emergency" is beyond the scope of this Court's review. Opp. at 18. To determine whether NMFS's decision was arbitrary, capricious, or unlawful, the Court will need to examine the information that NMFS considered, as well as information it arguably should have considered but did not. See, e.g., Am. Compl. ¶¶ 32-42. While judicial review under the APA generally is confined to the administrative record upon which the agency made the determination being challenged, "a court may consider evidence outside the record 'to see what the agency may have ignored'" in making its determination. Hough v. Marsh, 557 F. Supp. 74, 84 n.12 (D. Mass. 1982) (citation omitted); see also Geer v. Federal Highway Admin., 975 F. Supp. 39, 44-45 (D. Mass. 1997) (looking at extra-record materials "to show factors the agency should have considered, but did not"); Strahan v. Linnon, 966 F. Supp. 111, 114 (D. Mass. 1997) (same); Conservation Law Found. v. Clark, 590 F. Supp. 1467, 1475 (D. Mass. 1984) (same). Here, the Court cannot meaningfully determine whether NMFS's decision to allow "emergency" consultation – and to forego formal consultation until *after* the Wormbo dam is entirely rebuilt – passes muster under the APA unless it learns the complete story. See generally Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1284 (1st Cir. 1996) (reviewing court must "determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made.").

(which "restricts the equity power of the court" in Section 7 cases, 271 F.3d at 34) and Watt (holding that irreparable harm occurs when agency decisions are made without the "informed environmental consideration" mandated by statute, 716 F.2d at 952) *are* applicable here. See also Motion at 17-19 (citing others). Under this standard, Plaintiffs need only show that the activity at issue presents a *risk of harm* to the species.[13]

Second, NMFS artificially restricts its consideration of potential harm only to impacts directly "arising from the safety repairs." Opp. at 21-22; see also Murphy Decl. ¶¶ 14, 16, 17. Yet, according to NMFS's own Consultation Handbook and regulations, the timber crib replacement project triggered formal consultation not just on the demolition and construction project itself, but also on all aspects of the Worumbo dam's design, construction, and operation. Consultation Handbook § 4.5(A), p. 4-27 (defining interrelated or interdependent actions); 50 C.F.R. § 402.02 (definition of "effects of the action"). Because Worumbo cannot function as a hydroelectric dam without the timber crib section needed to create the impoundment, the dam itself is "interrelated and interdependent" with the construction project. And because NMFS must therefore consult regarding the impacts of the full dam itself (as well as of the construction project) on the species and its critical habitat, see Murphy Decl. ¶ 22, the irreparable harm analysis regarding NMFS's *failure* to complete such consultation must be equally wide in scope.

[13] Thus, the Section 9 "take" cases cited by NMFS are inapposite. Opp. at 20. In the Section 9 context, the consulting and acting agencies have already determined what will be necessary to conserve the species, and putative plaintiffs thus can readily show what further acts are apt to imperil the species. In the Section 7 context, it has not yet even been determined whether the activity should be allowed to occur at all. Given this uncertainty, and the paramount importance placed by Congress on species preservation, irreparable harm stems from the fact that the uninformed decision on the risky activity (and, in many cases, the activity itself) *cannot be undone*. Winter did not change this analysis; the Supreme Court found no harm from the procedural violation at issue there because 40 years of naval sonar training exercises had revealed little risk to marine mammals. 129 S.Ct. at 376. Cf. also Parnell v. U.S. Army Corps of Eng'rs, -- F.3d --, 2011 WL 2718144, at *13 (8th Cir. July 14, 2011) (applying First Circuit's long-enunciated NEPA "irreparable harm" standard in light of Winter). Here, of course, the historical record indicates that dams *do* threaten the extinction of the Atlantic salmon.

Third, the immediate rebuilding of a major portion of the Worumbo dam – rather than letting that part of the river run free pending completion of formal consultation – will, in fact, cause and contribute to irreparable harm to the species. NMFS's attempt to deny this, by emphasizing the low numbers of Androscoggin River salmon (in an attempt to minimize their importance to efforts to bring the species back from the brink of extinction), Opp. at 8-9, 22; Murphy Decl. ¶¶ 9-11, flies directly in the face of NMFS's own scientific and legal findings. In fact, precisely *because* there are so few salmon in the Androscoggin, harming or killing even one fish in this case *does* in fact have implications for the survival of the Gulf of Maine Distinct Population Segment ("GOM DPS"), for reasons of: maintaining spatial distribution throughout the critical habitat (which is needed to "reduce extinction risk from genetic risks and demographic stochasticity," 74 Fed. Reg. 29,344, 29,348 (June 19, 2009)); maintaining river-specific genetic adaptations (a unique feature of the GOM DPS, id. at 29,347) and overall genetic diversity ("maintaining sufficient levels of genetic variability and structure is of utmost importance," id. at 29,353); and meeting NMFS's own criteria for Atlantic salmon recovery (which depends on building self-sustaining populations of wild-origin salmon within *each* of three "salmon habitat recovery units," or SHRUs, one of which includes the Androscoggin; salmon numbers in the Penobscot, which is in a different SHRU, are thus irrelevant to Worumbo's impact, e.g., id. at 29,362 (Response to Comment 16), 29,361 (Response to Comment 15), 29,382). For these reasons and because of the documented impacts of dams on salmon and their habitat, NMFS would certainly not allow the construction of a completely new dam in the Androscoggin River without formal consultation, and irreparable harm will accrue to the species if it allows such construction at Worumbo now.

VI. THE EQUITIES AND THE PUBLIC INTEREST FAVOR AN INJUNCTION.

NMFS also argues that the balance of the equities favors preserving their unlawful decision because the "recommendations" it has given FERC on "minimizing the effects" *of the dam rebuilding process* on endangered Atlantic salmon outweigh the risk of allowing that dam to be completely rebuilt, and ostensibly to stand for another 100 years, without first making the proper determinations mandated by Section 7. Opp. at 23-24. Especially given the agency's well-documented opinions on the harms to salmon that are typically occasioned by dam *operations*, this is nonsense.[14] The fact that the requested injunction does not name FERC or Miller is not "[c]ritical" –those entities are highly unlikely to proceed without formal consultation once the cover provided by NMFS's faulty determination is removed. See generally Lone Rock Timber Co. v. U.S. Dep't of Interior, 842 F. Supp. 433, 437 (D. Or. 1994) (agencies acting at variance with NMFS consultation findings "will almost certainly be found to have acted arbitrarily and capriciously and contrary to law"). Lastly, issuing an injunction to enforce duly-promulgated ESA regulations will not "wreak havoc on the administration of the ESA." Opp. at 24. Judicial review under the APA will remain limited to "final agency actions," and in *true* exigencies – where (unlike here) the activity giving rise to expedited consultation generally will be brought under control within a matter of days (and may escape public notice altogether) – there will be little opportunity for "meddlesome" public interest litigation.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion should be granted.

Dated: August 10, 2011

/s/ David A. Nicholas */s/ Bruce M. Merrill*

[14] Moreover, there is no reason to believe that FERC and Miller will not continue to follow the "conservation recommendations" even if this Court overturns NMFS's "emergency" determination.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2011, I electronically filed on behalf of the above-named Plaintiffs the above Plaintiffs' Reply Brief On Motion For Preliminary Injunction with the Clerk of Court using the CM/ECF system, which will send notification of such filings to all other counsel of record.

/s/ Bruce M. Merrill
Bruce M. Merrill
225 Commercial Street, Suite 501
Portland, Maine 04101
(207) 775-3333
mainelaw@maine.rr.com