UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY and ENVIRONMENT MAINE,

Plaintiffs,

v.

TOPSHAM HYDRO PARTNERS LIMITED PARTNERSHIP,

Defendant.

Civil Action No. 2:11-cv-00037

PLAINTIFFS' OPPOSITION TO TOPSHAM HYDRO PARTNERS' RENEWED MOTION TO STAY AND INCORPORATED MEMORANDUM OF LAW

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 (*Pro hac vice*)
National Environmental Law Center
44 Winter Street, 4th Floor
Boston, Massachusetts
(617) 747-4333
josh.kratka@verizon.net

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

Joseph J. Mann (*Pro Hac Vice*)
National Environmental Law Center
369 Broadway Street, Suite 200
San Francisco, California 94133
(415) 622-0086 (ext. 306)
jmann@nelconline.org

The Court already rejected a request by Topsham to stay this case. Docket Nos. 11 and 17. It was denied without prejudice "to the Defendant renewing the request if it can provide documentation that the Endangered Species Act ["ESA"] administrative consultation process will result in final agency action by a date certain in the near future." Docket No. 17. The "action agency" in the consultation process, the Federal Energy Regulatory Commission ("FERC"), told Topsham it *cannot* provide a schedule by which it will complete the process. Ex. B to Hall Declaration (Docket No. 30). Thus, this motion should be denied. Further, there are still no grounds to invoke primary jurisdiction or this Court's inherent authority for a stay.

FACTUAL AND LEGAL BACKGROUND

Nature Of The Case

The Recommended Decision on Motion to Dismiss ("Rec. Dec.") (Docket No. 11) details Plaintiffs' allegations and claims, and they will not be repeated here.

Topsham may lawfully "take" salmon only if it first obtains authorization from the National Marine Fisheries Service ("NMFS") and/or the United States Fish and Wildlife Service ("USFWS") (collectively, "the Services"). Topsham has no such authorization. Topsham is now attempting to obtain it through the ESA Section 7 consultation process, 16 U.S.C. § 1536(a)-(c).

Plaintiffs seek a declaration that Topsham is violating the ESA take prohibition. Complaint, Relief Requested (a) (Docket No.1). Plaintiffs also ask for an injunction ordering Topsham to implement "appropriate measures to comply with the ESA's take prohibition pending the issuance of any…ITS," including measures to prevent salmon from swimming into operating turbines, id. at (b), and seek other "appropriate" relief, id. at (d), which likely will include measures to remediate the harm caused by illegal takes. Plaintiffs also ask the Court to order Topsham to prepare a biological assessment ("BA") on a set schedule. Id.

The Section 7 Consultation Process

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), provides that each federal agency ("action agency") contemplating certain types of federal actions (such as the issuance or modification of a federal license) shall, in consultation with the Services, insure that the action is not likely to jeopardize the continued existence of an endangered species (cause "jeopardy") or result in the destruction or adverse modification of habitat designated as critical to that species ("adverse modification"). It is the action agency, and not the Services, that is ultimately responsible for determining whether to take the contemplated action, and for insuring that the action will not cause jeopardy or adverse modification if it *is* taken. National Wildlife Federation v. Coleman, 529 F.2d 359, 371 (5th Cir. 1976).

The action agency is required to consult with the Services to inform its decision as to whether jeopardy or adverse modification will occur. 16 U.S.C. § 1536(a)(2). One of the first steps in consultation is the preparation of a BA, to help determine whether a proposed activity "is likely to adversely affect" listed species or their critical habitat. 16 U.S.C. § 1536(c). The federal licensee may be designated to prepare a draft of the BA (in which case it is termed the "designated non-Federal representative"). 50 C.F.R. § 402.12(b). However, ultimate responsibility for the BA lies with the action agency. 50 C.F.R. § 402.08 (action agency "shall independently review and evaluate the scope and contents of the biological assessment.")

If the action agency determines through a BA that the contemplated action is likely to adversely affect a listed species, it is required to submit to the Services a formal request for "consultation" ("formal consultation"). 16 U.S.C. § 1536(a) and (b). In the formal consultation process, the Services develop and provide to the action agency an opinion as to whether a

proposed activity will cause jeopardy or adverse modification, and issue a "biological opinion" ("Bi Op") setting forth this determination. 16 U.S.C. § 1536(b)(3)(A).

If (and only if) it is the Services' opinion in the Bi Op that jeopardy and adverse modification can be avoided if certain additional measures are taken to minimize the adverse effects of the proposed activity, the Services may issue an incidental take statement ("ITS"). The ITS, in turn, "specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize" the impact of the activity on endangered species, and "sets forth the terms and conditions…that must be complied with by…the applicant [the federal licensee]…to implement" those measures. 16 U.S.C. § 1536(b)(4)(ii) and (iv). An ITS, not a Bi Op, provides authorization for an incidental take. It is unlawful to violate an ITS.

The Section 7 Consultation Process For Pejepscot Dam

In the case of Pejepscot dam, the contemplated federal action is a modification of the dam's FERC license, the action agency is FERC, and the designated non-federal representative charged with preparing a draft BA is Topsham. No BA has been prepared by FERC. No Bi Op has been developed by the Services. No jeopardy/adverse modification determination has been made. No ITS has been issued. In fact, as of the time it filed this motion, Topsham had not finalized a draft BA to give to FERC (only a "preliminary" draft has been prepared).

Topsham developed what it calls an "Updated Schedule" for issuance of a BA and a Bi Op. The schedule does not mention an ITS. Renewed Motion at 5. Under the schedule, Topsham would not give FERC a draft BA until "March 2012." Id. Topsham suggests it could be authorized to take salmon as early as "September 2012," with the issuance by FERC of "an amended license for Pejepscot including protective measures" (though, again, there is no mention in the Updated Schedule of an ITS). But formal consultation will not even begin until

FERC completes its review of a draft BA (once it receives it from Topsham) and prepares its own final BA to submit to NMFS. The timetable for that process is wholly within FERC's control.

Topsham's Memorandum of Law fails to mention that FERC has expressly stated that it *does not agree* to the Updated Schedule. In a letter to the company attached as Exhibit B to the Hall Declaration (Docket No. 32) filed by Topsham, FERC states:

> Regarding Commission actions in this proceeding, please note that, while we will act on any filings we receive as quickly as possible, *schedules for future Commission actions cannot be identified at this time.*

(Emphasis added; italics not disclosed in Topsham's Memorandum of Law.) The statement by NMFS, which cannot control FERC's timetable, that the Updated Schedule "seems reasonable" is not a formal commitment to a date certain. Jeff Murphy email, Isaacson Dec. Ex. A.

ARGUMENT

I. THERE IS NO DATE CERTAIN FOR FINAL AGENCY ACTION.

There is no "documentation that the ESA administrative consultation process will result in final agency action by a date certain in the near future." Docket No.17. In fact, FERC has not agreed to any timetable at all. Accordingly, this motion should be denied.

II. THIS CASE SHOULD NOT BE STAYED UNDER THE DOCTRINE OF PRIMARY JURISDICTION.

Citizen suits are stayed only under "rare circumstances" because "to delay citizen enforcement would frustrate Congress's intent…to facilitate broad enforcement of environmental-protection laws and regulations." Rec. Dec. 10 (cites omitted). The factors considered in deciding whether to invoke primary jurisdiction weigh against invoking the doctrine in this case, as this Court has already held. See also Friends of Merrymeeting Bay ["FOMB"] v. NextEra Energy Res. LLC, 2011 U.S. Dist. Lexis 78510, at *7-11 (D. Me., July

19, 2011) (rejecting primary jurisdiction argument and stay request for same reasons it denied Topsham's earlier stay motion); FOMB v. Brookfield Power US Asset Mgmt., LLC, 2:11-cv-35, (D. Me., February 9, 2012), Docket 53 (same).

A. The Heart Of NMFS' Task Is Not Implicated.

Topsham argues that Congress assigned to federal agencies the determination of whether operation of Pejepscot takes salmon in violation of the ESA. Renewed Motion at 7. This Court already rejected this argument. Rec. Dec. 11. Congress put enforcement in the province of the district courts by granting them "jurisdiction" to "enforce" the provisions of the ESA against any party alleged to be violating them. 16 U.S.C. § 1540(g)(1)(A); Coho Salmon v. Pac. Lumber Co., 61 F. Supp. 2d 1001, 1015-1016 (N.D. Cal. 1999) (same).

Topsham also argues Congress assigned to federal agencies the determination of whether it "may be authorized to commit incidental takes of salmon." Renewed Motion at 7. But whether Topsham may someday be authorized to take salmon (and under what conditions) is not at issue. The issues here are (1) has Topsham violated the ESA by taking salmon without authorization?, and (2) if "yes," what is the remedy for these ESA violations? Courts routinely adjudicate citizen suit take claims where the defendant is trying to obtain authorization for incidental takes.[1]

B. This Case Is Not Too Technical For This Court To Decide.

[1] E.g., Animal Welfare Institute ["AWI"] v. Martin, 623 F.3d 19, 28-29 (1st Cir. 2010) (Maine liable for take of lynx while incidental take permit ("ITP") application pending); Strahan v. Roughead, 2010 U.S. Dist. LEXIS 123636 (D. Mass. Nov. 22, 2010) (take claim against Navy for killing whales adjudicated despite effort to obtain ITS); Alabama v. United States Army Corps of Eng'rs, 441 F. Supp 2d 1123 (N.D. Ala. 2006) (take claim against the Corps of Engineers for killing mussels adjudicated even though Corps was in process of obtaining ITS); Coho Salmon, 61 F. Supp. 2d at 1016 (rejecting primary jurisdiction doctrine despite pending ITP application); Loggerhead Turtle v. County Council of Volusia County, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995), rev'd on other grounds, 148 F.3d 1231 (11th Cir. 1998) (court held it was "not divested of jurisdiction over this case simply because" defendant filed an ITP application); see also Rec. Dec. 4-7 (rejecting Topsham's argument that this Court has no jurisdiction because Plaintiffs must await final agency action in § 7 consultation process); cf. AWI v. Martin, 588 F. Supp. 2d 70, 96-97 (D. Me. 2008) (citing Loggerhead Turtle in rejecting stay where defendant's application for ITP was pending).

Courts routinely decide whether an activity violates the take prohibition of the ESA and issue orders remedying such violations; agency expertise is not needed. Rec. Dec. at 11 (take suits implicate no "'invasion' of the expertise" of the Services) (cites omitted).[2] Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 703 (1995), cited by Topsham, is not to the contrary. (If it were, courts would never decide take suits.) Sweet Home was not a take case. It was a challenge to a regulation promulgated by the Services interpreting the term "harm" under the ESA's definition of "take." The Court held that in construing the validity of such a regulation, "we owe some degree of deference" to the Secretary's "reasonable interpretation" because of the Services' "degree of regulatory expertise." Id.

C. Awaiting Agency Determination Would Not Materially Aid The Court.

Waiting for NMFS and FERC to complete § 7 consultation would not aid this Court. The agencies are not addressing the *current* unauthorized takes that have been ongoing since the species was listed as endangered in 2009, which is why Plaintiffs are suing. Waiting until the Section 7 process runs its course would deny Plaintiffs, and the salmon, the relief they seek now.

III. THE COURT SHOULD NOT EXERCISE ITS INHERENT AUTHORITY TO STAY THIS CASE.

Topsham has not met its "heavy burden" of proof on the propriety of a stay. St. Bernard Citizens for Envtl. Quality, Inc v. Chalmette Ref., Inc., 348 F. Supp. 2d 765, 767 (E.D. La.)

First, there would be significant hardship if a stay were granted. The salmon in the Androscoggin and throughout the Gulf of Maine Distinct Population Segment ("GOM DPS")

[2] E.g., Palila v. Hawaii Dep't of Land and Natural Res., 639 F.2d 495, 497-498 (9th Cir. 1981) (finding feral goats and sheep were taking endangered bird by destroying critical habitat, and ordering state to remove these ungulates); AWI v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 580-581 (D. Md. 2009) (finding wind turbines under construction would take endangered bats during seven months of the year, and issuing order prohibiting operation during those months); AWI v. Martin, 588 F. Supp. 2d 70, 110 (finding Maine's trapping program caused takes of threatened Canada lynx and ordering state to prevent lynx from accessing "killer-type" traps); Animal Prot. Inst. v. Holsten, 2008 U.S. Dist. LEXIS 53396, at *2 (D. Minn July 14, 2008) (finding state trapping program caused takes and ordering state to develop proposal "to restrict, modify or eliminate…the incidental taking of Canada lynx").

face extinction. 16 U.S.C. § 1532(6) ("'endangered species' means any species which is in danger of extinction…"). Topsham claims, "[b]ecause the Atlantic salmon population in the Androscoggin River accounts for approximately 1% or less of the GOM DPS, any risk to those fish by operation of the Pejepscot Project would have a negligible impact on the GOM DPS." Renewed Motion at 9. But *Topsham offers literally no evidence to support its assertion of "negligible impact."* Further, the record belies Topsham's claim. The Services divided the GOM DPS into three Salmon Habitat Recovery Units ("SHRUs") for recovery purposes. 74 Fed. Reg. 29,300, 29,333 (June 19, 2009). The Androscoggin is part of Merrymeeting Bay SHRU, with the Kennebec River. Id. at 29,341. Penobscot Bay SHRU and Downeast Coastal SHRU are the other two designated recovery units for Atlantic salmon. Id. at 29,339-29,340. The Services have proposed an *initial* goal of 500 wild return spawners to *each* SHRU. Id. at 29,324. Currently, Merrymeeting Bay SHRU is nowhere near that number. Id. at 29,350-51.

Biologist Jeffrey Hutchings, who specializes in recovery of endangered fish populations, has submitted an expert report (summarizing the testimony he plans to give at trial) stating that "[r]estoration of both the Androscoggin and Kennebec Rivers of the Merrymeeting Bay SHRU is fundamentally important to the recovery of the GOM DPS of Atlantic salmon" and that "[g]iven the exceedingly low numbers of returning adults to the SHRU, most notably of fish of wild origin, the loss of a single smolt, or of a single adult, to human-induced causes is significant." Hutchings Report, p.2 (Nicholas Declaration Ex. 1) (the report was provided to Topsham in advance of the instant motion). See also Hutchings report, p. 16 ("Measured against the returning adults of wild origin, the Merrymeeting Bay SHRU is on the brink of extinction."). Dr. Hutchings will also testify that salmon mortality "attributable to dam facilities in the SHRU" will

have "an adverse impact on the survival and the prospects for recovery of the Merrymeeting Bay SHRU and, thus, *of the GOM DPS as a whole*." Id. (emphasis added).

Topsham also claims, without evidence, that any injunction here would not affect salmon until spring 2013 because they will not migrate downstream until then, so no harm could come from a stay. Renewed Motion at 9-10. This is untrue. Salmon migrate downstream in the fall and winter. Services' Critical Habitat Rule, 74 Fed. Reg. 29,300, 29,320 (June 19, 2009) (large parr migrate downstream in the fall); Report of Plaintiffs' expert Randy Bailey, p. 7 (kelts migrate downstream in the fall) (Nicholas Dec. Ex. 2); Complaint ¶ 11 (kelts [adults) return to the ocean in early winter]. Moreover, Topsham is ignoring the fact that an injunction would also remedy the take caused by its impeding of upstream passage, which also occurs in the fall. 74 Fed. Reg. at 29,315 (adult salmon ascend rivers in the fall).

Topsham would have this Court find now, without a trial, that the company may kill as many Androscoggin salmon as it chooses, without consequence to the biological integrity of the species. Under Topsham's logic, the small salmon population that presently populates the Androscoggin should be sacrificed, not protected. This argument should be rejected.

Second, the equities favor continuing this case. Topsham has known since at least 2006 that the Androscoggin salmon were likely to be listed as endangered, Complaint ¶ 17, yet made a business decision to continue harming salmon at Pejepscot dam after they were formally declared endangered in 2009.[3] Moreover, Topsham can only speculate as to when, or whether, it may receive an ITS. Further, Topsham may decide that the conditions of any ITS it does receive are too onerous, and may appeal its terms.

[3] The Androscoggin River salmon population was listed as endangered on June 19, 2009, 74 Fed Reg. 29,344 (June 19, 2009), not, as Topsham states at page 1 of the Renewed Motion, in "June of 2010."

And while Topsham complains this case is forcing it "to incur litigation expenses" and "strain[s] Topsham's ability to dedicate resources to the consultation process," it could avoid further litigation expenses by agreeing not to take salmon. In any event, Topsham introduces no evidence as to its resources, and has in fact refused to produce this very information to Plaintiffs. Nicholas Dec. Ex. 3 (Topsham document response refusing to produce financial information).

Third, Topsham's argument that this Court can save judicial resources because the case may become moot is fallacious. See Renewed Motion at 8. This Court has already held:

> [W]hether a permit is issued in the future is irrelevant to the question of whether a remediable violation is taking place at the present time...If the government's eventual action is inconsistent with the court's finding in this case, that discrepancy will have to be resolved when it arises. Speculation that it might arise is not a reason to defer this court's consideration of a possible current violation of a federal statute.

Rec. Dec. at 8-9 (cites omitted).

Moreover, federal courts have the equitable power in citizen suits to order remediation of past harm caused by illegal conduct, even where the relief imposes requirements more stringent than those contained in an agency-issued permit. See generally USPIRG v. Atlantic Salmon of Maine, 339 F.3d 23, 30 (1st Cir. 2003) (upholding order imposing conditions to protect salmon that were more stringent than those imposed by Clean Water Act discharge permit). This Court would also have the authority to order compliance with the terms of any ITS that may eventually be issued. Id. For these reasons, too, an eventual take authorization would not moot this case.

The two cases on which Topsham relies do not support a different result. I Ka'aina v. Kaua'I Island Util. Corp., 2010 U.S. Dist. LEXIS 101948 (D. Hawaii Sept. 24, 2010), suggested in dictum that issuance of an incidental take permit ("ITP") could render a take claim moot. However, the court in that case offered no analysis of the mootness issue, and did not address either the many cases that have adjudicated take claims despite the pendency of ITP applications

or Section 7 consultation, see n.1, supra, or the availability of remediation as a remedy to redress past violations. Also, in that case the defendant sought a stay to protect its Fifth Amendment rights against self-incrimination because there was a parallel criminal proceeding. Even so, the Court granted only a four-month partial stay of discovery, and allowed the plaintiff to take discovery in the interim on issues relevant to an anticipated motion for summary judgment. Id. at *24-27. This hardly compares to, or is probative of, the situation before the Court here.

Ctr. for Biological Diversity v. Henson, 2009 U.S. Dist. LEXIS 55709 (D. Ore. June 30, 2009), where a six-month stay was granted, is also fundamentally different from this case. Henson was not a take case. It was a suit against the Services for failure to satisfy their § 7 obligations. The defendants were *themselves* in a position to cure the violation alleged. Here, instead of offering to cure its alleged take violations, Topsham asks for a stay on the hope that two parties not before the Court (NMFS and FERC) will eventually authorize Topsham's (future) takes. But neither agency has made a commitment to Topsham's schedule, and FERC has expressly declined to say when it will complete the formal consultation process (which *has not yet begun*), or what the outcome of that process might be. A stay would effectively "pre-authorize[] take for an action that could subsequently be determined to jeopardize the existence of an endangered species," a result that "would be contrary to the ESA's fundamental purpose and scheme." Ore. Nat. Res. Council v. Allen, 476 F.3d 1031, 1036 (9th Cir. 2007).

CONCLUSION

For the reasons set forth above, Topsham's Renewed Motion should be denied.

Dated: February 16, 2012

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

CERTIFICATE OF SERVICE

I, David A. Nicholas, certify that on February 17, 2012 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system that will send notification of this filing to Defendant's counsel.

/s/ David A. Nicholas
David A. Nicholas