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.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move for a preliminary injunction directing Defendant National Marine Fisheries Service ("NMFS") to rescind its decision that purported "emergency" circumstances allow it to forgo required before-the-fact consultation under the Endangered Species Act ("ESA" or the "Act") with regard to the reconstruction of a 520-foot section of Worumbo dam on the Androscoggin River. Even if the present state of the aging dam is creating an emergency situation (which Plaintiffs strongly dispute), such emergency can be abated by simply drawing down the water in the impoundment behind the dam, thus allowing formal consultation to take place. Alternatively, the aging section of the dam (and any temporary dams or other structures put into the river during the dam removal process) can be removed and that portion of the river left to run closer to its natural course. This would mitigate the ongoing harm to salmon caused by the existing structure and allow for formal consultation prior to putting a dam back in the river. Thus, while Plaintiffs do not seek, if a true emergency exists, to prevent the removal of the aging section of the dam (or the taking of measures to reduce hydraulic pressure on that section), they do seek an order that will allow for completion of full ESA consultation prior to

construction work on any *replacement* of the dam. The need for a reconstructed dam – under any reasonable interpretation of the facts or law – does not constitute an "emergency."

INTRODUCTION

The federal ESA is the primary legislative mechanism by which animal and plant species pushed to the brink of extinction are to be recovered and preserved for the benefit of present and future generations. "For federal agencies, the heart of the Endangered Species Act is section 7(a)(2)," 16 U.S.C. § 1536(a)(2), which "affirmatively commands each federal agency to 'insure that any action authorized, funded or carried out' by the agency 'is not likely to jeopardize the continued existence of any endangered species … or result in the destruction or adverse modification of [the designated critical] habitat of such species.'" California ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1018 (9th Cir. 2009) (brackets in original).

To carry out this mandate, federal agencies must engage in a rigorous "consultation" process *before* proceeding with federal actions that may affect species listed under the Act as "endangered" or "threatened." See Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1126 (9th Cir. 1998); 50 C.F.R. § 402.14(a); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007) ("The language of § 7(a)(2) of the ESA is … imperative. … This mandate is to be carried out through consultation and may require the agency to adopt an alternative course of action."). This consultation process is designed to ensure that actions with potentially adverse effects on these decimated populations and their habitat are taken only after a full, science-based vetting of potential impacts and methods of ameliorating them. See Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A., 684 F.2d 1041, 1049 (1st Cir. 1982) (intent of Section 7(a)(2) was "to give the benefit of the doubt to the species"). With respect to certain aquatic species, including salmon, Congress has charged NMFS with the responsibility to

facilitate this formal consultation process, to ascertain whether agency activities should be allowed to proceed at all, and, if so, to specify measures that will minimize negative impacts on the affected species.

This case involves an unlawful decision by NMFS to forsake this before-the-fact consultation process with respect to the action of the Federal Energy Regulatory Commission ("FERC") in approving a project to remove and then reconstruct a major portion of the Worumbo hydroelectric dam, located on the Androscoggin River between the towns of Lisbon and Durham, Maine. Compl. ¶ 2. Although this project has been in the planning stages for years, and although NMFS has found that dams on the Androscoggin are a direct and significant threat to Atlantic salmon, NMFS chose *not* to complete formal consultation with FERC prior to allowing the project to move forward. Instead, NMFS decided to push off full consultation until *after* this 520-foot portion of the dam is torn down and then fully rebuilt, invoking a regulatory exception reserved for sudden, unforeseen "emergencies." The Worumbo dam removal and replacement project is expected to commence any day.[1] Compl. ¶ 31a.

Plaintiffs are conservation groups working to restore, and protect from harm, endangered Atlantic salmon in the Androscoggin River. Compl. ¶¶ 47-51. They submit that long-planned maintenance projects such as the Worumbo dam replacement are not "emergencies" as defined in NMFS regulations, and that if full consultation is put off until after the dam rebuild is a *fait accompli*, there is little chance NMFS will seriously consider or specify alternatives to the project (including alternative dam designs) that would reduce or eliminate harm to Atlantic

[1] The Worumbo dam is owned and operated by Miller Hydro Group ("Miller") pursuant to a FERC license. On January 31, 2011, the Plaintiffs in this case sued Miller for illegally "taking" (*i.e.*, killing, harming, harassing) endangered Atlantic salmon at the Worumbo dam in violation of Section 9(a)(1)(B) of the ESA, 33 U.S.C. § 1538(a)(1)(B). See Civil Action No. 2:11-cv-36-GZS, Doc. 1.

salmon and their critical habitat. Accordingly, if NMFS's decision is allowed to stand, Plaintiffs – and the salmon themselves – will suffer irreparable harm.

THE NATURE OF THIS MOTION

On July 15, 2011, Plaintiffs filed a Verified Complaint alleging claims under the federal Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), that the decision by NMFS to invoke emergency consultation procedures is unlawful and must be set aside because it was arbitrary, capricious, and not in accordance with law. However, it is unlikely that the administrative record will be compiled and a final decision rendered before the Worumbo dam is removed and rebuilt, and Plaintiffs thus will be irreparably harmed in the interim.

To prevent this, and to preserve the status quo *ante litem* pending a full resolution of this case on its merits, Plaintiffs respectfully request this Court issue a preliminary injunction rescinding NMFS's determination that the replacement portion of the dam removal and replacement project falls within the agency's regulatory exception for "emergencies."

FACTUAL AND LEGAL BACKGROUND

I. THE ANDROSCOGGIN RIVER POPULATION OF ATLANTIC SALMON IS ENDANGERED.

Historically, the Androscoggin River had, along with the Kennebec River, the largest Atlantic salmon runs in the United States, estimated at more than 100,000. Compl. ¶ 12. In 2011 (as of mid-July), only 46 adult salmon returned to the Androscoggin. Compl. ¶ 12. On June 19, 2009, Defendant NMFS and the United States Fish and Wildlife Service ("USFWS") (collectively, "the Services") issued a final rule designating the Androscoggin River population of Atlantic salmon as "endangered" under the ESA. 74 Fed. Reg. 29,344 (June 19, 2009). (An "endangered species" is a "species which is in danger of extinction." 16 U.S.C. § 1532(6).) That same day, the Services issued a final rule designating "critical habitat" for the Androscoggin –

i.e., habitat determined by the Services to be "essential to the conservation of the species" and "which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). The portion of the Androscoggin River where the Worumbo dam is located is part of that critical habitat. 74 Fed. Reg. 29,300 (June 19, 2009).

II. THE CONSULTATION PROVISIONS OF THE ENDANGERED SPECIES ACT.

The nature of the Section 7 consultation process is set forth in regulations jointly promulgated by the Services. Depending on the anticipated impact to the endangered species, the consultation process may be either formal, 50 C.F.R. § 402.14, or informal, 50 C.F.R. § 402.13.[2] Formal consultation, at issue here, is required unless the agency and the relevant Service conclude, in writing, that the contemplated action is unlikely to adversely affect the species or its critical habitat. 50 C.F.R. § 402.14(a) & (b); id. § 402.13(a).

Formal consultation is a detailed, rigorous process. As explained by the Services in their Consultation Handbook:

> Formal consultations determine whether a proposed agency action(s) is likely to jeopardize the continued existence of a listed species (jeopardy) or destroy or adversely modify critical habitat (adverse modification) … . They also determine the amount or extent of anticipated incidental take [*i.e.*, take of a listed species that results from, but is not the purpose of, carrying out an otherwise lawful activity][3] in an incidental take statement … [and] provide an administrative record of effects on species that can help establish the species' environmental baseline in future biological opinions.

[2] "An agency's finding that its action will have *no effect* on listed species or critical habitat obviates the need for consultation." Lockyer, 575 F.3d at 1019 (emphasis added).

[3] Under ESA Section 9, 16 U.S.C. § 1538(a)(1)(B), it is illegal for any person – whether private or governmental entity – to "take" any endangered species of fish or wildlife without authorization from the Services. "Take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The Services have defined "harm" to include "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102 (NMFS definition); accord 50 C.F.R. § 17.3 (similar USFWS definition).

Endangered Species Consultation Handbook (March 1998)[4] (available at http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) at 4-1; see also Compl. ¶¶ 16-24 (detailing consultation process). Moreover, the formal consultation requirement imposes a detailed set of "responsibilities" on the Services themselves. 50 C.F.R. § 402.14(g)(1)-(8). These include the obligation to review all of the information provided by the project agency, to evaluate the current status of the species and its habitat and the likely effect on them of the proposed action, to formulate a written biological opinion as to whether the action will jeopardize the species or its habitat, to evaluate alternatives that could reduce or eliminate such impacts, and to formulate an incidental take statement if a take will occur. See also Consultation Handbook at 4-1; 50 C.F.R. § 402.14(h) (required contents of a biological opinion). In formulating the biological opinion and evaluating alternatives, the relevant Service must use "the best scientific and commercial data available." 50 C.F.R. § 402.14(g)(8).

A discrete activity may give rise to the need for consultation on a larger activity. As the Services' Consultation Handbook states: "The [Service] biologist should ask whether another activity in question would occur 'but for' the proposed action under consultation. If the answer is 'no,' that the activity in question would not occur but for the proposed action, then the activity is interrelated or interdependent and should be analyzed with the effects of the action." Consultation Handbook at 4-27; see also 50 C.F.R. § 402.02 (definition of "effects of the action") ("Interdependent actions are those that have no independent utility apart from the action under consideration").

[4] Courts consider the Consultation Handbook in construing Section 7. E.g., Oregon Natural Res. Council v. Allen, 476 F.3d 1031, 1040 (9th Cir. 2007).

III. THE DAMS ON THE ANDROSCOGGIN ARE A SIGNIFICANT THREAT TO THE SURVIVAL AND RECOVERY OF ANDROSCOGGIN RIVER SALMON.

In their decision to include the Androscoggin River population of Atlantic salmon on the Endangered Species List, NMFS and USFWS found that dams on that river play a major role in imperiling the salmon. Compl. ¶ 14. Among these findings are the following:

> [T]he greatest impediment to self-sustaining Atlantic salmon populations in Maine is obstructed fish passage and degraded habitat caused by dams. … Dams are known to typically kill or injure between 10 and 30 percent of all fish entrained at turbines. … With rivers containing multiple hydropower dams, these cumulative losses could compromise entire year classes of Atlantic salmon. … Thus, cumulative losses at passage facilities can be significant … [D]ams remain a direct and significant threat to Atlantic salmon.

74 Fed. Reg. at 29,362. Similarly, the Services concluded, "[d]ams are among the leading causes of both historical declines and contemporary low abundance of the GOM DPS [Gulf of Maine Distinct Population Segment] of Atlantic salmon."[5] Id. at 29,366. The Services also found that "[the] effects [of dams] have led to a situation where salmon abundance and distribution have been greatly reduced, and thus the species is more vulnerable to extinction," and that, "[t]herefore, dams represent a *significant threat to the survival and recovery* of the GOM DPS." Id. at 29,367 (emphasis added). In the listing decision, the Services detail various ways in which Androscoggin River dams harm salmon. Id. at 29,352, 29,362, 29,366-67, 29,370-71 (turbines kill fish, fish passage is limited and delayed, access to spawning and rearing habitat is prevented, predator-prey assemblages are adversely affected, *etc.*); see also Compl. ¶ 15.

[5] Androscoggin River Atlantic salmon are part of the GOM DPS.

IV. NMFS HAS DECIDED THAT MILLER MAY RECONSTRUCT THE WORUMBO DAM ON THE ANDROSCOGGIN RIVER WITHOUT BEFORE-THE-FACT FORMAL CONSULTATION.

Miller plans to remove a 520-foot long "timber crib spillway"[6] at the Worumbo dam and replace it with a new concrete structure. Compl. ¶¶ 3-4. Miller may not proceed with this project without FERC approval. Such approval is a federal action, and it triggers the formal consultation requirements of Section 7 because any such removal and replacement would have an effect on the Atlantic salmon and their critical habitat. Moreover, the portion of the dam to be replaced is critical to creating the riverine impoundment, and Worumbo cannot function as a hydroelectric dam without it. Thus, the dam itself is "interrelated and interdependent" with the reconstruction project, and ESA consultation must consider the impacts of a reconstructed Worumbo dam as a whole, and not just of a newly rebuilt section of the dam.

However, on May 4, 2011, FERC wrote to NMFS asking for "formal consultation under the Endangered Species Act (ESA) using the emergency consultation procedures specified in NMFS's joint regulations [with USFWS] at 50 C.F.R. § 402.05." Compl. ¶ 30. By its terms, this emergency regulation "applies to situations involving acts of God, disasters, casualties, national defense or security emergencies." 50 C.F.R. § 402.05(a). Nonetheless, NMFS invoked the emergency consultation regulation here, thus "green-lighting" the dam removal and replacement project to proceed to completion without prior formal consultation.

V. PLAINTIFFS CHALLENGE NMFS'S DECISION.

Under the Administrative Procedure Act ("APA"), Plaintiffs challenge the determination by NMFS that the need to remove and reconstruct a major portion of Worumbo dam presents an "emergency" situation under 50 C.F.R. § 402.05, and its concomitant determination that both the removal and the reconstruction of that portion of the dam may proceed before completion of the

[6] The "timber crib" is a log structure filled with stone and capped by concrete. Compl. ¶ 3.

formal consultation procedures required by Section 7 of the ESA, as being arbitrary, capricious, an abuse of discretion, and not in accordance with law.

ARGUMENT

I. THE NMFS DECISION IS A FINAL AGENCY ACTION SUBJECT TO REVIEW UNDER THE APA.

The APA empowers federal courts to review final agency actions, see 5 U.S.C. §§ 702, 704, including decisions made by the Services under the ESA, see Bennett v. Spear, 520 U.S. 154, 177-78 (1997).[7] As this Court has stated:

> Generally, agency action is final if (1) it marks the "consummation of the agency's decision making process -- it must not be of a merely tentative or interlocutory nature," and (2) it is "one by which rights or obligations have been determined, or from which legal consequences will flow."

Community Housing of Maine v. Martinez, 146 F. Supp. 2d 36, 44 (D. Me. 2001) (quoting Bennett, 520 U.S. at 178).[8]

Both criteria are met here. First, NMFS has completed its decision-making process as to whether 50 C.F.R. § 402.05 is applicable. Second, this decision purports to determine the respective obligations of NMFS, FERC, and Miller under the ESA. Under this decision, NMFS and FERC need not engage in formal consultation, and NMFS need not formulate a biological opinion, before the Worumbo project is completed. Thus, real consequences flow from it.[9]

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[7] This Court has jurisdiction under 28 U.S.C. § 1331, and Plaintiffs have Article III standing to bring this action, see Comp. ¶¶ 47-54.

[8] "Finality is determined in a pragmatic and flexible way, … and even the relatively informal actions of subordinate officials can be final if the two conditions are satisfied." Id. (agency newsletter subject to APA review); see also Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 653-54, 664-65 (D. Me. 1975) (agency correspondence deemed "final agency action").

[9] A biological opinion "has a powerful coercive effect" on a federal agency. Bennett, 520 U.S. at 169. It "alters the legal regime to which the action agency is subject." Id. When the biological opinion contains measures to minimize the action's impact on the listed species (an "incidental take statement"), it constitutes a permit. If the agency or its licensee disregards a biological opinion and its conditions, "it does so at its own peril (and that of its employees), for 'any person' who knowingly 'takes' an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment." Id. at 170. In short, if NMFS were made to withdraw its decision to forgo

II. THE FOUR PRELIMINARY INJUNCTION FACTORS WEIGH IN FAVOR OF GRANTING AN INJUNCTION.

The four factors considered by courts in deciding whether to grant a preliminary injunction are: (1) the likelihood of the movant's success on the merits; (2) the potential for irreparable harm to the movant; (3) a balancing of the relevant equities; and (4) the effect on the public interest. Iantosca v. Step Plan Servs., Inc., 604 F.3d 24, 29 n.5 (1st Cir. 2010).

A. Plaintiffs Are Highly Likely To Succeed On The Merits.

1. The Standard of Review Under the APA.

"[T]he task of a court reviewing agency action under the APA's 'arbitrary and capricious' standard, 5 U.S.C. § 706(2), is 'to determine whether the [agency] has *considered the relevant factors and articulated a rational connection* between the facts found and the choice made.'" Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1284 (1st Cir. 1996) (emphasis and brackets in original) (citation omitted). Circumstances in which an agency action is considered arbitrary and capricious include where the agency "offer[s] an explanation for its decision that runs counter to the evidence," id. at 1285 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)); where a decision has "no support in the record," Shays v. Federal Election Comm'n, 414 F.3d 76, 102 (D.C. Cir. 2005); where an agency offers no explanation for its decision, Communications & Control, Inc. v. Federal Communications Comm'n, 374 F.3d 1329, 1335-36 (D.C. Cir. 2004); or where an agency fails to consider some important aspect of a problem, Puerto Rico Sun Oil Co. v. U.S. E.P.A., 8 F.3d 73, 77 (1st Cir. 1993). Ultimately, "[i]n order for an agency decision to pass muster under the APA's 'arbitrary and capricious' test, the reviewing court must determine that the decision 'makes sense.'"

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before-the-fact formal consultation, Miller may well be constrained by the ESA to change the way it rebuilds and operates the Worumbo dam.

Dubois, 102 F.3d at 1285 (citation omitted); see also Citizens Awareness Network, Inc. v. U.S. Nuclear Reg. Comm'n, 59 F.3d 284, 290 (1st Cir. 1995) (APA review "is not a rubber stamp").

Here, the decision by NMFS to invoke the emergency consultation procedures of 50 C.F.R. § 402.05 runs counter to the facts in the record, to the plain language of the regulation itself, and to the interpretation of that regulation given by the federal courts and by NMFS itself.

2. Only Sudden, Unpredictable, and Short-Lived Events, or Truly Exigent Situations Involving a Clear Risk of Great Harm, Constitute "Emergencies" Within the Meaning of 50 C.F.R. § 402.05.

The emergency consultation regulation invoked by NMFS provides as follows:

> (a) Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Director determines to be consistent with the requirements of sections 7(a)-(d) of the Act. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.
>
> (b) Formal consultation shall be initiated as soon as practicable after the emergency is under control. The Federal agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats. The Service will evaluate such information and issue a biological opinion including the information and recommendations given during the emergency consultation.

50 C.F.R. § 402.05. Thus, the Services and the action agency may postpone formal consultation, but must proceed with such consultation as soon as the relevant emergency "is under control."

By its own terms, this regulation applies to a very limited set of circumstances. As one court has explained:

> Although "emergency" was not actually defined [in § 402.05], some guidance may be taken from the examples provided.
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> "Act of God" is defined in the dictionary as "[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado." BLACK'S LAW DICTIONARY (8th ed. 2004). It is defined in the *Oxford English Dictionary* as the "action of uncontrollable natural forces in causing an accident, as the burning of a ship by lightning." OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("OED"). *Black's* defines "disaster" as a "a calamity, a catastrophic emergency," while

> the OED defines it as "[a]nything that befalls of ruinous or distressing nature; a sudden or great misfortune, mishap, or misadventure; a calamity." "Casualty" is defined as "[a] chance occurrence, an accident; *esp.* an unfortunate occurrence, a mishap; now, generally, a fatal or serious accident or event, a disaster," *Oxford English Dictionary*, and "1. A serious or fatal accident. 2. A person or thing injured, lost, or destroyed," BLACK'S LAW DICTIONARY.

Washington Toxics Coalition ("WTC") v. USFWS, 457 F. Supp. 2d 1158, 1195 (W.D. Wash. 2006). Similarly, the Services themselves use the phrase "natural disaster or other calamity" to describe the situations which present an "emergency" within the meaning of this regulation. Consultation Handbook at 8-1.

"In addition, 'emergency' is defined in the dictionary as 'a state of things unexpectedly arising, and urgently demanding immediate action,'" and an emergency circumstance thus must be "unpredictable or unexpected in some way." WTC, 457 F. Supp. 2d at 1195 (quoting OED); Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., 397 F. Supp. 2d 1241, 1257 (D. Mont. 2005) ("The emergency exception is meant for unexpected exigencies."); Consultation Handbook at 8-1 ("Predictable events … usually do not qualify as emergencies under Section 7 regulations unless there is a significant unexpected health risk.");[10] 51 Fed. Reg. 19,926, 19,938 (June 3, 1986) (in promulgating 50 C.F.R. § 402.05, the Services referred to "severe time

[10] This same principle is applied in other, similar regulatory contexts. In Malama Makua v. Gates, 2008 WL 976919 (D. Hawaii 2008), where the Army had purported to "consult" with native Hawaiians only *after* limiting their access to certain cultural sites, the court found no "emergency" because the Army knew *beforehand* that unexploded ordnance was present there. Id. at *10 ("The Court does not have before it a request by [the plaintiffs] for access in the midst of an out-of-control fire or a hurricane, or while noxious fumes are pervading cultural sites or while a hidden sniper is shooting at people …"). And courts have limited application of 40 C.F.R. § 1506.11, the "emergency circumstances" exception to the National Environmental Policy Act ("NEPA", another statute that which directs federal agencies to consider the environmental impacts of certain actions *before* those actions may be taken) to circumstances involving unforeseeable exigencies, especially those with dire consequences. Compare Valley Citizens for a Safe Env't v. Vest, 1991 WL 330963, at *5 (D. Mass. 1991) (strict NEPA compliance excused where use of Air Force base depended on "hostile and unpredictable nature of the Persian Gulf region" following Iraqi invasion of Kuwait), with Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 681-85 (9th Cir. 2008) (Navy's "long-planned, routine training exercises" are not "emergencies"), rev'd on other grounds, 555 U.S. 7 (2008).

constraints inherent in an emergency" and "actions that are immediately required").[11]

Here, there has been no unpreventable or unpredictable event, flood, ruinous misfortune, or fatal or serious accident, and nothing has been destroyed. Nor, according to Miller and FERC, are any of these expected to happen, even if the dam were to fail.

3. The Need to Remove the Timber Crib Spillway Does Not Present an "Emergency."

The Worumbo dam's timber crib section is over 100 years old, and the need for its eventual replacement was predictable. In Miller's words, the timber crib needs to be replaced because it "has reached the end of its service life." Compl. ¶¶ 3, 4, 30. Plans to replace it date back to at least March 2009. Compl. ¶ 37. In 2010, Miller told the Maine Department of Environmental Protection that this project is an "ongoing maintenance activit[y]" constituting "planned construction." Compl. ¶ 38; Compl. Ex. 12. Had formal Section 7 consultation begun then, during the planning stage of the project, it could have been completed by now.

The first inquiry regarding the use of the truncated "emergency" consultation process appears to have come from FERC, which telephoned and wrote to NMFS in late April and early May 2011 to ask for guidance as to how to justify the use of that process. Compl. Ex. 10. FERC then wrote to NMFS on May 4, 2011, requesting "formal consultation … using the emergency consultation procedures," and providing the following basis for this request:

> The attached April 29, 2011 letter from the dam owner conveys the sense of urgency for replacing the existing timber crib spillway with a concrete gravity structure as soon as possible. The existing 100-year-old-plus timber crib spillway has reached the end of its service life, resulting in a significant probability of failure if construction is delayed to 2012. In terms of impact of failure, when dams fail suddenly, effects are often unpredictable. A failure of Worumbo Dam would result in significant environmental consequences and could also produce serious public safety consequences and property

[11] "[A] Federal agency may not have the time for the administrative work required by the consultation regulations under non-emergency conditions." Consultation Handbook at 8-1. Indeed, the regulation appears to be reserved largely for situations requiring same-day turnaround, where time is so short that the initial contact with the Service is "usually" done by telephone or fax. Id.

> damage. FERC concurs with the urgency expressed by the owner, and as such, believes that the spillway should be replaced during the construction season this summer.

Compl. ¶ 30; Compl. Ex. 1. In the "attached April 29, 2011 letter," however, Miller identified the Worumbo dam as a "low hazard" structure, which means no loss of life, and only minimal economic loss, are expected in the event of a dam failure. Compl. ¶ 32; see also 33 C.F.R. § 222.6, App. D § 2.1.2 (Army Corps of Engineers hazard potential classifications).[12]

Moreover, Miller's April 29 letter stated that when it had last examined Worumbo "closely," in 2010, "the condition of the dam was not of failure in progress or imminent failure." That letter went on to say that if the dam failed "slowly during a high water event," which is "normally" how such dams fail, there would be "some impacts to property, but there would probably be limited impact to the environment or persons." In the more unlikely event of a "sunny day breach" (a failure of the dam during a time of low flow), Miller stated in the letter, the only "hazard risk" would be to "fisherm[e]n or other recreationists" who happen to be downstream. In that event, Miller stated, there would also be some environmental impact from sediment flows, and "property impacts to the Project" (*i.e.*, to the dam itself). Compl. Ex. 1.

Indeed, Miller has for decades been exempt from having to file an Emergency Action Plan for Worumbo, which means Miller "satisfactorily" demonstrated to FERC "that no reasonably foreseeable project emergency" at Worumbo (such as a dam breach)[13] "would endanger life, health, or property." Compl. Ex. 4; 18 C.F.R. § 12.21(a). See generally Bluestone Energy Design, Inc. v. FERC, 74 F.3d 1288, 1291 (D.C. Cir. 1996) (discussing FERC notice to dam operator that exemption from EAP can be obtained by showing breach "would not endanger

[12] There are three hazard classifications, with "low hazard" posing the smallest risk. In contrast, a "significant hazard" dam is expected to have "few" losses of life and "appreciable" economic loss if it fails, while a "high hazard" dam is expected to have "more than few" losses of life and "excessive" economic loss if it fails. 33 C.F.R. § 222.6, App. D § 2.1.2.

[13] A "project emergency" is defined as "an impending or actual sudden release of water at the project caused by a natural disaster, accident, or failure of project works." 18 C.F.R. § 12.3(b)(9).

nearby dwellings"). In 2010 Miller applied to renew this exemption. Compl. ¶ 35.

Nonetheless, on May 9, 2011, Jeff Murphy of NMFS sent an email to FERC stating that NMFS agrees to the use of emergency consultation procedures, and that NMFS would prepare a biological opinion *after* the dam is rebuilt. Compl. ¶ 31. The email stated, in its entirety:

> We received your letter dated May 4, 2011 concerning the emergency repairs at the Worumbo Project (FERC No. 3428), located on the Androscoggin River in Maine. Given the emergency nature of the repairs, NMFS can confirm that emergency consultation procedures outlined under 50 CFR §402.05 are appropriate for this situation. We will continue to work with the licensee to minimize environmental impacts including those to listed Atlantic salmon during the repairs. *Once construction is completed*, FERC should submit a biological assessment to NMFS describing the nature of the emergency, the justification for the expedited consultation, a description of the work, and any impacts to listed Atlantic salmon and designated critical habitat. Much of this information has already been prepared. *NMFS will then evaluate this information to issue a Biological Opinion to FERC.*
>
> We would appreciate obtaining monthly updates on your work.

Compl. Ex. 10. (emphasis added).

Since that time, neither Miller nor the responsible government officials have appeared to treat the Worumbo dam as a real risk to public safety or property. They have not warned the public of a possible Worumbo dam failure, and fishermen and others continue to recreate directly downstream from the dam. Compl. ¶ 41. Nor has Miller taken any interim steps to avert a possible dam break, such as drawing down the water behind the dam to lower the pressure on the timber crib. Compl. ¶ 41; see also Compl. ¶ 42 (Miller filing with FERC indicates that even during timber crib reconstruction, a failure of a temporary "cofferdam" would be "low hazard" and have "minor downstream impacts"). There is no on-the-ground indication that anything is amiss at Worumbo, let alone an incipient "emergency." Compl. ¶¶ 40-41.

At bottom, NMFS's decision to use emergency consultation procedures comports neither with the law nor the facts.

4. Any Need to Rebuild the Dam Does Not Present an "Emergency."

Logically, once the impoundment level is lowered or the timber crib structure removed, any risk of the dam's failure will be at an end, and any alleged emergency will thus have been brought "under control." Certainly, there is absolutely nothing in the record to indicate that a lowered impoundment or the *absence* of the timber crib (either of which would result in a more freely flowing river) will present an exigent risk to public safety or property. At that point, then, full, before-the-fact formal consultation will be required by the terms of the emergency regulation itself. See 50 C.F.R. § 402.05(b) ("Formal consultation shall be initiated as soon as practicable after the emergency is under control.") Further, such consultation must not be limited to the construction project itself, but must examine the impact of the dam as a whole on Atlantic salmon. Compl. ¶¶ 43-44.

As described by Miller in a July 26, 2010, letter to FERC, its plan is "to build a new dam just downstream from the current dam." Compl. ¶ 4; Compl. Ex. 4. Presumably, Miller desires to rebuild the dam for business reasons. This, however, does not justify the use of "emergency" consultation procedures for the rebuild. Indeed, the true emergency presented by reconstruction of the dam will be the harm its presence causes to the remaining Atlantic salmon population. Cf. National Audubon Soc'y v. Hester, 801 F.2d 405, 408 n.3 (D.C. Cir. 1986) (exigent steps taken to prevent possible extinction of endangered species qualifies as "emergency" excusing strict compliance with NEPA). Formal consultation, to assess both the extent of that risk and the means of ameliorating it, thus is required by the ESA prior to the start of any rebuild.[14]

[14] FERC has suggested the coffer dams (temporary earthen dams put into the river during the timber crib removal process) would degrade salmon habitat through erosion if the project were limited to removal of the timber crib with reconstruction deferred until 2012. This claim rings hollow because the existing Maine Department of Environmental Protection permits require that the coffer dams be removed in fall 2011, even if high water during the fall (due to hurricanes or other high water events) prevents full completion of the project in 2011 as Miller has proposed. As such, the existing state and federal permits have already factored in the possibility that the project as proposed by Miller might to be done in two seasons, 2011 and 2012, rendering moot FERCs concerns about

B. **Without An Injunction, Plaintiffs Will Be Irreparably Harmed.**

A plaintiff seeking an injunction must show "that irreparable injury is likely in the absence of an injunction." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S.Ct. 365, 375-76 (2008). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 544 (1987).[15] Among environmental harms, risks to endangered species are "afforded the highest of priorities." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 174 (1978); see also id. at 177 (extinction is an "irreplaceable loss to aesthetics, science, ecology, and the national heritage").

Where the violation at issue involves a procedural requirement designed to further substantive goals of environmental protection, the court should assess the risk that an improperly approved or vetted action will occasion actual harm to the environment.[16] The requirement for proper consultation under Section 7 of the ESA generally has been linked to a risk of substantive injury to the affected species and its habitat, such that federal agency actions may be enjoined pending such consultation. E.g., Sierra Club v. Marsh, 816 F.2d 1376, 1384 (9th Cir. 1987) ("If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will

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additional impacts from sedimentation on Atlantic salmon from the project requiring two construction seasons instead of one.

[15] Also, aesthetic harm cannot be compensated by the payment of money damages. E.g., Fund for Animals v. Clark, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (aesthetic harm caused by buffalo hunt not compensable).

[16] E.g., Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989) (noting risk "that real environmental harm will occur through inadequate foresight and deliberation" in plan to build causeway in ecologically sensitive area, and "difficulty of stopping a bureaucratic steam roller" once initial decisions are made); United States v. Coalition For Buzzards Bay, -- F.3d --, 2011 WL 1844221, at *3 (1st Cir. May 17, 2011) (noting importance that the NEPA analysis regarding potential impacts and mitigation measures occur in time to inform agency decision-making); Winter, 129 S.Ct. at 376 (procedural violation may pose little risk where 40 years of naval sonar training exercises had revealed no demonstrable harm to marine mammals).

not result. The latter, of course, is impermissible.").[17] The irreparable nature of this harm is also recognized in Section 7(d) of the Act, 33 U.S.C. § 1536(d), which forbids public agencies and private permit/license applicants from "mak[ing] any irreversible or irretrievable commitment of resources" during consultation that might prejudge the result of that process.

In the present case, as discussed above, NMFS has made formal administrative findings, after full notice and comment, that Androscoggin River dams harm endangered Atlantic salmon in a variety of ways. 74 Fed. Reg. at 29,358. Moreover, by acknowledging that formal consultation is required, NMFS and FERC have effectively conceded that this project is likely to adversely affect the Androscoggin River salmon and their critical habitat. Putting a dam back into the Androscoggin River without the required before-the-fact formal consultation poses a clear danger to "the survival and recovery" of the Androscoggin salmon. 74 Fed. Reg. at 29,367.

NMFS may argue there is no irreparable harm because the procedural protections of full formal consultation will be afforded at some undetermined point in the future. But this is of cold comfort to Plaintiffs (and to the salmon themselves). As courts have observed in analogous circumstances, it is extremely unlikely that NMFS will *later* make findings that lead to a recently rebuilt dam being taken down or significantly altered. E.g., Marsh, 872 F.2d at 504 (noting a "deeply rooted human psychological instinct not to tear down projects once they are built"); Parnell v. U.S. Army Corps of Eng'rs, -- F.3d --, 2011 WL 2718144, at *13 (8th Cir. July 14, 2011) (irreparable harm found where "fail[ure] to consider important environmental factors" relating to potential impacts to endangered species led to commencement of construction at power plant). Indeed, this is the very reason that the requirement for *prior* Section 7 consultation

[17] See also Florida Key Deer v. Paulison, 522 F.3d 1133, 1147 (11th Cir. 2008) (affirming injunction prohibiting issuance of flood insurance for new developments in endangered species habitat pending compliance with Section 7); WTC v. EPA, 413 F.3d 1024, 1029, 1034-35 (9th Cir. 2005) (affirming injunction prohibiting use of pesticides near salmon-supporting waters pending compliance with Section 7).

exists, and why the granting of emergency exemptions from it is exceedingly rare. See Forest Serv. Employees, 397 F. Supp. 2d at 1256-57 ("[T]he emergency consultation provision of 50 C.F.R. § 402.05 is not a substitute for required consultation under 16 U.S.C. § 1536 (a)-(c). … [E]mergency consultation is intended to be the exception, not the rule.").

C. The Equities Favor Plaintiffs.

In favor of granting an injunction is that the ESA "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." Hill, 437 U.S. at 180, 185 (construction of dam that was 80% complete halted to protect snail darter where USFWS violated its Section 7 obligations). Congress intended "to halt and reverse the trend toward species extinction, whatever the cost." Id. at 184. As this Court has stated in the analogous NEPA context, "unless defendants assert that an injunction will cause an imminent harm to national defense, … the impending bankruptcy of an entire industry, … or the bankruptcy of innocent third parties, … the balance of harms usually favors the issuance of an injunction to protect the environment." Sierra Club v. Marsh, 714 F. Supp. 539, 592 (D. Me. 1989) (citations and subsequent history omitted).

There is no equitable reason to deny an injunction. As discussed above, genuine emergency circumstances do not exist. And even if they did, the water in the impoundment behind the dam could be drawn down to alleviate any emergency; a new permanent structure need not be erected. Miller has had ample time to plan this project, and formal consultation could have been sought far earlier. There is simply no call for an end-run around ESA Section 7.

D. An Injunction Would Serve The Public Interest.

The protection of endangered species is indisputably in the public interest. E.g., Strahan v. Coxe, 127 F.3d 155, 160, 171 (1st Cir. 1997) (upholding injunction); United States v. Town of

Plymouth, 6 F. Supp. 2d 81, 89 (D. Mass. 1998) (endangered species deserve "the highest of priorities"). See generally Conservation Law Found. v. Watt, 560 F. Supp. 561, 583 (D. Mass.) ("It is plain that the public interest calls upon the courts to require strict compliance with environmental statutes."), aff'd, 716 F.2d 946 (1st Cir. 1983).

An injunction directing NMFS to rescind its "emergency" determination would further that interest, and therefore should be granted. See Marsh, 816 F.2d at 1383 ("institutionalized caution mandated by section 7 of the ESA" demands that federal projects be halted pending consultation, "regardless of any consequences of delay"). With the timber crib removed and the river running closer to its natural course, impacts to salmon would also be mitigated in the interim, and the agencies could then conduct formal consultation. Miller could thereafter rebuild the dam pursuant to the conditions specified by NMFS in its biological opinion if consultation shows that jeopardy to salmon can be averted.

CONCLUSION

Plaintiffs' motion should be granted, and, until such time as the Court has resolved this action on its merits, NMFS should be temporarily enjoined from invoking or applying emergency consultation procedures under 50 C.F.R. § 402.05 with regard to the replacement portion of the Worumbo dam project.

Dated: July 25, 2011

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CERTICIATE OF SERVICE

I, Bruce M. Merrill, certify that on July 25, 2011 I caused the foregoing Motion for a Preliminary Injunction to be served by hand on Defendants' counsel, the Office of the United States Attorney for the District of Maine, 100 Middle Street, East Tower, 6th Floor, Portland, Maine 04101. Service could not be effected through the ECF System because Defendants' counsel has not made an appearance yet in this case.

/s/
Bruce M. Merrill