

**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

**DEFENDANT TOPSHAM HYDRO PARTNERS LIMITED
PARTNERSHIP'S RENEWED MOTION TO STAY**

Defendant Topsham Hydro Partners Limited Partnership ("Topsham Hydro"), by and through its undersigned counsel, hereby moves the Court to stay this action during the pendency of the agency consultation process that is occurring pursuant to Section 7 of the Endangered Species Act (the "ESA"), 16 U.S.C. §1536(a)(2). In further support of this Motion, Topsham Hydro will rely on the Declaration of Scott Hall dated January 12, 2012, which is being filed herewith.

Preliminary Statement

Topsham Hydro previously moved the Court for an Order dismissing or staying this action. [Docket No. 7]. By Order dated September 9, 2011 (the "September 9, 2011 Order"), the Court denied Topsham Hydro's Motion. [Docket No. 17]. Importantly, however, the September 9, 2011 Order expressly stated that:

[T]he denial of the request for a stay is without prejudice to the Defendant renewing the request if it can provide documentation that the ESA administrative consultation process will result in final agency action by a date certain in the near future.

[*Id.* at p. 1]. Thereafter, Topsham Hydro submitted an updated proposed schedule for completion

of the ESA Section 7 consultation process to the appropriate federal agencies (the “Updated Schedule”). NOAA National Marine Fisheries Service (“NMFS”) has approved the Updated Schedule; the Federal Energy Regulation Commission (“FERC”) has stated that it will act on all filings received as quickly as possible. Under the Updated Schedule, the ESA administrative consultation process will be completed, culminating in final agency action, by September 2012, which is just two to three months after the currently scheduled trial-ready date. Topsham Hydro’s progress pursuant to the Updated Schedule has already rendered moot some of the claims asserted in the Plaintiffs’ Complaint. As for Plaintiffs’ remaining claims in this action, there are two possible outcomes: (i) they will be rendered moot by the actions of Topsham Hydro and/or the federal agencies occurring during the course of the litigation; or (ii) this Court’s resolution of any issues will be duplicated by agency action occurring very shortly thereafter.

Therefore, Topsham Hydro now renews its request for a stay of this action. This request should be granted under the doctrine of primary jurisdiction and/or the Court’s inherent authority to control its own docket for the following reasons: (i) it will prevent the Court from duplicating the resolution of complex technical issues pending before specialized federal agencies having jurisdiction over those issues; (ii) it will preserve and promote judicial economy; and (iii) it will avoid prejudice to Topsham Hydro caused by the parallel administrative and judicial proceedings addressing the same issues and claims that are likely to be decided nearly simultaneously.

Factual Background

A. The Atlantic Salmon GOM DPS And The Pejepscot Project

The Gulf of Maine Distinct Population Segment (“GOM DPS”) of Atlantic salmon was listed as an endangered species within the meaning of the ESA in June of 2010. [*See* Complaint, Docket No. 1, at ¶16]. The portion of the Androscoggin River on which Topsham Hydro’s

Pejepscot Project is located was also listed as critical habitat for Atlantic salmon in June of 2010. [*Id.* at ¶¶ 16-18]. The Complaint alleges that Topsham Hydro’s operation of the Pejepscot Project violates the ESA by adversely affecting the GOM DPS Atlantic salmon on the Androscoggin River. [*Id.* at ¶¶ 1, 4]. Since the listing, Topsham Hydro has been working with NMFS and the United States Fish and Wildlife Services (“USFW”) (USFW and NMFS, collectively, the “Services”), along with FERC as the action agency (the Services and FERC collectively referred to as the “Agencies”) in the requisite ESA consultation process. Topsham Hydro has now completed key data collection necessary to progress to the next stage of consultation. Based on the completion of this data collection, Topsham Hydro submitted the Updated Schedule to the Agencies for their review and approval, as described further in Section C below.

B. The ESA Section 7 Consultation Process

ESA Section 7 and its companion regulations provide a specific protocol by which to determine whether Topsham Hydro’s operations may adversely affect the GOM DPS Atlantic salmon. First, FERC and/or FERC’s designated non-federal representative (here, Topsham Hydro), engage in informal consultation to assist in determining whether formal consultation or a conference is required. 50 C.F.R. §402.13(a). In this case, the informal consultation includes, among other things, the drafting of a Biological Assessment (“BA”) by the non-federal designee (again, Topsham Hydro), and the finalization of a BA by FERC. *See id.*

Section 7 informal consultation may result in a finding that the agency action in question (*i.e.*, here, the continued operation of the Pejepscot Project under a FERC-issued license) is “not likely to adversely affect listed species or critical habitat,” in which event “the consultation process is terminated, and no further action is necessary.” 50 C.F.R. §402.13(a). Alternatively, there could be a finding that the action may “affect a listed species or critical habitat,” such that

FERC must engage in formal consultation with the Services. *Id.* at § 402.14. After formal consultation, the Services must provide FERC with a biological opinion (“BO”) explaining how the proposed action will affect the species and/or its habitat; if appropriate, this BO would include an Incidental Take Statement (“ITS”). 16 U.S.C. § 1536(b)(3)(A). An ITS includes the extent of anticipated take due to the federal action, reasonable and prudent measures to minimize the take, and terms and conditions to observe when implementing those measures. *Id.*

More importantly, however, the issuance of an ITS is tantamount to a finding that there is no prohibited taking.¹ This is because under the ESA “any taking that is in compliance with the terms and conditions specified in [an ITS] shall not be considered to be a prohibited taking of the species concerned.” 16 U.S.C. § 1536(o). Thus, Section 7 consultation may result in a no-taking finding, or an agency determination that, so long as the specified certain terms and conditions in the BO are met there is no taking in violation of the ESA. In either event, the taking question now before the Court will be resolved pursuant to the ongoing consultation process.

C. Topsham Hydro’s Approved Schedule For The Section 7 Consultation Process

NMFS has been designated as the lead agency on ESA matters relating to Atlantic salmon and the impacts of hydroelectric facilities. 74 Fed. Reg. 29,358 (June 19, 2009); 50 CFR 402.07. Accordingly, NMFS controls, among other things, the schedule for Topsham Hydro’s ESA Section consultation process. *Id.* On November 4, 2011, Topsham Hydro submitted the Updated Schedule for completion of the ESA Section 7 consultation process to NMFS (and received NMFS’s acceptance that same day) and subsequently submitted the agreed-upon schedule to FERC on November 23, 2011.² *See* Declaration of Scott Hall (“Hall Dec.”) at ¶ 2

¹ To “take” a species means to “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).

² Because, as noted above, NMFS controls the Schedule, USFWS’s approval is not required.

and Exhibit A thereto. The Updated Schedule sets forth a series of tasks and objectives that are consistent with the Section 7 ESA consultation process described above, as well as a timeline for their completion. It states as follows:

December 2011 – Topsham Hydro provides the preliminary draft Biological Assessment (BA) and Species Protection Plan (SPP) to agencies for review and consultation.

January - February 2012 – Continuation of ongoing consultation/meetings/document development.

March 2012 – Topsham Hydro files with the FERC the draft BA and the draft SPP as agreed upon with the Services, with a request for the FERC to amend the Project license for purposes of incorporating pertinent provisions of SPP.

April 2012 - FERC forwards its BA and SPP to NMFS with request for formal Section 7 consultation.

August 2012 – NMFS submits its Biological Opinion (BO) based on the SPP with agreed-upon protective measures to FERC for inclusion into the Pejepscot Project license.

September 2012 - FERC issues amended license for Pejepscot including protective measures as outlined in the BA and BO.

Id. In response, NMFS confirmed to Topsham Hydro that the “proposed schedule is acceptable to NOAA Fisheries.” *Id.* FERC (i) stated its appreciation for the Updated Schedule and for Topsham Hydro’s “continuing efforts to ensure the timely protection of Atlantic Salmon” at the Project; and (ii) committed to acting “on any filings we receive as quickly as possible.” *Id.* ¶ 3 and Exhibit B thereto. Consistent with the Updated Schedule, on December 30, 2011, Topsham Hydro submitted to NMFS its draft BA and SPP. *Id.* at ¶ 4.

D. The Plaintiff’s Requested Relief As Compared To The Approved Updated Schedule

The Plaintiffs’ Complaint requests that the Court (i) determine that Topsham Hydro’s operation of its Pejepscot Project results in the taking of Atlantic Salmon in violation of the ESA; (ii) set a schedule for Topsham Hydro to prepare a BA in connection with the ongoing Section 7

consultation process; and (iii) order Topsham Hydro to prevent salmon from entering the turbines at the Pejepscot Project until the issuance of an incidental take permit (“ITP”) or ITS. However, this relief will be granted, or denied, through the ongoing Section 7 agency process.

The request for a declaration that Topsham Hydro has committed a taking of Atlantic salmon by reason of its operation of the Pejepscot Project is at the core of the question that will be addressed conclusively by the Agencies, pursuant to the Updated Schedule, by September 2012. The request for an Order to set a schedule to prepare a BA is now moot inasmuch as Topsham Hydro is operating under a specific schedule to do just that. In the event litigation is concluded before September 2012, any Order addressing operations at the Pejepscot Project as they relate to Atlantic salmon may be moot soon thereafter by the issuance of an ITS, which is the expected result of the consultation process, and will not impact operations until Spring of 2013 in any event.

Argument

Topsham Hydro is operating under the Updated Schedule that anticipates final agency action under the ESA Section 7 consultation process by September 2012. Therefore, this action should be stayed based on the doctrine of primary jurisdiction or the Court’s inherent authority to (i) prevent the Court from unnecessarily resolving questions that are pending before specialized federal agencies; (ii) promote judicial economy; and (iii) avoid prejudice to Topsham Hydro.

A. This Action Should Be Stayed Pursuant To The Primary Jurisdiction Doctrine

Under the primary jurisdiction doctrine, a court tends to favor allowing an agency an initial opportunity to decide an issue in a case in which the court and the agency have concurrent jurisdiction. *U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 339 F.3d 23, 34 (1st Cir. 2003). The doctrine is meant to promote uniform application of the law, *id.*, and “is particularly applicable...where an administrative agency...is conducting proceedings

involving the same question as the Court.” Kocolene Oil Corp. v. Ashland Oil, Inc., 509 F. Supp. 741, 743 (S.D. Ohio 1981). It calls for a court to refrain from exercising jurisdiction to avoid the risk of putting a defendant in “an untenable position should the agency and the court disagree on the interpretation” of the law. *Id.*

In determining whether to defer to an agency under the primary jurisdiction doctrine, a court may consider the following factors: (i) “whether the agency determination [i]s at the heart of the task assigned the agency by Congress;” (ii) “whether agency expertise [i]s required to unravel intricate, technical facts;” and (iii) “whether, though perhaps not determinative, the agency determination would materially aid the court.” Massachusetts v. Blackstone Valley Elec. Co., 67 F.3d 981, 992 (1st Cir.1995) (quoting Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580 (1st Cir.1979)). All three factors weigh in favor of granting a stay of this action.

This action requires at least two determinations that were expressly assigned to federal agencies by Congress under the ESA: whether operation of the Pejepscot Project results in a taking of Atlantic salmon, and, if so, whether Topsham Hydro may be authorized to commit incidental takes of Atlantic salmon. *See* 50 C.F.R. §§ 402.13-402.14. The task of resolving these questions are unquestionably “at the heart” of the Congressional mandate to federal agencies under the ESA. Blackstone, 67 F.3d at 992. The Supreme Court has long-since acknowledged that administration of the ESA requires a high “degree of regulatory expertise,” which “counsel[s] deference” to federal agencies charged with its implementation. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 703 (1995).

The Agencies are taking pro-active and timely steps to conclude the consultation process, which would resolve the issues before this Court. Under the Scheduling Order, the parties are to be ready for trial by July 2, 2012, only two to three months before final agency action is expected

under the Updated Schedule. Even assuming a judgment is forthcoming shortly following trial, final agency action is likely to issue within a few weeks of the Court reaching a decision on the merits. In fact, the filing of any dispositive motions prior to trial, or an appeal of any judgment resulting from trial, could mean that agency action would precede final judgment in this action. Granting a stay will protect the resources of all parties and the Court against resolving claims that will become moot either shortly after, or even before, the Court resolves those claims. All of these facts weight in favor of granting a stay pursuant to the primary jurisdiction doctrine.

B. The Court Should Exercise Its Inherent Authority to Stay This Action

A “district court has the inherent power to stay its proceedings.” *Center for Biological Diversity v. Henson*, 2009 WL 1882827, *2 (D. Or. 2009) (recommended decision). “This power to stay is ‘incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.’” *Id.* (quoting *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)).

Courts generally consider three factors in weighing a motion to stay: (i) potential prejudice to the non-moving party; (ii) hardship and inequity to the moving party if the action is not stayed; and (iii) the judicial resources that would be saved by granting a stay. *Henson*, 2009 WL 1882827 at *2. An ongoing agency review process “weighs in favor of a stay pursuant to [a court’s] inherent authority.” *Ka’aina v. Kaua’i Island Utility Co-op*, 2010 WL 3834999 at *8 (D. Hawaii 2010). Where completion of the regulatory process may render a plaintiff’s claims under the ESA moot, “both the burden on the defendant and judicial economy and efficiency strongly favor a stay.” *Id.*

In *Henson*, the plaintiff sought to compel federal agencies to re-initiate consultation in connection with a previously issued ITP that authorized the incidental take of spotted owls based

on new information gleaned after the issuance of the ITP. 2009 WL 1882827 at *1. The defendant agencies moved to stay the action on the grounds that, though consultation had not formally been initiated, work was underway to have a draft ITS prepared within six months. *Id.* Once the draft ITS was approved, the agencies argued, it would supersede the ITP in dispute and render the plaintiffs' claims moot. *Id.*

The Magistrate Judge found that there would be no, or at most only limited, prejudice to the plaintiffs if a stay were granted. *Henson*, 2009 WL 1882827 at *2. The court noted, for example, that only a small amount of spotted owl habitat could be lost during a six-month stay. *Id.* Further, the defendants had dedicated substantial resources to the process aimed at the issuance of an ITS, and staying the action, the court noted, could moot or simplify the issues raised by the plaintiffs. *Id.* at 3-4; *see also Ka'aina*, 2010 WL 3834999 at *8 (granting a stay of a suit filed during pending efforts to obtain an ITP because the action would be rendered moot “[i]f the regulatory process is completed and Defendant secures an incidental take permit.”). Thus, the Magistrate Judge granted a stay of the action.

As in *Henson*, the Plaintiffs in this case cannot plausibly claim that the requested stay would prejudice them or the GOM DPS. The time between the anticipated outcome of litigation and that of the consultation process is negligible. Because the Atlantic salmon population in the Androscoggin River accounts for approximately 1% or less of the GOM DPS,³ any risk to those fish by operation of the Pejepscot Project would have a negligible impact on the GOM DPS. Moreover, proceeding with this matter will not result in faster implementation of any operational constraints that may be required -- operational constraints to enhance downstream migration

³ *See* <http://www.maine.gov/dmr/searunfish/salmontraps.shtml>. Data from the Maine Department of Marine Resources shows that salmon on the Androscoggin River account for approximately 1% of salmon returning to Maine rivers that have counting facilities. This does not account for salmon returning to rivers in Maine where there are no counting facilities. In all likelihood, the salmon returning to the Androscoggin account for less than 1% of Gulf of Maine salmon.

would not impact the Pejepscot Project's operations until the Spring of 2013, regardless of whether the stay is ordered.⁴ In short, there is not prejudice sufficient to weigh against a stay of this action. *Henson*, 2009 WL 1882827 at *2.

However, Topsham Hydro will suffer considerable prejudice if a stay is denied. Such an outcome would force Topsham Hydro to bear the expense of simultaneously resolving the same issues through litigation and through Section 7 consultation. Aside from needlessly forcing Topsham Hydro to incur litigation expenses, it would strain Topsham Hydro's ability to dedicate resources to the consultation process, reducing the efficiency of that process.

Finally, as discussed above, granting a stay would prevent the Court from having to expend judicial resources on an outcome that will, for all practical purposes, have no meaningful impact on providing protection to the GOM DPS of Atlantic Salmon. All of these facts weigh in favor of the Court exercising its inherent authority to stay this action.

Conclusion

For all of the foregoing reasons, Defendant Topsham Hydro Partners Limited Partnership respectfully requests that the Court stay this action until completion of the ESA Section 7 consultation process.

Dated: January 12, 2012

Respectfully submitted,

/s/ Theodore A. Small

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⁴ As the Complaint acknowledges, downstream migration of Atlantic salmon takes place in the Spring. [Complaint ¶ 11.]

