

**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 REPLY IN SUPPORT OF ITS RENEWED
MOTION TO STAY¹**

Preliminary Statement

Topsham Hydro initially moved to dismiss or stay this action on the grounds that it is an unwarranted interference with an ongoing process of agency enforcement of the ESA. In response, Plaintiffs claimed they were not challenging enforcement of the ESA. In opposing Topsham Hydro’s pending Motion to Stay, Plaintiffs renew that claim and assert that they are seeking only injunctive measures “pending the issuance of any ITS.” (Plaintiffs’ Opposition at 1.) However, the expert reports introduced in the Opposition reveal that Plaintiffs are indeed seeking to challenge agency implementation of the ESA, and are seeking relief that would be in direct conflict with the position the federal agencies have taken with respect to the Topsham Hydro project (the “Project”). Specifically, but without limitation:

- (i) Plaintiffs’ experts have reached conclusions regarding impacts on salmon and allegedly appropriate remedial measures at the Project without any site-specific studies; the agencies have taken the position that site-specific studies are required before the need for any additional new mitigation measures (in addition to those already in place) can be assessed;

¹ In further support of this Reply, Topsham Hydro relies on the March 5, 2012 Declaration of Scott Hall (“S. Hall Reply Dec.”), and the March 5, 2012 Declaration of Theodore Small (“T. Small Dec.”) which are being filed herewith.

- (ii) Plaintiffs seek substantial modification of fish passage systems at the Project; the existing fish passage systems were designed in consultation with federal fisheries agencies, and utilize state-of-the-art technology;
- (iii) Plaintiffs argue that the loss of one salmon could jeopardize the entire species; during the ongoing consultation process, NMFS has taken the position that the Project does not jeopardize the species; and
- (iv) Plaintiffs seek permanent alterations to the Project, which would remain in place after the issuance of an ITS; the agencies have stated they are prepared to issue an ITS that will permit Topsham Hydro to work with the agencies to conduct site-specific studies for up to three years to determine whether any further mitigation efforts should be implemented.

The Updated Schedule that forms the basis of this Motion remains on track. Topsham Hydro has already received feedback from NMFS on the draft BA, and both NMFS and FERC have agreed to a plan that will result in the issuance of an ITS under terms that are dramatically different than those that Plaintiffs wish to pursue in this action.² This matter should be stayed to allow the agencies to formalize this agreement.

A. The Project Does Not Jeopardize GOM DPS Atlantic Salmon

Plaintiffs' Opposition paints a grossly distorted picture of the status of the salmon population in the Androscoggin River and the effect of the Project on the species. Plaintiffs' Opposition further assumes as true the central factual issues in this case: (i) whether the Project is "taking" salmon in violation of the ESA; and (ii) whether these asserted takes are causing irreparable harm to the species. Plaintiffs' self-serving portrayal the alleged "facts" is not only inaccurate; it is inconsistent with the views expressed by the federal agencies.

There is no natal salmon population in the Androscoggin river, and there is very little accessible habitat in the river. (John Devine Report at 3-6).³ For the ten years from 2001 to 2010,

² Plaintiffs mistakenly claim that NMFS has not committed to the Updated Schedule. (Opposition at 4.) In fact, NMFS has stated that the Updated Schedule is acceptable, and has acted accordingly since then. (January 12, 2012 S. Hall Declaration at 2 and Ex. A thereto; S. Hall Reply Dec. at ¶ 6 and Ex. 1 thereto.)

³ The report of John Devine, one of Topsham Hydro's experts, is attached to the T. Small Dec. as Exhibit 1.

the mean number of Atlantic salmon recorded returning to the Androscoggin River per year was less than 11 fish, and an average of 9 per year were of hatchery origin (*i.e.*, strays from other watersheds). (*Id.* at 6.) The only “stocking” program consists of having school groups plant approximately 1,200 frye in a minor tributary every year. (*Id.* at 4.) Survival estimates indicate that 0-3 adults would have been expected to return from the frye planted in this tributary since 2001, without regard to whether any dams existed on the river. (*Id.* at 8-9.) In short, there is no salmon population on the Androscoggin River that could be put in jeopardy by the Project. Moreover, the reports of Plaintiffs experts do not point to a single instance of actual harm to an actual salmon caused by the Project; rather, these reports are merely predictions of expected harm based on results from other projects on other rivers. *See* Randy Bailey Report *generally*, and at 9.

B. The Agency Consultation Process Is On Schedule

The parties are in compliance with requirements of the Updated Schedule, which is the foundation of this Motion.⁴ (S. Hall Reply Dec. ¶ 5.) NMFS has provided its comments to the draft BA and Species Preservation Plan (“SPP”) submitted on December 30, 2011.⁵ NMFS has informed Topsham Hydro that it expects that the consultation process will result in the issuance of an ITS. (S. Hall Reply Dec. at ¶ 3(d).) Under an ITS, it is anticipated Topsham Hydro will work with NMFS to design and conduct studies on the effectiveness of upstream and downstream fish passage at its facility for up to three years, beginning with the 2013 season. (*Id.* at ¶ 3.) Upon completion of the studies, Topsham Hydro and the agencies will re-initiate consultation and devise a plan for implementing measures, if any, that are warranted by the

⁴ Plaintiffs critique the Updated Schedule as referencing only a Biological Opinion, not any ITS, and state that a Bi Op does not authorize an incidental take. Plaintiffs also suggest that an ITS would add to the current timeline. (Opp. at 3.) In reality, an ITS is issued as part of a Bi Op. 50 CFR 402.14(i); an ITS is not an added step in the process that has not been included in the Updated Schedule, nor an added step that will delay the consultation process.

⁵ The agencies have dedicated even more focus to the SPP than with BA. The BA is the Licensee’s document whereas the SPP is essentially an Agreement between the Agencies and the Licensee. (S. Hall Reply Dec. at ¶ 2.)

studies. (*Id.* at ¶ 3(f).) A request to add the agreed conditions to the Topsham Hydro license as necessary will then be submitted to FERC, which has indicated it will add the agreed conditions as necessary. (*Id.* at ¶ 3(g).) Implementation of any new mitigation measures will occur in the summer season after this consultation. (*Id.* at 3(h).)⁶

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

1. Plaintiffs' Claims Implicate Tasks Assigned To Federal Agencies

The questions of whether and to what extent Topsham Hydro's facility impact Atlantic salmon and what new measures might be necessary to mitigate any such impact are the central questions being addressed in the Section 7 consultation process. (Motion at 4, 7.) In addition, in order to grant the injunctive relief Plaintiffs seek, the Court would necessarily have to determine whether the Topsham Hydro facility causes harm to salmon as a species, rather than to individual salmon. *See Animal Welfare Institute v. Martin*, 668 F.Supp.2d 254, 264 (D. Me. 2009), *aff'd* 623 F.3d 19 (1st Cir. 2010). These are matters expressly assigned to federal agencies in the consultation process. *See* 50 C.F.R. §§ 402.13-402.14.

2. Agency Expertise Can Help Resolve Facts Before The Court

Plaintiffs argue that this case is not "too technical for this Court to decide." (Opposition at 5.) This misconstrues the pertinent standards under the primary jurisdiction doctrine. "The doctrine, informed by principles of deference to agency decision making, gives effect to the eminently sensible notion that 'in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.'" *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir.1995) (quoting *United States v. Western*

⁶ The agencies' views contrast starkly with the relief sought by Plaintiffs. Plaintiffs seek, among other things, (i) immediate operational shutdowns; (ii) vague, undefined studies; (iii) the construction of a fish hatchery, which, according to Plaintiffs, would take a year to complete; (iv) the design of new fish passages "within 12 months"; and (v) significant, permanent alterations to Topsham Hydro's facility that would not be completed this Fall. (*See* Randy Bailey Report, a copy of which is attached to the T. Small Dec. as Exhibit 2 at pp. 40-41, 105.)

Pacific Railroad Co., 352 U.S. 59, 64 (1956)). “The doctrine is intended to serve[] as a means of coordinating administrative and judicial machinery, and to promote uniformity and take advantage of agencies' special expertise.” *Id.* (internal quotations omitted).

Thus, the question under the primary jurisdiction doctrine is not, as Plaintiffs suggest, whether the Court lacks any ability to resolve the dispute. Rather, the question is whether the issues raised in the dispute implicate agency expertise that should be afforded deference. Such deference is appropriate in this case. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995)).

3. Permitting Completion Of The Consultation Process Would Aid The Court

Plaintiffs argue that awaiting agency action would not aid the Court because “agencies are not addressing the *current* unauthorized takes that have been ongoing.” (Opposition at 6) (emphasis in original). As discussed in the Motion, the issuance of an ITS, as opposed to the issuance of an Incidental Take Permit, *does* constitute a conclusion that there is no prohibited taking within the meaning of the ESA. (Motion at pp. 3-4.) In addition, other questions raised by Plaintiffs’ request for relief, including what impact any take has on the species as a whole, *Animal Welfare Institute*, 668 F.Supp.2d at 264, and what new measures, if any, should be implemented to mitigate that impact are being addressed, and already have been significantly answered by the agencies. Allowing the agencies a few months to complete consultation would aid the Court in resolving these questions.

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

Plaintiffs raise three arguments as to why the Court should not exercise its inherent authority to stay this case: (i) a stay will cause significant hardship to salmon; (ii) the equities favor continuing the case; and (iii) a stay would not conserve judicial resources. All three arguments are without merit.

1. A Stay Will Not Harm Atlantic Salmon

Aside from, or perhaps consistent with, the fact that there is no natal salmon population in the Androscoggin River, during consultation the agencies have taken the position that the Project does not pose a threat to the Atlantic salmon species, and that a three-year period is necessary to conduct site-specific studies. (S. Hall Reply Dec. at ¶¶ 3-4.) There is currently no evidence that the Project poses a threat to salmon. Clearly, the Agencies do not agree that any impact the Project may have on salmon during a stay poses any immediate threat to the species. Of course, the Court cannot resolve such issues in the present Motion. Yet, that is the very point of the Motion: the circumstances of this case will inevitably require the Court resolve conflicts between the positions taken by Plaintiffs and the positions taken by federal agencies in the consultation process. A stay would eliminate the possibility that the Court's decisions and the agencies' decisions would conflict, and would, therefore, eliminate the possibility that Topsham Hydro could be subjected to conflicting outcomes.

A stay will have no measurable impact on any relief Plaintiffs seek. For the most part, the relief Plaintiffs seek, if granted, could not be implemented for many months, or longer (T. Small Dec. ¶ 4 and Ex. 2 thereto at 40-41, 105.); the measures proposed by Plaintiffs cannot be implemented this Fall under any circumstances.

2. The Equities Weigh In Favor Of A Stay

Plaintiffs' incendiary charge that Topsham Hydro made a business decision to harm salmon (Opposition at 8) is demonstrably false. The Project is equipped with state-of-the-art fish passage systems that were designed with the guidance of federal agencies. (J. Devine Report at 9-10.). Topsham Hydro has been working closely with the agencies since the ESA listing – less than two years ago – to develop a comprehensive plan to assess the Project's impact on salmon and, if necessary, implement additional protective measures. Plaintiffs may not view this plan as

sufficient. But this is not the proper forum to challenge that plan. *Bennett v. Spear*, 520 U.S. 154, 173-174, 179 (1997). Nor would it be appropriate or equitable to subject Topsham Hydro to Plaintiffs' dramatically different plan.

3. A Stay Will Conserve Judicial Resources

To argue that a stay would not conserve judicial resources, Plaintiffs cite a portion of the Recommended Decision on Topsham Hydro's original Motion to Dismiss. In that excerpt, the Court stated that the issuance of a *permit* is irrelevant to the question of whether a take is occurring, and that speculation that a conflict may arise with agency action is not a reason to stay the case. (Opposition at 9.) Although issuance of a permit might not implicate the taking question before the Court, the issuance of an ITS would. (Motion at 3-4.) In addition, based on consultation to date, we are past the point of speculation about the agencies' conclusions. Topsham Hydro's facility does not pose a threat to the species, and, as a result, the agencies are prepared to authorize the issuance of an ITS. The only way those conclusions would not conflict with the Court's findings would be if the Court were to find either that Topsham Hydro has not committed a take or that, whether or not a take has occurred, the relief requested by Plaintiffs should not be granted. A stay will eliminate the risk of conflicting outcomes in the agency process and this action.

Dated: March 5, 2012

Respectfully submitted,

/s/ Theodore A. Small

Paul McDonald
Theodore A. Small
Bernstein Shur
100 Middle Street; PO Box 9729
Portland, ME 04104-5029
207-774-1200

Attorneys for Defendant
Topsham Hydro Partners Limited Partnership

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March 2012, I electronically filed *Defendant Topsham Hydro Partners Limited Partnership's Reply Brief in Support of its Renewed Motion to Stay* with the Clerk of the Court using the CM/ECF system which will send notification of such filing(s) to the following:

Bruce M. Merrill, Esq. 225 Commercial St, Suite 501 Portland, ME 04101	Charles C. Caldart, Esq. National Environmental Law Center 1402 Third Avenue, Suite 715 Seattle, WA 98101
David A. Nicholas, Esq. 20 Whitney Road Newton, MA 02460	Joshua R. Kratka, Esq. National Environmental Law Center 44 Winter Street Boston, MA 02108

/s/ Theodore A. Small

Paul McDonald
Theodore A. Small
Bernstein Shur
100 Middle Street; PO Box 9729
Portland, ME 04104-5029
207-774-1200

Attorneys for Defendant
Topsham Hydro Partners Limited Partnership