IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY and ENVIRONMENT MAINE, Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE and NATIONAL MARINE FISHERIES SERVICE, Defendants.	Civil No. 2:11-cv-00276-GZS

DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO DISMISS WITH INCORPORATED MEMORANDUM OF LAW

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INTRODUCTION

This case arises out of emergency repairs currently underway at the Worumbo Hydropower Project in Lisbon, Maine, a hydroelectric dam owned and operated by a private company under a Federal Energy Regulatory Commission ("FERC") license. Several months ago, FERC's Division of Dam Safety and Inspections determined that Worumbo was in such disrepair that it required immediate, emergency repairs. FERC ordered its licensee to undertake this necessary safety work, which is now underway. Plaintiffs have filed this suit and preliminary injunction motion to ultimately stop the repairs. But they have sued neither FERC, the agency that authorized the repairs, nor its licensee, which is performing them. Instead, they sued the U.S. Department of Commerce and National Marine Fisheries Service ("NMFS"), for accepting FERC's request to engage in emergency consultation under the Endangered Species Act ("ESA") during the work. Notably, NMFS's role during this emergency response is to recommend ways to minimize any potential adverse effects of the response action on an ESA-listed species of Atlantic salmon.

At the outset, the Court must resolve the threshold question of whether it has jurisdiction over Plaintiffs' claim against NMFS. As detailed below, it does not, for two independent reasons. First, assuming *arguendo* that NMFS took final agency action (which it did not), the Federal Power Act ("FPA") bars the exercise of subject-matter jurisdiction over Plaintiffs' claim seeking review of that action. Any challenge related to FERC's safety order can only be brought in the Court of Appeals following an administrative appeal of that order. Second, neither NMFS's acceptance of FERC's request to engage in emergency consultation, nor the initiation of that consultation, is a judicially reviewable final agency action by NMFS. Thus, Plaintiffs' action must be dismissed.

Plaintiffs' motion for preliminary injunction must be denied as well. Because of these jurisdictional defects, they cannot show a likelihood of success on the merits. Moreover, even if

Plaintiffs could overcome these infirmities, they cannot demonstrate a likelihood of success because they cannot show that NMFS's reliance on FERC's stated need for emergency consultation was arbitrary and capricious. In addition, Plaintiffs have not demonstrated any need for an injunction because they have not shown that irreparable harm to the species is likely to occur without such relief. Indeed, they offer no evidence of concrete harm at all, choosing instead to ask the Court to presume such harm from language in NMFS's final rule listing the species under the ESA, and from the legal standard for initiating formal ESA consultation. Neither basis is sufficient to meet their burden of proof. And, as a matter of fact, no irreparable harm is likely to occur. Indeed, the most up-to-date information shows that no fish are even present in the project area. And, given the timing of the emergency repairs, the extensive monitoring and mitigation measures in place, and the biology and location of the species, no harm to the species is likely. Finally, even if the Court were inclined to agree with Plaintiffs in all respects, their requested relief would not stop these repairs or redress their alleged harm. If anything, enjoining NMFS will only lessen the protection of the listed species. Thus, neither the balance of harm nor public interest favors an injunction.

STATUTORY AND REGULATORY BACKGROUND

I. The Federal Power Act

The FPA is "a complete scheme" for federal regulation and development of water power resources, authorizing FERC to issue licenses for hydroelectric project works, including dams, reservoirs, and other works, to develop and improve navigation and to develop and use power. First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152, 180 (1946); 16 U.S.C. § 797 et seq. A FERC license is required before any entity may build a hydroelectric project on, among other things, any navigable stream or on "any part of the public lands and reservations of the United States." Id. at § 797(e). FERC's responsibilities include issuing licenses for the construction of new projects and the continuation of existing projects, and overseeing all ongoing project

operations, including dam safety inspection and environmental monitoring. See Coal. for Fair and Equitable Reg'n of Docks on Lake of the Ozarks v. FERC, 297 F.3d 771, 774-75 (8th Cir. 2002).

Although the FPA does not exempt FERC from compliance with the ESA or the Administrative Procedure Act, ("APA"), 5 U.S.C. §§ 701–706, it establishes a "*separate and exclusive* procedure that governs review of its licensing decisions." City of Tacoma v. NMFS, 383 F. Supp. 2d 89, 92 (D.D.C. 2005); citing 16 U.S.C. § 8251(b); see also Skokomish Indian Tribe v. United States, 332 F.3d 551, 558 (9th Cir. 2003). Any party to a proceeding who is dissatisfied with a FERC order must file a petition for rehearing within 30 days of the order. 16 U.S.C. § 825*l*(a). This requirement applies equally to staff orders issued under delegated authority, including the construction authorization order issued for Worumbo ("FERC Order").[1] 18 C.F.R. §§ 12.4(c), 385.207, 385.1902(a), 385.713(a)(1). See Missouri Coal. for the Env't v. FERC, 544 F.3d 955 (8th Cir. 2008) (review following exhaustion of administrative remedies of dam safety action). A rehearing request is a mandatory, statutory prerequisite to judicial review. 16 U.S.C. § 825*l*(b). Once FERC issues an order on rehearing, the Court of Appeals' jurisdiction "shall be exclusive" and is limited to issues "urged before [FERC] in the application for rehearing." Id.

II. The Endangered Species Act

A. Consultation Under ESA Section 7

The ESA contains both substantive and procedural requirements to carry out its goal of conserving endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(b). Species preservation begins with ESA Section 4, which empowers NMFS[2] to

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[1] See Request for Judicial Notice ("RJN") Ex. 1 (FERC order), online at: http://elibrary.ferc.gov:0/idmws/file_list.asp?document_id=13940989 (last visited Aug. 8, 2011).

[2] The Secretary of Commerce (delegated to NMFS) administers the ESA with respect to marine and anadromous species. See 16 U.S.C. § 1532(15); Lujan v. Defenders of Wildlife, 504 U.S. 555, 586 n.3 (1992). NMFS and the

designate species as "threatened" or "endangered" and to designate "critical habitat" for listed species. 16 U.S.C. § 1533(a)(1), (a)(3); see also 16 U.S.C. § 1532(5), (6), (20) (defining critical habitat, endangered and threatened species). Once listed, the species comes under the protection of the ESA, Section 7(a)(2) of which mandates, in part, that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species … or result in the destruction or adverse modification of [its critical] habitat ….

16 U.S.C. § 1536(a)(2). In 1986, NMFS and FWS promulgated implementing regulations setting forth the procedures for carrying out consultations. 50 C.F.R. Part 402. If a federal agency (also called the action agency), determines that its proposed action will have no effect on protected species, its obligations under the ESA are discharged. 50 C.F.R. § 402.12. If it determines that its actions "may affect" listed species, it either enters into "formal consultation" with NMFS or engages in "informal consultation" to determine whether formal consultation is necessary. See 50 C.F.R. § 402.13; 402.14(a)-(b).

When formal consultation is required, NMFS, as the "consulting agency," must provide to the action agency "a written statement," called a biological opinion ("BiOp"), "detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A); see 50 C.F.R. § 402.14. If the BiOp concludes that jeopardy or adverse modification of critical habitat exists, NMFS must suggest reasonable and prudent alternatives ("RPAs") that it believes would not violate Section 7(a)(2) and that can be implemented by the action agency. 16 U.S.C. § 1536(b)(3)(A). If NMFS concludes that no jeopardy exists or that the RPAs would avoid jeopardy and that the

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U.S. Fish and Wildlife Service ("FWS") jointly administer the ESA as it applies to Atlantic salmon. NMFS has the lead for ESA activities and actions to address dams. RJN Ex. 2 (Statement of Cooperation between NMFS and FWS).

incidental taking[3] of listed species will not violate Section 7(a)(2), NMFS must issue an Incidental Take Statement ("ITS") specifying the conditions under which incidental taking may occur. Id. § 1536(b)(4). Any take of a listed species that is in compliance with the terms and conditions of an ITS issued in conjunction with a BiOp is exempt from the ESA Section 9 prohibition on the take of a listed species. 16 U.S.C. §§ 1536(o)(2), 1538(a)(1)(B) and 1539(a).[4]

While the consultation requirements *allow* an action agency to avail itself of "the expertise of [NMFS] in assessing the impact of the proposed project [on protected species] and the feasibility of adopting reasonable alternatives,"[5] the action agency (here, FERC) is responsible for determining the need for consultation, and whether to proceed with its proposed action. 50 C.F.R. § 402.15 (1993); see Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy, 898 F.2d 1410 (9th Cir. 1990). The decision whether to seek consultation is the action agency's alone, as "[n]othing" in the ESA regulations "mandates the action agency enter into consultation." Defenders of Wildlife v. Flowers, 414 F.3d 1066, 1069-70 (9th Cir. 2005). Accordingly, as explained by NMFS in the preamble to the ESA implementing regulations, NMFS is not authorized to initiate consultation, even if the action agency is about to take action that will harm a listed species:

> Although [NMFS] will, when appropriate, request consultation on particular Federal actions, it lacks the authority to require the initiation of consultation. The determination of possible effects is the Federal agency's responsibility. The Federal agency has the ultimate duty to ensure that its actions are not likely to jeopardize listed species or adversely modify critical habitat. The Federal agency makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision.

51 Fed. Reg. 19,926, 19,949 (June 3, 1986).

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[3] "Take" 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).

[4] The ESA anticipates the consultation process will take 135 days, although that time may be, and often is, extended. 50 CFR §402.14 (g)(5).

[5] Lone Rock Timber Co. v. U.S. Dep't of Interior, 842 F. Supp. 433, 440 (D. Or. 1994).

B. Emergency Consultation Under 50 C.F.R § 402.05

The ESA consultation regulations also expressly recognize that there will circumstances where the usual procedures will be infeasible or unworkable. When an emergency occurs for which federal response action may affect listed species or critical habitat, the action agency may request expedited consultation with NMFS during the emergency response, followed by formal consultation once the emergency is abated. 50 C.F.R. § 402.05. Like any form of consultation, the action agency determines whether emergency consultation is warranted, 50 C.F.R. § 402.15, depending on the nature of the emergency and what actions are immediately required. ESA Section 7 Consultation Handbook ("Handbook"), at 8-1.[6]

Under Section 402.05, NMFS may carry out consultation informally through modified procedures while the emergency is ongoing, as long they are consistent with sections 7(a)-(d) of the ESA. During informal consultation, NMFS "offer[s] recommendations to minimize the effects of the emergency response action on listed species." Handbook, at 8-2(a). These informal means allow rapid response to emergency situations. 51 Fed. Reg. 19,926-01. As soon as practicable after the emergency is under control, the regulation requires the action agency to initiate formal consultation with NMFS. 50 CFR § 402.05(b).

Although formal consultation under emergency procedures occurs after the informal consultation that takes place during the emergency response action, procedurally it is like any other formal consultation. Handbook, at 8-4. During formal consultation, NMFS evaluates the information submitted by the action agency, describing things like the nature of the emergency actions, the action agency's justification for the expedited consultation, and an evaluation of the impacts to listed species and critical habitat. 50 CFR § 402.05; 51 Fed. Reg. 19,926. After formal

[6] The ESA Section 7 Consultation Handbook was issued after notice and opportunity for public comment. It is available online at: http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

consultation, NMFS issues an emergency BiOp including that information and any recommendations NMFS gave during the emergency consultation. Id. The BiOp gives NMFS's conclusion about whether the response action, taken together with cumulative effects, is likely to jeopardize the listed species or destroy or adversely modify its critical habitat. 50 C.F.R. § 402.15.

FACTUAL BACKGROUND[7]

This case involves emergency repairs to the Worumbo Hydropower Project on the Androscoggin River, located in Lisbon, Maine.[8] The Worumbo is owned and operated by Miller Hydro Group under a FERC license issued under the FPA. 16 U.S.C. § 797(e). As a FERC licensee, Miller must "maintain [Worumbo] in a condition of repair adequate . . . for the efficient operation of said works in the development and transmission of power, [and] make all necessary renewals and replacements." 16 U.S.C. § 803(c). FERC's Office of Energy Projects, Division of Dam Safety and Inspections administers FERC's dam safety program and has broad supervisory and inspection authority of dam safety. 18 C.F.R. § 12.4(b). "Dam safety is a critical part of [FERC]'s hydropower program and receives top priority."[9]

In late April 2011, Worumbo's operator notified FERC that the dam was about to fail. In turn, FERC's Division of Dam Safety and Inspections immediately wrote to NMFS detailing the "urgen[t]" need for "dam safety work" at Worumbo. First Amend. Compl. ("FAC") Ex. 1 at 2-3. The more than 100-year-old timber crib spillway[10] had reached the end of its service life, FERC

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[7] Facts are based on publically available documents that were attached as exhibits to Plaintiffs' Complaint or are otherwise public documents which the Court may take judicial notice of, Fed. R. Evid. 201, and the declaration of NMFS biologist Jeff Murphy ("Murphy Decl.").

[8] The project requires a FERC license because of its location on the navigable Androscoggin River. See Miller Hydro Group, 33 FERC ¶ 62,430 at 63,612 (1985).

[9] See http://www.ferc.gov/industries/hydropower/safety.asp (last visited Aug. 8, 2011).

[10] The spillway is the section of dam designed to pass water from the upstream side of a dam to the downstream side.

explained, and posed a "significant probability" of failure. Id. at 2. "A failure," FERC warned, "could result in significant environmental consequences and could also produce serious public safety consequences and property damage." Id.

Although FERC found a significant probability that Worumbo would fail, neither FERC, nor its licensee, could predict precisely when, or how failure would occur. Id. at 2, 4-5. Miller indicated that it could not provide "even reasonable assurance" that Worumbo would not fail if repairs were delayed until 2012. Id. at 4-5. Given the "significant" amount of concrete in the failing timber spillway, Miller added, it also was not possible to predict whether it would fail slowly during a weather event, or through a sudden, so-called "sunny day breach." Id. at 5. Even its slow failure would cause flooding and property damage, and a "sunny-day" breach, Miller explained, posed a hazard risk to fishermen and downstream recreationists, would damage property, and would negatively impact the environment. Id. Emergency repairs were needed "now." Id.

The Worumbo is located in the geographic range and designated critical habitat of the Gulf-Of-Maine Distinct Population Segment[11] of Atlantic salmon ("GOM DPS"), a species listed as endangered under the ESA. Murphy Decl. ¶ 4. The GOM DPS, listed in 2009, includes all anadromous Atlantic salmon whose freshwater range occurs in the watersheds from the Androscoggin River north along the Maine coast to the Dennys River. 74 Fed. Reg. 29,344 (June 19, 2009). It also includes all conservation hatchery populations used to supplement these natural populations. Id. The GOM DPS has rarely exceeded 5,000 individuals since 1967. Id.

While the range for the species is large, the overwhelming majority of adults return to a single river, the Penobscot. Id. In 2010, 93% of all adults returned there. Murphy Decl. ¶ 9. In

[11] The ESA provides for listing species, subspecies, or distinct population segments of vertebrate species. 16 U.S.C. § 1532(16). A distinct population segment is a vertebrate population or group of populations that is discrete from other populations of the species and significant in relation to the entire species.

sharp contrast, the Worumbo's river, the Androscoggin, typically accounts for fewer than 1% of annual adult returns. Id., ¶ 10. Over the last decade, only seven wild origin adults have returned to the Androscoggin, and, on average, only 11 total adult fish (wild and hatchery) annually return to this river. Id. This year, 45 adults have returned to the Androscoggin. Id. ¶ 11.

Because Worumbo is within the range and critical habitat of this listed species, FERC, as the action agency under the ESA, must "insure" that any order authorizing Worumbo safety repairs does not jeopardize the species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). To that end, as noted above, shortly after its licensee detailed the immediate need for repairs at Worumbo to FERC, FERC forwarded Miller's letter to NMFS, along with its analysis confirming that the safety work was "urgen[t]," the probability of the crib dam's failure was "significant," and that the resulting consequences to the environment, public safety and property were "significant" and "serious." FAC Ex. 1 at 2-3. FERC further informed NMFS that the repairs had to be made during the low water season, between July and September. Id.

On these grounds, FERC requested formal consultation with NMFS pursuant to the emergency procedures in 50 C.F.R. § 402.05, so that "dam safety work could begin as soon as possible." RJN, Ex. 3. Based on FERC's description of "the emergency nature of the repairs," NMFS accepted FERC's request for emergency consultation as "appropriate for this situation," and explained to FERC the contours of that consultation. FAC Ex. 10. NMFS explained that it "will continue to work with the licensee to minimize environmental impacts including those to listed Altantic salmon during the repairs." Id. Once the emergency was abated, NMFS went on, FERC would initiate formal consultation with NMFS, and should provide NMFS with "a biological assessment … 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." Id. NMFS would evaluate FERC's information and issue an emergency BiOp. Id.

On July 12, 2011, FERC's New York Regional Engineer issued a construction authorization order (FERC Order) to its licensee for the emergency repairs.[12] Days later, the licensee commenced instream repairs, along with detailed monitoring and mitigation measures recommended by NMFS to protect the species. Murphy Decl. ¶¶ 14-19. For example, Miller installed impermeable barriers, called sediment curtains, to protect listed salmon by trapping sediment flows, and submits daily monitoring reports detailing construction and environmental monitoring efforts at the project. Id.

These reports have not show a single dead, injured, or stranded salmon; in fact, no adults are even in the project area. Id. ¶¶ 19, 20. Sedimentation levels have generally remained low, and there have been no releases of toxins. Id. ¶ 19. Yet, Plaintiffs sued NMFS for agreeing that emergency consultation was "appropriate," and then filed this Preliminary Injunction Motion ("Motion").

STANDARD OF REVIEW

I. Dismissal For Lack Of Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction, possessing only those powers specifically granted to them by either the U.S. Constitution or Congress. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). If a court determines that it lacks subject matter jurisdiction to hear and decide a claim, the claim must be dismissed. Fed. R. Civ. P. 12(b)(1). All matters are presumed to lie outside the limited jurisdiction of the federal courts until the plaintiff establishes that subject matter jurisdiction is proper. Kokkonen, 511 U.S. at 376-378.

II. Injunctive Relief

A preliminary injunction is an extraordinary remedy and is never granted as of right. Winter v. Natural Res. Def. Council, 555 U.S. 7, 24 (2008). The four-part test for granting a preliminary

[12] RJN Ex. 1 (FERC's order), available at: http://elibrary.ferc.gov:0/idmws/file_list.asp?document_id=13940989.

injunction in this Circuit is well-settled. The movant must demonstrate: (1) its likelihood of success on the merits; (2) the likelihood of irreparable injury without an injunction; (3) the balance of the relevant harms or equities tips in the movant's favor; and (4) the effect on the public interest. Water Keeper Alliance v. U.S. Dep't of Defense, 271 F.3d 21, 30 (1st Cir. 2001); see also Friends of Magurrewock, Inc. v. U.S. Army Corps of Eng'rs, 498 F. Supp. 2d 365, 369 (D. Me. 2007). Plaintiffs have the burden of proof on each factor and must provide facts supporting their assertions. Granny Goose Foods v. Brotherhood of Teamsters Local No. 70, 415 U.S. 423, 441 (1974); see also Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 17 (1st Cir. 1996). Even where there is a showing of likely success on the merits, in order for an injunction to issue, a movant must show that irreparable harm is "likely," not just possible, and that such injury is beyond the procedural concerns associated with violations of the environmental statutes. Winter, 555 U.S. at 24-25.

ARGUMENT

I. THE COURT MUST DISMISS PLAINTIFFS' COMPLAINT.

Plaintiffs' Complaint[13] must be dismissed for two independent reasons, either of which is fatal to their Complaint. First, assuming NMFS took final agency action (which, as discussed, *infra* it did not), Plaintiffs' challenge to it collaterally attacks the FERC Order to its licensee, and thus may be sought only in the Court of Appeals after the exhaustion of administrative remedies. Second, neither NMFS's acceptance of FERC's request to engage in emergency consultation, nor the initiation of that consultation, is a judicially reviewable final agency action.

A. The FPA Bars Exercise Of Subject-Matter Jurisdiction Over Plaintiffs' Action.

By challenging NMFS's supposed "decision" "with respect to the action of [FERC],"

[13] Plaintiffs' allege a single cause of action under the APA, which permits suit against an agency when an individual has suffered "a legal wrong because of agency action" or has been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

Motion at 3, Plaintiffs plainly hope to undermine FERC's order requiring its licensee to repair Worumbo. Exclusive jurisdiction over their claim would lie in the Court of Appeals. As the Ninth Circuit aptly observed in a similar context, "we do not believe that the jurisdictional remedy prescribed by Congress hangs on the ingenuity of the complaint." California Save Our Streams Council v. Yeutter, 887 F.2d 908, 912 (9th Cir. 1989).

By its express language, the FPA grants Circuit Courts exclusive authority to review and modify claims arising out of FERC licensing orders, including the FERC Order. See California Save Our Streams, 887 F.2d at 910, quoting 16 U.S.C. § 8251(b); see 18 C.F.R. §§ 12.4(c), 385.207, 385.1902(a), 385.713(a)(1); see Missouri Coal., 544 F.3d 955 (Circuit review of safety action). Interpreting this provision, the Supreme Court held that its "simple words of plain meaning [leave] no room to doubt the congressional purpose and intent [to give the courts of appeals exclusive jurisdiction]." City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 335-336 (1958).[14]

Well-established caselaw also makes clear that Plaintiffs cannot avoid the FPA's exclusive judicial review provisions by artfully pleading a claim against NMFS under the APA, rather than challenging FERC's order directly. In fact, in City of Tacoma v. NMFS, the court flatly rejected a plaintiff's attempt to do exactly that. 383 F. Supp. 2d 89, 91 (D.D.C. 2005). There, the City brought an action seeking judicial review of a biological opinion issued by NMFS in relation to a licensing order granted by FERC. NMFS moved to dismiss for lack of subject matter jurisdiction, contending the FPA barred district court review. Id. Plaintiff argued that the special-review provisions of the FPA were irrelevant because its suit was filed against NMFS, not FERC, and arose

[14] Where Congress has vested jurisdiction to review administrative determinations in the Courts of Appeals, these specific jurisdictional provisions are considered exclusive, and preempt district court jurisdiction over related issues under other statutes. Media Access Project v. FCC, 883 F.2d 1063, 1067-68 (D.C. Cir. 1989).

under the ESA and APA.[15] In effect, plaintiff claimed that it was "not challenging the ultimate licensing decision made by FERC, but it instead is seeking review only of the NMFS's failure to follow the procedural and substantive steps outlined in statutes beyond the scope of the FPA." Id. The court rejected the arguments and dismissed the action for lack of subject matter jurisdiction. Id.

Likewise, in California Save Our Streams, the court found that a jurisdictional grant to review FERC's actions reaches another agency's related action. There, the plaintiff sued the U.S. Forest Service in district court under the National Environmental Policy Act and the American Indian Religious Freedom Act over a FERC-licensed hydroelectric power facility in the Sierra National Forest. 887 F.2d at 910-11. Plaintiff argued it was not attacking the FERC licensing decision, but rather the Forest Service's alleged failure to follow necessary procedural steps required by these statutes. Id. at 911-12. The court rejected plaintiff's argument, holding that the FPA governs reviews of all disputes concerning the licensing of hydroelectric projects, and that plaintiff's action was, at its core, an attempt to restrain the licensing procedures authorized by FERC. Id. The Court stated, "the practical effect of the action in district court is an assault on an important ingredient of the FERC license." Id. at 912. The Court noted that "[t]he point of creating a special review procedure in the first place is to avoid duplication and inconsistency," and warned that plaintiffs' theory "would resurrect the very problems that Congress sought to eliminate." Id.[16]

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[15] It is also the case that when two jurisdictional statutes provide different avenues for judicial review, courts apply the more specific legislation. California Save Our Streams, 887 F.2d at 911. This rule is simply an application of the "elementary principle of statutory construction [that] a court confronted with competing statutory provisions ordinarily should follow the dictates of the provision more specifically applicable to the problem at hand." United States v. Saade, 652 F.2d 1126, 1132 (1st Cir. 1981).

[16] Similarly, in Skokomish Indian Tribe, where a tribe attempted to quiet title to land containing a FERC licensed hydroelectric power project. 332 F.3d at 560. The Tribe sued under 42 U.S.C. § 1983, the Fifth and Fourteenth Amendments, federal common law, and the treaty creating their Reservation. Id. The court found that the claims flowed directly from FERC's licensing order and held that any such dispute belonged first before FERC and then the circuit courts only. Id. The court explained that Congress decided that jurisdiction under the FPA should be a function of the agency whose acts are being challenged, not the cause of action a petitioner asserts. Id. at 557.

The reasoning and holdings of City of Tacoma and California Save Our Streams apply with equal force here and require dismissal. As in those cases, the Court here must apply the "well-established principle" that where, as here, two jurisdictional statutes provide different avenues for judicial review, courts apply the more specific legislation. City of Tacoma, 383 F. Supp. 2d at 91; California Save Our Streams, 887 F.2d at 911; see also Media Access Project, 883 F.2d. at 1067 (rejecting challenge to Federal Communication Commission ("FCC") order in district court where FCC Act vested exclusive jurisdiction in Court of Appeals). Here, as in those cases, the "specific provisions of the FPA that govern review of disputes concerning the licensing of hydroelectric facilities," like Worumbo, "must preempt the general procedures for ESA and APA claims brought under general federal question jurisdiction." City of Tacoma, 383 F. Supp. 2d at 92; California Save Our Streams, 887 F.2d at 911–12.[17]

Moreover, by challenging a supposed final agency action of NMFS "related to" the FERC Order, Plaintiffs are seeking to undermine the FERC license itself, and this action must be dismissed for lack of subject-matter jurisdiction. See California Save Our Streams, 887 F.2d at 911. Indeed, an important requirement of FERC's license is that its licensee "maintain [Worumbo] in a condition of repair adequate … for the efficient operation of said works in the development and transmission of power, [and] make all necessary renewals and replacements." 16 U.S.C. § 803(c).

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[17] See also City of Rochester v. Bond, 603 F.2d 927, 936 (D.C. Cir. 1979) ("policy behind having a special review procedure in the first place similarly disfavors bifurcating jurisdiction over various substantive grounds between the district court and court of appeals"); Municipal Elec. Utils. Ass'n v. Conable, 577 F. Supp. 158, 163-64 (D.D.C. 1983) (dismissing APA case where "remedies plaintiff seeks from this Court are only available to it via appeal from the Commission's orders to the United States Court of Appeals pursuant to the [FPA]."); North Carolina v. FPC, 393 F. Supp. 116, 1121-28 (M.D.N.C. 1975) (exclusive review provisions of FPA precluded suit under Wild and Scenic Rivers Act to enjoin construction pursuant to FPC issued license); Northwest Res. Info. Ctr. v. NMFS, 25 F.3d 872, 874-75 (9th Cir. 1994) (rejecting ESA suit in district court against Bonneville Power Administration for alleged ESA violations where Northwest Power Act's specific jurisdictional provision required all challenges in Court of Appeals); Southwest Ctr. for Biological Div. v. FERC, 967 F. Supp. 1166, 1177 (D. Ariz. 1997) (FPA's exclusive jurisdiction barred exercise of jurisdiction over claims Forest Service violated ESA by failing to recommend flow levels).

The FERC Order authorizing commencement of these emergency repairs allowed Miller to comply with that requirement.[18] In effect, by seeking to enjoin NMFS's "invoking" emergency procedures "with respect to the Worumbo dam reconstruction," FAC, at 30, Plaintiffs seek to force Miller to violate or delay compliance with its license by ignoring a duty to repair Worumbo. As in City of Tacoma, "there is no reason to believe that Congress inadvertently created the glaring loophole, which [Plaintiffs] advocate[], in contravention of the efficacy of the expedited process that it previously adopted. This result is implausible and, thus, unpersuasive." 383 F. Supp. 2d at 93.

B. Even If Judicial Review By This Court Were Proper Here, This Claim Must Be Dismissed As NMFS Has Taken No Judicially-Reviewable Final Agency Action.

Final agency action "implicates the jurisdiction of the federal courts, and such final action is normally a prerequisite to judicial review." Puerto Rico v. U.S., 490 F.3d 50, 70 (1st Cir. 2007) (citation omitted). Here, Plaintiffs repeatedly insist that NMFS "invoked" emergency consultation procedures and challenge the alleged "decision by NMFS to forsake … before-the-fact consultation process with respect to the action of [FERC]." See, e.g., Motion at 1, 3, 11. The claim that this is final agency action fails at the outset because, as a matter of law, NMFS cannot "invoke," "decide" or require an action agency to pursue consultation. As noted above, because "nothing" in the ESA regulations "mandates the action agency enter into consultation," the decision whether to seek consultation is the action agency's—here FERC's—alone. Defenders of Wildlife, 414 F.3d at 1070.

The emergency consultation regulation does not change this fact.[19] It gives NMFS no authority (let alone any expertise) to declare an engineering emergency or "invoke" emergency consultation, nor to reject, disagree with, or otherwise disapprove of an action agency's finding that

[18] RJN Ex. 1.

[19] Plaintiffs concede that FERC "wrote to NMFS … requesting 'formal consultation … using the emergency consultation procedures." PI at 13.

emergency consultation is warranted. 50 C.F.R. § 402.05(a). Nor does it allow NMFS to debate, stop, or hinder an agency's emergency response. The action agency, not NMFS, determines whether an emergency exists, id. (action agency "submit[s] information on the nature of the emergency action(s)"), and NMFS's Consultation Handbook makes clear that NMFS must never force an action agency to delay its response during an emergency, commanding: "DO NOT stand in the way of the response efforts." Handbook, at 8-1. In short, NMFS has no authority to require any form of consultation—including emergency consultation—or any legal role in sanctioning that decision. It is simply not the province of NMFS, as the biological agency, to second-guess FERC's expert determination about the likelihood of a dam's collapse.

Even assuming NMFS did "invoke" emergency consultation, Plaintiffs' claim fails because the initiation of emergency consultation meets neither of the requirements for final agency action:[20]

> First, the action must mark the "consummation" of the agency's decisionmaking process-it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-178 (1997) (citations omitted); Rhode Island v. EPA, 378 F.3d 19, 23 (1st Cir. 2004) (agency action "final when it represents the culmination of the agency's decisionmaking process and conclusively determines the rights and obligations of the parties").

Plaintiffs argue that NMFS's acknowledgement of FERC's request for emergency consultation means "NMFS has completed its decision-making process as to whether [the emergency consultation procedures] is applicable." Motion at 9. But NMFS's decision-making under the ESA is not so narrowly defined. As the "consulting agency" under the ESA, the consummation of NMFS's decision-making process occurs when it issues it BiOp determining if an

[20] 5 U.S.C. § 704 allows judicial review only of "final agency actions" for which there is no other adequate remedy.

action violates the action agency's Section 7(a)(2) duty to avoid jeopardizing the species or adversely modifying its critical habitat. 50 C.F.R. § 402.05(b). Indeed, under the first Bennett prong, the Court noted that the BiOp, not any step along the way, was the "uncontested" consummation of the consulting agency's decision-making process. 520 U.S. at 177-178.

As to the second prong of Bennett, Plaintiffs have not shown any "legal consequences" that flow from NMFS's action. Id. They seek to obscure this hard truth by highlighting supposed "real consequences" of emergency consultation, namely, that formal consultation and the issuance of a BiOp will occur after the emergency is brought under control. Motion at 9.[21] As the Supreme Court made clear, it is the "Biological Opinion and accompanying [ITS] [that] alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions." Bennett, 520 U.S. at 178.

Here, by contrast, the initiation of emergency consultation offers no safe harbor from the ESA's take prohibition. In fact, until NMFS issues its emergency BiOp, FERC's and its licensee's rights and obligations to comply with the ESA remain unchanged. See Fairbanks North Star Borough v. U.S. Army Corps of Eng'nrs, 543 F.3d 586, 594 (9th Cir. 2008) (agency action must have legal consequence to be final agency action). Accordingly, the initiation of emergency consultation is at most an unreviewable interlocutory step leading to NMFS's final agency action, the emergency BiOp. 50 C.F.R. § 402.05(b). Thus, the Court should dismiss Plaintiffs' claim.

II. PLAINTIFFS' PRELIMINARY INJUNCTION ALSO MUST BE DENIED.

A. Plaintiffs Cannot Show A Likelihood Of Success On The Merits.

Plaintiffs cannot meet their burden to show a likelihood of success for four reasons. First,

[21] A shift in the timing of the BiOp may be a practical effect of emergency consultation, but it is not a legal consequence.

they cannot succeed on the merits because the Court lacks jurisdiction over their claim. Second, Plaintiffs' argument is based on the legally invalid premise that NMFS "invoked," or otherwise made a "decision to invoke the emergency consultation procedures[.]" See e.g., FAC at 14, 26, Motion at 11. As discussed above, this argument fails as a matter of law because neither the ESA nor its regulations authorize NMFS to require consultation at all, let alone any particular form of consultation. Rather, once FERC determined that Worumbo is in such disrepair that it required emergency safety work, it was FERC's decision whether to consult during those repairs.

Third, Plaintiffs' real challenge is to FERC's underlying analysis and conclusion that an emergency existed in the first instance. Indeed, Plaintiffs focus exclusively on the interaction between FERC and its licensee to quarrel with FERC's conclusion that Worumbo's failure would produce serious public safety consequences and property damage:

> Miller represented to FERC … that Worumbo dam is a 'low hazard structure' …. Miller demonstrated to FERC that a failure of Worumbo would pose little danger …. Miller made clear to FERC that no emergency conditions would arise if Worumbo failed…. Miller notified FERC … it wanted to replace the timber crib … with no mention of an 'emergency.'"

FAC at 15-19.[22] But FERC is not a party to this action. Therefore, Plaintiffs' challenges to FERC's supposedly faulty analysis and conclusions "are beyond the scope of … review" in this case. See ALCOA v. BPA, 175 F.3d 1156, 1160 (9th Cir. 1999) (agency's analysis beyond scope of review where it is not party to action). Here, FERC's conclusion that an emergency exists is relevant only to determine whether NMFS's response to FERC's finding was "arbitrary and capricious." Pyramid Lake Paiute, 898 F.2d at 1415.

This leads to the fourth failing in Plaintiffs' claim, namely, that they cannot show that

[22] Plaintiffs' claim is also misleading because Miller expressly warned that Worumbo's status as a low hazard structure "does not mean that there would be no impact to property, persons, or the environment." FAC Ex. 1 at 4.

NMFS acted irrationally in response to FERC's expert conclusion. Judicial review of Plaintiffs' claim is governed by the APA, requiring this Court to uphold NMFS's action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). See, e.g., Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1284 (1st Cir. 1996); accord Friends of Magurrewock, 498 F. Supp. 2d at 369-70. This standard applies fully to assessing the likelihood of success on the merits of a request for a preliminary injunction. Lands Council v. McNair, 537 F.3d 981, 986-87 (9th Cir. 2008). "If the agency decision was based on a consideration of the relevant factors and there has not been 'a clear error of judgment,' then the agency decision was not arbitrary or capricious." Dubois, 102 F.3d at 1285. Plaintiffs bear the burden of showing an agency acted arbitrarily. M/V Cape Ann v. United States, 199 F.3d 61, 63 (1st Cir. 1999). While the Court's inquiry must be thorough, the standard of review is narrow and highly deferential, *and* the agency's decision is "entitled to a presumption of regularity." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). A decision involving an agency's technical expertise is accorded an especially high level of deference. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989). This merits inquiry is limited to the administrative record, comprised of information directly or indirectly considered by NMFS. Id.; 5 U.S.C. § 706(2).

Here, Plaintiffs offer no evidence that NMFS irrationally relied on FERC's request, nor could they. NMFS's expertise is in fish biology, not hydroelectric dam engineering. FERC, not NMFS, is the expert agency charged with licensing, monitoring, and overseeing the Nation's hydroelectric infrastructure. And FERC has both the broad supervisory and inspection authority over dam safety, 18 C.F.R. § 12.4(b), and the expertise to determine, as it did here, that a dam is in such disrepair that there is a need for emergency consultation. FERC explained that the probability

of failure of Worumbo was "significant" and that such a failure "could produce serious public safety consequences and property damage." FAC Ex. 1 at 2. Plaintiffs have not shown that NMFS acted irrationally in accepting FERC's conclusion that emergency consultation was thus warranted.

B. Plaintiffs Also Have Not Shown A Likely Irreparable Harm To The Species.

1. Plaintiffs Offer No Evidence Of Harm.

Plaintiffs also fail to satisfy their formidable burden of "demonstrat[ing] that irreparable injury is *likely* in the absence of an injunction." Winter, 555 U.S. at 22 (emphasis added); Animal Welfare Inst. v. Martin, 623 F.3d 19, 26-28 (1st Cir. 2010). Where, as here, Plaintiffs only allege a violation of the procedural requirements of Section 7, they must "show potential for irreparable harm 'apart from the harm that they argue is inherent in a procedural violation of the ESA's consultation requirements.'" Water Keeper Alliance v. U.S. Dep't of Defense, 271 F.3d 21, 34 (1st Cir. 2001). Their showing must be "grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store." See Charlesbank Equity Fund II v. Blinds To Go, 370 F.3d 151, 162 (1st Cir. 2004).

It is also settled law in this Circuit that Plaintiffs must show that the alleged imminent harm rises to the level of injury to the species as a whole:

> [T]he court did not abuse its discretion when it determined that Water Keeper's assertions concerning irreparable harm stemming from the 'death of even a single member of an endangered species' were insufficient to justify granting injunctive relief…. In support of its position of irreparable harm, Water Keeper can only point to vague concerns as to long-term damage to the endangered species expressed by [USFWS] and [National Marine Fisheries Service]. In the absence of a more concrete showing of probable deaths during the interim period and of how these deaths may impact the species, the district court's conclusion that Water Keeper has failed to show potential for irreparable harm was not an abuse of discretion.

Water Keeper Alliance, 271 F.3d at 34; see also Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70, 105-06 (D. Me. 2008) (rejecting "view that 'any take and every take' of whatever definition meets the standard for irreparable harm"), aff'd 623 F.3d 19 (1st Cir. 2010). The First Circuit has

emphasized that the ESA "directs federal agencies to insure that agency action 'is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.'" Water Keeper, 271 F.3d at 25. It also emphasized the regulatory concern about the effect an action will have on *the species*. Id.[23]

Here, Plaintiffs fail to make any "concrete showing of probable deaths" arising from the safety repairs or "how these deaths may impact *the species*." Water Keeper, 271 F.3d at 34 (emphasis added). They have offered no evidence, for example, showing what, if any, fraction of the less than 1% of adult Atlantic salmon that typically return to the Androscoggin River are in the river, or near Worumbo. Nor have they shown how the emergency repairs might injure any of that tiny fraction that may be near Worumbo during the repairs. They also do not show that any fish have been or are likely to be harmed, or how the loss of even all of these fish—comprising less than 1% of the species' adults—has a species-level impact. In short, they offer no concrete evidence of harm at all.

Instead, they purport to show irreparable harm on two grounds: (i) NMFS's conclusion in its GOM DPS listing rule that "dams harm endangered Atlantic salmon in a variety of ways;" and (ii) NMFS's acknowledging that formal consultation is appropriate, by which "NMFS [has] effectively conceded that this project is likely to adversely affect the Androscoggin River salmon and their critical habitat." Motion at 18. But neither allegation is concrete proof of any likely species-level injury. NMFS's broad discussion of the problem posed by dams in its ESA listing rule is the very type of general concern about long-term damage posed to the species that the First

[23] While the death of a small number of individuals could constitute irreparable harm, it is only where that loss "would be significant for the species as a whole." Pacific Coast Fed'n of Fisherman's Ass'ns v. Gutierrez, 606 F. Supp. 2d 1195, 1210 n.12 (E.D. Cal. 2008). In other words, irreparable harm must be "'significant' vis-a-vis the overall population." Id. at 1210 (citation omitted).

Circuit rejected in Water Keeper, 271 F.3d at 34. Similarly, neither an "effective[] conce[ssion]" nor even an actual finding of "is likely to adversely affect" proves a likelihood of imminent harm. The Consultation Handbook defines "[i]s likely to adversely affect" only as:

> the appropriate finding in a biological assessment [prepared by the action agency] if any adverse effect to listed species *may occur* as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not: discountable, insignificant, or beneficial.

Handbook, at xv (emphasis added). Plaintiffs cannot elevate this conservative threshold for finding "likely to adversely affect," into a concrete, species-level harm that is likely to occur absent an injunction. Otherwise, under Plaintiffs' untenable theory, a party would automatically be entitled to injunctive relief anytime an action agency merely initiates formal consultation.

In short, Plaintiffs invite the Court to improperly presume irreparable harm solely from the language in the species' listing decision and the standard for formal consultation under the ESA, which the Court may not do. Moreover, even if there was a likelihood of such harms, which there is not, Plaintiffs' request that the Court order NMFS to "rescind its 'emergency' determination," Motion at 20, would not stop these repairs and, therefore, not redress any alleged harms. In fact, as discussed below, if anything, their requested relief would only lessen the protection of the species.

2. In Fact, There Is No Likelihood Of Irreparable Harm To The Species.

As detailed in the Declaration of NMFS biologist Jeff Murphy, for several reasons there is no likelihood of irreparable harm to the species as a result of these emergency dam safety repairs. Because instream repair work is planned only from late July through mid-October, 2011, the only life stage of salmon that could likely occur near Worumbo are the adults returning to the Androscoggin to spawn in the fall. Murphy Decl. ¶ 17. As discussed above, these adults are only a tiny fraction of the overall species, constituting less than 1% of all adults in the GOM DPS. The most up-to-date data, however, show that no adults are even in the project area at this time. Id. ¶ 20.

Moreover, while it is possible that the work potentially could affect the few fish that may at some point be near Worumbo during the project, Mr. Murphy's declaration makes clear that these potential effects are just that, potential, and fall far short of any showing of irreparable harm to the species. Id. ¶¶ 15-19. Indeed, fish passage is not a concern at all because the Worumbo upstream fishway will remain operable throughout construction for any adults moving upstream to spawn. Id. ¶ 16. Miller has also made several alterations to the project to minimize effects to the species both during construction and post-construction, including altering the proposed spillway configuration and rubber dam section to facilitate the safe downstream passage of salmon. Id. ¶ 14. In addition, Miller has agreed to use Best Management Practices during construction to minimize effects to any salmon potentially occurring in the action area, and is coordinating with downstream dam owners to verify that few Atlantic salmon are even present in the action area. Id. ¶¶ 14, 16. Under these Practices, sediment levels are monitored daily during construction to ensure that the effects of sedimentation are low. Id. ¶ 16. And, because all instream work will occur behind cofferdams, the potential for direct injury or mortality is significantly reduced. Id.

These efforts have been successful in minimizing any impact to the species. In fact, to date, "no significant impacts" to the species have been reported: daily reports have not documented a single dead, injured, or stranded Atlantic salmon; sedimentation levels have generally remained low; and there has been no release of toxins. Id. ¶ 19. In sum, there is no evidence that repairs have harmed or are likely to harm even a single fish, let alone be likely to irreparable harm *the species*.

C. Balancing Of Harms And Public Interest Tips Against Issuing An Injunction.

While Plaintiffs are correct that the protection of endangered species is in the public interest, Strahan v. Coxe, 127 F.3d 155, 160, 171 (1st Cir. 1997), they are wrong that this prong favors an injunction in this case. The very purpose of the regulation is to protect listed species *even in emergencies*. Here, by accepting FERC's request to initiate emergency consultation, NMFS has

been able to give advice and recommend measures that FERC and its licensee could take to "minimize[e] effects of the response" on the listed species. Handbook, at 8-4. As detailed above, NMFS's recommendations are being implemented and have been successful. Critically, Plaintiffs' requested injunction, directed neither at FERC nor its licensee, would not stop the repairs. It would hamper, rather than facilitate, NMFS's ability to protect the species during them (because FERC could proceed without consultation at all). If Plaintiffs succeed, it could serve a model for disrupting species protection during emergencies by those that may disagree with those measures or find them too onerous.

More broadly, if Plaintiffs successfully elevate the mere initiation of emergency consultation into a reviewable final agency action, it would wreak havoc on the administration of the ESA. Any person dissatisfied with one form of consultation (for example, a water district that felt formal consultation would ultimately impair its water deliveries) could simply bog it down in district court by challenging the initial request to engage in consultation at all. The judicial and administrative morass that could ensue would significantly undermine the goals of the ESA. Finally, if Plaintiffs are allowed to make an end-run around the strict jurisdictional limits of the FPA, it would undermine the FPA's comprehensive scheme of energy regulation and "resurrect the very problems that Congress sought to eliminate" through the FPA. California Save Our Streams, 887 F.2d at 912.

CONCLUSION

Plaintiffs have brought suit in the wrong court, against an agency that has taken no reviewable final action. Thus, the case must be dismissed. Moreover, jurisdictional defects aside, Plaintiffs have not established a likelihood of success on the merits. Nor have they, nor could they, demonstrate that irreparable harm to the species is likely to occur in the absence of an injunction against NMFS. In fact, their requested relief would not stop these emergency repairs and therefore

not redress any alleged harm. If anything, it would harm the species by removing NMFS's ability to oversee the response and suggest ways to minimize impacts to the species. In sum, the Court should deny Plaintiffs' request for preliminary injunctive relief and dismiss this misplaced lawsuit.

DATED: August 8, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served via the Court's CM/ECF system on all counsel of record.

/s/ Bradley H. Oliphant
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