UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY AND ENVIRONMENT MAINE, Plaintiffs v. MILLER HYDRO GROUP, Defendant	)	Civil Action No. 2:11-cv-00036

DEFENDANT MILLER HYDRO GROUP'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Miller Hydro Group ("Miller Hydro") hereby submits its Reply in support of its Motion ("Motion") to Dismiss the Complaint filed by Friends of Merrymeeting Bay and Environment Maine (collectively, "Plaintiffs").

Preliminary Statement

Plaintiffs' Complaint is premised on allegations that neither the Federal Energy Regulatory Commission ("FERC"), the National Marine Fisheries Service, nor the United States Fish and Wildlife Services (collectively, the "Federal Agencies") have taken any steps to enforce the Endangered Species Act ("ESA") and that Miller Hydro must be compelled to engage in consultation with the Federal Agencies.[1] At the same time, the Complaint admits that Miller Hydro is in fact engaged in just such a consultation process with the Federal Agencies, but yet asks the Court to dictate a schedule for that process. These allegations can only be read for what they are – an effort to challenge the Federal Agencies' enforcement of the ESA.

Confronted with the fact that their use of the ESA's Citizen Suit provision is barred under

[1] Of course, Miller Hydro reserves the right to dispute the factual assertions in the Complaint. Miller Hydro recognizes, however, that the standard governing a Rule 12(b)(6) motion requires that a plaintiff's factual allegations be accepted as true, but for the purposes of the Motion only. Thus, any reference to Plaintiffs' allegations is not to be deemed an admission to any of Plaintiffs' allegations.

the rule announced in *Bennett v. Spear*, 520 U.S. 154 (1997), Plaintiffs now seek to recharacterize their Complaint as a straightforward effort to enforce the ESA without encroaching on agency authority. They do this by almost completely ignoring the allegations in their Complaint. Yet, there is simply no escaping the fact that the allegations in the Complaint reveal Plaintiffs' intent to challenge the means by which the Federal Agencies are enforcing the ESA. This alone requires dismissal of the Complaint.

Moreover, Plaintiffs' claims are not ripe for adjudication, or should not be heard, if at all, until the ongoing administrative process is completed. The Complaint alleges that Miller Hydro's consultation with the Federal Agencies is aimed at obtaining an Incidental Take Statement ("ITS"). As a matter of law, and as supported by cases Plaintiffs themselves cite, the issuance of an ITS would implicate an agency determination regarding the extent to which Miller Hydro's activities result, or do not result in a taking – the very question Plaintiffs say they are asking the Court to resolve in this action.

Argument

Plaintiffs claim that Miller Hydro's Motion is premised on the theory that only the Federal Agencies have authority to determine whether Miller Hydro is committing a take of Atlantic Salmon, and that this is the basis for Miller Hydro's position that the focus of the Complaint is the Agencies' enforcement of the ESA. (Opp. at 2, 8) This is simply untrue.

In reality, the fact that the Complaint is targeted at the Federal Agencies' enforcement of the ESA is established by the express allegations of the Complaint. Those allegations establish that Plaintiffs are impermissibly using the Citizen Suit provision of the ESA to challenge agency action that is not final. It is because the ongoing Federal Agencies' consultation implicates an agency determination of whether Miller Hydro's activities result in a taking – not any jurisdictional bar that applies in all instances – that the Court is either divested of jurisdiction, or should refrain from

exercising jurisdiction at this time.

I. The Complaint Expressly, And Impermissibly, Seeks To Challenge The Federal Agencies' Enforcement Of The ESA

The Complaint's opening paragraphs highlight that Plaintiffs' true focus is to challenge implementation of the ESA. Those paragraphs allege that "[n]either the federal nor state government has taken enforcement action against Miller Hydro to redress its ESA violation." (Compl. ¶ 3.) The Complaint then alleges, accurately, that Miller Hydro has been designated to prepare a draft biological assessment ("BA") for FERC, and that a BA will assist the Federal Agencies in determining whether Miller Hydro's activities adversely affect Atlantic salmon. The Complaint also alleges that Miller Hydro is attempting to obtain an ITS through this process, and that an ITS would authorize Miller Hydro to continue its operations subject to certain conditions. (*Id.* ¶¶ 32-34.) Finally, Plaintiffs allege that "Miller Hydro must be put on an enforceable schedule for preparing the BA," with the Court setting that schedule. (*Id.* ¶ 34 and *ad damnum* clause.) These allegations are given short shrift in Plaintiffs' Opposition. This is because the allegations lead to the inescapable conclusion that what Plaintiffs characterize as a routine Citizen Suit claim against Miller Hydro is in reality an impermissible attack on the statutorily prescribed implementation of the ESA.

As acknowledged by the Complaint, Miller Hydro has been engaged in the administrative process for over a year. That process may result in (i) a finding that Miller Hydro is not committing a take or, alternatively, (ii) the issuance of an ITS, pursuant to which Miller Hydro's activities would have been determined not to jeopardize the species. Despite this, the Complaint, as characterized by Plaintiffs, not only asks the Court to answer the question currently before the Federal Agencies – whether Miller Hydro is committing a taking – but also to inject itself into agency decision-making by imposing its own schedule on the administrative process. However Plaintiffs may wish to characterize the nature of their Complaint, allegations of this nature can only

be read as a not-so-thinly veiled effort to challenge the Federal Agencies' implementation of the ESA. *Bennett* requires dismissal of the Complaint under these facts.

II. The Court Is Without, Or Should Refrain From Exercising Jurisdiction, Until The Agency Review Is Completed

The ripeness doctrine, as delineated in *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), requires that courts refrain from interfering in the administrative process "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49. In a similar vein, the primary jurisdiction doctrine requires deference to agency action, where, *inter alia,* an agency determination "lies at the heart of the task assigned the agency by Congress." *Mashpee Tribe v. New Seabury Corp.*,592 F.2d 575, 580-81 (1st Cir.1979). 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.* Finally, a court should exercise its inherent right to stay a matter when an ongoing administrative process may render a plaintiff's claims moot. *I Ka'aina v. Kaua'I Island Util. Corp.*, 2010 WL 3834999, *8 (D. Hawaii 2010).

Plaintiffs cite several cases for the proposition that the administrative process does not divest the Court of jurisdiction, or require the Court to refrain from exercising jurisdiction. (Opp. at 11-13.) Some of these cases are completely off point; others, interestingly, explain why the Complaint must be dismissed.

One case cited by Plaintiffs, *United States Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 215 F.Supp.2d 239 (D. Me. 2002) ("*USPIRG*") involved a citizen's suit under the Clean Water Act, not the ESA, and there was no ongoing agency consultation at the time

of the suit. 215 F.Supp.2d at 245, 257-58. Another case, *Strahan v. Roughead*, 2010 WL 4827880 (D. Mass. 2010), involved allegations that the defendant had failed to engage in agency consultation. *Id.* at *7. *Alabama v. United States Army Corps of Engineers*, 441 F.Supp.2d 1123 (N.D. Ala. 2006) did not address the question of whether or how the plaintiff's participation in administrative consultation impacted the court's jurisdiction, or the exercise thereof. *Id. generally*. These are not the circumstances presented in this case, where Plaintiffs accurately allege that Miller Hydro is in fact already actively engaged in an administrative process.[2]

Finally, two cases Plaintiffs cite, *Animal Welfare Institute v. Martin*, 623 F.3d 19 (1st Cir. 2010), and *Loggerhead Turtle v. County Council of Volusia County, Florida*, 896 F.Supp. 1170 (M.D. Fla. 1995), involved defendants who had applied for an ITP under the ESA – not the situation presented here, where an ITS is involved. *Martin*, 623 F.3d at 28; *Loggerhead Turtle*, 896 F.Supp. at 1177. Neither of these cases implicated pending agency consideration over whether a taking was being committed. The defendant in *Martin*, while already subject to a consent order regarding the impact of its activities on Canadian Lynx, applied for an ITP to authorize incidental takings of the species. *Martin*, 623 at 22-23. The defendant was not seeking any agency determination that a taking was, or was not, being committed. *Id.* The defendant in *Loggerhead Turtle* sought an ITP after it was notified by the governing agency that its activities were resulting in takings. *Loggerhead Turtle*, 896 F.Supp. at 1175-76. The application for an ITP implicated only questions of whether the proposed activities to be authorized by permit would minimize the impact on turtles. *Id.* It did not require an agency determination of whether a taking was being committed in the first instance. *Id.*

[2] The depth of the ongoing agency review is outlined in considerable detail in both the Motion to Dismiss filed by Miller Hydro, as well as similar motion filed by the defendant in separate action brought by these same Plaintiffs against Topsham Hydro Partners Limited Partnership ("Topsham"), docket number 11-cv-37, where Topsham is following a similar administrative process. A pending Motion to Dismiss in a similar case brought by Plaintiffs against different hydro companies involves related legal principles as here, docket number 11-cv-38.

This is critical distinction from the present case. Unlike the defendants in *Martin* and *Loggerhead Turtle*, Miller Hydro is deep into a consultation process aimed at resolving the taking question Plaintiffs claim they would have the Court resolve. Section 7 of the ESA charges the Federal Agencies with determining in this process whether Miller Hydro's activities are "not likely to jeopardize the continued existence" of Atlantic salmon, or would result in "the destruction or adverse modification of" Atlantic salmon habitat. 16 U.S.C. 1536(a)(2). If there is no taking at all, consultation is terminated and no further action is required. 50 C.F.R. § 402.13(a). If Miller Hydro's activities are "found to be consistent with Section 7(a)(2)," the Federal Agencies are required to issue an ITS specifying the conditions, if any, for such activities. *Id.* § 1539(a)(1)(B). These are not questions that were the subject of agency action in *Martin* or *Loggerhead Turtle*.

Moreover, as explained in the appeal of *Loggerhead Turtle*, if an ITS is issued, Miller's activities in compliance therewith would not constitute takings under the ESA. After the defendant in *Loggerhead Turtle* received an ITP, an appeal followed in which the dispute turned on the scope of activities authorized by the ITP. *Loggerhead Turtle v. County Council of Volusia County, Florida*, 148 F.3d 1231, 1235-36 (11th Cir. 1998). In analyzing the separate statutory provisions governing ITPs and ITSs, the Eleventh Circuit Court of Appeals explained that the issuance of an ITS, unlike the issuance of an ITP, establishes, as a matter of law, that activities that comply with an ITS do not result in takings under the ESA:

> [An] important difference between an incidental take statement . . . and an incidental take permit . . . lies in the broad language of 16 U.S.C. 1536(o), which applies only to holders or beneficiaries of the former. Under section 1536(o), 'any taking that is in compliance with the terms and conditions specified in [an incidental take statement] shall not be considered to be a prohibited taking of the species concerned.'

Id. at 1245 (quoting 16 U.S.C. § 1536(o).) At hand, then, is the question of whether the Court may inject itself into an ongoing administrative process to resolve whether Miller Hydro is involved in a taking, a question not presented in cases cited by Plaintiffs. The administrative process in which

Miller Hydro is involved may result in an agency conclusion that there is no taking. It may also result in the issuance of an ITS, which, though premised on a finding that certain activities result in incidental takes, would conclusively establish that those activities as conditioned in the ITS are not to be considered "takings" within the meaning of the ESA.

The Complaint, as characterized by Plaintiffs, impermissibly seeks to have the Court interfere with this process before it is complete, and asks the Court to resolve issues at the heart of the task assigned to the Federal Agencies by Congress. *Abbott Labs*, 387 U.S. at 148-149; *Mashpee Tribe*, 592 F.2d at 580-81. It also would pose the risk of putting Miller Hydro in quite an untenable position if, for example, the Court were to find that Miller Hydro's present activities result in takings, and the Federal Agencies were later to (i) determine there is no taking, or (ii) issue an ITS. *Kocolene Oil Corp.*, 509 F.Supp. at 743. Finally, an agency determination that there is no taking, or the issuance of an ITS, during the course of litigation would render Plaintiffs' claims moot. For all of these reasons, the Court either is without jurisdiction, or should refrain from exercising jurisdiction, and dismissal is therefore warranted.

Conclusion

For the reasons outlined above, Defendant Miller Hydro Group respectfully requests that the Court dismiss the Complaint filed by Friends of Merrymeeting Bay and Environment Maine.

Dated at Portland, Maine this 12th day of April, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2011, I electronically filed ***Defendant Miller Hydro Group's Reply In Support of Its Motion to Dismiss*** with the Clerk of the Court using the CM/ECF system which will send notification of such filing(s) to the following:

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