**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**

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

**DEFENDANT MILLER HYDRO GROUP'S MOTION TO DISMISS**

Defendant Miller Hydro Group ("Miller Hydro") moves pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss the Complaint filed by Friends of Merrymeeting Bay ("FOMB") and Environment Maine ("EM") (FOMB and EM, collectively, "Plaintiffs") for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

**Preliminary Statement**

Plaintiffs have characterized their Complaint as one properly seeking redress against Miller Hydro for its alleged taking of Atlantic salmon in the Androscoggin River under the Citizen Suit provisions of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.,*. However, the Plaintiffs' clear objective, despite that characterization, is not directed at Miller Hydro at all. In fact, the Complaint directly acknowledges that Miller Hydro is actively engaged in the ESA's informal consultation procedures with the governing federal agencies[1] to determine how and whether the ESA applies to its operations.

[1] Here, the federal agencies involved are the Federal Energy Regulation Commission ("FERC"), as the acting agency (licensor of the Worumbo dam), and the National Marine Fisheries Service and the United States Fish and Wildlife Services (collectively, the "Services"), with which FERC must consult to implement the ESA. All three are collectively referred to as the "Federal Agencies").

Rather, the foundation of the Complaint is allegations regarding the Federal Agencies' implementation of the ESA. Specifically, the core of the Complaint is that 1) the Federal Agencies' consultation process is not being conducted on a timeline of Plaintiffs' liking, and Plaintiffs' implicit assertion that 2) the consultation process is not necessary at all.[2] Plaintiffs' objective, then, as expressed clearly in their request for relief is to have the Court 1) preempt the Federal Agencies' consultation process by entering a judgment which presumes to know the outcome of the process, and 2) prescribe the timeline in which the Federal Agencies are implementing the ESA consultation process to determine both whether Miller Hydro's operations may result in a take under the ESA and whether the Federal Agencies will authorize Miller Hydro to commit incidental takes of Atlantic salmon. Such relief would, however, require that the Court ignore an active and ongoing administrative process, and mandate, in place of the Federal Agencies, the schedule by which the consultation process must proceed.

The Complaint is a classic example of claimants attempting to use artful pleading to disguise the true nature of their claims in order to avoid the preclusive effect of controlling precedent. Regardless of how Plaintiffs characterize their claims, their Complaint is nothing short of a direct challenge to the agencies' implementation of the ESA. Yet the United States Supreme Court, in the case of *Bennett v. Spear*, 520 U.S. 154 (1997), has clearly held that agencies' implementation of the ESA is ***not subject to review*** under the ESA's Citizen Suit provision. Plaintiffs' artful pleading thus cannot escape the reach of *Bennett*, which requires dismissal of this lawsuit pursuant to Rule 12(b)(1) and/or Rule 12(b)(6).

[2] This consultation process, which is being conducted in full conformance with the ESA's requirements, may ultimately result in an agency determination that Miller Hydro's operations do not commit incidental takes of Atlantic salmon, and therefore need no authorization. In the alternative, it may result in the agency issuance of an Incidental Take Statement (an "ITS"), which would authorize Miller Hydro to commit incidental takes of Atlantic salmon under prescribed limitations.

Further, Plaintiffs' claims are not ripe for adjudication and must be dismissed pursuant to Rule 12(b)(1). *Bennett* mandates that citizens with concerns about implementation must await a final agency action prior to engaging in a lawsuit; here there is no such final agency action. Further, the very administrative processes that Plaintiffs acknowledge to be underway may render Plaintiffs' claims moot.

Finally, and in the alternative, if Plaintiffs' claims are not otherwise subject to dismissal, the Court should decline to exercise jurisdiction so that the active and ongoing administrative process may come to a full resolution.

**Facts**

Atlantic salmon are listed as an endangered species, and the portion of the Androscoggin River in which the Worumbo dam is located is listed as critical habitat for Atlantic salmon. (Complaint. ¶¶ 17-18.) Miller Hydro owns and operates the Worumbo dam on the Androscoggin River. (*Id.* ¶ 6.) Plaintiffs allege that Miller Hydro's operation of the Worumbo dam violates the ESA by adversely impacting the endangered Atlantic salmon on the Androscoggin River. (Complaint ¶¶ 1, 4.) Both FOMB and EM are Maine non-profit corporations that advocate for environmental conservation and preservation. (Complaint ¶¶ 4-5.)

Plaintiffs claim that "[n]either the federal nor state government has taken enforcement action against Miller Hydro to redress its ESA violation," and that "[w]ithout a court order directing it to so, Miller Hydro will not comply expeditiously with the ESA." (*Id.* ¶¶ 3-4.) At the same time, the Complaint tacitly concedes – because it must – that the Miller Hydro is actively engaged with the Federal Agencies in the informal consultation process under the ESA for determining what Plaintiffs allege to already know: whether Miller Hydro's operations may, in fact, adversely impact Atlantic salmon. (*Id.* ¶¶ 32-34.) Specifically, Plaintiffs concede the

following:

- "[O]ne of the first steps in" the consultation process "is the preparation of a biological assessment ("BA")." (*Id.* ¶ 33.)
- "One of the purposes of a BA is to help make the determination whether a proposed activity is likely to adversely affect listed species or their critical habitat." (*Id.* ¶ 33.)
- The federal licensee, in this instance, Miller Hydro, "may be designated to prepare the BA, though ultimate responsibility for the BA lies with the agency issuing the license," in this instance the Federal Energy Regulatory Commission ("FERC"). (*Id.* ¶ 33.)
- Miller Hydro has been designated by FERC to prepare a [draft] BA. (*Id.* ¶ 34.)
- If FERC determines in its BA that the operation of the Worumbo dam adversely affects Atlantic salmon, it will be required to submit to the Services (along with its BA) a request for formal consultation, a process that "can result in the issuance of an incidental take statement" (an "ITS"). (*Id.* ¶ 33.)
- The issuance of an ITS would authorize Miller Hydro to continue its Worumbo dam operations subject to "reasonable and prudent measures . . . necessary or appropriate to minimize" the impact on Atlantic salmon and its habitat. (*Id.* ¶ 33.)

In short, although Plaintiffs purport to allege that Miller Hydro is not complying with the ESA, the allegations of the Complaint describe the exact manner in which Miller Hydro and the federal agencies **are** complying with the regulatory process under the ESA to determine the extent of impact Miller Hydro's operations may have on Atlantic salmon, and for Miller Hydro to obtain approval for incidental take of Atlantic salmon, should such approval be deemed necessary. In fact, FERC's designation of Miller Hydro as its non-federal representative in the development of a

draft BA, referenced in the Complaint (*Id.* ¶ 34.) from which will necessarily follow FERC's review and issuance of its BA to NMFS (triggering NMFS' preparation of a Biological Opinion, "BO") expressly acknowledges that Miller Hydro is engaged in "informal consultation under Section 7 of the ESA." (Skancke Aff. ¶ 2 and Ex. 1 thereto.) It is inconsistent of Plaintiffs to allege a violation of the ESA while conceding compliance. It is further inconsistent of Plaintiffs to acknowledge the ongoing nature of the consultation process, but then request that the Court intrude on that process to declare that Miller Hydro is in violation of the ESA, i.e. to act upon Plaintiffs' speculated outcome of a process that is **not yet complete**.

The allegations of the Complaint make clear that Plaintiffs' real objective in this action is to have the Court, rather than the Federal Agencies, implement the ESA. This is perhaps best demonstrated by Plaintiffs' allegation that "Miller Hydro must be put on an enforceable schedule for preparing the BA," and their request for relief in which they ask the Court to order Miller Hydro to "prepare a BA according to a specific schedule." (*Id.* ¶ 34 and Relief clause ¶ b.) The Plaintiffs have not proposed or justified what that specific schedule ought to be or how it would differ from the ongoing process, nor can they demonstrate that Miller Hydro has failed to act within any schedule required of them by the Federal Agencies. In sum, what Plaintiffs seek here would be an inappropriate judicial intrusion into an ongoing regulatory administration of the ESA, and thus their lawsuit must be dismissed.

## Legal Standard of Review

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) raises the fundamental question of whether the Court has subject matter jurisdiction over the action. 5B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1350, at 61 (3d ed. 2004). Typically, such challenges are made in the context of whether the Court has federal question or diversity

jurisdiction. *See* 28 U.S.C. §§ 1331, 1332. However, a challenge to a claim's ripeness, *vel non*, may also be brought under Fed. R. Civ. P. 12(b)(1). *United States v. Lahey Clinic Hospital, Inc.*, 399 F.3d 1, 8 n. 6 (1st Cir. 2005); *NEGB, LLC v. Weinstein Co. Holdings, LLC*, 490 F.Supp.2d 89, 91 (D. Mass. 2007) ("*Weinstein*"). When a claim is challenged on ripeness grounds, the burden of establishing ripeness falls on the party asserting that the District Court has jurisdiction. *Weinstein*, 490 F. Supp. at 91 (citing *McBee v. Delica Co., Ltd.*, 417 F.3d 107, 122 (1st Cir. 2005) (citation omitted)).

A Court may consider materials outside the pleadings on a Rule 12(b)(1) motion. *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002). Among other things, the Court may properly consider "depositions or affidavits," or even "'entertain arguments not raised by the parties' memoranda.'" *Weinstein*, 490 F.Supp.2d at 91 (citing *Cutting v. United States*, 204 F.Supp.2d 216, 218-19 (D.Mass. 2002) (citation omitted), *aff'd*, *Skwira v. United States*, 344 F.3d 64 (1st Cir. 2003)).

The standard for assessing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is whether "the complaint states facts sufficient to establish a claim to relief that is plausible on its face." *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 320 (1st Cir.2008) (internal quotations and citations omitted). A "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir.2008). In considering a motion to dismiss pursuant to 12(b)(6), a court ordinarily may not "consider any documents that are outside of the complaint, or not expressly incorporated therein," but may consider "documents central to" a plaintiff's claim or "documents sufficiently referred to in the complaint." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267

F.3d 30, 33 (1st Cir.2001). Here, as noted above, Defendant attaches only one document to this Motion to Dismiss – a document that is referenced in the Complaint, but itself refutes the basis of Plaintiffs' Complaint, thereby requiring dismissal of this proceeding.

## Legal Argument

### I. The Complaint Must Be Dismissed Because It Improperly Seeks To Use The Citizen Suit Provision To Challenge Administrative Implementation Of The ESA

The Complaint alleges, and asks the Court to determine, that Miller Hydro's operations result in a taking of an endangered species. This position is inappropriately conclusory, suggesting that the ongoing statutory and regulatory administrative process for informing such a determination that is ongoing need not be completed in order to make such a finding. The Complaint also requests that the Court substitute its judgment for that of the Federal Agencies in setting the appropriate timeline for the ESA evaluation process pursuant to established federal regulations.

The ESA and regulations enacted pursuant thereto govern the process by which federal agencies are to determine whether (i) a federal licensee's activity would result in the taking of an endangered species, and (ii) a federal licensee may receive authorization to engage in the activity notwithstanding the fact that the activity may result in a "take." Miller Hydro is fully and properly engaged in this process, as the Complaint itself concedes. The Plaintiffs' request that the Court find against Miller Hydro in order to truncate or preempt the Federal Agencies' implementation of this process is improper under precedent that 1) requires that citizens concerned about the implementation of the ESA await final agency action, and 2) determines that a BA (much less a not-yet-completed **draft** BA) does not constitute final agency action.

**A. The administrative implementation of the consultation process under the ESA, and not the Plaintiffs' lawsuit or allegations, is the appropriate method to determine whether an incidental take permit or statement is necessary.**

The ESA requires the Secretaries to promulgate regulations listing those species that are "endangered" and to designate "critical habitat" for those species. 16 U.S.C. § 1533. The statute prohibits the "take" of any species listed as endangered without authorization. 16 U.S.C. § 1538(a). 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." *Id.* § 1532(19). The statute sets forth a process by which to determine whether a particular operation may result in a take, which in turn supports an agency decision regarding whether, and what type of , authorization may be required.

Here, where Atlantic salmon have been listed under the ESA, and the Worumbo dam is located within the critical habitat area, there is a legislatively proscribed process by which to determine whether Miller Hydro's operations may adversely impact Atlantic salmon, which must take place **prior to** concluding whether authorization may be needed for Miller Hydro to operate its facility in compliance with the ESA. The ESA explicitly authorizes the Services to promulgate regulations that outline the procedures to be followed for this consultation process. *Id.* § 1536(f). Those regulations contemplate a two-staged consultation process:

First, the Services and the acting agency (here, FERC), and/or the agency's designated non-federal representative (here, Miller Hydro), may engage in informal consultation to assist in determining whether formal consultation or a conference is required. 50 C.F.R. § 402.13(a). This informal consultation may include, among other things, the drafting of a BA by a non-federal designee, and the finalization of a BA by the federal licensing agency. If the informal

consultation process results in a finding that the agency action in question is "not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary." *Id.* This first step has not yet been completed with regard to the Worumbo dam.

Second, if through the informal consultation process, or otherwise, an agency determines that its action may "affect a listed species or critical habitat," the agency must engage in formal consultation with the Services, as delegates of the Secretaries. 50 C.F.R. § 402.14. After formal consultation, the Services must provide the acting or authorizing agency with a BO explaining how the proposed action will affect the species and/or its habitat. 16 U.S.C. § 1536(b)(3)(A). Formal consultation need not be initiated if (i) as explained above, consultation is terminated at the informal consultation stage, or (ii) a BA prepared pursuant to 50 C.F.R. § 402.12 culminates in a determination that the proposed action is not likely to adversely affect any listed species or critical habitat. *Id.* § 402.14(b). Both the informal and formal consultation processes set forth in 50 CFR Part 42 clearly contemplate the collection and analysis of data as a necessary component of determining the potential impact of operations on an endangered species.

**Only after** the consultation process is complete, such that a federal licensee's operations are, **in fact,** determined to cause a take of a listed species, does the process move on to require one of the two means by which parties engaged in federally licensed activities may be authorized to take endangered species under limited circumstances. First, if consultation results in the determination that Miller Hydro's FERC-licensed operations (i) will not violate Section 1536(a)(2) or (ii) offers "reasonable and prudent alternatives which the Secretar[ies] believe[] would not violate such" provision, the Services must provide FERC with an ITS specifying the "impact of such incidental taking on the species," any "reasonable and prudent measures that the

[Services] consider[] necessary or appropriate to minimize such impact," and setting forth "the terms and conditions ... that must be complied with by the Federal agency or applicant [if any] . . . to implement" those measures. 16 U.S.C. § 1536(b)(4). Second, a federal licensee may undertake the process necessary to apply for and obtain a permit pursuant to Section 10 of the ESA. *Id.* § 1539.

This consultation process, in which every federal agency must engage, is to "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 threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." *Id.* § 1536(a)(2) ("Section 1536(a)(2)"). The structure and plain language of the ESA and associated regulations makes abundantly clear that consultation process in which the Federal Agencies determine whether a facility may be adversely impacting a listed species is a necessary prerequisite to identifying the appropriate method for a facility's compliance with the ESA.

The Complaint attempts to use the Citizen Suit provision of the ESA to truncate, pre-empt, or skip entirely the legitimate, administrative process described above by requesting relief that presumes that the Plaintiffs or the Court already know the outcome of this process, and/or dictating the terms of implementation. As set forth in Section B, below, doing so is in direct conflict with controlling judicial precedent.

**B. The Citizen Suit Provision Does Not Authorize a Challenge to the Federal Agencies' Active Implementation Of The ESA.**

The ESA authorizes "any person" to bring a civil action "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be

in violation of any provision" of the ESA. 16 U.S.C. § 1540(g)(A).[3] The *Bennett* Court held in no uncertain terms that this provision does **not** permit a citizen suit brought for the purpose of challenging the Federal Agencies' implementation or administration of the ESA. *Bennett*, 520 U.S. at 173-174, 179. Rather, citizens who are dissatisfied with how the ESA is being implemented must await final agency action and then pursue their claims under the Administrative Procedure Act. *Id.* at 173-174. As the Court explained, a contrary interpretation would turn "[a]ny procedural default, even one that had not yet resulted in a final disposition of the matter at issue" into a basis for a lawsuit. *Id.* at 174. The *Bennett* decision "clarified that the ESA offers no independent jurisdiction to challenge a federal agency's implementation of the Act." *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1357 (Fed. Cir. 1998).

Further, Plaintiffs can not reasonably claim that there has been final agency action in this matter. The Complaint's acknowledgment that Miller Hydro is engaged in ESA consultation and preparation of "a BA", in and of itself, precludes such an argument (particularly where Miller Hydro is actually only engaged in informal consultation, which precedes agency action, and the preparation of a **draft** BA). *See Oregon Natural. Desert Ass'n*, 716 F.Supp.2d 982, 995 (D. Or. 2010) (holding that "biological assessments do not constitute final agency action" because they do not "mark the consummation of the agency's decisionmaking").

While the Plaintiffs characterize their Complaint as one brought to, *inter alia*, enjoin Miller Hydro's alleged violation of the ESA, upon reading, it is clear that they actually are challenging the Services' ongoing administration of the ESA and implementation of this specific ESA proceeding.

[3] The Citizen Suit provision also allows for suits to be brought under two conditions not present here. It provides that individuals may commence an action to compel the Secretary to apply prohibitions on violations of the ESA during the ESA transition period, which expired no later than December 28, 1973, or to compel the Secretaries to perform its non-discretionary duties to list endangered species and designate critical habitat pursuant to 15 U.S.C. § 1533. 15 U.S.C. § 1540(g)(B)-(C); *see also Bennett*, 520 U.S. at 171.

Plaintiffs admit in their Complaint that Miller Hydro has been designated by FERC to prepare a BA (Miller Hydro has actually been designated by FERC to prepare a draft BA; FERC will be responsible for issuing a final BA), and that preparation of a BA is a **preliminary** step in the administrative consultation process. Indeed, the letter by which FERC designated Miller Hydro to prepare a draft BA expressly states that the agency and Miller Hydro are, in fact, engaged in informal consultation pursuant to Section 7 of the ESA. (Skancke Aff. ¶ 2.) This consultation may result in a determination that Miller Hydro is not engaged in any violation of the ESA. It may also result ultimately in the issuance of an ITS by NMFS, which would specify the conditions under which Miller Hydro would be authorized to commit the incidental taking of Atlantic salmon. 16 U.S.C. § 1536(b)(4). This is precisely the process contemplated by the ESA and regulations enacted pursuant thereto.

The real nature and purpose of Plaintiffs' Complaint is to attempt to compel the Court to step into the Federal Agencies' handling of an ongoing process that administers or implements the ESA. This purpose is revealed by Plaintiffs' allegation that "Miller Hydro must be put on an enforceable schedule for preparing the BA," and their request for relief in which they ask the Court to order Miller Hydro to "prepare a BA according to a specific schedule." (Complaint ¶ 34 and Relief clause ¶ b.)

In sum, however Plaintiffs may attempt to characterize these claims, they are nothing less than an attempt to challenge the Federal Agencies' ongoing process of implementing or administering the ESA with Miller Hydro. The claim must be dismissed because it is not plausible on its face, and also dismissed under the preclusive nature of the clear precedent set forth by the Supreme Court in *Bennett*. *Trans-Spec Truck Serv., Inc.*, 524 F.3d at 320; *Bennett*, 520 U.S. at 173-74, 179.

## II. The Complaint Must Be Dismissed Because It Is Not Ripe For Adjudication

Article III of the Federal Constitution limits Federal Courts to adjudicating actual "cases" and "controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992). Ripeness, one of several justiciability doctrines, is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *City of Fall River, Mass. v. F.E.R.C.* 507 F.3d 1, 6 (1st Cir. 2007) (internal citations omitted). The doctrine seeks "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Whether a court lacks subject matter jurisdiction because a claim is not ripe for review is a question of law. *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 534 (1st Cir. 1995) ("*Ernst & Young*"). A court has "no alternative but to dismiss an unripe action." *Id.* at 535.

Whether a claim is ripe for adjudication turns on "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003). Both prongs must be satisfied for a claim to be deemed ripe for review. *Ernst & Young*, 45 F.3d at 535.

The fitness inquiry "typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends on facts that may not yet be sufficiently developed." *Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4, 10 (1st Cir. 2000) (quoting *Ernst & Young*, 45 F.3d at 535.) "[T]he critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." *Ernst & Young*, 45 F.3d at 536 (quoting *Mass. Ass'n of Afro-*

*Am. Police, Inc. v. Boston Police Dep't*, 973 F.2d 18, 20 (1st Cir. 1992)). A matter is not fit for review when it may be significantly affected by further factual development. *Id.*

The hardship inquiry evaluates "the extent to which withholding judgment will impose hardship - an inquiry that typically 'turns upon whether the challenged action creates a direct and immediate dilemma for the parties.'" *Stern*, 214 F.3d at 10 (quoting *W.R. Grace & Co. v. EPA*, 959 F.2d 360, 364 (1st Cir. 1992)). A claim is not ripe where there is little or no hardship to the complainant. *See State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 693 (1st Cir. 1994).

Plaintiffs' claims are not ripe for adjudication because the issues raised in the Complaint are not fit for judicial decision and because any hardship Plaintiffs might suffer if the Court withholds consideration is at best speculative. The claims are not ripe for review because the ESA consultation process in which Miller Hydro is presently involved may render Plaintiffs' claims moot. Specifically, a determination in the consultation process that Miller Hydro's operations do not constitute a violation of the ESA would render moot Plaintiffs' request that the Court declare Miller Hydro to be in violation of the ESA's take prohibition. *See I Ka'aina v. Kaua'I Island Util. Corp.*, 2010 WL 3834999, *8 (D. Hawaii 2010) (suit alleging a taking prohibited by the ESA, and filed during pending efforts to obtain an incidental take permit, would be rendered moot "[i]f the regulatory process is completed and Defendant secures an incidental take permit.").[4]

In addition, Plaintiffs cannot establish that they would suffer hardship if the Court were to withhold judgment. If the consultation process results in a finding of no ESA violation, or in the issuance of an ITS, then Plaintiffs would have no remaining cognizable claim against Miller

[4] The impropriety of Plaintiffs' additional claim for relief to have the Court compel Miller Hydro to prepare a BA "according to a specified schedule" is addressed in Section I, *supra.*

Hydro. They therefore can not be said to suffer harm if the Court were to withhold judgment pending completion of an administrative process that results in such an outcome. Given these facts, dismissal of the Complaint is necessary to prevent the Court from being entangled in an abstract disagreement. *Abbott Labs*, 387 U.S. at 148.

## III. Alternatively, The Court Should Decline To Exercise Jurisdiction Or Stay This Action Pursuant To Its Inherent Authority Or The Doctrine Of Primary Jurisdiction

Should the Court not find that the Plaintiffs' Complaint is subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(1) or Fed. R. Civ. P. 12(b)(6), the Court should decline to exercise jurisdiction, at least pending resolution of the administrative process now underway. The Court may do so pursuant to either its inherent authority or the primary jurisdiction doctrine.

A court has inherent authority to stay a case. *I Ka'aina*, 2010 WL 3834999 at *7. An ongoing agency review process "weighs in favor of a stay pursuant to [a court's] inherent authority." *Id.* 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.*

The doctrine of primary jurisdiction is "applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). "It requires a court to enable a "referral" to the agency," either by staying further proceedings to allow the parties a "reasonable opportunity to seek an administrative ruling," or by dismissing the action without prejudice. *Id.*

The doctrine is meant to serve "as a means of coordinating administrative and judicial machinery" and to "promote uniformity and take advantage of agencies' special expertise." *Mashpee Tribe v. New Seabury Corp.*,592 F.2d 575, 580 (1st Cir.1979). In determining whether

to defer a matter to an agency under the doctrine, a court should consider the following: (i) "whether the agency determination l[ies] 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*, 592 F.2d at 580-81).

As a threshold matter, Courts generally afford great deference to administrative actions taken pursuant to the ESA. *See, e.g., Maine v. Norton*, 257 F.Supp.2d 357, 384 (D. Me. 2003) (noting that "Congress delegated broad administrative and interpretive powers to the Secretary [of the Interior and the Secretary of Commerce]" when it enacted the ESA," requiring that courts "be hesitant to substitute their views of wise policy for the agencies' views") (citing and quoting *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995)).

This dispute implicates at least two questions at the heart of administrative consultation process relating to Miller Hydro's operation of its Worumbo Dam – the question of whether operation of the dam results in a taking of Atlantic salmon, and, if so, whether Miller Hydro may be authorized to commit incidental takes of Atlantic salmon. The task of resolving these very questions was **expressly** assigned to federal agencies by Congress under the ESA. *See* Section I, *supra*. The task could not be more "at the heart" of the Congressional mandate to federal agencies. *Blackstone Valley Elec. Co.*, 67 F.3d at 992.

Furthermore, the Supreme Court has long-since acknowledged that enforcement of the ESA requires a high "degree of regulatory expertise," which "counsel[s] deference" to federal agencies charged with its implementation. *Babbit*, 515 U.S. at 703. Finally, agency action would more than aid the Court. As noted above, the resolution of pending agency action could

completely render Court action moot.

In other words, at hand is a claim that (i) poses the risk of undermining the ability of federal agencies to make determinations central to the authority granted, and direction given, by Congress, (ii) falls squarely within the realm of agency expertise, and (iii) could be rendered utterly futile by the outcome of pending agency proceedings. Whether pursuant to the Court's inherent authority or the doctrine of primary jurisdiction, these undisputed facts warrant the dismissal of Plaintiffs' Complaint, or, at the very least, a stay of these proceedings pending final agency action.

## 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 8th day of March, 2011.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of March, 2011, I electronically filed ***Defendant Miller Hydro Group's 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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Dated at Portland, Maine this 8th day of March, 2011.

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