

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' REQUEST FOR JUDICIAL NOTICE

Pursuant to Rule 201 of the Federal Rules of Evidence, Defendants, United States Department of Commerce and National Marine Fisheries Service, request this Court take judicial notice of the documents set forth and described below, true and correct copies of which are attached hereto and incorporated herein by reference:

Exhibit 1 is a Construction Authorization dated July 12, 2011 from the Federal Energy Regulatory Commission to Mr. Bearl S. Keith, Project Administrator, Miller Hydro Group and order is available at: http://elibrary.ferc.gov:0/idmws/file_list.asp?document_id=13940989.

Exhibit 2 is a Statement of Cooperation signed by the National Marine Fisheries Service Regional Administrator of Northeast Regional Office and U.S. Fish and Wildlife Service Regional Director for Region 5.

Exhibit 3 is a letter dated July 5, 2011 from the Federal Energy Regulatory Commission to Douglas H. Watts regarding dam safety work at the Worumbo Project and emergency consultation under the Endangered Species Act.

These documents are reports and records of administrative bodies and are properly judicially noticeable pursuant to Rule 201(b) of the Federal Rules of Evidence. See *Torrens v. Lockheed Martin Services Group, Inc.*, 396 F.3d 468, 473 (1st Cir. 2005) (court may “take judicial notice of the existence of government records”); see also *United States v. 14.02 Acres*, 547 F.3d 943, 955 (9th Cir. 2008) (“Judicial notice is appropriate for records and ‘reports of administrative bodies.’”).

DATED: August 8, 2011

Respectfully submitted,

THOMAS E. DELAHANTY II
United States Attorney

IGNACIA S. MORENO
Assistant Attorney General
SETH M. BARSKY
Section Chief

/s/ Bradley H. Oliphant
BRADLEY H. OLIPHANT
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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
BRADLEY H. OLIPHANT

Exhibit 1

FEDERAL ENERGY REGULATORY COMMISSION

Office of Energy Projects

Division of Dam Safety and Inspections – New York Regional Office

19 West 34th Street, Suite 400

New York, NY 10001

Telephone No. (212) 273-5900

Fax No. (212) 631-8124

CELL

In reply refer to:

P- 3428-ME; Worumbo

NATDAM # -ME00004

Dam Reconstruction:

Construction Authorization

July 12, 2011

**Mr. Bearl S. Keith
Project Administrator
Miller Hydro Group
148 Middle Street, Suite 506
Portland, ME 04101**

Dear Mr. Keith:

We have received and reviewed the pre-construction filings of May and June 2011 as requested by our May 19, 2010 letter for the referenced construction. With your submittals of July 5, 2011 and July 8, 2011 you also responded appropriately to our June 30, 2011 letter and July 7, 2011 e-mail requesting additional information/revisions regarding the design report, the quality control and construction inspection program, and the cofferdam design. Our review of all pre-construction filings did not reveal any significant deficiencies or errors that would affect the safety of the project structures, or adequacy of the project works to perform their intended functions. As such, these submittals are satisfactory and you may proceed with construction.

The cofferdam design indicates that the Phase I cofferdam seepage test will determine if a low permeability layer (or core) is required. Please submit the results of this test when it is completed. If the seepage test determines that this low permeability layer is required,

***Contains Critical Energy Infrastructure Information
-Do Not Release-***

Project No. 3428-ME

-2-

please submit a revised cofferdam design that includes the low permeability layer specifications.

The temporary construction emergency action plan lists Mr. Peter Valeri as the FERC point of contact. Please change this to Mr. Gerald L. Cross at the phone number 212-273-5911.

You must possess all necessary permits before your contractor mobilizes. Please provide copies of these permits when they are received. When construction is completed you will be required to submit all construction/design certifications, and the revised as-built exhibit drawings as requested by our May 19, 2010 letter.

Your continued cooperation is appreciated. If you have questions regarding this letter please call Mr. William Atlas at (212) 273-5912.

Sincerely,



Gerald L. Cross, P.E.
Regional Engineer

cc: D2SI

cc: Jeff Murphy
National Marine Fisheries Service
Protected Resources Division
17 Godfrey Drive, Suite 1
Orono, ME 04473

***Contains Critical Energy Infrastructure Information
-Do Not Release-***

Exhibit 2

Statement of Cooperation

Roles and Responsibilities between the NOAA Fisheries Service and U.S. Fish and Wildlife Service Concerning Implementation of the Endangered Species Act for Anadromous Atlantic Salmon

The U.S. Fish and Wildlife Service (USFWS) and NOAA Fisheries Service (National Marine Fisheries Service or NMFS) jointly administer the Endangered Species Act (ESA) as it applies to anadromous Atlantic salmon. In 2006, the USFWS Region 5 and NOAA Fisheries Northeast Region (NER) entered into an agreement (Statement of Cooperation) to divide responsibility for ESA implementation with respect to Atlantic salmon in order to enhance efficiency and effectiveness. Experience implementing the agreement, changes in the structure of the recovery program, and potential increases in workload should the listing be expanded call for the 2006 agreement to be revised. This revised agreement addresses workload allocation, cooperation, disagreement resolution, and elevation and aims to clarify roles, responsibilities, and procedures to avoid duplication, improve coordination, and facilitate decision-making.

Workload Allocation

ESA implementation related to Atlantic salmon includes listing; critical habitat designation; recovery planning; section 7 consultation; recovery permitting; incidental take permitting; and recovery implementation (hatchery operations, research, population assessment, etc.). These actions are carried out by multiple offices of NMFS (the regional office in Gloucester, MA; the Northeast Fisheries Science Center in Woods Hole, MA; and the joint research and management office in Orono, Maine) and the USFWS (the Region 5 office in Hadley, MA; the Maine Field Office in Old Town, ME; the Gulf of Maine Office in Falmouth, ME; the Northeast Fishery Center in Lamar, PA; and the Maine Fisheries Resource Office in Orland, ME).

Given the large number of actions and large number of offices involved in Atlantic salmon conservation, careful allocation of workload is essential to maximize efficiency and effectiveness. Existing communication and coordination has and will continue to facilitate implementation of the overall recovery program for the species. Workload allocation decisions take into account agency authorities, expertise, and capacity.

Joint Actions

Listing

The Services will continue to work cooperatively to develop a final determination on the proposal to expand the GOM DPS. NMFS will have responsibility for publication of the final determination in the Federal Register.

Salmon Recovery Framework

The Services will continue to work jointly and cooperatively with the State of Maine Department of Marine Resources and the Penobscot Indian Nation in developing the

biologically based Atlantic Salmon Recovery Framework. Staff from all four organizations chair and participate on Action Teams.

Recovery Plan Implementation Oversight

The Services, in full collaboration with the State of Maine, will be responsible for plan implementation oversight including holding annual public meetings to ensure an open and transparent approach to recovery implementation and to seek input from stakeholders.

Recognition of Tribal Rights

USFWS and NMFS have tribal trust responsibilities and will work jointly with the tribes to identify and address issues of concern and to seek and implement opportunities for cooperative conservation.

Joint Actions with Lead Assigned

Recovery Planning

If a final determination is made to list an expanded GOM DPS, USFWS will be the administrative lead for the development of a new recovery plan as described later in this agreement. USFWS will integrate information from the current Recovery Plan, the Listing and Critical Habitat rules, and the Recovery Framework to form the basis for the recovery plan.

Actions with Single Agency Responsibility

Critical Habitat

NMFS will be responsible for making a final determination regarding critical habitat designation, preparing all associated documentation, reviewing and responding to all public comments, and publishing the final determination in the Federal Register. USFWS may review if requested to do so by NMFS.

Section 10 Recovery (Assessment, Research, and Enhancement) Permitting

USFWS will have responsibility for issuing section 10 recovery permits. Annual reports under section 10 permits will be provided by each permittee and copies will be provided to NMFS for review and comment as part of the USFWS annual review process. The USFWS will work with permittees on methods to quantify and monitor take for renewal of existing and issuance of new permits.

Section 10 Habitat Conservation Planning and Incidental Take Permitting

It is expected that HCPs will cover activities in freshwater, perhaps including agriculture, forestry, and activities conducted or authorized by Maine Department of Inland Fisheries and Wildlife. Therefore, USFWS will have the lead for working with interested entities in development of habitat conservation plans (HCPs) and for issuing section 10 incidental take permits for all activities in freshwater except for dams.

Freshwater Consultations under Section 7

USFWS will have the lead on all section 7 consultations on activities in freshwater, except dams. All consultations will address both the listed species and designated critical habitat.

Estuarine and Marine Consultations under Section 7

NMFS will have the lead on all section 7 consultations on activities within estuaries and marine waters. All consultations will address both the listed species and designated critical habitat.

Dams

NMFS will have the lead for ESA activities and actions to address dams. For FERC dams this could involve section 7 consultations and/or section 10 habitat conservation plans. For non-FERC dams this could include encouraging section 10 habitat conservation plans, for which NMFS would be the lead as well as pursuing any section 9 violations. It is acknowledged that USFWS will maintain its section 18 authority under the Federal Power Act. In addition, it is acknowledged that USFWS (Gulf of Maine Program and Maine Fisheries Resources Office) will continue to work toward enhancing fish passage at non-FERC dams through non-regulatory mechanisms. Both of these USFWS programs will coordinate their activities with NMFS.

Conservation Hatchery Program

The USFWS will maintain responsibility for maintenance and operation of the conservation hatchery program. This includes responsibility for broodstock management, production, and stocking. In addition, the USFWS will continue to provide genetic expertise on other issues including screening of aquaculture fish and validation of genetic marking schemes.

Assessment

NMFS will continue to conduct scientific assessment activities in the estuary and marine environment. It is anticipated that the Maine Department of Marine Resources Bureau of Sea Run Fisheries and Habitat will continue to conduct scientific assessment activities in freshwater. The USFWS will continue, through its various programs, to support monitoring and evaluation.

International Science and Management

NMFS will be responsible for participating in international efforts to coordinate science and conduct stock assessment activities as well as participating in international management activities. The USFWS will continue to participate and support the United States delegation to NASCO.

Cooperation

Frequent communication is essential to ensure efficient and effective ESA implementation and to achieve a single Federal position when necessary. The agencies will coordinate as needed at all levels. The NOAA NER ARA for Protected Resources, NOAA NER Endangered Species Coordinator, the USFWS Region 5 ARD for Ecological Services, USFWS Region 5 ARD for Fisheries and USFWS Maine Field Office Supervisor will meet at least quarterly, and the NOAA RA and USFWS RD will meet at least once a year. Other meetings may be scheduled as needed, in particular to resolve any issues being elevated.

To ensure smooth coordination, if comments are being sought from the other agency, it is imperative that the proposed approaches and draft written documents be provided early. This will help minimize substantive comments at the final review stage.

Joint Actions

The Services will develop workplans setting deadlines and responsibilities for joint actions on a case-by-case basis. When a part of a joint action is assigned to one agency, the agency will follow the "Joint Actions with Lead Assigned" procedures below.

Joint Actions with Lead Assigned

The lead agency in this context serves as an administrative lead and will prepare all necessary documents and prepare and maintain the administrative record. The lead agency will fully coordinate with the non-lead agency to develop approaches and strategies to ensure that the concerns of the non-lead agency are taken into account prior to drafting or finalizing. The lead agency will share the proposed approach with the non-lead agency and obtain concurrence before proceeding further with the action. The lead agency and non-lead agency will establish an estimated timeline for the action identifying points at which coordination, review, and comment will take place. The lead agency will keep the non-lead agency apprised of any changes to the estimated timeline as soon as possible upon realizing a change is necessary.

The non-lead agency will provide timely and substantive comments and concerns and will be available to resolve and finalize strategies as necessary.

Each agency will coordinate review by their Solicitor's Office and encourage their attorneys to coordinate and attempt to resolve differences.

Actions with Single Agency Responsibility

The responsible agency has responsibility for all aspects of the action and is the sole signatory. The agencies will share information on actions for which they are responsible as part of normal coordination and communication processes to ensure each agency has knowledge of actions taking place and to foster consistency.

At times there may be actions that fall under the purview of one agency but that may have overarching implications to the overall management of the Atlantic salmon program. At this time, we have only identified jeopardy biological opinions as falling into this category. In such cases it is incumbent on the lead agency to communicate the proposed approach early to ensure consistency and provide sufficient time to resolve any outstanding concerns. Jeopardy biological opinions should be provided to the non-lead agency at least 10 days prior to issuance. Concurrence is not required but this will ensure both agencies understand the determination and can effectively communicate a single message to affected parties and individuals. Either agency can propose additional actions to be considered controversial and having overarching management implications. Both agencies must agree, however, before the above coordination procedures are applied to any action other than jeopardy opinions.

Delegation to the State

If either agency is considering delegating authority to the State of Maine to implement ESA responsibilities on behalf of the Services, they will consult fully with each other prior to making such a delegation. The non-lead agency must agree with such delegation before it is made.

Disagreement Prevention and Resolution

The agencies will make use of tools, as appropriate; to prevent disagreements from arising and to attempt to resolve disagreements should they arise. Structured decision making, facilitated meetings, and conflict resolution processes will be considered for significant issues or disagreements.

Elevation Procedure

If the agencies cannot agree on an approach or decision, and attempts to resolve the conflict are not successful, the disagreement will be elevated for review. The levels of elevation will be from staff level to (1) the NMFS Endangered Species Program Coordinator and the USFWS Maine Field Office Supervisor, (2) NOAA Assistant Regional Administrator for Protected Species and the USFWS Assistant Regional Director for Ecological Services, (3) NOAA Deputy Regional Administrator/USFWS Deputy Regional Director, and finally (4) NOAA Regional Administrator/USFWS Regional Director. The elevation process will begin at the level where the disagreement emerges. Initially and throughout the process, each agency (or both agencies jointly, if agreed upon) will prepare a clear and concise description of the issue, respective positions and their justifications, and remedies and submit it to the level above that at which the disagreement arose. At any step in the elevation process, disputes concerning biological interpretations may be sent to third parties or other experts in the form of a workshop or informal peer review.

General Conditions

This Statement of Cooperation will become effective upon signature by both agencies. Nothing in this Statement of Cooperation shall be construed as obligating the signatory agencies to the expenditure of funds in excess of appropriations or otherwise commit the signatory agencies to actions for which they lack statutory authority. Nothing in this statement shall create any cause of action or any substantive or procedural right in any party not a signatory to this statement. The Region 5 Director of the USFWS and the Northeast Regional Administrator of NOAA Fisheries Service may cancel this Statement of Cooperation upon thirty days written notice to the other.



Patricia A. Kurkul
Regional Administrator
NERO, National Marine Fisheries Service



Marvin Moriarty
Regional Director
Region 5, U.S. Fish and Wildlife Service

Date MARCH 16, 2009

Date March 23, 2009

Exhibit 3

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D. C. 20426

OFFICE OF ENERGY PROJECTS

**Project No. 3428-153--Maine
Worumbo Project
Miller Hydro Group**

**Douglas H. Watts
131 Cony Street
Augusta, ME 04330**

July 5, 2011

**Subject: Dam safety work at the Worumbo Project and emergency consultation
under the Endangered Species Act**

Dear Mr. Watts:

We received your June 26, 2011 letter regarding dam safety work at the Worumbo Project and the Commission's consultation with the National Marine Fisheries Service (NMFS) under the Endangered Species Act (ESA). The Worumbo Project is located on a reach of the Androscoggin River that has been identified as critical habitat for federally-listed Atlantic salmon.

In your letter, you object to the Commission's request for a waiver of formal consultation under the ESA pursuant to the emergency consultation procedures in 50 CFR § 402.05. You write that a waiver is not appropriate for the reconstruction phase of this project because once the unstable portions of the spillway are removed the immediate safety issue is resolved. You say the reconstruction phase should be implemented after the Commission has completed standard (non-emergency) formal consultation with NMFS under the ESA.

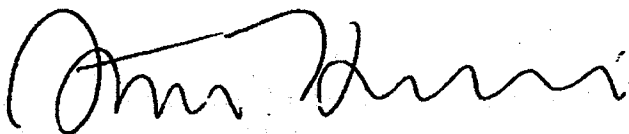
In our May 4, 2011 letter to NMFS, Commission staff requested formal consultation for this project, and did not request a waiver. Our request for consultation was made pursuant to the emergency procedures in 50 CFR § 402.05 so that important dam safety work could begin as soon as possible. As stated in our letter, emergency consultation is warranted for this project because of the dam safety concerns and because work needed to remedy these concerns must begin by the low water period of the summer of 2011 which is too soon to complete standard formal consultation under the ESA.

Commission staff is working with the project licensee to prepare a biological assessment which will be provided to NMFS as soon as possible. NMFS will then provide the Commission with its biological opinion which will address all work that has already been completed.

You also request that completion of the spillway be delayed until 2012, by which time normal consultation under Section 7 of the ESA could be completed. The Commission reviewed this issue when determining how best to move forward with the emergency work at Worumbo while ensuring public safety as required under the Federal Power Act, and also protecting Atlantic salmon under the ESA. It was determined, in coordination with NMFS and the licensee, that the best way to ensure public safety and protect property and natural resources, including Atlantic salmon, was to have the work completed within one construction season, in coordination with NMFS pursuant to 50 CFR § 402.05. For example, this approach avoids the possibility of damage to work areas by winter weather or high spring flows, which could lead to significant erosion and sedimentation, degrading critical habitat of Atlantic salmon.

We believe that this letter adequately addresses the issues raised in your June 26, 2011 letter. If you wish to discuss this matter, please contact B. Peter Yarrington at (202) 502-6129 or peter.yarrington@ferc.gov.

Sincerely,



Steve Hocking
Chief, Biological Resources Branch
Division of Hydropower Administration
and Compliance

cc: Jeff Murphy
National Marine Fisheries Service
Protected Resources Division
17 Godfrey Drive, Suite 1
Orono, ME 04473

Mark Isaacson
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Frederic G. Seavey
U.S. Fish and Wildlife Service
1168 Main Street
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