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Judge mulls injunction in Lisbon dam reconstruction

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PORTLAND — Two environmental groups are hoping a judge will order a delay of reconstruction of a portion of a dam on the Androscoggin River in Lisbon until a thorough review has considered the project's possible impact on endangered Atlantic salmon.

Miller Hydro Group, which owns and operates the Worumbo hydroelectric dam, applied for authorization from the licensing agency, the Federal Energy Regulatory Commission, to replace the 520-foot-long timber crib portion of its dam because it was in poor condition, according to documents filed in Maine's U.S. District Court.

The licensing agency sought from the National Marine Fisheries Service a formal consultation, required under the federal Endangered Species Act. The Marine Fisheries Service invoked "emergency circumstances" for the project, at FERC's request, which

allowed the project to get under way in July without a complete review and before a study of the project's possible adverse effects on endangered Atlantic salmon was finished.

Instead, demolition of the old portion of the dam is nearly complete. Only after construction of the new portion of the dam would a so-called "biological opinion" be offered by the Marine Fisheries Service as an assessment of the effects the project might have on the endangered fish.

Attorneys for the Friends of Merrymeeting Bay and Environment Maine argued Friday before Chief Judge George Z. Singal that if the dam's reconstruction were allowed to go forward without complete environmental review, it would be too late to effectively make any changes to protect the salmon after the reconstruction. Plaintiffs had filed a motion for a preliminary injunction. After hearing arguments on that motion Friday, Singal promised he would decide the matter promptly.

There was never an emergency circumstance, such as an act of God or other natural disaster, that posed a security or health risk to trigger the "emergency" status of the project, the groups' attorneys told the judge. And, even if an emergency had existed, there is no emergency in effect now that the old timber crib portion of the dam has been removed, they said. For that reason, the plaintiffs argued, the project should be halted before new construction of the dam to give the National Marine Fisheries Service time to undertake formal consultation about possible adverse impacts the project might have on Atlantic salmon in the Androscoggin River.

The attorneys told the judge that the entire dam's existence should be studied under the Endangered Species Act, including the existing turbines, as a possible threat to Atlantic salmon.

"There's a host of problems with dams," Boston lawyer David Nicholas said.

Bradley Oliphant, an attorney for the U.S. Department of Justice's Environment and National Resources Division, argued Friday that the plaintiffs were suing the wrong agency. He has filed motions to dismiss the lawsuit for that reason.

If the two Maine environmental groups opposed reconstruction of the dam, they should have challenged FERC, not the Marine Fisheries Service, Oliphant said.

"They had a duty to seek party status to intervene," he told the judge.

Moreover, the fisheries service, acting on the Endangered Species Act, has no authority to stop a FERC-approved project, Oliphant said; it can only make recommendations.

If the fisheries service were to tell FERC to stop the project, "FERC can say, 'Pound sand,'" Oliphant said.

Because the plaintiffs sat out the FERC licensing process, they are attempting an “end run” around it now, Oliphant said. At this point, the plaintiffs’ only option is to challenge the fisheries service’s “biological opinion,” once it is rendered after the project’s completion, he said.

Oliphant said the environmental groups’ attorney had not offered evidence of any harm that would result from the reconstruction of the dam.

“They have to prove that irreparable harm is likely without the injunction,” he said.

Ongoing monitoring of the salmon by biologists is taking place, he said.

The plaintiffs’ attorneys called as a witness Jeffrey Murphy, a fishery biologist in the Atlantic Salmon Program of the Northeast Regional Office of the National Marine Fisheries Service.

Murphy, who agreed that the Worumbo dam area is a critical habitat for Atlantic salmon, said dams can have an adverse effect on salmon habitat in general.

He said his agency would like to see at least 500 adult Atlantic salmon return every year to the Androscoggin and Kennebec rivers, where fewer than 10 were recorded returning to each river in 2010.

Under cross-examination by Oliphant, Murphy said he wasn’t aware of any toxins in the water at the dam site and that there were no dead, injured or stranded salmon recorded there.

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