

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ATLANTIC SALMON)
FEDERATION U.S., et al.,)
)
Plaintiffs,)
)
v.) 1:21-cv-00257-JDL
)
MERIMIL LIMITED)
PARTNERSHIP, et al.,)
)
Defendants.)

ORDER ON DEFENDANTS' MOTION TO STAY CASE OR EXTEND
SCHEDULE

Defendants Merimil Limited Partnership, Hydro-Kennebec LLC, Brookfield White Pine Hydro LLC, and Brookfield Power US Asset Management LLC filed a motion (ECF No. 51) to stay this case until the National Marine Fisheries Service (“NMFS”) issues a biological opinion concerning proposed amendments to the licenses of the four hydroelectric dams at issue in this litigation and the proposed relicensing of one of those same dams. In the alternative, the Defendants request a 60-day extension of the deadlines in the Scheduling Order (ECF No. 46). For reasons that follow, I deny the request to stay the case and grant the request to extend the deadlines.

I. BACKGROUND

Substantial background about this Endangered Species Act (“ESA”) litigation involving the endangered Gulf of Maine Distinct Population Segment of Atlantic salmon (“Atlantic Salmon”) and the four dams at issue appears in my recent order (ECF No. 59) denying the Motion for a Preliminary Injunction (ECF No. 10) filed by

Plaintiffs Atlantic Salmon Federation U.S., Conservation Law Foundation, Maine Rivers, and the Natural Resources Council of Maine. *See Atl. Salmon Fed'n U.S. v. Merimil Ltd.*, 1:21-cv-00257, 2022 WL 558358, at *1-3 (D. Me. Feb. 24, 2022). The following additional facts provide the necessary context for this order.

After NMFS initiated its formal consultation in December 2021 on the proposals to amend the licenses at Lockwood Project, Hydro-Kennebec Project, Shawmut Project, and Weston Project and to relicense Shawmut Project, NMFS asked the Federal Energy Regulatory Commission (“FERC”) for a 60-day extension. FERC’s response to NMFS’s extension request is not in the record. If FERC approves the request, the deadline for NMFS’s biological opinion would be extended from April 15, 2022 to June 15, 2022. The Defendants would need to consent to any extension beyond June 15. *See* 50 C.F.R. 402.14(e) (2021).

The proposed license amendments that NMFS is studying through the consultation process would require the Defendants to adhere to new species-protection plans at the dams.¹ NMFS’s biological opinion about the four license amendments and the relicensing will feed into a second ongoing administrative process: FERC’s preparation of an environmental impact statement, due in February 2023, to comprehensively evaluate the environmental consequences of the same proposed actions. *See* Notice of Intent to Prepare an Environmental Impact

¹ To describe just a few elements of the proposed plans, at Lockwood Project, the Defendants would need to “construct and operate permanent volitional passage in the Lockwood bypass reach”; at Hydro-Kennebec Project, they would need to “relocate the existing bypass entrance and Worthington boom, increase the capacity of the downstream bypass to 5 percent of station flow, and install an Alden-style weir”; and at Weston Project, they would need to “construct and operate an upstream fish lift adjacent to the existing log sluice” and “modify the downstream bypass by adding an upturned lip to the end of the sluice to dissipate discharge.” ECF No. 51-7 at 3-5.

Statement, 86 Fed. Reg. 67931, 67932 (Nov. 30, 2021). This second administrative process is happening under the National Environmental Policy Act (“NEPA”), which requires federal agencies to “include in every recommendation . . . for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement” on “the environmental impact of the proposed action” and “alternatives to the proposed action.” 42 U.S.C.A. § 4332(C) (West 2022). The NEPA process will help FERC decide whether the agency wants to pursue license amendments for the four dams and the relicensing of Shawmut in light of the reasonably foreseeable environmental impacts, including but not limited to the consequences for Atlantic Salmon. *See* 40 C.F.R. § 1508.1(g) (2021); *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 754 (2004) (NEPA “ensure[s] both that an agency has information to make its decision and that the public receives information so it might also play a role in the decisionmaking process.”).

When NMFS agreed to initiate formal consultation, the agency advised FERC that the Defendants’ authority to incidentally take Atlantic Salmon pursuant to any incidental take statement that may appear in the forthcoming biological opinion “will not be effective unless and until FERC requires compliance with any [of the incidental take statement’s] Reasonable and Prudent Measures and Terms and Conditions through enforceable terms in the amendment of licenses and/or the issuance of a new or subsequent license.” ECF No. 51-12 at 3. And, according to NMFS, “FERC cannot proceed with any licensing decision or the amendment of existing licenses until the conclusion of its responsibilities under the National Environmental Policy Act.” ECF No. 60-1 at 2. NMFS has also informed FERC that, “[s]hould one or more of your

proposed actions change because of your findings in the [environmental impact statement], it is likely that we will need to reinitiate ESA consultation to consider the effects of the modified action(s).” ECF No. 51-12 at 2-3.

II. STAY REQUEST

The Defendants first argue that I should stay this case pursuant to the primary jurisdiction doctrine. “The doctrine of primary jurisdiction is a prudential doctrine developed by the federal courts to promote accurate decisionmaking and regulatory consistency in areas of agency expertise.” *Ass’n of Int’l Auto. Mfrs., Inc. v. Comm’r, Mass. Dep’t of Env’t Prot.*, 196 F.3d 302, 304 (1st Cir. 1999). “[I]f a court concludes that an issue raised in an action before the court is within the primary jurisdiction of an agency, the court will defer any decision in the action before it until the agency has addressed the issue that is within [the agency’s] primary jurisdiction.” *Id.* (quoting 2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 271 (3d ed. 1994)).

“[T]here is ‘no fixed formula’ for applying the primary jurisdiction doctrine” *Conservation L. Found., Inc. v. Exxon Mobil Corp.*, 3 F.4th 61, 72 (1st Cir. 2021) (alteration omitted) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). Nevertheless, the First Circuit has “recognized three principal factors that guide whether to defer a matter to an agency: ‘(1) whether the agency determination lies at the heart of the task assigned the agency by Congress; (2) whether agency expertise is required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court.’” *Id.* (alterations omitted) (quoting *Massachusetts v. Blackstone Valley Elec.*

Co., 67 F.3d 981, 992 (1st Cir. 1995)). “[T]he third [*Blackstone*] factor can outweigh the other factors, and sometimes greatly so.” *Id.* at 73. “After considering the *Blackstone* factors, we balance them ‘against the potential for delay inherent in the decision to refer an issue to an administrative agency.’” *Id.* at 74 (quoting *Am. Auto. Mfrs. Ass’n v. Mass. Dep’t of Env’t Prot.*, 163 F.3d 74, 81 (1st Cir. 1998)).

The Defendants assert that the three *Blackstone* factors favor a stay until NMFS issues the biological opinion. The Defendants also argue that a stay pursuant to the primary jurisdiction doctrine is especially appropriate because the issuance of the biological opinion may moot this case. More specifically, the Defendants reason that the Plaintiffs’ claims are predicated on the Defendants’ lack of incidental take authority and that the issuance of a biological opinion with a new incidental take statement would cure that deficiency, if the taking complies with the statement’s terms and conditions. Finally, the Defendants argue that the Plaintiffs’ interests would not be harmed by the requested stay because the next migration season for Atlantic Salmon will not begin until April 1, 2022, so the overlap between the stay and migration season would be short. The Defendants also state their intention to take voluntary steps during the upcoming migration season to protect out-migrating Atlantic Salmon.

The Plaintiffs respond that the primary jurisdiction doctrine does not call for a stay here because this litigation is about the ongoing unauthorized take of Atlantic Salmon, not the specific terms governing the Defendants’ incidental take permit. As such, waiting for NMFS to unravel the intricate and technical facts that pertain to the terms of a future incidental take statement would not materially aid my decision-

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