

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

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FRIENDS OF MERRYMEETING BAY and  
ENVIRONMENT MAINE,

Plaintiffs,

Civil Action No. 1:11-cv-35-GZS

v.

BROOKFIELD POWER US ASSET MANAGEMENT,  
LLC, and HYDRO KENNEBEC, LLC,

Defendants.

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**PLAINTIFFS' MOTION TO CONSOLIDATE MAINE DAM CASES  
FOR TRIAL AND FOR DEPOSITIONS OF PLAINTIFFS' WITNESSES**

Plaintiffs Friends of Merrymeeting Bay (“FOMB”) and Environment Maine respectfully ask that this action against Defendants Brookfield Power US Asset Management, LLC, and Hydro Kennebec LLC (“the Brookfield Defendants”) be consolidated under Fed. R. Civ. P. 42(a) for trial and for depositions of Plaintiffs’ witnesses with three similar actions presently pending before the Court, involving Defendants Miller Hydro Group (“Miller Hydro”) (C.A. No. 2:11-cv-36), Topsham Hydro Partners Limited Partnership (“Topsham Hydro”) (C.A. No. 2:11-cv-37-GZS), and NextEra Energy Resources, LLC, NextEra Energy Maine Operating Services, LLC, FPL Energy Maine Hydro, LLC, and The Merimil Limited Partnership (collectively, “the NextEra Defendants”) (C.A. No. 2:11-cv-38-GZS) (collectively, all four cases hereinafter will be referred to as the “Dam Cases”).<sup>1</sup> All of the Dam Cases were commenced on the same date, have the same discovery and pre-trial schedule, and are scheduled for a July 2, 2012 trial.

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<sup>1</sup> Counsel for Plaintiffs conferred with counsel for each set of Defendants regarding consolidation prior to filing this motion; all objected to consolidation.

## ARGUMENT

### **I. THE STANDARDS FOR RULE 42(a) CONSOLIDATION.**

Rule 42(a) of the Federal Rules of Civil Procedure provides:

If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or
- (3) issue any other orders to avoid unnecessary cost or delay.

“Rule 42(a) is designed to encourage consolidation where common questions of law or fact are present.” Gonzalez-Quiles v. Cooperativa de Ahorro Y Credito de Isabela, 250 F.R.D. 91, 92 (D. P.R. 2007). “A motion for consolidation will usually be granted unless the party opposing it can show ‘demonstrable prejudice.’” Seguro de Servicio de Salud de Puerto Rico v. McAuto Systems Group, Inc., 878 F.2d 5, 8 (1st Cir. 1989) (citations omitted).

For a consolidation motion, “[t]he threshold issue is whether the two proceedings involve a common party *and* common issues of fact or law. [Citation omitted]. Once this determination is made, the trial court has broad discretion in weighing the costs and benefits of consolidation to decide whether that procedure is appropriate.” Id. (emphasis in original); New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 5 (1st Cir. 1988) (same); J.J.R. Distributing Corp. v. Sandler Bros., 2009 U.S. Dist. LEXIS 66773, at \*2 (D. Me. July 29, 2009) (same). More specifically, consolidation is appropriate to avoid, *inter alia*, “(1) overlapping trials containing duplicative proof; (2) excess cost incurred by all parties and the government; [or] (3) the waste of valuable court time in the trial of repetitive claims.” Vazquez Rivera v. Congar Int’l Corp., 241 F.R.D. 94, 95 (D.P.R. 2007).

## **II. THE DAM CASES INVOLVE COMMON QUESTIONS OF LAW AND FACT.**

The four cases involve the same Plaintiffs suing under the same cause of action, 16 U.S.C. § 1540(g), the citizen suit provision of the Endangered Species Act (“ESA”). All four suits seek to prevent the “take” of endangered Atlantic salmon, which is prohibited by Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B). As this Court noted in ordering that this case be assigned the same Magistrate Judge as the other Dam Cases, “the court concludes that the claims of all four cases [are] similar.” FOMB v. Brookfield Renewable Power, Inc., 2011 U.S. Dist. LEXIS 4472, at \*1 (D. Me. April 26, 2011) (Docket No. 1:11-cv-35, docket entry 15).<sup>2</sup>

The defendants in all four cases are owners or operators of hydroelectric dams on one or both of adjacent Maine rivers (the Androscoggin and the Kennebec). Plaintiffs allege that each of the defendants is “taking” salmon in much the same fashion, for a common set of reasons having largely to do with the essential nature of dams. Specifically, the Complaints in each case allege that Defendants’ dams:

- a. kill and injure out-migrating salmon when the salmon attempt to pass through turbines;
- b. severely limit upstream passage of salmon, preventing access to significant amounts of spawning and rearing habitat;
- c. delay passage, resulting in incremental losses of salmon smolts, pre-spawn adults, and adults;
- d. create a barrier to the migration of other fish whose presence is necessary for the salmon to complete their life cycle;

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<sup>2</sup> In two of the cases, those against the NextEra and Brookfield Defendants, Plaintiffs have also sued to enforce water quality certifications issued under the Clean Water Act (“CWA”), 33 U.S.C. § 1341, which prohibit those defendants from allowing adult Atlantic salmon or shad to pass through the turbines of their Kennebec River dams without requisite proof that such passage will not cause significant harm to the fish. The water quality certifications for each of the four Kennebec River dams are virtually identical. See NextEra Compl. ¶36; Brookfield Subst. Compl. ¶35. Most factual matters relating to this claim (such as the presence of salmon in the Kennebec River and the impact of turbine passage on migrating salmon), and thus much of the lay and expert testimony to be offered on these matters, overlap with the ESA “take” claim.

e. adversely alter predator-prey assemblages, such as the ability of the salmon to detect and avoid predators;

f. create slow-moving impoundments in formerly free-flowing reaches, which makes habitats less suitable for spawning and rearing of salmon and contribute to the significant impairment of essential behavior patterns of the salmon;

g. cause adverse hydrological changes, adverse changes to stream and river beds, interruption of natural sediment and debris transport, and changes in water temperature, all of which contribute to the dams' significant impairment of essential behavior patterns.

Brookfield Subst. Compl. ¶ 27; Miller Hydro Compl. ¶ 24; Topsham Hydro Compl. ¶ 24; NextEra Compl. ¶ 28;<sup>3</sup>

The defenses asserted in all four cases are virtually the same. Miller Hydro, Topsham Hydro, and the NextEra Defendants filed nearly identical motions to dismiss.<sup>4</sup> The Brookfield Defendants have now filed their own motion to dismiss, raising these issues once again.<sup>5</sup> The same four or five defenses, with minor variations, are asserted in each of the Defendants' Answers.<sup>6</sup> (Miller Hydro and Topsham have hired the same counsel and in fact filed identical motions to dismiss and Answers.) All of these defenses involve a set of common factual questions. Similarly, if liability is found, the degree and timing of salmon-protection measures to be ordered will also involve common questions, such as the state of fish passage technology and standards for operating practices in the hydropower industry, and facts relating to fish biology and behavior.

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<sup>3</sup> The complaints are docket entry 1 in all four cases.

<sup>4</sup> Docket entry 7 in the Miller Hydro case; docket entry 7 in the Topsham Hydro case; docket entry 13 in the NextEra case.

<sup>5</sup> Docket entry 31 in the Brookfield case, filed October 12, 2011.

<sup>6</sup> Docket entries 13 and 24 in the Brookfield case; docket entry 18 in the Miller Hydro case; docket entry 18 in the Topsham Hydro case; docket entry 40 in the NextEra case;.

The basic factual background in all four cases is also the same: the dire situation for Atlantic salmon; the history of listing the species as endangered; designation of “critical habitat” for the fish, which includes the two rivers at issue in these cases; the fact that the two rivers are located in the same “salmon habitat recovery unit” (the “Merrymeeting Bay SHRU”) by the National Marine Fisheries Service (“NMFS”) for purposes of developing and evaluating the species recovery effort;<sup>7</sup> and the adverse effect of the dams on Plaintiffs’ members’ use and enjoyment of the rivers (which establishes their standing to bring these suits).

**III. THERE ARE SIGNIFICANT BENEFITS TO CONSOLIDATING THE CASES FOR TRIAL.**

All four cases will be bench trials.<sup>8</sup> A great deal of the evidence to be presented at the trial in each of the Dam Cases will be the same. Consolidating the cases for trial would allow presentation of that evidence to the Court once instead of four times, thus saving court time and expenses for the parties.

For instance, there is much evidence in government documents that will be submitted, and about which witnesses will testify, in all four cases. The federal rule listing the Kennebec and Androscoggin River salmon populations as endangered contains a wealth of information on the status of the fish in each river and the effects of the rivers’ dams on their survival; the same is true of the rule designating critical habitat for the species. Official salmon return statistics, fact sheets on the Atlantic salmon species, and other government documents will also be used. In addition, evidence on salmon-protection measures being taken at other dams (on the Kennebec

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<sup>7</sup> “Designation of Critical Habitat for Atlantic Salmon (*Salmo salar*) Gulf of Maine Distinct Population Segment; Final Rule,” 74 Fed. Reg. 29,300 (June 19, 2009).

<sup>8</sup> Compare J.J.R. Distributing, 2009 U.S. Dist. LEXIS 6773, at \* 4 (fact that one case is a bench trial and another is a jury trial weighs against consolidation).

and Androscoggin, as well as on other rivers) will be relevant in all four cases to the question of whether Defendants' salmon-protection measures fall short.

In addition, Plaintiffs anticipate that they will present testimony from the same expert witnesses in all four cases. Oxford Aviation, Inc. v. Constellation Brands, Inc., No. 2:08-cv-419, at p. 3 (D. Me. September 30, 2011) (Order on Motion to Consolidate available on the District Court's website) (listening to the same witnesses at trial weighs in favor of consolidation). These expert witnesses will likely cover a variety of topics, such as those relating to salmon habitat, population biology, and fish passage efficiency at dams, *inter alia*, that will be relevant to all four cases. Plaintiffs expect that some of these witnesses will be from the West Coast (where considerable experience and expertise with salmon-protection issues has been developed) and Canada, and it will be difficult to schedule their appearance at four different trials.

Plaintiffs also expect the same witnesses to testify regarding standing issues, *i.e.*, the manner in which Plaintiffs' members are adversely affected by Defendants' alleged violations of the ESA and CWA.

Further, consolidation would enable the Court to more easily fashion relief in an equitable and efficient manner, since it would be able to assess and coordinate the relief needed at the various dams in the same proceeding.

In this District there is precedent for consolidating the trials of environmental citizen suits. In United States Public Interest Research Group v. Atlantic Salmon of Maine, LLC, 257 F. Supp. 2d 407 (D. Me. 2003), conservation groups brought citizen suits against two aquaculture companies for violating the CWA at their many salmon farms, which were located at a number of different sites in Down East coastal waters. Liability against both companies was established through summary judgment, and the two cases were consolidated for purposes of a trial on

remedy. As the extensive order granting a remedy shows, the Court considered facts and expert opinions that were common to both cases, but also considered facts unique to each company and tailored relief accordingly.

**IV. THE BENEFITS OF CONSOLIDATING THE CASES FOR PURPOSES OF DEPOSING PLAINTIFFS' WITNESSES FAR OUTWEIGH THE COSTS.**

As noted above, Plaintiffs expect to call the same expert and standing witnesses to testify in all four cases. Scheduling each of these witnesses for four wholly separate depositions would waste time and money. It would make considerably more sense, Plaintiffs respectfully suggest, for each witness to be questioned by lawyers for all Defendants at the same deposition. For matters that relate to all of the cases, such as the backgrounds of the standing witnesses, the experience and qualifications of the experts, and the parts of their opinions that are not specific to a particular dam (*e.g.*, matters relating to fish biology, or fish passage measures being taken at other dams), questioning can be conducted by all Defendants *ad seriatim* (Plaintiffs would not object to lawyers for all four sets of Defendants asking questions, as long as they are not duplicative). To the extent there are defendant-specific matters in an expert's report or a standing witness's declaration, the parties can work out a plan for individual questioning on limited topics as part of a single deposition. Similarly, in the unlikely event the questioning of any of these witnesses will touch upon a defendant's confidential information, a process can be worked out to maintain confidentiality.

While this arrangement might make the scheduling of depositions somewhat more complicated for the attorneys to work out, Plaintiffs do not anticipate that scheduling will be an insurmountable problem, and they submit that the overall efficiency gains for the witnesses and the parties would justify any such increased inconvenience.

**V. DEFENDANTS WOULD NOT BE PREJUDICED BY CONSOLIDATION.**

Plaintiffs are aware of no prejudice that would occur as a result of consolidating the Dam Cases for trial and for the depositions of Plaintiffs' witnesses. As this Court stated previously, in FOMB v. Brookfield Renewable Power, Inc., 2011 U.S. Dist. LEXIS 4472, at \*1 (Docket No. 1:11-cv-35, docket entry 15):

[T]he court concludes that the claims and the procedural posture of all four cases is similar. Under these circumstances, it serves the interests of justice and judicial efficiency to have the same magistrate judge assigned to all four cases.

All the cases are at the same stage: discovery has just begun and no depositions have yet been taken. The amended Scheduling Orders for all of the cases are the same.<sup>9</sup> Compare, J.J.R. Distributing, 2009 U.S. Dist. LEXIS 6773, at \*1 (denying consolidation because, among other reasons, discovery had proceeded further in one case). Although the Brookfield Defendants have newly filed a motion to dismiss, discovery in this case is proceeding simultaneously.

Plaintiffs note that the Brookfield Defendants have already acknowledged the likelihood and utility of consolidation in an earlier filing, a Joint Motion to Amend Scheduling Order (docket no. 27 in that case), stating at ¶8A: "The underlying claims in [the other] three cases, under the Clean Water Act and the Endangered Species Act, are the same as the claims in this case. As a matter of judicial economy, all four cases will, in all likelihood, be consolidated..." Moreover, the NextEra Defendants have acknowledged that all four of their dams – three on the Kennebec and one on the Androscoggin – may be addressed in the same proceeding.<sup>10</sup>

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<sup>9</sup> Docket entries 25, 30, and 34 in the Brookfield case; docket entries 19 and 21 in the Miller Hydro case; docket entries 19 and 21 in the Topsham Hydro case; and, docket entries 42 and 44 in the NextEra case.

<sup>10</sup> In the event the Court is disinclined at this time to consolidate the cases for trial, Plaintiffs respectfully request that the Court consider consolidating the cases at least for the purposes of depositions of Plaintiffs' witnesses.

**CONCLUSION**

For the reasons set forth above, Plaintiffs request that their motion be granted.

Dated: October 28, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2011, I electronically filed on behalf of the above-named Plaintiffs the above Motion To Consolidate Maine Dam Cases with the Clerk of Court using the CM/ECF system, which will send notification of such filings to all other counsel of record.

/s/ Bruce M. Merrill  
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