

establishment of a Habitat Conservation Plan (“HCP”), developed with technical assistance from, and ultimately approved by, the Services. 16 U.S.C. §1539. An ITP will not be issued without an approved HCP. Thus, the HCP is at the heart of this case. Indeed, Plaintiffs’ requested relief includes that the Defendants be ordered to apply for an ITP. Amended Complaint, Dkt. 27.

Defendants have already released, and provided to the Plaintiffs, draft sections of the HCP which assess the impacts of the dams on the species of concern. Moving forward, additional sections of the HCP will describe the performance standard which the dams must achieve in order to achieve recovery of the species, the steps that the Licensees must take in order to ensure attainment of that performance standard, and any mitigation programs that will be implemented. The draft of these critical sections will be released for review by the Services and the Technical Advisory Committee (“TAC”), which is assisting the Licensees and the Services in developing the HCP, on February 29, 2012, one day *after* the date agreed upon between the parties on which Defendants’ Expert Reports are currently due.¹

Both Plaintiffs’ and Defendants’ expert witnesses should have the opportunity to consider these materials, which are highly relevant to this case. Such materials are also relevant to the 30(b)(6) depositions of Defendants, scheduled to begin on February 29, 2012 – the same day that the draft HCP will be released. Most of the topics identified by the Plaintiffs in their deposition notice will be impacted by the provisions of the HCP.

¹ Although Amended Scheduling Order currently provides that defendants’ expert reports would be served on February 16, 2012, the Plaintiffs asked for, and the Defendants consented to, a five-day extension in the service of Plaintiffs’ expert reports, with a concomitant five-day delay in Defendants’ response, making the Defendants’ expert reports due February 21, 2012. However, as an accommodation to long-scheduled vacation plans of Defendants’ counsel, Plaintiffs have agreed to extend that date to February 28, 2012.

Defendants thus proposed to the plaintiffs that, following issuance to the public of the draft HCP sections, the Plaintiffs would be provided a two-week period, until March 14, 2012, to supplement their expert reports. Defendants' expert reports would then be due two weeks later, on March 28, 2012. Defendants also proposed that the Rule 30(b)(6) deposition be rescheduled for a date convenient to the parties after the plaintiffs have had an opportunity to review the HCP sections released on February 29.

Following the requested dates for Expert Designations, all subsequent deadlines, except for the trial date would be extended as follows:

- a. Further Matters in Aid of Disposition: Extend deadline by two weeks so that Plaintiff shall make a written settlement demand by March 14, 2012, and the Defendants shall respond in writing by March 28, 2012.
- b. Discovery Deadline: April 27, 2012
- c. Deadline to Identify and Produce Local Rule 44 records: April 27, 2012
- d. Deadline to File Notice of Intent to File Motion for Summary Judgment and Need for Pre-Filing Conference: May 4, 2012
- e. Deadline for Dispositive Motions and All Daubert and Kumho Motions: May 18, 2012.

Defendants' counsel consulted with Plaintiffs' counsel regarding this motion, but they did not consent. Plaintiffs emailed Defendants' counsel a written explanation of their opposition this morning. A copy of that letter is attached as Exhibit A to this motion. None of the grounds stated in Plaintiffs' letter justifies their opposition to the short extension sought by Defendants.

Plaintiffs first note that Defendants have not provided any preliminary drafts of the HCP to Defendants' experts and thus must "bear the consequence of that decision." However,

Defendants have shared drafts of sections of the HCP with their experts when those non-privileged drafts have been released to the public, including the Services and the TAC, for review and comment. Plaintiffs fail to understand that, until that time, there is no draft which in fact spells out the Licensees' position regarding what performance standard is necessary to achieve recovery, what measures must be taken to attain that performance standard, and what other mitigation measures may be necessary and appropriate. Defendants' experts are reviewing and opining upon the Licensees' position on these issues; until those positions have been determined, they are not in a position to opine usefully to the Court.

Plaintiffs' next argument against the motion is that, because the drafts will only be "preliminary", the schedule should not be extended; the final HCP may differ. In other words, Plaintiffs try to have it both ways. Not only are Defendants too late in sharing the HCP drafts with their experts, Defendants are also too early. However, the point is not whether the HCP may change before it is issued. The case, at this point, is not about the terms of the HCP.² The point is that the draft HCP released to the public embodies what the Licensees believe to be necessary to achieve restoration of the species. It seems obvious that a significant role of the experts – for both Plaintiffs³ and Defendants – will be to opine concerning the appropriateness of the measures proposed by the Licensees.

² Defendants still believe that this Court should stay or dismiss this action to allow the Services to make appropriate administrative decisions concerning the HCP and ITP. However, Defendants acknowledge the Court's decision to deny Defendants' motion, subject to refile. Thus, as noted above, the point of this motion is not to renew Defendants' motion to stay or dismiss, but simply to point out that the schedule should reflect the parties' experts' ability to opine on Licensees' proposals.

³ If Plaintiffs do not choose to supplement their expert reports based on the draft HCP sections to be released on February 29, that would be their choice. In that case, Defendants would be willing to provide their expert reports on March 14, and the other deadlines could be advanced two weeks earlier. Defendants' proposal was simply trying to accommodate what they assumed would be Plaintiffs' desire to supplement their expert reports.

Third, Plaintiffs note that there is no guarantee that the draft HCP sections will in fact be released on February 29. That is true. However, it is Defendants' expectation and intent to issue the drafts by that date, and the limited uncertainty concerning the release seems a small price to pay to ensure that the experts in fact are opining about the significant issues in the case.

Next, Plaintiffs assert that the suggested delay is impractical, given the other deadlines. The Court will have to make this determination, but the Defendants do not believe that the delay would be difficult to manage. Indeed, as the schedule currently stands, all discovery now must be completed in the next five or six weeks. Even aside from the need to accommodate expert assessment of Licensees' plans, it already appears that there is more room in the schedule at the back end than in the discovery phase.

Finally, Plaintiffs note that reports can always be supplemented. That is true, but meaningless in this context. It is one matter to allow supplementation when some unforeseen event occurs after the initial report has been issued. Here, there is nothing unforeseen. Not only do we know that expert reports – at least those of Defendants – would have to be supplemented, the supplements will become a main focus of the expert opinions. Moreover, even following a supplementation pathway would not address how to accommodate expert depositions. Defendants would not want to depose Plaintiffs' experts prior to supplementation. Defendants assume that Plaintiffs would want to depose Defendants' expert following any supplemental report. In that case, the depositions would have to wait anyway. It would be nearly impossible to conduct the expert depositions within the current time frame, but following issuance of supplemental reports.

For all of these reasons, Plaintiffs' objections carry no weight and the Court should extend the schedule as requested herein. In fact, Plaintiffs' opposition appears more concerned

with obtaining tactical advantage over the Defendants than in a reasonable, ordered, pre-trial schedule which maximizes the truth-seeking, objective inherent in pre-trial discovery. Plaintiffs' position is demonstrated by their request that the defendants should release any privileged, internal drafts of the relevant HCP sections, thus permitting the Rule 30(b)(6) deposition to go forward without delay to accommodate public release of the HCP sections. However, as noted above, any internal drafts do not in fact reflect what the Licensees will actually propose for a performance standard, measures to attain that standard, or appropriate mitigation measures. Those matters will not be known until the draft is finalized and released on February 29, 2012. Thus, Plaintiffs' position seems intended to require the Defendants to disclose their attorneys' thoughts and comments to the Plaintiffs, because the Plaintiffs would then have an opportunity to compare internal working drafts to the publicly released drafts and thus have an unauthorized and inappropriate window into the development of Defendants' thinking on these critical issues. Defendants note that, taken to its logical limit, Plaintiffs' position that Defendants should release any available internal drafts would require Defendants and their consultants to stop after each paragraph, or each page, or each day, and make disclosure to the Plaintiffs of that paragraph or that page, or that days' work.⁴

Finally, Defendants note that they are aware of the pending related cases, *Friends of Merrymeeting Bay v. Brookfield Renewable Power, Inc.*, 1:11-cv-00035-GZS, *Friends of Merrymeeting Bay v. Miller Hydro Group*, 2:11-cv-00036-GZS, *Friends of Merrymeeting Bay v.*

⁴ Defendants assume that, should this Court allow this motion, Plaintiffs would then in fact agree to reschedule the deposition so that they may utilize the HCP sections to be released on February 29 in their questioning. Whether plaintiffs agree to such a delay, however, if the Plaintiffs continue to seek release of privileged internal drafts, then Defendants would, as appropriate, be forced to seek a protective order against release of such drafts. If Plaintiffs choose to proceed with the deposition on February 29, 2012, Defendants would also then oppose any effort by the Plaintiffs to keep the deposition open past March 2, 2012, just so that Plaintiffs may question Defendants concerning the HCP. The solution to that self-created dilemma would for Plaintiffs instead to agree to delay the deposition, but they should not be permitted two bites at the apple.

Topsham Hydro Partners Limited partnership, 2:11-cv-00037-GZS, and that those cases share a common pre-trial schedule with this case. Defendants' counsel in this case has consulted with defendants' counsel in those cases and can report that they consent to the revisions in the schedule proposed herein. Thus, all the cases would remain on a common pre-trial schedule.

WHEREFORE, the NextEra Defendants respectfully request that the Court

1. Amend the Scheduling Order in this matter, as follows:
 - a. Plaintiffs' Rule 30(b)(6) deposition of the Defendants be rescheduled to a date or dates after February 29, convenient to the parties, when both parties have had an opportunity to review the draft HCP sections to be provided on February 29, 2012.
 - b. Plaintiffs may supplement their expert reports by no later than March 14, 2012.
 - c. Defendants' expert reports shall be served no later than March 28, 2012.
 - d. Further Matters in Aid of Disposition: Plaintiff shall make a written settlement demand by March 14, 2012, and the Defendants shall respond in writing by March 28, 2012.
 - e. Discovery Deadline: April 27, 2012
 - f. Deadline to Identify and Produce Local Rule 44 records: April 27, 2012
 - g. Deadline to File Notice of Intent to File Motion for Summary Judgment and Need for Pre-Filing Conference: May 4, 2012
 - h. Deadline for Dispositive Motions and All Daubert and Kumho Motions: May 18, 2012; and
2. Grant such other and further relief as it deems proper.

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THE MERIMIL LIMITED PARTNERSHIP
By their attorneys,

/s/ Seth D. Jaffe

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Dated: February 14, 2012

Certificate of Service

I hereby certify that on this 14th day of February, 2012, I electronically filed the within document with the Court's CM-ECF system, which automatically sends notification to counsel of record.

/s/ Seth D. Jaffe

Seth D. Jaffe (MA BBO No. 548217)