

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY and
ENVIRONMENT MAINE,

Plaintiffs,

Civil Action No. 2:11-cv-00036

v.

MILLER HYDRO GROUP,

Defendant.

**PLAINTIFFS' OPPOSITION TO MILLER HYDRO GROUP'S
MOTION TO ENLARGE DISCOVERY AND RELATED DEADLINES**

Plaintiffs oppose Miller Hydro Group's ("Miller") motion to enlarge discovery related deadlines, including the expected trial date. The grounds for the opposition are set forth below.

**I. DEFENDANTS SEEK AN EXTENSION TO SERVE EXPERT REPORTS
LONGER THAN THE TIME COUNSEL WILL BE ON VACATION.**

Miller's counsel states they will be out of the office on vacation for "most" (not all) of this week. (Obviously, Miller's counsel will be working – they asked for an "immediate conference" on this motion). They do not actually state that their experts are unavailable this week (or even at all). Nonetheless, Plaintiffs accommodated Miller's counsel's vacation schedule by agreeing to a full one-week extension (from Tuesday, February 21, to the next Tuesday) for Miller to serve its expert reports. Miller wants more – an additional three days.

Miller has had Plaintiffs' expert reports since January 16, 2012, yet did not file the instant motion until after 4:00 p.m. on a Friday, February 17, 2012 – and only after being first contacted by the Court to respond to NextEra's motion for an extension.¹ By asking for an immediate

¹ Plaintiffs note that the NextEra defendants did not ask for an extension of the trial date.

conference with the Court, Miller necessitated Plaintiff's counsel (who is visiting his parents out of town over President's Day weekend) to draft this opposition on a holiday weekend. Such is life and litigation. This case is heading towards trial. It is time for Defendants to file their expert reports so Plaintiffs can depose the experts and move on.

II. THE PRETRIAL AND TRIAL SCHEDULE SHOULD NOT BE CHANGED.

Miller wants to enlarge the pretrial deadlines and the trial date because there will be a lot of depositions to take. This is unfair. *Neither Miller nor any Defendant in any of the other three related cases has noticed any depositions, or even asked Plaintiffs' counsel to schedule any depositions.* By contrast, in the four cases, Plaintiffs have thus far deposed Defendants in one of the cases, noticed the deposition of Defendants in the three other cases, deposed a consultant for two of the Defendants, and issued subpoenas for two more consultant depositions. (Plaintiffs have not noticed depositions of Defendants' experts because they do not yet know who they are and have not received their reports).

By hanging back and not scheduling depositions, Miller has created a self-imposed logjam at the end of the discovery period. Miller (and the other Defendants) should not be rewarded for, and Plaintiffs' interest in a speedy resolution should not be prejudiced by, in the words of one court, a "rope-a-dope approach." Driver v. Town of Richmond, 570 F. Supp. 2d 269, 272 (D. R.I. 2008).

There certainly was nothing preventing Defendants from taking depositions within the last month. For instance, one of Plaintiffs' experts, Maximilian Chang, will testify that should the Court order a shutdown of turbines during salmon migration periods, there would be no adverse impact to the New England electric power grid or the local electric system within Maine.

Defendants certainly are not awaiting any additional information to take Mr. Chang's deposition. Yet Plaintiffs have not heard from Defendants about a deposition of Mr. Chang.

As for the number of documents in this case, almost all of the documents Plaintiffs produced were either (1) publicly available documents obtained through FOIA requests from the very agencies Miller regularly deals with, or (2) from Miller's own consultant, HDR. Miller is thus already fully aware of their contents (or at least could have been, if they were interested) and review of these documents should not occasion any delay.

The fact is, Plaintiffs' experts had to submit their reports without benefit of many of Defendant's documents. Miller is engaged in a "rolling" production over the course of months, the most recent of which occurred on February 1, 2012. Miller will probably produce more documents between now and trial as they are newly generated, and Plaintiffs will have to live with that. Again, that is simply the nature of litigation.

Lastly, a trial delay will cause additional harm to the endangered salmon. Biologist Jeffrey Hutchings, who specializes in recovery of endangered fish populations, has submitted an expert report (summarizing the testimony he plans to give at trial) stating that "[g]iven the exceedingly low numbers of returning adults to the SHRU, most notably of fish of wild origin, the loss of a single smolt, or of a single adult, to human-induced causes is significant." Hutchings Report, p.2 (attached as Exhibit 1 to the Declaration of David A. Nicholas in opposition to Defendant's renewed motion for a stay, Docket No. 34-2). Accordingly, the trial of this action should be kept on its current schedule.

CONCLUSION

For the reason set forth above, Defendant's motion should be denied.

Dated: February 20, 2012

/s/ David A. Nicholas

David A. Nicholas
20 Whitney Road
Newton, Massachusetts 02460
(617) 964-1548
dnicholas@verizon.net

/s/ Bruce M. Merrill

Bruce M. Merrill
225 Commercial Street Suite 501
Portland, Maine 04101
(207) 775-3333
mainelaw@maine.rr.com

Joshua R. Kratka (*Pro hac vice*)
National Environmental Law Center
44 Winter Street, 4th Floor
Boston, Massachusetts
(617) 747-4333
josh.kratka@verizon.net

Charles C. Caldart (*Pro hac vice*)
National Environmental Law Center
1402 Third Ave., Suite 715
Seattle, Washington 98101
(206) 568-2853
ccnelc@aol.com

Joseph J. Mann (*Pro Hac Vice*)
National Environmental Law Center
369 Broadway Street, Suite 200
San Francisco, California 94133
(415) 622-0086 (ext. 306)
jmann@nelconline.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2011, I served the foregoing on behalf of the above-named Plaintiffs by filing it with the Court's CM-ECF system, which automatically sends notification to all counsel of record.

/s/ David A. Nicholas

David A. Nicholas
20 Whitney Road
Newton, Massachusetts 02460
(617) 964-1548
dnicholas@verizon.net