

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

---

FRIENDS OF MERRYMEETING BAY and  
ENVIRONMENT MAINE,

Plaintiffs,

C.A. No. 11-cv-38-GZS

v.

NEXTERA ENERGY RESOURCES, LLC;  
NEXTERA ENERGY MAINE OPERATING  
SERVICES, LLC; FPL ENERGY MAINE HYDRO, LLC  
and THE MERIMIL LIMITED PARTNERSHIP,

Defendants.

---

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION  
TO AMEND THE DISCOVERY SCHEDULE  
AND REQUEST FOR EXPEDITED RESOLUTION**

For the reasons set forth below, Plaintiffs oppose Defendants' motion to amend the discovery schedule ("Motion"). Plaintiffs respectfully request that the Court reset the deadline for Defendants' reply to be February 17, 2012, which is consonant with the period provided for reply in the Court's deadline reset filed today. Given the impending deposition schedule, Plaintiffs also respectfully request an expedited ruling on Defendants' motion.

**ARGUMENT**

Defendants have not complied with Local Rule 26(b), which provides, "[n]o written discovery motions shall be filed without the prior approval of a judicial officer." Accordingly, Defendants' motion should be dismissed. Additional grounds for the opposition are set forth below.

**I. DEFENDANTS' EXPERT REPORTS SHOULD NOT BE DELAYED.**

Defendants seek a one-month extension to file their expert reports on the grounds that an extension would give their experts an “opportunity to consider” draft sections of a habitat conservation plan (“HCP”) Defendants are preparing in connection with their attempt to obtain authorization to “take” salmon. Motion 2. Defendants’ “expectation and intent” is to make these draft HCP sections available to the public (and its own experts) on February 29. Motion 5. However, they admit there “is no guarantee that the draft HCP sections will in fact be released on February 29.” Id. For this reason alone – Defendants’ unwillingness to commit to a date certain regarding a matter within their own control – Defendants’ request should be denied.

Moreover, the February 29 date itself represents a delay of Defendants’ own making. In papers they previously filed with their unsuccessful motion to dismiss, Defendants represented to this Court that a preliminary draft of the HCP was to be generated by *February 1, 2012*, a month before their expert reports are currently due. Ex. 11 to Richter Declaration, Docket No. 14-11 (“HCP Process Schedule”). Defendants do not explain why this timetable was not met, or why it may change again. The pretrial schedule in this case must be set independently of the shifting timelines of an applicant-driven regulatory process.

Further, according to the HCP Process Schedule Defendants previously filed with the Court, the HCP to be released on February 29 is only a “preliminary draft.” Id. It will not have been reviewed by the federal agencies or by a Technical Advisory Committee NextEra has organized, and there is nothing preventing Defendants from themselves modifying the draft (indeed, presumably Defendants want the input of the Technical Advisory Committee before it finalizes its position on what should be included in the HCP). Thus, the ultimate draft of the

HCP may be very different from the preliminary draft. Expert reports and other pretrial deadlines should not be delayed for a “preliminary draft.”

Defendants’ experts have apparently not been given any drafts of the HCP, nor have the Defendants talked to them about these portions of the HCP. It is not as if the drafting of an HCP is a secret process. For some reason Defendants chose to wall off their experts from the company’s work; the fact that their experts must start at square one when the preliminary draft HCP is eventually released to the public is Defendants’ own fault.

Under the Federal Rules, expert reports can be supplemented. Thus, there would be no prejudice to NextEra from submitting its reports according to the current deadline. Moreover, Defendants offer no explanation as to why those portions of the expert reports that do not offer opinions on the forthcoming draft HCP should not be submitted as currently scheduled.

**II. THE 30(b)(6) DEPOSITION SHOULD NOT BE RESCHEDULED.**

Defendants ask the Court to order the 30(b)(6) deposition of the defendant companies to be rescheduled to a time “when both parties have had an opportunity to review the draft HCP sections to be provided on February 29, 2012.” Motion 7. There is no reason for delay. Obviously, Defendants will have already “reviewed” the preliminary draft HCP, *which is their own document* and which (supposedly) will be released the very next day. As for Plaintiffs, they are prepared to go forward with the deposition as scheduled.

**III. THE PROPOSED SCHEDULING ORDER AMENDMENT IS INFEASIBLE.**

According to Defendants, a delay in submission of their expert reports would necessitate an extension of other pretrial deadlines. Under the pretrial schedule sought by Defendants, the deadlines to file summary judgment and Daubert motions would be pushed back to May 18, 2012. This means those motions would not be fully briefed until June 22, 2012, just ten days

before the July 2, 2012 trial-ready date. This would make it difficult, if not impossible, for the Court to decide the motions before trial.

Moreover, Plaintiffs object to being required to supplement their expert reports by March 14, 2012. Plaintiffs have ordered their work on this and the three related cases against other dam owners based on the pretrial schedule set months ago. It would be a hardship for Plaintiffs to supplement their expert reports within two weeks of the public release of the preliminary draft HCP, given the heavy upcoming workload in the various cases.

Defendants state that their counsel has consulted with defendants' counsel in the other cases "and can report tha[t] they consent to the revisions in the schedule." Motion 7. Plaintiffs have not been contacted by counsel in the other cases seeking such a change in the schedule for their cases. Moreover, since their experts will not be commenting on NextEra's HCP there is no reason their expert reports and other pretrial schedules should be delayed for this (or any other) reason.

### CONCLUSION

For the reasons set forth above, Defendants' motion should be denied.

Dated: February 14, 2012

/s/ David A. Nicholas

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

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

/s/ Bruce M. Merrill

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

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

**CERTIFICATE OF SERVICE**

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

/s Bruce M. Merrill

Bruce M. Merrill