UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY AND ENVIRONMENT MAINE, Plaintiffs, v. BROOKFIELD POWER US ASSET MANAGEMENT, LLC, and HYDRO KENNEBEC, LLC, Defendants.	)	C.A. No. 11-cv-00035-GZS

BROOKFIELD'S OBJECTION TO MOTION CONSOLIDATE

Defendants Brookfield Power US Asset Management, LLC and Hydro Kennebec, LLC (Brookfield) object to Plaintiffs' Motion To Consolidate Maine Dam Cases For Trial And For Depositions Of Plaintiffs' Witnesses because the four cases involve different claims against seven defendants relating to seven unique dams on two different rivers, and call for inherently site-specific determinations about the alleged impacts of each facility on endangered salmon and their critical habitat in the vicinity of each particular dam. As Plaintiffs implicitly acknowledge in their requests for relief – that the dam operators be required to secure individualized incidental take statements or permits from the applicable federal agencies – the Endangered Species Act compliance of each dam must be judged on its own merits. Indeed, Plaintiffs' arguments for consolidation now only serve to underscore the points raised in Brookfield's motion to dismiss or stay these proceedings, on the ground that NMFS is actively engaged in undertaking the individualized expert administrative and scientific judgments demanded in Plaintiffs' prayers for relief. Consolidation will not promote trial efficiency, but will instead foster confusion,

duplication, and interference with the agency's statutory responsibilities to make case-specific decisions. Moreover, while Brookfield is prepared to cooperate in scheduling the depositions of Plaintiffs' experts so as to avoid unnecessary burdens to the witnesses, Brookfield objects to any attempt to consolidate the depositions if it means that Brookfield's right to depose those experts is inappropriately limited in scope or duration.

I. Procedural History.

Plaintiffs filed their initial Complaint against Brookfield on January 31, 2011. At the same time, they filed three other, separate cases against Miller Hydro Group (Miller Hydro) (C.A. No. 2:11-cv-36-GZS), Topsham Hydro Partners Limited Partnership (Topsham Hydro), and NextEra Energy Resources, LLC, et al. (NextEra). Plaintiffs decided not to incorporate their allegations about the seven dams in a single complaint.

Because Plaintiffs' initial complaint named an incorrect party as a defendant in this case, Plaintiffs and Brookfield agreed that Plaintiffs could file a substituted complaint. That Substituted Complaint was filed on June 2, 2011, some four months after the complaints against the other dam operators. Meanwhile, the defendants in the other cases filed motions to dismiss. Brookfield did not. On July 14 and July 22, 2011, the Magistrate Judge issued recommended decisions on the motions to dismiss by Miller Hydro, Topsham, and NextEra. Judge Singal affirmed the recommended decisions, but left open the question of whether to grant a stay if the ESA administrative consultation process will result in final agency action in the near future. Subsequently, Brookfield filed its motion to dismiss or, in the alternative, to stay the case. That motion is now pending before the Court.

Plaintiffs' Complaints relate to different dams on separate rivers. Plaintiffs' Complaint against Topsham Hydro addresses allegations about the Pejepscot dam on the Androscoggin

River; the Complaint against Miller Hydro concerns the Worumbo dam on the Androscoggin River. (C.A. No. 2:11-cv-37 at ¶7; C.A. No. 2:11-cv-36 at ¶ 7). Neither of those Complaints allege violations of the Clean Water Act. Both Topsham Hydro and Miller Hydro intend to apply for an Incidental Take Statement (ITS) under section 7 of the Endangered Species Act, not an Incidental Take Permit (ITP) under section 10.

The Complaint against NextEra alleges that, along with certain subsidiaries, NextEra owns and operates the Weston, Shawmut, and Lockwood dams on the Kennebec River, and the Brunswick dam on the Androscoggin River. (C.A. No. 2:11-cr-38 at ¶ 8, 11.) NextEra intends to apply for an ITP, not an ITS like Miller Hydro and Topsham Hydro. *Id.* at ¶ 51. The Complaint asserts that NextEra is in violation of the Clean Water Act as well as the Endangered Species Act.

Meanwhile, Brookfield's dam is located on the Kennebec River. Brookfield is in the process of applying for an ITS, like Miller Hydro and Topsham Hydro but unlike NextEra. The Substituted Complaint against Brookfield alleges a violation of the Clean Water Act as well as the Endangered Species Act.

II. Plaintiffs Have Not Met The Standard For Consolidation.

Federal Rule of Civil Procedure 42 provides: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." The party moving for consolidation bears the burden of proof. *Servants of Paraclete, Inc. v. Great Am. Ins. Co.*, 866 F. Supp. 1560, 1572 (D.N.M. 1994).

In determining whether to order consolidation, courts must first ask whether the two proceedings involve a common party and common issues of fact or law. *Seguro de Servicio de Salud de Puerto Rico v. McAuto Sys. Group*, 878 F.2d 5, 8 (1st Cir. 1989). Next, courts have "broad discretion in weighing the costs and benefits of consolidation to decide whether that procedure is appropriate." *Id.* Only after these threshold questions are favorably resolved will consolidation be granted, unless the opposing party can demonstrate prejudice. *Id.* Courts should weigh the costs and benefits of consolidation, including the convenience or inconvenience to the parties, judicial economy, the savings in time, effort, or expense, and any confusion, delay or prejudice that might result from consolidation. *Cruickshank v. Clean Seas Co.*, 402 F. Supp. 2d 328, 341 (D. Mass. 2005). "Even though the Court takes a favorable view for consolidation, the fact that a common question is present and that consolidation is permissible under Rule 42(a), this does not mean that the Court must order consolidation in those cases." *Arroyo v. Chardon*, 90 F.R.D. 603, 605 (D.P.R. 1981). "If the parties at issue, the procedural posture and the allegations in each case are different, however, consolidation is not appropriate." *Hanson v. Dist. of Columbia*, 257 F.R.D. 19, 21 (D.D.C. 2009). A small factual overlap among cases counsels against consolidation. *Gilliam v. Fid. Mgmt. & Research Co.*, 2005 WL 1288105, at *4 (D. Mass. May 3, 2005).

The four cases are sufficiently dissimilar that consolidation is unwarranted. They involve different river systems, different dams with distinguishable turbines, and different fish passage systems. Each dam has unique characteristics, and determining whether a dam is unlawfully "taking" Atlantic salmon depends on a particularized determination about the characteristics of that specific dam. Evidence regarding the impact of one dam on endangered species or protected habitat has little to do with the impact of another dam.

The complaints in these cases also assert different causes of action. Two allege violations of the Clean Water Act, while two do not. One relates to dam operators' efforts to obtain ITPs, three relate to operators' efforts to obtain ITSs. Plaintiffs do not explain how it is more efficient for three parties to sit and listen to testimony about the ITP application of another dam operator on a different river. Consolidation will lengthen the time of trial considerably, and result in an unwieldy number of parties and counsel.

Plaintiffs argue that there will be significant duplication of evidence if the cases remain separate – as Plaintiffs initially filed them. However, the overlapping evidence relates to the general behavior, anatomy, and reproduction cycles of Atlantic salmon and other species, and the parties can stipulate to much of that. The heart of each case relates to the specific dam's characteristics, and that evidence is unique to each dam.

Consolidation will prejudice Brookfield in several respects. First, it will make the trial significantly more expensive for Brookfield, as trial time will be increased for testimony relating to six dams that do not belong to Brookfield. Instead of a trial focused narrowly on Brookfield's dam, almost 85 percent of the testimony (the testimony relating to six out of seven dams) will relate dams other than Brookfield's. The longer trial will also require Brookfield's designated representative to remain in the courtroom and away from her regular duties for a longer period. Brookfield's experts and lay witnesses will have to be on stand-by, waiting to testify, for a longer period of time. Fourth, the likelihood of confusion will increase at a trail involving seven separate dams. Consolidating the cases will make the litigation process even more costly and less efficient for Brookfield.

III. The Plaintiffs Should Not Be Permitted To Restrict The Defendants' Ability To Depose Experts.

Plaintiffs have also moved to consolidate the cases for purposes of deposing their expert witnesses. They assert that scheduling each witness for "four wholly separate depositions would waste time and money." Plaintiffs' Motion at 7. Plaintiffs voluntarily initiated these cases against Brookfield and three other sets of dam owners and operators. Under Federal Rule of Civil Procedure 30(d)(1), Brookfield is entitled to take up to seven hours to depose each expert. Brookfield will work cooperatively with Plaintiffs so their experts are not burdened unnecessarily, and each deposition may take far less than seven hours to complete. Nevertheless, Plaintiffs should not be permitted to restrict the scope or duration of Brookfield's depositions of Plaintiffs' experts beyond the strictures of the Federal Rules of Civil Procedure and the Local Rules.

IV. Conclusion

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

Dated at Portland, Maine this 18th day of November, 2011.

Respectfully submitted,

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_/s/ George T. Dilworth__
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CERTIFICATE OF SERVICE

I certify that on this 18th day of November, 2011, I electronically filed this pleading with the Court's CM-ECF system, which automatically sends notification to all counsel of record.

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