UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY and ENVIRONMENT MAINE, Plaintiffs, v. NEXTERA ENERGY RESOURCES, LLC; NEXTERA ENERGY MAINE OPERATING SERVICES, LLC; FPL ENERGY MAINE HYDRO, LLC; and THE MERIMIL LIMITED PARTNERSHIP, Defendants.	C.A. No. 11-cv-38-GZS

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE CASES FOR TRIAL AND FOR DEPOSITIONS OF PLAINTIFFS' WITNESSES

Defendants NextEra Energy Resources, LLC; NextEra Energy Maine Operating Services, LLC; FPL Energy Maine Hydro, LLC; and The Merimil Limited Partnership (collectively, the "NextEra Defendants") hereby oppose Plaintiffs' Motion to Consolidate (Dkt. No. 45). Plaintiffs seek to consolidate this case, for the purposes of depositions and trial, with three other cases that they have brought against other owners of dams on the Kennebec and Androscoggin Rivers – Miller Hydro Group ("Miller Hydro") (C.A. No. 2:11-cv-36-GZS), Topsham Hydro Partners Limited Partnership ("Topsham Hydro") (C.A. No. 2:11-cv-37-GZS) and Brookfield Power US Asset Management, LLC and Hydro Kennebec LLC ("the Brookfield defendants") (C.A. No. 2:11-cv-35-GZS) (collectively the "Other Defendants"). Consolidation is inappropriate because it would cause confusion, delay and prejudice. The motion appears to

have been brought largely for the convenience of Plaintiffs' witnesses. This is an insufficient basis on which to seek consolidation, and the motion should be denied.

Substantial factual and legal differences between the Plaintiffs' allegations against NextEra and the Other Defendants and the defenses the parties raise make consolidation inappropriate. The facts and legal issues in the cases are different because: 1) each dam has unique physical features that must be addressed in determining both the dams' impact, if any, on fish passage and survival, and habitat, as well as potential remedies, if necessary; 2) Plaintiffs have asserted distinct claims against the NextEra Defendants; 3) the NextEra Defendants'[1] are working to comply with the Endangered Species Act ("ESA") under a different regulatory scheme than the Other Defendants; 4) Plaintiffs seek different relief against the NextEra Defendants; and 5) the NextEra Defendants have raised a unique defense involving issues of control by a parent corporation and piercing the corporate veil. Consolidation of all four cases would create substantial delay, prejudice and confusion that outweigh concerns of judicial economy and the Plaintiffs' convenience.

FACTS

All four cases involve allegations of violations of the ESA, through the similar acts of operating hydroelectric dams on two rivers in Maine. The Defendants in the four cases have asserted some similar defenses – they are proceeding promptly to obtain any necessary approvals under the ESA, and this Court should defer to the ongoing federal processes. However, the similarities end there. The allegations in Plaintiffs' four separate complaints concern seven

[1] As they noted in their Motion to Dismiss (Dkt. No. 13), NextEra Energy Resources, LLC and NextEra Energy Maine Operating Services, LLC dispute that they have any obligation to comply with the ESA. That obligation rests with the dam owner and licensee, FPL Energy Maine Hydro, LLC (with respect to the Weston, Shawmut, and Brunswick dams) and The Merimil Limited Partnership (with respect to the Lockwood dam). Nonetheless, for convenience and brevity, this opposition will simply refer to the "NextEra Defendants".

different dams on two different rivers. There is nothing in either the complaints or the motion to consolidate to support Plaintiffs' assertion of a common nucleus of facts. The dams are constructed differently and have different existing technologies and methods for fish passage. Moreover, at this early stage, this Court has no basis for concluding that the dams' impacts, if any, on critical habitat are the same. Nor is there a basis for concluding at this point that any remedial technologies or operations which the Court might find necessary would be the same.

In short, Plaintiffs' argument reduces to the point that all the cases involve hydroelectric dams and the protection of Atlantic Salmon under the ESA. Plaintiffs intend to utilize the same expert witnesses in all three cases. QED. Unfortunately, the differences noted above outweigh the convenience of the Plaintiffs' witnesses.

Even aside from the factual distinctions that make consolidation inappropriate, the NextEra Defendants are participating in a different regulatory scheme than the Other Defendants – the NextEra Defendants seek an Incidental Take Permit ("ITP") under Section 10 of the ESA, while the Other Defendants seek an Incidental Take Statement ("ITS") under Section 7.[2] These processes are created by different sections of the ESA, involve different timetables, require input and certification by different agencies, and result in different permits with different implications for future changes in habitat or to the project. *Compare* Section 7, 16 U.S.C. §1536, *with* Section 10, 16 U.S.C. §1539.

Under Section 7, federal agencies must consult with the National Marine Fisheries Service ("NMFS") when any agency action may affect a listed endangered species. The steps of

[2] The Other Defendants have stated that they do not intend to apply for an ITP under Section 10, but rather, intend to obtain an ITS, by applying to amend their FERC licenses, triggering the Section 7 consultation process that FERC must undertake, and pursuing a Biological Assessment and Biological Opinion that result in an ITS regarding the Atlantic salmon in the area. Brookfield Amended Complaint, ¶¶ 51 and 53; Miller Hydro Complaint, ¶¶ 32 and 34; Topsham Hydro Complaint, ¶¶ 32 and 34.

the process involve preparation of a "biological assessment" ("BA"), as well as formal consultation between the agency and NMFS that can result in the issuance of an ITS as part of the Biological Opinion issued by NMFS. 16 U.S.C. § 1536(a-c). FERC has required the Other Defendants to prepare a BA regarding each dam.[3]

In contrast, the NextEra Defendants have entered into a formal process under Section 10 with both the NMFS and the United Fish and Wildlife Service (collectively "the Services") to obtain an ITP, through the creation of a Habitat Conservation Plan ("HCP"), developed with technical assistance from the Services. 16 U.S.C. §1539. The HCP/ITP process is significantly more involved and detailed than the Section 7 process.

The outcomes of the Section 7 and Section 10 processes are also different. If the ITP is granted, it will allow the NextEra Defendants to commit a specified number of "takes" in a set amount of time. 16 U.S.C. §1539(a)(1)(B). Through the "No Surprises Policy," if any unforeseen circumstances arise, the Services will not require any additional restrictions, so long as the HCP is implemented in good faith. *See, e.g.* 63 Fed. Reg. 8859 (Feb. 23, 1998). The Other Defendants will not obtain this flexibility through their ITS process. If the incidental take specified in the ITS is exceeded, or any other details change, FERC is required to reinitiate formal consultation, and the Other Defendants must go through this process all over again. 50 C.F.R. §§402.14(i) and 402.16.

ARGUMENT

I. Consolidation is Discretionary and Should Not Be Granted If It Would Cause Confusion, Delay or Prejudice

[3] *See* Topsham Hydro Motion to Dismiss, Dkt. No. 7; Miller Hydro Motion to Dismiss, Dkt. No. 7; Brookfield Motion to Dismiss, Dkt. 31.

Rule 42(a) of the Federal Rules of Civil Procedure provides that if actions involve a common question of law or fact, the court may join for hearing or trial any or all matters at issue in the actions, or consolidate the actions. The moving party bears the burden of proving the commonality necessary to establish that consolidation is appropriate. *See In re Consolidated Parlodel Litigation*, 182 F.R.D. 441, 444 (D. NJ, 1998). Plaintiffs failed to meet this burden.

Consolidation is only possible when the proceedings involve a common party *and* common issues of fact or law. *Seguro de Servicio de Salud de Puerto Rico v. McAuto Systems Group, Inc.* 878 F.2d 5, 8 (1st Cir. 1989). However, even when consolidation is *permissible* under Rule 42(a), it does not mean that the court *must* order consolidation. *See Arroyo v. Chardon*, 90 FRD 603, 605 (D. PR, 1981) (Denying consolidation of cases with identical allegations, but different specific acts by each defendant) (emphasis added). Even where there are commonalities, "the court should weigh the prospective benefits of consolidation in terms of convenience to the parties and judicial economy against the extent of confusion, delay or prejudice that might result from consolidation." *Data General Corp. v. Grumman Sys. Support Corp.*, 834 F. Supp. 477, 487 (D. Mass. 1992).

Consolidation is inappropriate where, as here, individual issues outweigh the other common issues of law or fact, or the evidence to be presented in one case is irrelevant in another, because that "would create a likelihood of prejudice by confusing the issues." *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 81 (D.NJ 1993) (denying consolidation of cases that assert similar theories of recovery under the same statute, but have specific factual distinctions); *Henderson v. National Railroad Passenger Corp.*, 118 F.R.D. 440, 441 (D. Ill. 1987) (denying motion to consolidate when "although certain common issues of fact may exist in both actions, the variety of individual issues predominate.")

II. The Factual and Legal Distinctions Between the NextEra Defendants and the Other Defendants Would Cause Confusion, Delay, and Prejudice in a Consolidated Trial

A. Factual Differences Among the Dams Weigh Against Consolidation

As noted above, the Plaintiffs' complaints involve allegations concerning seven different dams on two different Rivers.[4] Neither the complaints nor the motion to consolidate allege any facts concerning similarities among the dams, their alleged impacts and any allegedly appropriate remedies that warrant consolidation. The dams are constructed differently and currently have different approaches to fish passage. Given the different existing technologies, there is no reason to believe that there will be common evidence regarding potential remedies for Plaintiffs' witnesses to discuss – should this Court conclude that any remedy is even relevant or necessary.

B. The Plaintiffs Have Brought Against NextEra Different Claims Involving Different Statutes Than Those Alleged Against the Other Defendants

The Plaintiffs have asserted claims against NextEra under *both* the ESA and the Clean Water Act ("CWA"), while in the Miller Hydro and Topsham Hydro cases, the claims involve only the ESA. *Compare* NextEra Complaint *with* Miller Hydro and Topsham Hydro Complaints. This separate count against NextEra regarding the CWA involves both a different legal claim and different fact-specific inquiries into each dam's compliance with its individual FERC operating licenses. Plaintiffs concede this distinction in their Motion, at page 3, n. 2, arguing that since "most" of the factual issues involved with the CWA claims overlap with the

[4] Plaintiffs attempt to make much of the NextEra Defendants' willingness to have Plaintiffs' claims regarding the four dams in which the NextEra Defendants have an interest heard in the same action. Plaintiffs' Motion at 9. This is completely irrelevant. Under the Federal Rules of Civil Procedure, the Plaintiffs had the right to bring their claims against the NextEra Defendants in one action, precisely because of the commonality among the ownership and licensing interests in the dams. Were the four NextEra dams owned by different persons, there would be no basis for hearing the claims in the same action. Here, there is no basis for consolidating the claims regarding dams that are owned by different persons.

ESA claims, this court should overlook this distinction. However, as the Magistrate Judge has already determined, the legal analysis for the CWA claim is different than for the ESA claims. *See* Amended Recommended Decision on Motions to Dismiss, NextEra Dkt. 34, at 8. These distinctions in both the facts and the law of the claims brought against the NextEra Defendants make consolidation inappropriate.

C. The NextEra Defendants' Are Following A Different ESA Process, Creating Substantial Factual Distinctions

At trial, the Plaintiffs must introduce evidence concerning each Defendant that will support their allegations of violations of the ESA, and each Defendant will respond with specific facts regarding its own compliance and regulatory pathway. The NextEra Defendants' different regulatory pathway is a major distinction, and will result in different lines of inquiry regarding the NextEra Defendants' work to obtain an HCP/ITP, the progress that they have made, and the timing of and circumstances surrounding the issuance of any agency decisions. Such differences in the factual record surrounding the NextEra Defendants' compliance with the ESA will create confusion that makes consolidation of all four cases inappropriate.

In *Arroyo*, the court denied consolidation because, even though the plaintiffs' allegations against all eight defendants were identical, the defendants' alleged acts were distinct. *Arroyo v. Chardon*, 90 F.RD 603, 605 (D.PR. 1981). Since each allegation must be proven by presenting specific evidence for each defendant, consolidation was denied. *Id.* Here, where *both* the factual circumstances surrounding each defendant's acts and the statutory underpinnings of the allegations against the NextEra Defendants are different, consolidation is even less appropriate.

D. Plaintiffs Have Requested Different Relief

While the Plaintiffs have requested for all of the Other Defendants that the court "Order [the Other] Defendant[s] to prepare a BA according to a specified schedule," (Brookfield,

Topsham Hydro and Miller Hydro Complaints), the Plaintiffs have requested that the NextEra Defendants "be ordered to apply for an ITP on a specified schedule." NextEra Complaint. Although using the same language, these requests ask for substantially different relief from the Court, to be imposed and monitored on different timetables.

The Other Defendants are already working on their BAs to file with FERC, and anticipate doing so in early 2012.[5] In contrast, before the NextEra Defendants may apply for an ITP, they must complete the HCP Consultation process with the Services. Under the HCP/ITP schedule that the Services and the NextEra Defendants have together devised, the Services and the NextEra Defendants expect that the HCP process will be completed by March 2012, and the final ITP would be issued by June 2013.[6]

The NextEra Defendants assume that the process chosen by the Other Defendants was appropriate for their dams. Unfortunately, at the time of the scheduled trial in the summer of 2012, the NextEra Defendants and the Other Defendants may be in different procedural postures with respect to their approvals from the Services. Those different postures could easily result in prejudice to the NextEra Defendants or the Other Defendants. In these circumstances, it is not appropriate to consolidate the cases.

E. NextEra's Defenses on Control and Piercing the Corporate Veil Raise Unique Issues That Are Inappropriate For A Consolidated Trial

Two of the NextEra Defendants – NextEra Energy Resources, LLC and NextEra Energy Maine Operating Services, LLC – have raised a fact-intensive defense not present in the Other Defendants' cases, which will require significant discovery and briefing to resolve, causing

[5] *See, e.g.*, Brookfield Motion to Dismiss, Dkt. No. 31, at 7 (stating that it expects to file its BA with FERC in January 2012).

[6] NextEra Motion to Dismiss, Dkt. 13, at 7.

unnecessary delay for the Other Defendants, and risking confusion and prejudice for the NextEra Defendants if these defenses are not appropriately evaluated, due to a consolidated trial.

As set forth in NextEra's Motion to Dismiss, NextEra Energy Resources, LLC and NextEra Energy Maine Operating Services, LLC are not the FERC licensee, or owner or operator of any of the four dams at issue.[7] Consequently, Plaintiffs must prove that NextEra Energy Resources, LLC and NextEra Energy Maine Operating Services, LLC control the operation of the dams.[8] None of the Other Defendants have raised a similar defense – in fact, all concede that they are the owners, operators, or licensees of the dams, and would thus be responsible for a taking, if Plaintiffs establish that takes have occurred.[9]

The issue of whether a corporate parent can be liable in the ESA context is relatively novel, having not been specifically addressed by the Supreme Court, and will require a fact-specific analysis by the Court. In addition, piercing the corporate veil requires a highly fact-specific inquiry under Maine corporate law. *See, e.g. Johnson v. Exclusive Properties Unlimited*, 1998 ME 244. Consequently, this defense will demand significant attention from the Plaintiffs, the NextEra Defendants, and the Court.

A trial involving the NextEra Defendants will necessarily have to address this unique issue. Therefore, consolidation of all four cases would cause unnecessary delay for the Other Defendants, and raise the potential for confusion and prejudice. It is appropriate for the court to

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[7] NextEra Motion to Dismiss, Dkt. 13, and supporting affidavit.

[8] Section 9 of the ESA makes it unlawful for any person to take an endangered species, and the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such *conduct.*" 16 U.S.C. §§1538(a)(1)(b) and 1532(19) (emphasis added). Consequently, to commit a take, a defendant must have actually engaged in the challenged conduct.

[9] Brookfield Complaint and Answer, ¶¶8 and 9; Miller Hydro Complaint and Answer, ¶6; Topsham Hydro Complaint and Answer, ¶6.

decline to consolidate when adding more parties and issues would only clutter an already unwieldy proceeding. *See, e.g., Norfolk v. EPA*, 134 F.R.D. 20, 22 (D. Mass. 1991) (Denying motion to consolidate when complexity and clutter outweigh potential benefits).

CONCLUSION

For the foregoing reasons, the NextEra Defendants respectfully request that the Court deny the Plaintiffs' Motion for Consolidation.

Respectfully submitted,
NEXTERA ENERGY RESOURCES, LLC
NEXTERA ENERGY MAINE OPERATING SERVICES, LLC
FPL ENERGY MAINE HYDRO, LLC
THE MERIMIL LIMITED PARTNERSHIP
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Dated: November 23, 2011

Certificate of Service

I hereby certify that on this 23rd day of November, 2011, I electronically filed the within document with the Court's CM-ECF system, which automatically sends notification to counsel of record.

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