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February 13, 2012

BY EMAIL

Seth Jaffe, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, Massachusetts 02210

Re: FOMB v. NextEra, C.A. No. 11-cv-38-GZS

Dear Seth:

The NextEra defendants have asked for a more than three-week delay in submitting expert reports on the grounds that NextEra “expects” to have certain sections of a “draft” habitat conservation plan (“HCP”) available for “public review” on February 29, 2012, and the “HCP will...play a significant role in our experts’ reports.” You also offered, as an alternative, for Plaintiffs’ experts to supplement their reports first, by March 14, and then for Defendants to submit their expert reports by March 28. You also propose “to delay all other pretrial deadlines by the same amount of time” as the delay in submitting Defendants’ expert reports. You also suggest that the defendants in the other three cases would like to obtain similar delays, “in order to keep all the cases on the same schedule,” although none of the other defendants has contacted me about this or has a similar reason for delay.

For the reasons set forth below, Plaintiffs cannot agree to such a delay. If you go to the Court on this, please inform the Court of Plaintiffs’ position and provide it a copy of this letter.

1. *Despite the scheduling order deadlines in this case and the fact that the company has been working on the HCP for over a year, NextEra’s expert has not looked at any drafts of an HCP or even talked to the company about the HCP.* According to an “HCP Process Schedule” filed by NextEra with the Court in connection with NextEra’s motion to dismiss, Ex. 11 to Richter Declaration, Docket No. 14-11, the company has been working on an HCP for over a year. Your experts have had full access to company personnel to help prepare their reports. Yet, you told me on the phone that NextEra’s experts have not looked at any drafts of the HCP or even talked to the company about it. It was NextEra’s choice not to share with its experts information about the development of a draft HCP; NextEra, not Plaintiffs, should bear the consequence of that decision.

2. *The draft HCP supposedly coming out on February 29 is only a "preliminary draft."* According to the HCP Process Schedule filed by NextEra in connection with NextEra's motion to dismiss, the draft that will be generated is a "preliminary draft." As you point out in your email to me, it is a draft to be reviewed by a Technical Advisory Committee and the Services. 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."

3. *February 29 is not a hard deadline to submit the preliminary draft HCP.* The incidental take permit process is applicant-driven. NextEra can prepare an HCP on whatever timetable it chooses, or not prepare one at all. The company could have already submitted a preliminary draft HCP, and in fact the HCP Process Schedule indicated a preliminary draft was originally to have been generated by February 1, 2012. You could not guarantee me in our recent phone conversation that the preliminary draft won't be further delayed. The pretrial schedule in this case must be set independently of the shifting timelines of the regulatory process.

4. *Delaying expert reports and other pretrial deadlines is impractical, given the July 2 trial-ready date.* Summary judgment and *Daubert* motions are due on April 18. Answering and reply papers take another five weeks. Thus, any such motions will not fully be submitted until about a month before trial. That is already cutting it close. Pushing those dates back is simply not feasible (and Plaintiffs cannot agree to a delay of the trial date, given the ongoing harm).

5. *Expert reports can be supplemented.* Under the Federal Rules, expert reports can be supplemented. Thus, there would be no prejudice to NextEra to submitting its reports according to the current deadline.

6. *There is no reason to delay the pretrial schedules in the other cases.* The other defendants' experts in the other cases will not be commenting on NextEra's preliminary draft HCP, so there is no need for them to delay submission of their reports. I do note the inconsistency of defendants in all of the cases asking to be put on the same pretrial schedule while at the same time opposing consolidation of the trials.

Independent of the HCP issue, you asked for a delay to submit NextEra's expert reports because you will be on vacation the week of February 20. Plaintiffs will accommodate your vacation schedule and agree to a one-week extension (for NextEra, not for the defendants in the other cases), until February 28.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. A. Nicholas".

David A. Nicholas

cc by email:

Josh Kratka

Bruce Merrill

Toby Dilworth and Donald Carr (Brookfield counsel)

Paul McDonald and Ted Small (Miller Hydro and Topsham counsel)