

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

FRIENDS OF MERRYMEETING BAY)	
AND ENVIRONMENT MAINE,)	
)	
Plaintiffs)	
)	
v.)	Civil Action No.
)	2:11-cv-00037
)	
TOPSHAM HYDRO PARTNERS LIMITED)	
PARTNERSHIP,)	
)	
Defendant.)	

**DEFENDANT TOPSHAM HYDRO PARTNERS LIMITED
PARTNERSHIP’S MOTION TO ENLARGE DISCOVERY
AND RELATED DEADLINES, INCLUDING THE
EXPECTED DATE OF TRIAL, BY THIRTY DAYS AND A
REQUEST FOR CONFERENCE WITH THE COURT**

Defendant Topsham Hydro Partners Limited Partnership (“Topsham Hydro”), by and through its undersigned counsel, hereby moves the Court to enlarge the discovery deadline, and related deadlines, including the deadline by which the parties must be ready for trial, by thirty days. Because Topsham Hydro’s expert deadline is rapidly approaching and could lapse before a decision is issued on this Motion, Topsham Hydro requests an immediate conference with the Court to address its request to enlarge its expert deadline.

Preliminary Statement

This action is one of several that Plaintiffs have filed against owners of dams located on the Androscoggin and Kennebec rivers. The related actions include one filed against Miller Hydro Group (D. Me. No. 2:11-cv-36-GZS); one filed against Brookfield Power US Asset Management, LLC, and Hydro Kennebec LLC (D. Me. No. 1:11-cv-35-GZS); and one filed against NextEra Energy Resources et al., (“NextEra”) (D. Me. No. 2:11-cv-38-GZS) (the “NextEra Action”) (together with this case, the “FOMB Dam Cases”).

Topsham Hydro submits this Motion in response to a similar motion filed by NextEra in the NextEra Action (“NextEra’s Motion”) For the reasons outlined in NextEra’s Motion, and the additional reasons outlined below, Topsham Hydro consents to NextEra’s request to enlarge pre-trial deadlines, and seeks a similar extension of pre-trial deadlines in this matter.¹ In addition, Topsham Hydro seeks to enlarge its deadline to designate experts to March 2, 2012, and to extend expected date for trial to August 2, 2012.

Argument

Topsham Hydro requests that the Court set the following pre-trial deadlines and expected date for trial:

Defendant to designate experts:	March 2, 2012
Discovery and Local Rule 44 deadline:	April 27, 2012
Plaintiffs to make settlement demand:	March 14, 2012
Defendant to respond in writing to settlement demand:	March 28, 2012
Filing of notice of intent to file Motion for Summary Judgment:	May 4, 2012
Filing of dispositive motions and <i>Daubert/Kumho</i> motions:	May 18, 2012
Expected date of trial:	August 2, 2012

Plaintiffs have consented to enlarging Topsham Hydro’s deadline to designate experts to February 28, 2012. Due to vacation schedules, counsel needs a modest enlargement of three days in excess of that consented-to enlargement of time. Plaintiffs have otherwise objected to Topsham Hydro’s request to enlarge deadlines. As discussed below, enlarging the remaining pre-trial

¹ After NextEra filed its Motion, the Clerk contacted undersigned counsel and requested that Topsham Hydro file a motion or brief in this action if it consented to NextEra’s proposed pre-trial schedule revisions so that the Court could issue an Order in this action upon reaching a decision on NextEra’s Motion. Topsham Hydro assumes this meets the Rule 26(b) requirement that a prior judicial approval be obtained before the filing of any written discovery motion.

deadlines as requested is necessary given the difficulties that have arisen in scheduling and completing depositions within the current discovery deadline; enlarging the pre-trial deadlines necessitates corresponding extension of the expected date of trial.

I. Topsham Hydro's Deadline to Designate Experts Should be Enlarged to March 2, 2012

The Court's Scheduling Order provided that Plaintiffs' deadline to designate experts was January 11, 2012. Plaintiffs requested, and Topsham Hydro consented to, an enlargement of Plaintiffs' deadline to January 16, 2012. Plaintiffs agreed at that time that they would consent to a similar extension of time for Topsham Hydro. A similar extension of time for Topsham Hydro would extend Topsham Hydro's expert designation deadline to February 21, 2012, which falls a day after Presidents Day and within Maine's winter "school vacation week." Counsel for Topsham Hydro will be out of the office on previously-scheduled vacations for most of that week.

As noted, Plaintiffs have consented to enlarging Topsham Hydro's expert deadline to February 28, 2012. However, this would give counsel only one, or at most, two, working days after returning from vacation to finalize work with experts. Given school vacation, and counsel's own vacation, it is not practical to suggest that counsel will be able to coordinate with Topsham Hydro's experts during the week of February 20, 2012 in a manner sufficient to allow for expert reports to be completed by February 28, 2012. Topsham Hydro is seeking only a very modest additional three days enlargement of time to permit counsel to accommodate vacation schedules and also permit counsel to complete work with Topsham Hydro's experts.

II. The Discovery Deadline in This Action Should Be Enlarged Consistent With the Schedule Proposed by NextEra

A. Completion of Export Reports in the NextEra Action Will Delay Topsham Hydro's Ability to Depose Plaintiffs' Experts in This Action.

It its Motion, NextEra seeks to enlarge pre-trial deadlines primarily due to the fact that

completion of NextEra's preliminary draft Habitat Conservation Plan ("HCP") will cause a delay in the finalization of its expert reports. Plaintiffs have opposed NextEra's request to enlarge defendants' expert designation deadlines in that matter. However, even Plaintiffs' Opposition to NextEra's Motion contemplates that, in the absence of the requested enlargement of time, NextEra's experts could supplement their expert opinions when the preliminary draft HCP is completed. (Plaintiffs' Opposition to NextEra's Motion at 3.) Plaintiffs, presumably, would want and would seek an opportunity to supplement their expert reports in the event NextEra's experts supplements theirs. As a result, there appears to be no question that completion of NextEra's HCP will cause some delay in finalization of expert reports in the NextEra Action.

This necessarily will delay Topsham Hydro's ability to depose Plaintiffs' experts in this action. This is because Plaintiffs' experts in this case are also experts in all of the other FOMB Dam Cases. By Order dated February 9, 2012, this Court required that depositions of common witnesses in the FOMB Dam Cases – which will include Plaintiffs' experts – are to be consolidated. (February 9, 2012 Order at 2-3.) It would be impractical, inefficient, and a waste of resources to depose Plaintiffs' experts in consolidated depositions before those experts have completed their reports. If Plaintiffs intend to supplement their expert reports when NextEra's preliminary draft HCP is complete, the ability to schedule a consolidated deposition will be delayed accordingly. The proposed modest enlargement of the discovery deadline is necessary account for this delay.

B. The Scheduling of Consolidated Depositions, and Other Depositions, Will Require an Enlargement of the Discovery Deadline.

The Court's February 9, 2012 Order to consolidate depositions of common witnesses was, apparently, intended to create discovery efficiencies in all of the FOMB Dam Cases. Yet, achieving those efficiencies will require overcoming scheduling difficulties. Plaintiffs have

designated three experts, all of whom are common witnesses in all FOMB Dam Cases. Defendants in each of the FOMB Dam Cases will want to depose each of Plaintiffs' experts. Thus, the parties in the FOMB Dam Cases will have to schedule at least three consolidated depositions. Topsham Hydro expects that each deposition of each of Plaintiffs' experts will take multiple days. Thus, the parties will need to block off multiple days for each deposition to avoid having Plaintiffs' experts travel to Maine (in one instance from Oregon), return home, and then have to return to Maine for a continued deposition.

To accomplish this, the parties will need to find blocks of dates on which three experts and four teams of attorneys (Plaintiffs' attorneys, plus the three teams of defense counsel) are available for depositions in Maine. This is all without regard to other depositions that will be conducted in each individual FOMB Dam Case.

This is no minor complication, as experience has already proved in this case. For example, Plaintiffs previously noticed Topsham Hydro's 30(b)(6) deposition for February 22-23 2012. Topsham Hydro's representative was not available on those dates. The parties have since been attempting to schedule Topsham Hydro's 30(b)(6) deposition during the first two weeks of March, but have been unsuccessful due to scheduling conflicts.

In addition, Topsham Hydro assumes Plaintiffs will seek to depose Topsham Hydro's experts. If the first two weeks of March are unworkable due to scheduling conflicts, as appears to be the case, this would mean that the parties would have to schedule and conduct three consolidated depositions of Plaintiffs' experts, a 30(b)(6) deposition of Topsham Hydro, depositions of Topsham Hydro's experts, and any additional depositions Topsham Hydro may wish to take of Plaintiffs within the final two weeks of March in order to meet the current discovery deadline.

Complicating matters further is the sheer volume of documents in this case. To date,

Topsham Hydro has produced approximately 2,490 pages of documents to Plaintiffs. Plaintiffs have produced approximately 44,370 pages of documents to Topsham Hydro. One of Topsham Hydro's consultants, HDR, was subpoenaed and produced approximately 18,546 pages of hard copy documents, and approximately 9,000 emails.

Topsham Hydro received copies of HDR's production to Plaintiffs on February 8, 2012. Plaintiffs' original production to Topsham Hydro had formatting issues, and was re-produced to Topsham Hydro on February 13, 2012. Thus, Topsham Hydro has to review a significant volume of documents it has only recently received in order to be properly prepare for depositions. Completing this task while simultaneously preparing to conduct or defend seven or more depositions (assuming Topsham Hydro may designate two or more experts, and conducts at least one deposition of Plaintiffs) during the final two weeks of March (or even the whole month of March), is simple not feasible.

The requested enlargement of the discovery deadline is needed to permit sufficient time to conduct depositions in this matter; related pre-trial deadlines should similarly be enlarged as noted above.

III. The Expected Date for Trial Should be Enlarged to August 2, 2012

Should the Court agree that the discovery deadline, and related deadlines, be enlarged as proposed above, it will be necessary to similarly extend the date for trial. The current expected date for trial is July 2, 2012. Under the proposed schedule above, the parties would have until May 18, 2012 to file dispositive motions and any *Daubert/Kumho* motions. This would mean that the parties would still be briefing motions on the eve of trial. Plaintiffs, it seems, concede that this would be impractical. (Plaintiffs' Opposition to NextEra's Motion at 3-4.) Enlarging the trial date by just one month will eliminate any concerns over the timing of dispositive motions, and would provide the parties with sufficient time to prepare for trial.

Conclusion

For the reasons described above, Defendant Topsham Hydro Partners Limited Partnership respectfully requests that the Court enlarge the pre-trial deadlines, and the expected date of trial as outlined above.

Dated: February 17, 2012

Respectfully submitted,

/s/ Theodore A. Small

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February 2012, I electronically filed ***Defendant Topsham Hydro Partners Limited Partnership's Motion to Enlarge Discovery*** with the Clerk of the Court using the CM/ECF system that will send notification of such filing(s) to the following:

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