**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**

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|---|---|---|
| FRIENDS OF MERRYMEETING BAY AND ENVIRONMENT MAINE, | ) | |
| Plaintiffs | ) | |
| v. | ) | Civil Action No. 2:11-cv-00036 |
| MILLER HYDRO GROUP, | ) | |
| Defendant | ) | |

**DEFENDANT MILLER HYDRO GROUP'S OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE MAINE DAM CASES FOR TRIAL AND FOR DEPOSITIONS OF PLAINTIFFS' WITNESSES**

Defendant Miller Hydro Group ("Miller Hydro"), by and through its undersigned counsel, hereby opposes the motion of Plaintiffs Friends of Merrymeeting Bay and Environment Maine (collectively, "Plaintiffs") to consolidate this action under Fed. R. Civ. P. 42(a) for trial and for depositions of Plaintiffs' witnesses with three other actions pending before this Court (the "Motion").[1]

## Preliminary Statement

Consolidation of the Dam Cases is inappropriate because it would, allegedly, serve only Plaintiffs' interests in lowering their litigation costs. Moreover, Plaintiffs' alleged savings would be obtained at the expense of and prejudice to the Defendants. In a consolidated proceeding, each Defendant's costs will necessarily increase as the length and scope of its discovery and trial are expanded to accommodate the claims against and defenses of the other Defendants. Notwithstanding that Plaintiffs are asserting a common cause of action in each of the Dam Cases, the liability of any

[1] The other three actions involve the same Plaintiffs, and name as Defendants Topsham Hydro Partners Limited Partnership ("Topsham Hydro") (C.A. No. 2:11-cv-37-GSZ), NextEra Energy Resources, LLC, NextEra Energy Maine Operating Services, LLC, FPL Energy Maine Hydro, LLC, and the Merimil Limited Partnership (collectively, "NextEra") (C.A. No. 2:11-cv-38-GZS), and Brookfield Power US Asset Management, LLC, and Hydro Kennebec LLC (collectively, "Brookfield") (C.A. No. 1:11-cv-35-GZS) (Miller Hydro, Topsham Hydro, NextEra, and Brookfield, collectively, "Defendants") (each case a "Dam Case," collectively, the "Dam Cases").

Defendant and the appropriate remedy, if liability is found, will depend upon the presentation of evidence that is particular to that Defendant. Lumping all of that evidence together in a single, consolidated trial poses the risk that the defenses of one or more Defendants will be compromised by confusion of issues. Finally, given that Miller Hydro and Topsham Hydro are represented by the same counsel -- a decision that was made when Miller Hydro and Topsham Hydro were sued separately -- a consolidated trial poses the risk that irreconcilable conflicts of interest could arise in the event these parties disagree as to particular trial strategies or tactics. In short, the likely potential for delay, confusion, increased costs to the Defendants, as well as other factors, render consolidation unwarranted in these circumstances. Accordingly, the Motion should be denied.

**Factual Background**

The Dam Cases involve the same plaintiffs asserting a common statutory cause of action -- under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.* -- against owners/operators of hydroelectric dams on Maine rivers that are alleged to kill or injure Atlantic Salmon. The commonality between the Dam Cases, however, ends there. In fact, the dissimilarities between the Dam Cases far outweigh their similarities.

Each of the Dam Cases involves different dams, which are owned and operated by different Defendants. Two of the Dam Cases involve dams located on the Androscoggin River (Miller Hydro and Topsham Hydro); one Dam Case involves a dam located on the Kennebec River (Brookfield); the other Dam Case involves one dam located on the Androscoggin River and three dams located on the Kennebec River (NextEra). Two of the Dam Cases (Brookfield and NextEra) assert a second statutory cause of action -- under the Clean Water Act ("CWA"), 33 U.S.C. §1341, *et seq.* -- and assert claims of injury to an additional fish species -- Shad -- that are not asserted in the other two Dam Cases. The Defendants in three of the Dam Cases (Miller Hydro, Topsham Hydro, and Brookfield) are participating in a different regulatory process than the other Defendant (NextEra).

Based on these differing regulatory pathways, Plaintiffs are seeking different injunctive relief as it pertains to future regulatory action: preparation of a Biological Assessment ("BA") pursuant to an application for an Incidental Take Statement ("ITS") by Miller Hydro, Topsham Hydro, and Brookfield; and an application for, and preparation of, an Incidental Take Permit ("ITP") by NextEra.

## Argument

### A. The Applicable Legal Standards

Rule 42 of the Federal Rules of Civil Procedure provides, in pertinent part, that:

> If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
>
> (2) consolidate the actions; or
>
> (3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a).

The existence of "a common question of law or fact" is a necessary, but not sufficient, requirement for consolidation. *See* *Seguro de Servicio de Salud de Puerto Rico v. McAuto Sys. Group, Inc.*, 878 F.2d 5 (1st Cir. 1989) ("*Seguro de Servicio*") (common questions are but a "threshold requirement"). In other words, "[t]he mere existence of common issue does not require consolidation." *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 81 (D. N.J. 1993) ("*Liberty Lincoln*"). On the contrary, "consolidation is inappropriate if it would lead to inefficiency, inconvenience, or unfair prejudice." *Mudd v. Flagstaff Unified School Dist.*, 2010 WL 1874547 *1 (D. Ariz. May 6, 2010). Assuming the threshold commonality requirement is met, "the trial court has broad discretion in weighing the costs and benefits of consolidation to decide whether that procedure is appropriate." *Seguro de Servicio*, 878 F.2d at 5. The movant bears the burden of convincing the court that consolidation is warranted. *Transeastern Shipping Corp. v. India Supply*

*Mission*, 53 F.R.D. 204, 206 (S.D.N.Y. 1971) ("*Transeastern Shipping*").

Courts appropriately order consolidation of actions asserting similar claims that arise out of the same transaction or occurrence. For example, courts have ordered consolidation of actions asserting identical federal securities fraud claims involving the same allegedly false statements. *See, e.g.*, *Xianglin Shi v. Sina Corp.*, 2005 WL 1561438 *1 (S.D.N.Y. Jul. 1, 2005) (consolidation appropriate where "each of the actions involves the same allegedly false and misleading statements by defendants and the same alleged violations of the Securities and Exchange Act of 1934"); *Constance Sczesny Trust v. KPMG LLP*, 223 F.R.D. 319, 322 (S.D.N.Y 2004) (consolidation appropriate where "the gravamen of the complaints in each of the related actions is the same allegedly fraudulent accounting treatment of certain tax credits and expenses in Polaroid's public securities filings issued in the spring of 2001.") Other scenarios that courts sometimes find suitable for consolidation involve multiple actions by persons injured in a single accident. *See, e.g.*, *Ressler v. Boeing Co.*, 2011 WL 5037193 (D. Colo. Oct. 24, 2011) (airline crash); *Ikerd v. Lapworth*, 435 F.2d 197, 204 (7th Cir. 1970) ("*Ikerd*") (automobile crash). The decision to consolidate these types of actions is founded on the rationale that "considerations of judicial economy strongly favor simultaneous resolution of *all claims growing out of one event*…." *Ikerd* 435 F.2d at 204 (emphasis added).

On the other hand, even where there is an overlap of parties and theories of liability, courts do not hesitate to refuse consolidation where the claims in the separate cases arise out of different sets of operative facts. In that regard, *Liberty Lincoln* is instructive. *Liberty Lincoln* involved a request to consolidate separate actions brought by two Lincoln Mercury dealers, asserting identical claims under the New Jersey Franchise Practices Act, against their common franchisor, Ford Motor Company. 149 F.R.D. at 81. The plaintiffs sought consolidation on the basis that the cases raised identical questions of law and fact. Specifically, the plaintiffs argued that:

> Ford's policies concerning parts warranty reimbursement are uniform and do not vary from dealer to dealer. In both instances, the parties' claim is premised in N.J.S.A. 56:10–15 and they each seek, amongst other things, a judgment declaring that the parts warranty reimbursement policy established by [Ford] is a violation of the [Franchise Practices] Act. In both instances, the parties further seek the recovery of compensatory and other damages, which although they vary from dealer to dealer, would be calculated similarly.

*Id.*

The court rejected these arguments and denied the plaintiffs' motion for consolidation on the grounds that the claims in the different cases required "disparate factual analyses and sources of proof." 149 F.R.D. at 81. Specifically, the court reasoned that:

> …a determination of whether Ford and its warranty reimbursement policy violate N.J.S.A. § 56:10–15 can only be determined after each Dealer has submitted detailed proof, for each part, concerning its individual pricing practices and the other necessary issues already discussed.
>
> Given the disparate factual analyses and sources of proof required by the claims in the *Warnock* Action and the *Liberty* Action, consolidation is not appropriate. (Footnote omitted). Given that Liberty Lincoln alone performed over 6,000 warranty repairs in 1992, and each part replacement would require individual analysis, consolidation would not promote judicial economy and would result in delay and in confusion of the relevant factual issues in each case. (Citations omitted).

*Id.* at 81-82.

*Liberty Lincoln* bears a striking similarity to the circumstances presented by Plaintiffs' Motion. There, as here, the plaintiffs argued that consolidation was proper based on a common cause of action directed at similar business conduct. The court, however, was not persuaded by these superficial similarities, and instead determined that the salient inquiry was whether each case would require "disparate factual analyses and sources of proof." *Id.* at 82.

**B. Consolidation Of The Dam Cases Is Inappropriate Because Resolution Of The Claims Requires Disparate Factual Analyses And Sources Of Proof**

Plaintiffs point to the following similarities among the Dam Cases, which they contend

support consolidation: (i) each case asserts a claim of alleged "taking" of Atlantic Salmon under the ESA; (ii) all Defendants are owners and operators of hydroelectric dams on one or more adjacent rivers; (iii) the Defendants' defenses "are virtually the same"; and (iv) in the event liability is found, the Court will need to consider common questions in fashioning relief. *See* Motion at pp. 3-5. However, the dissimilarities between the Dam Cases far outnumber and outweigh their similarities. Those dissimilarities are summarized in the following table:

| | **TOPSHAM HYDRO** | **MILLER HYDRO** | **NEXTERA** | **BROOKFIELD** |
|---|---|---|---|---|
| **Cause(s) Of Action Asserted** | ESA | ESA | ESA and CWA | ESA and CWA |
| **River(s) At Issue** | Androscoggin | Androscoggin | Androscoggin and Kennebec | Kennebec |
| **Dam(s) Operations at Issue** | Pejepscot | Worumbo | Weston, Shawmut, Lockwood, Brunswick | Hydro Kennebec |
| **Fish Population(s) At Issue** | Salmon | Salmon | Salmon and Shad | Salmon and Shad |
| **Underlying Agency Process Involved** | ESA §7 - ITS | ESA §7 - ITS | ESA §10 - ITP | ESA §7 - ITS |
| **Injunctive Relief Requested** | Prepare a BA | Prepare a BA | Apply for an ITP | Prepare a BA |

This lack of commonality among the facts and issues involved in resolution of the Dam Cases augers against consolidation.

Plaintiffs also contend that "[a] great deal of evidence to be presented at trial in each of the Dam Cases will be the same." Motion at p. 5. Yet, Plaintiffs identify only a handful of government documents that they contend will be presented in each Dam Case: the listing of the salmon population, the designation of the critical habitat for the species, official salmon return statistics, salmon species fact sheets, and "other government documents". *Id.* at pp. 5-6. Plaintiffs make no attempt to explain how presenting this limited universe of documents in individual trials of the Dam Cases would involve significant time or expense. Plaintiffs further claim that they "anticipate" making use of the same expert witnesses in the Dam Cases, then leap to the unsupported conclusion

that "it will be difficult to schedule their appearances at four different trials." *Id.* at p. 6. These speculative assertions deserve little weight in the Court's analysis. *Accord* *Transeastern Shipping*, 53 F.R.D. at 206 ("The burden is on the movant to convince the court that there should be consolidation.")

The crux of both discovery and trial in each Dam Case will be whether the unique features of that Defendant's dam operations, at that particular location on that particular river, kill or otherwise harm the Atlantic Salmon population. Each dam presents different river features that affect fish passage, different means of providing upstream and downstream fish passage, different means of preventing harm to fish moving downstream, and different turbines. These, and an unknown number of other, pertinent facts, the inferences to be drawn from them, their application to the requirements of the ESA, and the appropriate relief available for Plaintiffs, if any, will be different in each Dam Case. Of course, only the Brookfield and NextEra Dam Cases involve CWA claims, and the issues and proof concerning those claims have no relevance to the Miller Hydro and Topsham Hydro Dam Cases.

Plaintiffs' arguments in favor of consolidating the Dam Cases echo those made by the car dealers in *Liberty Lincoln*. Plaintiffs point to the identity of parties, the identity of claims, and the identity of business practices at issue. Those similarities did not support consolidation in *Liberty Lincoln*; neither should they here. Indeed, the Dam Cases present even more dissimilarities than the two actions sought to be consolidated in *Liberty Lincoln*, including different defendants, more disparate factual scenarios, different causes of action, and different requests for relief. These differences provide additional grounds for refusing consolidation than were present in *Liberty Lincoln*. Finally -- and most importantly -- the determination each Defendant's liability in the Dam Cases will be based on detailed proof that is particular to that Defendant's business operations.

This is not an instance where consolidation would eliminate the need to conduct what would

essentially be the same trial four times. Rather, it is an instance in which consolidation would require four cases that turn on disparate facts to be tried together. This Court should find, as did the court in *Liberty Lincoln*, that the disparate factual analyses and sources of proof required by the claims asserted in the Dam Cases render consolidation inappropriate. *Liberty Lincoln*, 149 F.R.D. at 81-82.

**C. Consolidation Of The Dam Cases Is Inappropriate Because It Would Cause Prejudice To Miller Hydro**

Consolidation is inappropriate if it would result in prejudice to one or more parties. *Seguro de Servicio*, 878 F.2d at 8. Consolidation of the Dam Cases risks prejudicing Miller Hydro in three distinct ways. First, it would significantly increase Miller Hydro's expenses by expanding the scope of discovery and trial. Second, it is likely to lead to confusion of issues and proof, which could lead to an erroneous finding of liability and or imposition of unwarranted relief. Third, it could result in creation of an intractable conflict for Miller Hydro's counsel, which is also acting as counsel for Topsham Hydro in the Dam Cases.

Forcing Miller Hydro to participate in consolidated discovery along with the other Defendants will increase in Miller Hydro's litigation burden and expense. Consolidating the depositions of Plaintiffs' witnesses would force Miller Hydro to have to sit through hours of irrelevant testimony concerning the other Dam Cases. Consolidated depositions actually could lead to greater inefficiencies than separate depositions would entail. For example, coordinating the schedules of all counsel and witnesses may require that depositions span non-consecutive days. Additionally, the parties in three of the Dam Cases -- Miller Hydro, Topsham Hydro, and Brookfield -- have entered into Confidentiality Agreements/Protective Orders.[2] It is highly likely that documents designated as "confidential" will be used at the depositions of Plaintiffs' witnesses. In those circumstances, consolidated depositions would inevitably spawn issues concerning confidentiality and the scope

[2] Miller Hydro understands that NextEra and Plaintiffs will enter in to a Confidentiality Agreement/Protective Order, as well.

and/or breach of a Confidentiality Agreement/Protective Order. In addition to costing additional time and money to settle, resolution of those issues would likely cause disruptions to, and postponements of, scheduled depositions. None of those concerns would exist if consolidation were refused.

Forcing Miller Hydro to participate in a consolidated trial along with the other Defendants will further -- and significantly -- increase in Miller Hydro's litigation burden and expense. Instead of a trial involving one dam and a single ESA cause of action, a consolidated trial will involve documents, testimony, expert opinions, arguments, motions, *etc.* regarding six other dam operations and include claims under the CWA. Apart from increased attorneys' fees and costs, the expanded scope of trial in the event the Dam Cases are consolidated will place an increased burden on Miller Hydro's personnel and witnesses who will participate in the trial. These additional burdens and expense constitute prejudice to Miller Hydro that counsels against consolidation. *See* 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d §2383, pp. 48-49 (2008) (citations omitted).

Consolidating the Dam Cases also increases the probability that a Defendant's overall case and/or particular positions will be misunderstood, misapplied, or confused. The number of exhibits, witnesses, issues, arguments of counsel, motions, *etc.* could expand fourfold or more in a consolidated proceeding. It follows naturally that increasing the complexity and scope of a trial, even in the best of circumstances, correspondingly increases the chance that the strategy and/or tactics of one or more parties will be diluted or misunderstood by the Court. Such confusion constitutes further grounds to deny consolidation. *See* 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d §2383, pp. 41-43 (2008) (citations omitted).

The fact that Miller Hydro and Topsham Hydro are represented by the same counsel presents another, unique potential for prejudice in the event their cases are consolidated for trial. In a consolidated trial, issues could arise which call for strategic or tactical decisions on which Miller Hydro and Topsham Hydro do not agree. In those circumstances, one or the other party may be

convinced by the other party, reluctantly, to change its position. That outcome involves one party pursuing a course of conduct that it would not have pursued had its case been tried separately. A consolidated trial of the Dam Cases could also present a situation that calls for decisions on which Miller Hydro and Topsham Hydro cannot agree. In that case, the parties' counsel would be placed in an irreconcilable conflict, calling for their withdrawal, perhaps even in the middle of a trial. That outcome would involve substantial prejudice to both Miller Hydro and Topsham Hydro. Neither of these potential scenarios was present ten months ago, when Miller Hydro and Topsham Hydro chose to retain the same counsel in cases that were brought as separate actions. And, of course, neither scenario would occur if the Court refused to consolidate the Dam Cases.

## Conclusion

For all of the foregoing reasons, Defendant Miller Hydro Group respectfully requests that the Court deny the Motion for consolidation of the Dam Cases filed by Plaintiffs Friends of Merrymeeting Bay and Environment Maine.

Dated: November 23, 2011

Respectfully submitted,

/s/ Paul McDonald

Paul McDonald
Theodore Small
Bernstein Shur
100 Middle Street; PO Box 9729
Portland, ME 04104-5029
207-774-1200

Attorneys for Defendant
Miller Hydro Group

**CERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2011, I served the foregoing Opposition to Plaintiffs' Motion to Consolidate Maine Dam Cases For Trial and For Depositions of Plaintiffs' Witnesses on behalf of Defendant Miller Hydro Group by filing it with the Court's CM-ECF system, which automatically sends notification to all counsel of record.

Respectfully submitted,

/s/ Paul McDonald
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