UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STATE OF MAINE, *et al.*, Plaintiffs, v. SCOTT PRUITT, in his capacity as Administrator, United States Environmental Protection Agency, *et al.*, Defendants, and HOULTON BAND OF MALISEET INDIANS, and PENOBSCOT NATION, Intervenors-Defendants.	))))))))))))))))	Civil Action No. 1:14-cv-264-JDL

PLAINTIFFS' MOTION FOR APPROVAL OF THEIR PROPOSED REVISIONS TO THE AMENDED SCHEDULING ORDER

Plaintiffs State of Maine and Paul Mercer in his capacity as Commissioner of the Maine Department of Environmental Protection ("Plaintiffs") request that the Court adopt their proposed revisions to the Court's prior Amended Scheduling Order, ECF No. 84, which was previously stayed, as described below.

BACKGROUND

This action has been pending since July 2014. ECF No. 1. On November 30, 2016, the Court issued a standard proposed scheduling order. ECF No. 57. On December 7, 2016, Plaintiffs and EPA jointly objected to the Court's proposed scheduling order because of the needs of this case. ECF No. 58. On December 27, 2016, the Court granted motions to intervene by the tribal Intervenor-Defendants, which Plaintiffs did not oppose. ECF No. 70. In January 2017, the parties filed separate motions proposing competing schedules for briefing the merits of Plaintiffs' administrative appeal of various decisions in EPA's February 2, 2015 letter (including both

approvals and disapprovals of Maine's water quality standards for Indian waters) and request for declaratory relief. ECF Nos. 74, 79, 80. Following a telephone hearing on February 2, 2017, ECF No. 81, the Court resolved the briefing dispute and proposed an Amended Scheduling Order, ECF No. 82, which was entered on February 14, 2017, ECF No. 84. Apart from EPA's unopposed motion to extend certain reply and surreply deadlines by one week, ECF No. 85, which the Court granted, ECF No. 86, no parties objected to the Amended Scheduling Order. Fed. R. Civ. P. 72(a); ECF No. 82 at 4.

Under the Amended Scheduling Order, Plaintiffs' primary brief on the administrative record as supplemented was originally due on May 15, 2017. ECF No. 84. On May 5, 2017, EPA filed a motion to stay these proceedings for 90 days to provide it with time to determine how to proceed with respect to pending petitions requesting EPA reconsideration and withdrawal of decisions challenged in this case. ECF No. 93. Plaintiffs did not oppose EPA's motion, *id.*, but the tribal Intervenor-Defendants opposed EPA's motion arguing that the Amended Scheduling Order was already "unusually generous" in light of the change in administration and that a further stay would delay resolution of the merits of this action. ECF No. 98. On May 12, 2017, the Court granted EPA's motion for 90-day stay over those objections. ECF No. 101.

On August 10, 2017, EPA filed a status report stating that it would reconsider the decisions challenged in this case but that it had not yet determined the outcome of such reconsideration. ECF No. 103. On August 10, 2017, EPA also filed a motion for an additional stay for 120 days to undertake that reconsideration. *Id.* Plaintiffs did not oppose EPA's motion for additional stay, *id.*, and the tribal Intervenor-Defendants took no position on EPA's motion, ECF No. 106. To eliminate uncertainty over the timing of deadlines upon expiration of any additional stay and resumption of the briefing schedule, Plaintiffs also filed an unopposed motion

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asking the Court to hold all deadlines in abeyance until another revised schedule is entered by the Court. ECF No. 104. The Court granted Plaintiffs' motion on August 28, 2017, and stayed all deadlines until another revised schedule is entered by the Court setting forth new deadlines. ECF No. 107. The Court granted EPA's motion for additional stay on August 29, 2017. ECF No. 108.

On December 8, 2017, EPA filed another status report indicating it had determined not to withdraw or change any of the decisions challenged in this case. ECF No. 109. EPA requested, *id.*, and the parties were directed, ECF No. 110, to propose either a new joint proposed briefing schedule, separate proposed schedules, or request a status conference by January 19, 2018.

Counsel for the parties have consulted, but have been unable to reach agreement on a new briefing schedule. Plaintiffs also understand that EPA plans to request a status conference and seek to bifurcate and limit the issues to be briefed in Plaintiffs' appeal, which Plaintiffs object to.

Plaintiffs have expended considerable resources preparing their motion and brief on the administrative record as supplemented on all aspects of their appeal and request for declaratory relief, and are now (and have been) prepared to file that substantially complete motion and brief in short order. Plaintiffs agree with the previously expressed concerns of the tribal Intervenor-Defendants that briefing on Plaintiffs' administrative appeal and request for declaratory relief should not be further delayed and should proceed immediately. *See* ECF No. 98 at 1, 4.

Plaintiffs believe that the general order of briefing and the page limits in the Court's previous Amended Scheduling Order, which no party objected to, should be used again in any new and revised scheduling order. However, Plaintiffs believe that there should be some minor changes to the timing of some of the already generous deadlines, both to accommodate personal schedules, and because EPA and the new administration have now had over 210 additional days (as a result of EPA's two requested stays) to evaluate the merits of Plaintiffs' challenges to EPA's

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approvals and disapprovals at issue here. In light of these considerations, Plaintiffs propose the following revisions to the prior Amended Scheduling Order, ECF No. 84:

PROPOSED REVISIONS TO AMENDED SCHEDULING ORDER

Deadline for Plaintiffs To File a Motion for Judgment on the Administrative Record as Supplemented, with Incorporated Memorandum: February 9, 2018, not to exceed 60 substantive pages in length.

Deadline for *Amici* Supporting Plaintiffs' Position To File Motions for Leave To File Briefs, attaching Proposed Brief(s) (14 days after Plaintiffs' brief): February 23, 2018, each brief not to exceed 12 substantive pages in length. If, as anticipated, two such motions are filed, the *amici* may, at their election, filed a combined brief not to exceed 20 substantive pages in length.

Deadline for EPA Defendants To File a Combined Response/Cross-Motion for Judgment on the Administrative Record as Supplemented, with Incorporated Memorandum (70 days after amici): May 4, 2018, not to exceed 70 substantive pages in length.

Deadline for Each Tribal Defendant To File a Combined Response/Cross Motion for Judgment on the Administrative Record as Supplemented, with Incorporated Memorandum (10 days after EPA): May 14, 2018, each response/cross-motion not to exceed 35 substantive pages in length.

Deadline for *Amici* Supporting Defendants' Position To File Motions for Leave To File Briefs, attaching Proposed Brief(s) (14 days after Tribes' briefs): May 28, 2018, each brief not to exceed 12 substantive pages in length. If, as anticipated, two such motions are filed, the *amici* may, at their election, file a combined brief not to exceed 20 substantive pages in length.

Deadline for Plaintiffs To File a Combined Reply/Response Brief (60 days after amici): July 27, 2018, not to exceed 70 substantive pages in length.

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Deadline for EPA Defendants and Each Tribal Defendant To File a Reply Brief (40 days after Plaintiffs' brief): September 5, 2018, each brief not to exceed 15 substantive pages in length.

Deadline for Plaintiffs To File a Surreply (30 days after reply briefs): October 5, 2018, not to exceed 15 substantive pages in length. The Plaintiffs' surreply shall not raise any new arguments.

Other than new deadline dates, these proposed revisions make only two changes to the structure of the Court's prior Amended Scheduling Order: 1) a clarification that all page limits apply to "substantive" pages (*i.e.*, briefing pages, as opposed to title or signature pages, tables of contents or authorities, certificates of service, etc.), which no party objects to; and 2) a reduction in the amount of time for EPA to file a combined response/cross-motion for judgment on the administrative record as supplemented, with incorporated memorandum, from 90 days to 70 days after the first *amici* deadline in the Amended Scheduling Order, which EPA objects to.

The second change was made in this proposal primarily because that generous 90-day deadline was originally requested by EPA due to the change in the administration and the stated need for an additional 30 days (beyond a typical 60-day allotment) to allow the new administration to review this matter and familiarize itself with the issues. ECF No. 80 at 6-7; *see also* ECF No. 98 at 3. This is no longer a factor given the passage of time (over 210 days) resulting from EPA's two requested stays, which allowed EPA ample time to fully review and reconsider the decisions challenged in this case. In addition, the incorporation of that second change into Plaintiffs' proposed schedule accommodates counsel's personal schedule (namely, longstanding family travel plans booked for most of August 2018, during which counsel will be unavailable for briefing), by having the deadline for Plaintiffs to file their combined

reply/response brief at the end of July 2018. In any event, Plaintiffs' proposed schedule allows the EPA Defendants a still-generous 70 days from the *amici* deadline (84 days from the filing of Plaintiffs' primary brief) to file their brief, which exceeds a more typical 60-day allotment.

As noted above, Plaintiffs' motion and primary brief are now substantially complete and ready to be filed in short order. Given the multiple delays to date, Plaintiffs believe that briefing on all aspects of their administrative appeal and request for declaratory relief should begin as soon as practical and proceed generally without delay. Plaintiffs note that counsel for Intervenor-Defendant Houlton Band of Maliseet Indians have expressed concerns with their deadlines in Plaintiffs' proposed schedule because of their anticipation of significant work associated with a 10-day trial set for May 15, 2018. In addition, EPA has indicated that it objects to Plaintiffs' schedule because of a stated need to retain the full 90-day allotment for EPA's primary brief for internal review, input, and coordination purposes. Depending on when the Court resolves this matter and issues another schedule, Plaintiffs may be able to move up the proposed filing date for their primary motion and brief to free up additional days to alleviate some of these concerns.

CONCLUSION

For the reasons above, Plaintiffs request that the Court adopt their proposed revisions to the Court's prior Amended Scheduling Order.

DATED: January 19, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 19th day of January, 2018, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties listed on the electronic service list, including the following:

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To my knowledge, there are no other non-registered parties or attorneys participating in this case.

/s/ Scott W. Boak
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