

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

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FRIENDS OF MERRYMEETING BAY and  
ENVIRONMENT MAINE,

Plaintiffs,

Civil Action No.

v.

TOPSHAM HYDRO PARTNERS LIMITED  
PARTNERSHIP,

Defendant.

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**COMPLAINT**

**INTRODUCTION**

1. Defendant Topsham Hydro Partners Limited Partnership (“Topsham”) is violating the federal Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, by killing, harming, and harassing endangered Atlantic salmon at its Pejepscot hydroelectric dam on the Androscoggin River. Topsham is, in ESA parlance, illegally “taking” this endangered species. More specifically, Topsham’s dam: kills and injures salmon with its rotating turbine blades when the fish try to pass through them; impedes upstream and downstream salmon passage, which prevents salmon from gaining access to significant amounts of spawning and rearing habitat; alters the natural habitat to such a degree that the essential behavior patterns of the fish are significantly impaired; and has other deleterious effects on the salmon.

2. The ESA allows the National Marine Fisheries Service (“NMFS”) and United States Fish and Wildlife Service (“USFWS”) (collectively, the “Services”), under certain

circumstances, to authorize an otherwise prohibited taking of an endangered species if such taking is “incidental” to, and not the purpose of, the carrying out of an otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B). Topsham does not have an authorization from the Services to commit an “incidental take” of salmon at Pejepscot dam.

3. Neither the federal nor state government has taken enforcement action against Topsham to redress its ESA violation. However, Congress authorized citizens to bring “citizen suits” in United States District Courts to enforce the ESA directly against violators. 16 U.S.C. § 1540(g).

4. Topsham’s dam is a major reason the Androscoggin population of salmon has declined to perilously low levels. Although Topsham has long been aware of this fact, it has not taken a number of basic, feasible steps, such as keeping fish from swimming into its spinning turbine blades, that would reduce the detrimental effects of their dam on this endangered population. Without a court order directing it to so, Topsham will not comply expeditiously with the ESA.

### **PARTIES**

5. Plaintiff Friends of Merrymeeting Bay (“FOMB”) is a non-profit Maine corporation with over 400 members. FOMB is dedicated to preserving the ecological, aesthetic, historical, recreational, and commercial values of Maine’s Merrymeeting Bay and its watershed, which includes the Kennebec River. FOMB accomplishes its mission through research, advocacy, land conservation, education, and litigation.

6. Plaintiff Environment Maine is a non-profit Maine corporation. It is a statewide environmental organization that advocates for clean air, clean water, and preservation of Maine’s natural resources on behalf of approximately 3,460 citizen

members from across the state of Maine. Among other activities, Environment Maine researches and distributes analytical reports on environmental issues, advocates before legislative and administrative bodies, engages in litigation when necessary, and conducts public education.

7. Defendant Topsham is a Minnesota limited partnership. Topsham operates, and is an owner of, Pejepscot dam on the Androscoggin River. Topsham is named as a licensee in the Federal Energy Regulatory Commission (“FERC”) license for Pejepscot dam.

### **JURISDICTION AND VENUE**

8. Subject matter jurisdiction is conferred upon this Court by 16 U.S.C. § 1540(g)(1) (ESA citizen suit provision), and 28 U.S.C. § 1331 (federal question jurisdiction). Venue lies within this District pursuant to 16 U.S.C. § 1540(g)(3)(A) (ESA venue provision) and 28 U.S.C. § 1391(e) (federal venue provision).

9. Plaintiffs gave Topsham notice of the violations alleged in this Complaint more than 60 days prior to commencement of this lawsuit by a letter addressed and mailed to Charles Lucas of Topsham. A copy of this letter is attached as Exhibit 1 and incorporated herein. Copies of the notice letter were mailed to (a) Topsham’s registered agent and (b) the Secretaries of Commerce and Interior. The notice letter satisfies the pre-suit notice requirements of 16 U.S.C. 1540 § (g)(2)(A)(i) (ESA).

### **FACTUAL BACKGROUND**

#### **The Life Cycle Of Atlantic Salmon**

10. Atlantic salmon are anadromous, meaning they are born in fresh water, migrate to the ocean, and then return to fresh water to spawn.

11. In late autumn, female Atlantic salmon deposit eggs in a series of nests (called “redds”) in a stream or river bed. Once the eggs are fertilized by spawning adult male salmon, the female salmon uses her tail to cover those eggs with gravel. After spawning, adult salmon, called “kelts,” return to the ocean in early winter or the following spring. Eggs hatch in March or April; at this point the newborn fish are referred to as “alevin” or “sac fry.” Three to six weeks after hatching, alevins emerge from their redds seeking food, and are at that point called “fry.” Fry quickly develop into “parr,” with camouflaging vertical stripes. They feed and grow for one to three years in their native streams or rivers before becoming “smolts.” Smolts are silver colored and approximately six inches long. In the spring, the body chemistry of smolts change and they are able to enter salt water. Smolts migrate to the ocean where they develop over two to three years into mature salmon weighing 8 to 25 pounds. Mature adult salmon begin returning in the spring to their native streams to repeat the spawning cycle. Atlantic salmon are capable of spawning and completing this cycle several times.

**There Are Almost No Atlantic Salmon Returning To The Androscoggin River**

12. The Maine Atlantic Salmon Commission (“MASC”) monitors the abundance and status of Atlantic salmon in many Maine rivers. On the Androscoggin, MASC traps and counts returning adult salmon at the lower-most dam, Brunswick dam. This trapping and counting is conducted annually, typically between May and November.

13. Historically, the Androscoggin River and the Kennebec River, which share a common estuary, Merrymeeting Bay, had the largest Atlantic salmon runs in the United States, estimated at more than 100,000 adults each year. Now, according to the recent annual surveys done by MASC, the number of adult Atlantic salmon returning to the

Androscoggin River each year is dangerously low. In 2010, 10 adult salmon returned to the Androscoggin River; in 2009, 24 returned; in 2008, 21 returned; in 2007, 16 returned; in 2006, 7 returned.

**TOPSHAM IS VIOLATING  
THE ENDANGERED SPECIES ACT**

**The Androscoggin Population Of Atlantic Salmon  
Is On The Endangered Species List.**

14. In enacting the Endangered Species Act, Congress expressly found that species of fish, wildlife, and plants in danger of or threatened with extinction are of “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). Congress stated that the purposes of the ESA “are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered and threatened species...” 16 U.S.C. § 1531(b). By enacting the Endangered Species Act, Congress intended protection of endangered species to be afforded the highest of priorities. Under the ESA, an “endangered species” is a species of animal or plant (other than certain dangerous insect pests) which is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6).

15. The Secretary of Commerce (for endangered species in the ocean) and the Secretary of the Interior (for all other species) are responsible for administering and implementing the ESA, with the Services acting on their behalf. Because Atlantic salmon are anadromous, the Secretaries (and thus the Services) share responsibility for managing the protection of these fish under the ESA.

16. In 2000, the Services issued a rule listing the Gulf of Maine Distinct Population Segment (“GOM DPS”) of Atlantic salmon as “endangered” because it is in danger of becoming extinct. At that time, the Services included the salmon populations of seven rivers in Down East Maine in the description of the endangered GOM DPS, but did not include Androscoggin or Kennebec River salmon populations in this listing.

17. In 2005, Plaintiff Friends of Merrymeeting Bay, Douglas Watts (a member of Plaintiff FOMB) and others filed a petition with the Services asking them to include Kennebec salmon in the GOM DPS. Although a federal “biological review team” found that the Kennebec, Androscoggin, and Penobscot River salmon populations should be included in the GOM DPS and published this finding in the “2006 Status Review for Anadromous Atlantic Salmon in the United States,” by mid-2008 the Services still had not ruled on the petition. On May 12, 2008, Mr. Watts, FOMB, and other conservation groups sued the Services to obtain a ruling on the petition. On September 3, 2008, the Services did rule on the petition, proposing to include the Kennebec, Androscoggin and Penobscot River salmon populations in the GOM DPS. 73 Fed. Reg. 51,415 (September 3, 2008). On June 19, 2009, the Services issued a final rule including the salmon populations of all three rivers in the listed GOM DPS, thereby formally designating these populations as endangered under the ESA. 74 Fed. Reg. 29,344 (June 19, 2009).

18. On that same day, NMFS issued a final rule designating “critical habitat” for the Kennebec, Androscoggin and Penobscot salmon – *i.e.*, habitat “essential to the conservation of the species” and “which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i). The portion of the Androscoggin River where

Pejepscot dam is located and those portions affected by the dam are part of that critical habitat. 74 Fed. Reg. 29,300 (June 19, 2009).

**“Take” Of An Endangered Species Is Prohibited By The Endangered Species Act.**

19. Section 9 of the ESA makes it unlawful for any person to “take” an endangered species unless authorized to do so by the federal government. 16 U.S.C. § 1538(a)(1)(b).

20. Under the ESA, the term “take” means “to harass, harm, pursue, hunt, shoot, kill, trap, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

By USFWS regulation:

Harass in the definition of “take” in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. [and]

Harm in the definition of “take” in the Act means an act which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3.

21. A NMFS regulation further defines “harm” as including habitat modification where a causal link is established between such modification and injury or death of a listed species. 40 C.F.R. § 222.102. In publishing that rule, NMFS listed the following among its examples of activities that may modify habitat and thus cause a take:

1. Constructing or maintaining barriers that eliminate or impede a listed species’ access to habitat or ability to migrate;

\* \* \*

4. Removing or altering rocks, soil, gravel, vegetation or other physical structures that are essential to the integrity and function of a listed species’ habitat;

\* \* \*

5. Removing water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding or other essential behavior patterns; [and]

\* \* \*

7. Constructing or operating dams or water diversion structures with inadequate fish screens or fish passage facilities in a listed species' habitat...

64 Fed. Reg. 60,727, 60,730 (Nov. 8, 1999).

22. When a federally licensed activity – such as operating a hydroelectric dam – causes a take, the licensee may receive authorization under the ESA to continue the activity in one of two ways. One is to apply for and obtain an “incidental take permit” (“ITP”) pursuant to Section 10 of the ESA, 16 U.S.C § 1539. The other is to obtain an “incidental take statement” (“ITS”) pursuant to Section 7 of the ESA, 16 U.S.C. §1536; *see* 50 C.F.R. § 402.14. A take is considered “incidental” when the purpose of the activity is not to take an endangered species, but rather to conduct some otherwise lawful activity that incidentally results in a take. 16 U.S.C. § 1539(a)(1)(B); 50 C.F.R. § 402.02. An ITP can require that the holder of the ITP “minimize and mitigate the impacts of” the taking “to the maximum extent practicable.” 16 U.S.C. § 1539(a)(2) (B)(2). Similarly, an ITS can require that “reasonable and prudent measures” be taken to “minimize” the impact of a take. 16 U.S.C. § 1536(b)(4)(ii). An ITP is not authorized unless certain specified conditions are met. Among these is that the take “will not appreciably reduce the likelihood of survival and recovery of the species in the wild.” 16 U.S.C. § 1539(a)(2)(B)(4). Similarly, an ITS is not authorized if the licensed activity is “likely to jeopardize the continued existence of any endangered species...or result in the

destruction or adverse modification of habitat [critical to the species]...” 16 U.S.C. § 1536(a)(2) and (b)(4)(B).

23. The citizen suit provision of the ESA grants jurisdiction to United States District Courts to issue orders enjoining violations of the Act (such as the unauthorized taking of an endangered species) and authorizes an award of costs of litigation (including reasonable attorney and expert witness fees). 16 U.S.C. § 1540(g)(1) and (4).

**Topsham Is Taking Atlantic Salmon  
In Violation Of Section 9 Of The ESA.**

24. Topsham’s Pejepscot dam harasses, harms, and kills – and thus “takes” – Atlantic salmon in a number of ways. Among these are the following:

- a. The dam’s turbines kill and injure out-migrating salmon when the salmon attempt to pass through them.
- b. The dam severely limits upstream passage of salmon, preventing access to significant amounts of spawning and rearing habitat.
- c. Facilities meant to allow the salmon to pass around or through the dam cause delays in passage, resulting in incremental losses of salmon smolts, pre-spawn adults, and adults.
- d. The dam is a barrier to the migration of other fish whose presence is necessary for the salmon to complete their life cycle.
- e. The dam adversely alters predator-prey assemblages, such as the ability of the salmon to detect and avoid predators.
- f. The dam creates slow-moving impoundments in formerly free-flowing reaches. These altered habitats are less suitable for spawning and rearing of salmon and contribute to the dam’s significant impairment of essential behavior patterns of the salmon. In

addition, these conditions may favor non-native competitors at the expense of the native salmon.

g. The dam results in adverse hydrological changes, adverse changes to stream and river beds, interruption of natural sediment and debris transport, and changes in water temperature, all of which contribute to the dam's significant impairment of essential behavior patterns.

25. Topsham has neither an incidental take permit nor an incidental take statement authorizing its take of Atlantic salmon at Pejepscot dam. Topsham's take of Atlantic salmon therefore violates Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B). Topsham has been violating the Section 9 take prohibition since the day Androscoggin salmon were included in the GOM DPS and thus designated as endangered under the ESA.

26. In their decision to include the Androscoggin River population of Atlantic salmon on the Endangered Species List, the Services found dams on that river play a major role in imperiling the salmon. The Services stated: "The National Research Council stated in 2004 that the greatest impediment to self-sustaining Atlantic salmon populations in Maine is obstructed fish passage and degraded habitat caused by dams ... Dams are known to typically kill or injure between 10 and 30 percent of all fish entrained at turbines [cite omitted]. With rivers containing multiple hydropower dams, these cumulative losses could compromise entire year classes of Atlantic salmon ... Thus, cumulative losses at passage facilities can be significant ... Dams remain a direct and significant threat to Atlantic salmon." 74 Fed. Reg. at 29362. Similarly, the Services stated: "Dams are among the leading causes of both historical declines and contemporary

low abundance of the GOM DPS of Atlantic salmon [cite omitted].” The Services also stated that the “effects [of dams] have led to a situation where salmon abundance and distribution has been greatly reduced, and thus the species is more vulnerable to extinction ... Therefore, dams represent a significant threat to the survival and recovery of the GOM DPS.” 74 Fed. Reg. at 29366-29367.

**PLAINTIFFS HAVE STANDING TO BRING THIS SUIT**

27. Plaintiffs have members who have been very active in efforts to preserve Atlantic salmon in the Androscoggin River and Merrymeeting Bay. For example, Plaintiffs’ members were instrumental in securing the designation of the Androscoggin salmon population as part of the GOM DPS, have for years advocated before federal and state agencies for better salmon passage at Pejepscot and other dams, and regularly monitor the water quality of the Androscoggin River.

28. Plaintiffs have members who are interested in maintaining the natural biodiversity of the Androscoggin River and its environs. Plaintiffs have members who live near, own property near, and recreate on and near the Androscoggin River and Merrymeeting Bay. Plaintiffs have members who, among other activities, kayak on, canoe on, fish in, walk and hike along, lead guided trips on, and enjoy observing and photographing aquatic life and wildlife in and around the Androscoggin River and Merrymeeting Bay. Their enjoyment of these activities is impaired by the diminution of the size and health of the Atlantic salmon population in the Androscoggin River.

29. Plaintiffs’ members enjoy and in many ways receive great value from the presence of wild Atlantic salmon and want the numbers of wild salmon in the Androscoggin River to be as plentiful as possible. They also want the Androscoggin

River population of salmon to eventually recover to the point of no longer being endangered. The dearth of Atlantic salmon in the river diminishes Plaintiffs' members' use and enjoyment of the river. If Atlantic salmon were populous enough in the Androscoggin River, Plaintiffs' members would fish for and eat that salmon. They cannot do so now because the fish are endangered. Recovery of Atlantic salmon in the rivers would increase economic opportunities for Plaintiffs' members because there would be a greater demand for guided trips that they could lead for paddling, fishing, fish-spotting, or photography, and for other purposes.

30. Topsham's dam operations are directly responsible for depressing Atlantic salmon populations in the Androscoggin River. Topsham's dam is a leading cause of the near extinction of Atlantic salmon in the Androscoggin River and of the fish's presence on the Endangered Species List. If Topsham complied with the Endangered Species Act there would be more Atlantic salmon in the Androscoggin River and the chance of the river's salmon population recovering would be improved. Moreover, preservation and restoration of the salmon's critical habitat in and along the Androscoggin River would improve the health, biodiversity, and sustainability of these natural areas in which Plaintiffs' members have recreational, aesthetic, and economic interests.

**TOPSHAM CAN ACHIEVE COMPLIANCE WITH THE ESA IN A MANNER THAT IS CONSISTENT WITH THE TERMS OF ITS FERC LICENSE**

31. Relief in this case can be fashioned in a manner that is consistent with the FERC license issued for the operation of Pejepscot dam. For example, Topsham can stop the turbines during salmon migration season to prevent the fish from swimming into the spinning turbine blades. This can be done without having to modify the FERC license.

In fact, other dam owners stop their turbines in order to provide safe passage for migrating fish.

32. Topsham has indicated it does not intend to apply for an incidental take permit, but, rather, intends to obtain an incidental take statement pursuant to Section 7 of the ESA, 16 U.S.C. § 1536(b)(4). The ESA directs all federal agencies to work to conserve endangered species and to use their authorities to further the purposes of the ESA. Section 7 of the ESA, entitled “Interagency Cooperation,” is the mechanism designed to ensure the actions taken by federal agencies, including those they fund or authorize, do not jeopardize the existence of any listed species.

33. Under Section 7, federal agencies must consult with the Services when any action the agency intends to carry out, fund or authorize (such as through a federal license) may affect a listed endangered species. One of the first steps in consultation is the preparation of a “biological assessment” (“BA”). 16 U.S.C. § 1536(c). One of the purposes of a BA is to help make the determination whether a proposed activity “is likely to adversely affect” listed species or their critical habitat. *Id.* The federal licensee may be designated to prepare the BA, though ultimate responsibility for the BA lies with the agency issuing the license. If the agency determines through a BA that its action is likely to adversely affect a listed species, the agency is required to submit to the Services a request for consultation. 16 U.S.C. § 1536(a) and (b). This process can result in the issuance of an incidental take statement, so long as the activity to be authorized is not “likely to jeopardize the continued existence of any endangered species...or result in the destruction or adverse modification of habitat [critical to the species]...” 16 U.S.C. § 1536(a)(2) and (b)(4)(B). An ITS, if issued, “specifies those reasonable and prudent

measures that the Secretary considers necessary or appropriate to minimize” the impact of an activity on endangered species, and “sets forth the terms and conditions...that must be complied with by...the applicant [for a federal license]...to implement” those measures. 16 U.S.C. § 1536(b)(4)(ii) and (iv).

34. Topsham has indicated that it will attempt to obtain an ITS by applying to amend the FERC license for Pejepscot dam, which would trigger the Section 7 consultation process. Topsham has been designated by FERC to prepare the biological assessment. Given, among other things, (a) Topsham’s ongoing unlawful take of endangered Androscoggin River salmon, (b) the dire condition of these Atlantic salmon populations and the risk that the fish will soon become extinct, and (c) Topsham’s failure to take meaningful steps to protect salmon, despite years of warning that the ESA listing was forthcoming, Plaintiffs believe Topsham must be put on an enforceable schedule for preparing the BA. Such an order would have no effect on Topsham’s ability to operate in a manner consistent with its FERC license.

**RELIEF REQUESTED**

Plaintiffs request that this Court:

- a. Declare Defendant to be violating the take prohibition of the Endangered Species Act at Pejepscot dam;
- b. Order Defendant to prepare a BA according to a specified schedule, and to (1) prevent Atlantic salmon from swimming into operating turbines at Pejepscot dam unless authorized by an ITP or ITS and (2) implement other appropriate measures to comply with the ESA’s take prohibition pending the issuance of any ITP or ITS;

c. Award costs of litigation (including reasonable attorney and expert witness fees), as provided for in 33 U.S.C. § 1365(d);

d. Order such other relief as the Court deems appropriate.

Dated: January 31, 2011

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