

**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 ANSWER TO PLAINTIFFS' COMPLAINT  
WITH AFFIRMATIVE DEFENSES**

Defendant Topsham Hydro Partners Limited Partnership (“Topsham Hydro”), by and through its undersigned counsel, hereby submits its Answer to the Complaint (the “Complaint”) filed by Plaintiffs Friends of Merrymeeting Bay and Environment Maine (collectively, “Plaintiffs”).

1. Topsham Hydro denies the allegations set forth in Paragraph 1 of the Complaint.

2. Topsham Hydro admits in part and denies in part the allegations of Paragraph 2 of the Complaint. Topsham Hydro admits that it does not have authorization from the Services to commit an “incidental take” of salmon at Pejepscot dam. Topsham Hydro denies that it is committing a take of Atlantic Salmon or that its operations at the Pejepscot dam do not comply with Endangered Species Act (“ESA”). The remaining allegations of Paragraph 2 of the Complaint set forth legal conclusions and do not require a response. To the extent a response to those allegations is required, Topsham Hydro denies them on the grounds that the ESA, and the referenced statutory provision, speak for themselves.

3. Topsham Hydro admits in part and denies in part the allegations of Paragraph 3 of

the Complaint. Topsham Hydro admits that neither the federal nor the state government has taken enforcement action against Topsham Hydro for an ESA violation. Topsham Hydro denies that it has violated the ESA. The remaining allegations of Paragraph 3 of the Complaint set forth legal conclusions and do not require a response. To the extent a response to those allegations is required, Topsham Hydro denies them on the grounds that the referenced statutory provision speaks for itself.

4. Topsham Hydro denies the allegations set forth in Paragraph 4 of the Complaint.

#### **Parties**

5. Topsham Hydro is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 5 of the Complaint and therefore denies them.

6. Topsham Hydro is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 6 of the Complaint and therefore denies them.

7. Topsham Hydro admits the allegations set forth in Paragraph 7 of the Complaint.

#### **Jurisdiction and Venue**

8. The allegations of Paragraph 8 of the Complaint set forth legal conclusions and do not require a response.

9. Topsham Hydro admits in part and denies in part the allegations of Paragraph 9 of the Complaint. Topsham Hydro admits that its representative received a copy of the referenced letter more than 60 days prior to commencement of this action. Topsham Hydro is without knowledge or information sufficient to form a belief as to whether the referenced letter was also mailed to the Secretaries of Commerce and Interior, and therefore denies those allegations. The

remaining allegations of Paragraph 9 of the Complaint set forth legal conclusions and do not require a response. To the extent a response to those allegations is required, Topsham Hydro denies them.

### **Factual Background**

10. Topsham Hydro admits the allegations set forth in Paragraph 10 of the Complaint.

11. Topsham Hydro is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 11 of the Complaint and therefore denies them.

12. Topsham Hydro denies the allegations set forth in Paragraph 12 of the Complaint.

13. Topsham Hydro is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 13 of the Complaint and therefore denies them.

14. The allegations of Paragraph 14 of the Complaint set forth legal conclusions and do not require a response. To the extent a response is required, Topsham Hydro denies those allegations on the grounds that the referenced statutory provisions speak for themselves.

15. The allegations of Paragraph 15 of the Complaint set forth legal conclusions and do not require a response. To the extent a response is required, Topsham Hydro denies the allegations to the extent they are inconsistent with applicable law.

16. Topsham Hydro admits in part and denies in part the allegations of Paragraph 16 of the Complaint. Topsham Hydro admits that the Services (i) listed the GOM DPS of Atlantic Salmon as endangered in or around 2000; (ii) included the salmon populations of seven rivers in Maine in the description of the endangered GOM DPS; and (iii) did not include the Androscoggin River or Kennebec River salmon populations in this listing. Topsham Hydro is without knowledge

or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 16 of the Complaint and therefore denies them.

17. Topsham Hydro is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 17 of the Complaint and therefore denies them.

18. Topsham Hydro admits in part and denies in part the allegations of Paragraph 18 of the Complaint. Topsham Hydro admits that NMFS has designated critical habitat for the Kennebec, Androscoggin, and Penobscot Salmon and that the portion of the Androscoggin where the Pejepscot dam is located is part of that critical habitat. The remaining allegations of Paragraph 18 of the Complaint set forth legal conclusions and do not require a response. To the extent a response to those allegations is required, Topsham Hydro denies the allegations on the grounds that the referenced statutory provision speaks for itself.

19. The allegations of Paragraph 19 of the Complaint set forth legal conclusions and do not require a response. To the extent a response is required, the allegations are denied on the grounds that the referenced statutory provision speaks for itself.

20. The allegations of Paragraph 20 of the Complaint set forth legal conclusions and do not require a response. To the extent a response is required, the allegations are denied on the grounds that the referenced statutory and regulatory provisions speak for themselves.

21. The allegations of Paragraph 21 of the Complaint set forth legal conclusions and do not require a response. To the extent a response is required, the allegations are denied on the grounds that the referenced regulatory provisions speak for themselves.

22. The allegations of Paragraph 22 set forth legal conclusions and do not require a response. To the extent a response is required, those allegations are denied on the grounds that the

referenced statutory and regulatory provisions speak for themselves.

23. The allegations of Paragraph 23 of the Complaint set forth legal conclusions and do not require a response. To the extent a response is required, the allegations are denied on the grounds that the referenced statutory provisions speak for themselves.

24. Topsham Hydro denies the allegations set forth in Paragraph 24 of the Complaint.

25. Topsham Hydro admits in part and denies in part the allegations of Paragraph 25 of the Complaint. Topsham Hydro admits that, as of the time of the filing of this Answer, it has not obtained an incidental take permit or an incidental take statement (“ITS”) for the taking of Atlantic Salmon. Topsham Hydro denies that it is taking Atlantic Salmon, and denies the remaining allegations set forth in Paragraph 25 of the Complaint.

26. Topsham Hydro admits in part and denies in part the allegations of Paragraph 26 of the Complaint. Topsham Hydro admits that Paragraph 26 of the Complaint quotes certain passages from the Federal Register. Topsham Hydro is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 26 of the Complaint and therefore denies them.

27. Topsham Hydro is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 27 of the Complaint and therefore denies them.

28. Topsham Hydro is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 28 of the Complaint and therefore denies them.

29. Topsham Hydro is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 29 of the Complaint and therefore denies

them.

30. Topsham Hydro denies the allegations set forth in Paragraph 30 of the Complaint.

31. The first three sentences of Paragraph 31 of the Complaint set forth legal conclusions and do not require a response. To the extent a response is required, those allegations are denied. Topsham Hydro is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 31 of the Complaint and therefore denies them.

32. Topsham Hydro admits in part and denies in part the allegations of Paragraph 32 of the Complaint. Topsham Hydro admits that it is engaged in the consultation process, pursuant to Section 7 of the ESA, and that this consultation may result in the issuance of an ITS. The remainder of the allegations of Paragraph 32 of the Complaint set forth legal conclusions and do not require a response. To the extent a response is required, those allegations are denied on the grounds that the referenced statutory provisions speak for themselves.

33. The allegations of Paragraph 33 of the Complaint set forth legal conclusions and do not require a response. To the extent a response is required, the allegations are denied on the grounds that the referenced statutory provisions speak for themselves.

34. Topsham Hydro admits in part and denies in part the allegations of Paragraph 34 of the Complaint. Topsham Hydro admits that it is engaged in the consultation process, pursuant to Section 7 of the ESA, and that this consultation may result in the issuance of an ITS. Topsham Hydro denies the remaining allegations set forth in Paragraph 34 of the Complaint.

WHEREFORE, Defendant Topsham Hydro Group respectfully requests that the Court grant judgment in its favor; award costs of suit; and grant such further relief as the Court deems just and appropriate.

**Affirmative Defenses**

1. This action should be dismissed because Plaintiffs have failed to state a cause of action upon which relief can be granted.
2. This action should be dismissed because the Court lacks subject-matter jurisdiction.
3. This action should be dismissed because the federal regulatory agencies have primary jurisdiction.
4. This action should be dismissed because the Plaintiffs failed to exhaust their administrative remedies.

Dated at Portland, Maine this 23rd day of September 2011.

Respectfully submitted,

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/s/ Theodore Small  
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