

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

FRIENDS OF MERRYMEETING BAY)	
AND ENVIRONMENT MAINE,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MILLER HYDRO GROUP,)	
)	
Defendant.)	

Civil Action No.
2:11-cv-00036

**DEFENDANT MILLER HYDRO GROUP’S ANSWER TO
PLAINTIFFS’ COMPLAINT WITH AFFIRMATIVE DEFENSES**

Defendant Miller Hydro Group (“Miller 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. Miller Hydro denies the allegations set forth in Paragraph 1 of the Complaint.

2. Miller Hydro admits in part and denies in part the allegations of Paragraph 2 of the Complaint. Miller Hydro admits that it does not have authorization from the Services to commit an “incidental take” of salmon at Worumbo dam. Miller Hydro denies that it is committing a take of Atlantic Salmon or that its operations at the Worumbo dam do not comply with the 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, Miller Hydro denies them on the grounds that the ESA, and the referenced statutory provision, speak for themselves.

3. Miller Hydro admits in part and denies in part the allegations of Paragraph 3 of the Complaint. Miller Hydro admits that neither the federal nor the state government has taken enforcement action against Miller Hydro for an ESA violation. Miller 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, Miller Hydro denies them on the grounds that the referenced statutory provision speaks for itself.

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

Parties

5. Miller 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. Miller 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. Miller 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. Miller Hydro admits in part and denies in part the allegations of Paragraph 9 of the Complaint. Miller Hydro admits that its registered agent and its Vice President and Director received a copy of the referenced letter more than 60 days prior to commencement of this action. Miller 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, Miller Hydro denies them.

Factual Background

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

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

13. Miller 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, Miller 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, Miller Hydro denies the allegations to the extent they are inconsistent with applicable law.

16. Miller Hydro admits in part and denies in part the allegations of Paragraph 16 of the Complaint. Miller 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. Miller 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. Miller 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. Miller Hydro admits in part and denies in part the allegations of Paragraph 18 of the

Complaint. Miller Hydro admits that NMFS has designated critical habitat for the Kennebec, Androscoggin, and Penobscot Salmon and that the portion of the Androscoggin where the Worumbo 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, Miller 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. Miller Hydro denies the allegations set forth in Paragraph 24 of the Complaint.

25. Miller Hydro admits in part and denies in part the allegations of Paragraph 25 of the

Complaint. Miller 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. Miller Hydro denies that it is taking Atlantic Salmon, and denies the remaining allegations set forth in Paragraph 25 of the Complaint.

26. Miller Hydro admits in part and denies in part the allegations of Paragraph 26 of the Complaint. Miller Hydro admits that Paragraph 26 of the Complaint quotes certain passages from the Federal Register. Miller 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. Miller 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. Miller 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. Miller 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. Miller 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. Miller 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. Miller Hydro admits in part and denies in part the allegations of Paragraph 32 of the Complaint. Miller 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. Miller Hydro admits in part and denies in part the allegations of Paragraph 34 of the Complaint. Miller 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. Miller Hydro denies the remaining allegations set forth in Paragraph 34 of the Complaint.

WHEREFORE, Defendant Miller 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,

 /s/ Theodore Small
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Theodore Small

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Attorneys for Defendant
Miller Hydro Group

CERTIFICATE OF SERVICE

I, Marcia A. Libby, hereby certify that I am over eighteen years old and caused a true and correct copy of the above document to be served electronically upon the parties and at the addresses set forth below on the 23rd day of September 2011.

/s/ Marcia A. Libby
Marcia A. Libby
Paralegal

Mailing Information for Case 2:11-cv-00036

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.