

Effective as of July 20, 2009, the U.S. Fish and Wildlife Service (FWS) has expanded its listing of the endangered Gulf of Maine Atlantic (GOM) salmon ([link to final rule](#)). In addition, the National Oceanic and Atmospheric Administration (NOAA Fisheries) has designated over 12,000 miles of river, stream, and estuary habitat in Maine as “critical habitat” for the salmon ([link to final rule](#)). FWS’s initial listing of the GOM Atlantic salmon in 2000 included anadromous Atlantic salmon in eight Downeast Maine rivers. The expanded listing includes all anadromous Atlantic salmon whose freshwater range occurs in the watersheds from the Androscoggin River northward along the Maine coast to the Dennys River. This includes the Androscoggin, Kennebec, and Penobscot rivers.

Endangered Species Act Basics

When a species is listed as endangered, Section 9 of the Endangered Species Act (ESA) makes it illegal to “take” any such listed species. The term “take” is broadly defined to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.” The unauthorized take of a listed species can subject a party to civil penalties of up to \$25,000 for each violation and criminal penalties of up to \$50,000, or up to one year imprisonment, or both. Additionally, any person can bring suit to enjoin alleged violations of the ESA. Although the ESA strictly prohibits the unauthorized taking of a listed species, the ESA creates two procedures for authorizing the “incidental take” of a listed species. First, FWS/NOAA Fisheries may issue “incidental take” permits in certain circumstances when a private party has prepared a habitat conservation plan (HCP). An HCP is designed to offset any harmful effects that the proposed activity might have on the protected species and describes the actions required to conserve the listed species.

Second, in instances where there is a federal agency action, FWS/NOAA Fisheries may issue an “incidental take” statement following consultation between the federal action agency and FWS/NOAA Fisheries under Section 7 of the ESA. The incidental take statement authorizes a specified amount of take so long as the conditions of the statement are met. The Section 7 consultation process also may require reasonable and prudent alternatives to avoid adverse modification of critical habitat.

Potential Impacts of the Listing

The listing of the GOM Atlantic salmon as an endangered species and the designation of critical habitat could affect many individuals, businesses, and municipalities in Maine. Three industries that could be impacted by the decisions are dam owners, wastewater dischargers, and those who withdraw water for irrigation or other purposes. FWS and NOAA Fisheries have stated that NOAA Fisheries will be the lead agency for activities involving dams and FWS will be the lead agency for activities involving wastewater discharges and water withdrawals. Dams. According to the listing decision, there is a potential for “take” liability for dam owners whose dams may impede the passage of the GOM Atlantic salmon. Because the FWS has stated that dams may result in a “take,” dam owners may want to consider applying for an incidental take permit, which requires the preparation of an HCP in consultation with NOAA Fisheries. One potential outcome from the HCP process is that some dam owners could be required to install or modify existing fish passage facilities and to modify operations to minimize the potential for

harm. In addition, activities at a dam that require a federal permit will require a Section 7 consultation process, resulting in a lengthier and more expensive permitting process

Municipal and Industrial Discharges. According to the listing decision, there is the potential for “take” liability for the discharge of pollutants from municipal and industrial facilities because, according to FWS, the discharge of toxic chemicals, silt, or other pollutants into the aquatic environment may harm the GOM Atlantic salmon. Therefore, as with dam owners, it may be important for discharging facilities to seek an incidental take permit. In addition, a facility that requires a discharge permit should anticipate that the permitting agency will likely have to go through the consultation process prior to taking action.

Water Withdrawals. Finally, according to the listing decision, there is potential for “take” liability for those who withdraw water. The FWS stated that a water withdrawal that reduces the instream flow below the median monthly flow may be a stressor on the GOM Atlantic salmon. For example, in 2008, FWS alleged that a “take” occurred when a Maine farming operation withdrew water from a river for irrigation purposes and the withdrawal allegedly resulted in a moderate reduction of instream flow.

Again, owners of water withdrawal facilities may want to consider seeking an incidental take permit to avoid being subjected to “take” liability. The Section 7 consultation process, however, will probably not be invoked because water withdrawals generally do not require a federal permit. On the other hand, if the activity requiring the water withdrawal, such as a farming operation, is subsidized by the federal government, or otherwise receives federal funding, then Section 7 consultation will be required in order to receive federal support.

Next Steps

Any party whose activity might result in the “take” of a protected salmon or the adverse modification of salmon habitat should consider seeking an incidental take permit. As discussed above, issuance of an incidental take permit will require the development of an HCP.

The appropriate scope of an HCP is still in question. The HCPs could be developed on individual rivers, on salmon recovery units, or for individual incidental take permit holders. In addition, the Maine Department of Marine Resources has indicated that it might seek to create a state-wide HCP to govern all incidental takings of the protected salmon.

For more information about the potential impacts of the recent listing of the Gulf of Maine Atlantic salmon as an endangered species on your activities, contact:

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