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Dated: July 29, 2009.

**Marybeth Peters,**

*Register of Copyrights.*

Approved by:

**James H. Billington,**

*The Librarian of Congress.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 226

[Docket No. 0808061060-91139-03]

RIN 0648-AW77

#### Endangered and Threatened Species; Designation of Critical Habitat for Atlantic Salmon (*Salmo salar*) Gulf of Maine Distinct Population Segment; Final Rule

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Final rule.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), issue a final rule to revise the regulatory language that appeared in a final rule that published in the **Federal Register** of June 19, 2009. The final rule designated critical habitat for the Atlantic salmon (*USalmo salar*) Gulf of Maine Distinct Population Segment (GOM DPS) under the Endangered Species Act (ESA). We designated as critical habitat 45 specific areas occupied by Atlantic salmon at the time of listing that comprise approximately 19,571 km of perennial river, stream, and estuary habitat and 799 square km of lake habitat within the range of the GOM DPS and in which are found those physical and biological features essential to the conservation of the species. We excluded approximately 1,256 km of river, stream, and estuary habitat and 100 square km of lake habitat from critical habitat pursuant to the ESA. We issue this final rule to revise the designated critical habitat for the expanded GOM DPS of Atlantic salmon to exclude all trust and fee holdings of the Penobscot Indian Nation, and we correct the table to add an "E" to indicate that Belfast Bay is

excluded from critical habitat under the ESA for reasons of economics.

**DATES:** Effective August 10, 2009.

**FOR FURTHER INFORMATION CONTACT:** Dan Kircheis, National Marine Fisheries Service, Maine Field Station, 17 Godfrey Drive, Orono, ME 04473 at (207) 866-7320, or Marta Nammack at (301) 713-1401 ext. 180.

**SUPPLEMENTARY INFORMATION:** In the proposed rule to designate critical habitat for the expanded GOM DPS of Atlantic salmon (73 FR 51747; September 5, 2008), we proposed to exclude under section 4(b)(2) of the ESA all tribal lands from the critical habitat designation, based on Secretarial Order 3206 that recognizes Tribes as having the governmental authority and the desire to protect and manage their resources in a manner that is most beneficial to them.

In the final rule to designate critical habitat for the expanded GOM DPS of Atlantic salmon (74 FR 29300; June 19, 2009), we included as critical habitat Trust and Fee lands owned by the Penobscot Indian Nation, based on our interpretation of comments that we received from the Penobscot Indian Nation. In their comments, the Penobscot Indian Nation stated that "the Nations Trust landholdings are adequately identified and appropriately excluded from Critical Habitat Designation." Then they stated, "Given the extent of important salmon habitat located within the Penobscot Indian Reservation the Penobscot Nation asks that the services do not exclude any portion of the Penobscot Indian Reservation from the designation as Critical Habitat. The bed, banks, and islands that make up the Penobscot Indian Reservation are indeed "critical" to the survival of wild Atlantic salmon in the Penobscot River watershed. In fact, the Penobscot Nation believes that the recovery of the species will not be possible without adequate access to the Atlantic salmon habitat that is contained within the Penobscot Indian Reservation." We interpreted this to mean that all of the Penobscot Indian Nation's land should be included as critical habitat.

On June 22, 2009, we received notice from the Tribe that we incorrectly included Trust and Fee lands as critical habitat when they were seeking to include reservation lands. This final rule corrects the final rule published on June 19, 2009 (74 FR 29300) to exclude all areas that are Trust and Fee lands of the Penobscot Indian Nation. Critical habitat on Penobscot Indian lands will remain designated only for those lands that make up the Penobscot Reservation.

The exclusion of the Trust and Fee lands from the designation of critical habitat does not diminish the number of functional habitat units below those needed for the recovery of the species in the Penobscot Bay salmon habitat recovery unit.

The effect of this correction is to exclude 1,400 instead of 1,256 km of river, stream, and estuary habitat and 127 instead of 100 sq km of lake habitat from critical habitat pursuant to section 4(b)(2) of the ESA.

Recent information provided by the Penobscot on Tribal ownership of lands within the occupied range designated as critical habitat discloses that the Penobscot Tribe hold approximately 60,500 acres (244.8 sq km) of Fee lands and lands held in Trust within the areas occupied by GOM DPS. We have determined that all the rivers, streams, lakes, and estuaries of approximately 9,500 acres (38.4 sq km) of land held for the Passamaquoddy tribe already disclosed in the final rule and approximately 60,500 acres (244.8 sq km) of Fee lands and lands held in Trust by the Penobscot Nation (not disclosed in the final rule) within the areas occupied by the GOM DPS are excluded from critical habitat designation based on the principles of the Secretarial Order discussed above. The rivers, lakes, and streams within the approximately 4,400-acre (17.8 sq km) Penobscot Reservation are included as critical habitat per request of the Penobscot Nation.

We do not believe that exclusion of Penobscot Tribal Trust lands and Passamaquoddy tribal lands, including their lands in the Downeast Coastal Salmon Habitat Recovery Unit (SHRU), will reduce the conservation value or functional habitat units of Atlantic salmon habitat within those particular areas, given the ongoing cooperative efforts between the Tribes and the agencies. The Penobscot Indian Nation and the Passamaquoddy Tribe own lands within the range of the GOM DPS and have actively pursued or participated in activities to further promote the health and continued existence of Atlantic salmon and their habitats. The Penobscot Indian Nation has developed and maintained its own water quality standards that state "it is the official policy of the Penobscot Nation that all waters of the Tribe shall be of sufficient quality to support the ancient and historical traditional and customary uses of such tribal waters by members of the Penobscot Nation." The Tribe is also currently participating in the Penobscot River Restoration Project that has the intended goal of restoring 11 species of diadromous fish, including

Atlantic salmon. The Passamaquoddy Tribe has continued to maintain efforts to balance agricultural practices with natural resources. In a tract of Tribal land in Township 19, which accounts for approximately 12 km of the 28 km of rivers and streams on Passamaquoddy land that contain physical and biological features essential to salmon, the Tribe has established an ordinance to govern its water withdrawals for these lands. This ordinance states, "it is important to the Tribe that its water withdrawals at T. 19 do not adversely affect the Atlantic salmon in any of its life stages, or its habitat," and restricts water withdrawals to avoid adverse impact on the Atlantic salmon.

The benefits of excluding Tribal lands from critical habitat include maintenance of a long-term working relationship between the Tribes and government agencies that promotes environmental conservation and Atlantic salmon conservation and the continued promotion of established national policies, our Federal trust obligations, and our deference to the Tribes in management of natural resources on their lands.

Also, in § 226.217(b)(2)(i) of the June 19, 2009, final rule (74 FR 29300), we inadvertently left out the "E" in the table to indicate that the Belfast Bay HUC 10 watershed was excluded from critical habitat based on economic impacts. This final rule corrects that omission.

**Correction**

In FR Doc. E9-14268 appearing on page 29300 in the **Federal Register** of Friday, June 19, 2009, the following corrections are made:

On page 29330, under the heading *Other Relevant Impacts: Tribal Lands*, third column, the first paragraph is corrected to read: "Secretarial Order

3206 recognizes that Tribes have governmental authority and the desire to protect and manage their resources in the manner that is most beneficial to them. Pursuant to the Secretarial Order, and consistent with the Federal government's trust responsibilities, the Services must consult with the affected Indian Tribes when considering the designation of critical habitat in areas that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights."

**Classification**

The determinations made by the agency in the Classification section in the final rule published June 19, 2009 (74 FR 29300), with respect to Executive Order 12866, the Coastal Zone Management Act, the Regulatory Flexibility Act, the Information Quality Act, the Paperwork Reduction Act, the National Environmental Policy Act, Federalism, and Takings are unaltered by this correction.

The Assistant Administrator for Fisheries, NOAA (AA) finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it is "unnecessary". Exclusion of the Penobscot Nation's Trust and fee lands was part of the proposed rule on which public comment was solicited. The only comment received on this aspect of the proposed rule was from the Penobscot Nation. As such, this correction is considered a minor rule regarding which the public is not particularly interested. This correction actually responds to a further comment from the Penobscot Nation which pointed out that the agency had misinterpreted the intent of its comment on the proposed rule.

The AA further finds pursuant to 5 U.S.C. 553(d)(3) good cause to waive the

thirty (30) day delayed effectiveness period because it relieves a burden. Activities that are funded, authorized, or carried out by a Federal agency, such as agriculture, development, and transportation, on Tribal lands might be negatively impacted by the designation. If the activity may affect critical habitat, then the Federal agency would be required to consult with NMFS under ESA section 7 to ensure that the activity does not destroy or adversely modify critical habitat. Implementing this correction as soon as possible would remove this burden that might impact Federal activities on Tribal lands.

**List of Subjects in 50 CFR Part 226**

Endangered and threatened species.

Dated: August 3, 2009.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

**PART 226—DESIGNATED CRITICAL HABITAT**

■ 1. The authority citation for part 226 continues to read as follows:

**Authority:** 16 U.S.C. 1533.

■ 2. In § 226.217 paragraphs (b)(2)(i), (b)(4), and (b)(7)(ii) are revised to read as follows:

**§ 226.217 Critical habitat for the Gulf of Maine Distinct Population Segment of Atlantic Salmon (*Salmo salar*).**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(i) HUC 10 watersheds in the Penobscot Bay SHRU analyzed for critical habitat, those that meet the criteria for critical habitat, and those excluded under ESA section 4(b)(2):

Penobscot Bay SHRU	HUC 10 Code	HUC 10 Name	Status	Economic (E), Military (M), or Tribal (T) exclusions
1	0102000101	North Branch Penobscot River .....		
2	0102000102	Seeboomook Lake .....		
3	0102000103	WEST Branch Penobscot River at Chesuncook Lake .....		
4	0102000104	Caucomgomok Lake .....		
5	0102000105	Chesuncook Lake .....		
6	0102000106	Nesowadnehunk Stream .....		
7	0102000107	Nahamakanta Stream .....		
8	0102000108	Jo-Mary Lake .....		
9	0102000109	West Branch Penobscot River (3) .....		
10	0102000110	West Branch Penobscot River (4) .....		
11	0102000201	Webster Brook .....		
12	0102000202	Grand Lake Matagamon .....	Critical Habitat	T
13	0102000203	East Branch Penobscot River (2) .....	Critical Habitat	T
14	0102000204	Seboeis River .....	Critical Habitat	T
15	0102000205	East Branch Penobscot River (3) .....	Critical Habitat	T
16	0102000301	West Branch Mattawamkeag River .....	Critical Habitat	T
17	0102000302	East Branch Mattawamkeag River .....	Critical Habitat	

Penobscot Bay SHRU	HUC 10 Code	HUC 10 Name	Status	Economic (E), Military (M), or Tribal (T) exclusions
18	0102000303	Mattawamkeag River (1) .....	Critical Habitat	
19	0102000304	Baskahegan Stream .....		
20	0102000305	Mattawamkeag River (2) .....	Critical Habitat	
21	0102000306	Molunkus Stream .....	Critical Habitat	E
22	0102000307	Mattawamkeag River (3) .....	Critical Habitat	T
23	0102000401	Piscataquis River (1) .....	Critical Habitat	
24	0102000402	Piscataquis River (3) .....	Critical Habitat	
25	0102000403	Sebec River .....		
26	0102000404	Pleasant River .....	Critical Habitat	T
27	0102000405	Seboeis Stream .....	Critical Habitat	T
28	0102000406	Piscataquis River (4) .....	Critical Habitat	"
29	0102000501	Penobscot River (1) at Mattawamkeag .....	Critical Habitat	T
30	0102000502	Penobscot River (2) at West Enfield .....	Critical Habitat	T
31	0102000503	Passadumkeag River .....	Critical Habitat	E
32	0102000505	Sunkhaze Stream .....	Critical Habitat	
33	0102000506	Penobscot River (3) at Orson Island .....	Critical Habitat	T
34	0102000507	Birch Stream .....	Critical Habitat	T
35	0102000508	Pushaw Stream .....		
36	0102000509	Penobscot River (4) at Veazie Dam .....	Critical Habitat	
37	0102000510	Kenduskeag Stream .....	Critical Habitat	
38	0102000511	Souadabscook Stream .....	Critical Habitat	
39	0102000512	Marsh River .....	Critical Habitat	
40	0102000513	Penobscot River (6) .....	Critical Habitat	
92	0105000216	Bagaduce River .....		
93	0105000217	Stonington Coastal .....		
94	0105000218	Belfast Bay .....	Critical Habitat	E
105	0105000219	Ducktrap River .....	Critical Habitat	
103	0102000504	Olamon Stream .....		
95	0105000220	West Penobscot Bay Coastal .....		

\* \* \* \* \*

(4) Habitat that meets the definition of critical habitat in occupied habitat areas on Passamaquoddy Tribal Indian lands and Fee lands or lands held in Trust by the Penobscot Indian Reservation within the range of the GOM DPS are excluded from designation. Per request of the Penobscot Tribe, critical habitat does include occupied habitat that makes up the Penobscot Indian Reservation. The Indian lands specifically excluded from critical habitat are those defined in the Secretarial Order 3206, including:

(i) Lands held in Trust by the United States for the benefit of any Indian Tribe;

(ii) Lands held in trust by the United States for the benefit of any Indian Tribe or individual subject to restrictions by the United States against alienation;

(iii) Fee lands, either within or outside the reservation boundaries, owned by the tribal government; and

(iv) Fee lands within the reservation boundaries owned by individual Indians.

The rivers, streams, lakes, and estuaries on approximately 9,500 acres (38.4 sq km) of lands held by the Passamaquoddy Tribe and approximately 60,500 acres (244.8 sq km) of Fee lands and land held in Trust

for the Penobscot Tribe within the areas occupied by the GOM DPS are excluded from critical habitat designation based on the principles of the Secretarial Order discussed above. Per request of the Penobscot Nation, the rivers, lakes, and streams within the approximately 4,400-acre (17.8 sq km) Penobscot Reservation are included as critical habitat.

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(7) \* \* \*

(ii) *Penobscot Bay SHRU. Critical habitat area (in sq km), areas excluded under ESA section 4(b)(2) (in sq km), and exclusion type, by HUC 10 watershed:*

<u>Sub-basin</u>	<u>HUC 10 Code</u>	<u>HUC 10 Watershed Name</u>	<u>Critical Habitat</u>		<u>Excluded Areas[type]*</u>	
			<u>River, stream and estuary (km)</u>	<u>Lake (sq. km)</u>	<u>River, stream and estuary (km)</u>	<u>Lake (sq. km)</u>
East Branch Penobscot sub-basin	0102000202	Grand Lake Matagamon	326	30	6[T]	0.5[T]
	0102000203	East Branch Penobscot River (2)	179	3	1[T]	
	0102000204	Seboeis River	418	31		
	0102000205	East Branch Penobscot River (3)	588	5	3[T]	
	0102000201	Webster Brook	---	---		
West Branch Penobscot sub-basin	0102000101	North Branch Penobscot River	---	---		
	0102000102	Seeboomook Lake	---	---		
	0102000103	W. Br. Penobscot R. at Chesuncook	---	---		
	0102000104	Caucomgomok Lake	---	---		
	0102000105	Chesuncook Lake	---	---		
	0102000106	Nesowadnehunk Stream	---	---		
	0102000107	Nahamakanta Stream	---	---		
	0102000108	Jo-Mary Lake	---	---		
	0102000109	West Branch Penobscot River (3)	---	---		
	0102000110	West Branch Penobscot River (4)	---	---		
Mattawamkeag River sub-basin	0102000301	West Branch Mattawamkeag River	657	22		
	0102000302	East Branch Mattawamkeag River	315	12		
	0102000303	Mattawamkeag River (1)	192	0.5		
	0102000305	Mattawamkeag River (2)	451	8		
	0102000307	Mattawamkeag River (3)	226	3		
	0102000306	Molunkus Stream	0	0	438 [E]	11 [E]
	0102000304	Baskahegan Stream	---	---		
Piscataquis River sub-	0102000401	Piscataquis River (1)	762	15		
	0102000402	Piscataquis River (3)	382	6		

basin	0102000404	Pleasant River	828	17	16[T]	
	0102000405	Seboeis Stream	312	36	12 [T]	5 [T]
	0102000406	Piscataquis River (4)	328	30		
	0102000403	Sebec River	---	---		
Penobscot River sub-basin	0102000501	Penobscot River (1) at Mattawamkeag	292	7	5[T]	2.5[T]
	0102000502	Penobscot River (2) at West Enfield	551	29	80[T]	5.5[T]
	0102000503	Passadumkeag River	0	0	583[E]	79 [E]
	0102000505	Sunkhaze Stream	177	0.5		
	0102000506	Penobscot River (3) at Orson Island	211	0.5	6[T]	
	0102000507	Birch Stream	120	1	15[T]	
	0102000509	Penobscot River (4) at Veazie Dam	225	10		
	0102000510	Kenduskeag Stream	420	1.5		
	0102000511	Souadabscook Stream	341	5.5		
	0102000512	Marsh River	319	3		
	0102000513	Penobscot River (6)	514	29		
	0102000504	Olamon Stream	---	---		
	0102000508	Pushaw Stream	---	---		
Penobscot Bay sub-basin	0105000218	Belfast Bay	---	---	177 [E]	9 [E]
	0105000219	Ducktrap River	76	4		
	0105000216	Bagaduce River	---	---		
	0105000217	Stonington Coastal	---	---		
	0105000220	West Penobscot Bay Coastal	---	---		

\*Exclusion types: [E] = Economic, [M] = Military, and [T] = Tribal  
--- considered unoccupied at the time of listing

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