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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

RIN 0648-AY96

[Docket No. 100813359-3908-02]

Endangered and Threatened Species; Protective Regulations for the Gulf of Maine Distinct Population Segment of Atlantic Sturgeon

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

ACTION: Interim final rule.

SUMMARY: We, NMFS, are issuing an interim final regulation to conserve the Gulf of Maine Distinct Population Segment (DPS) of Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*).

On February 6, 2012, we listed the Gulf of Maine DPS of Atlantic sturgeon as threatened under the Endangered Species Act (ESA). When a species is listed as threatened under the ESA, we are required to issue protective regulations under section 4(d) of the ESA. Such protective regulations are ones deemed "necessary and advisable for the conservation of the species" and may include any act prohibited for endangered species under section 9(a)(1) of the ESA. This regulation extends the prohibitions listed in section 9 of the ESA to Gulf of Maine DPS Atlantic sturgeon. The prohibitions set forth in this rule are considered necessary and advisable for the conservation of this species. Given that the changes made to this rule are based on the new information that was not submitted as public comment on the proposed rule, we are publishing this rule as an interim final rule and are soliciting additional public comment. This

document also announces the availability of a final Environmental Assessment that analyzes the environmental impacts of promulgating this interim final regulation.

DATES: This interim final rule is effective on [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments on this interim final rule must be received by [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN No. 0648-AY96, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Fax: To the attention of Lynn Lankshear at (978) 281-9394.

- Mail or hand-delivery: Submit written comments to the Assistant Regional Administrator, Protected Resources Division, NMFS, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

We will accept anonymous comments (enter “n/a” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

The interim final rule and other reference materials regarding this determination are

available electronically at [http://www.nero.noaa.gov/prot\\_res/atlsturgeon/](http://www.nero.noaa.gov/prot_res/atlsturgeon/) under the section titled “What's New” or by submitting a request to the Assistant Regional Administrator, Protected Resources Division, NMFS, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Kimberly Damon-Randall, (978) 282-8485; Lynn Lankshear, (978) 282-8473, or Lisa Manning, (301) 427-8466.

#### SUPPLEMENTARY INFORMATION:

##### Background

As described in the two Federal Register notices published February 6, 2012 (77 FR 5880 and 77 FR 5914), we determined that there are five Atlantic sturgeon DPSs within the United States. Along with the Gulf of Maine DPS, there are also the New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs. We determined that listing the Gulf of Maine DPS as threatened and all of the other DPSs as endangered was warranted (77 FR 5880 and 77 FR 5914; February 6, 2012).

Section 9(a)(1) of the ESA prohibits any person subject to the jurisdiction of the United States from: (A) importing any endangered species into, or exporting any endangered species from the U.S.; (B) taking any endangered species within the United States or the U.S. territorial sea; (C) taking any endangered species upon the high seas; (D) possessing, selling, delivering, carrying, transporting, or shipping, by any means whatsoever, any endangered species that was illegally taken; (E) delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any endangered species; (F) selling or offering for sale in interstate or foreign commerce any endangered species; or (G) violating any regulation pertaining to endangered species or to any

threatened species of fish or wildlife. The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct” (16 U.S.C. 1532(19)). The term “harm” is defined by regulation as any act which kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation that results in death or injury of wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering (50 CFR 222.102). The term “harm” is used in this rule as defined in the regulations.

The prohibitions listed under section 9(a)(1) of the ESA automatically apply when a species is listed as endangered but not when listed as threatened. When a species is listed as threatened, section 4(d) of the ESA requires the Secretary of Commerce (Secretary) to issue regulations, as deemed necessary and advisable, to provide for the conservation of the species. The Secretary may, with respect to any threatened species, issue regulations that prohibit any act covered under section 9(a)(1). Whether section 9(a)(1) prohibitions are necessary and advisable for a threatened species is largely dependent on the biological status of the species and the potential impacts of various activities on the species.

The Atlantic Sturgeon Status Review Report (ASSRT, 2007), the Final Listing Determinations for Three Distinct Population Segments of Atlantic Sturgeon in the Northeast Region (77 FR 5880; February 6, 2012), and the Proposed Protective Regulations for the Gulf of Maine Distinct Population Segment of Atlantic Sturgeon (76 FR 34023; June 10, 2011) contain a thorough account of the status of the Gulf of Maine DPS and impacts to Atlantic sturgeon belonging to the Gulf of Maine DPS. In addition, new information has become available since publication of the proposed protective regulations for the Gulf of Maine DPS, as detailed below.

New tagging and tracking data, provided to us as a result of ongoing studies, indicates that Atlantic sturgeon tagged in the United States range in the marine environment from as far north as the St. Lawrence River, Canada (D. Fox, DSU, pers. comm.) to as far south as Cape Canaveral, FL (T. Savoy, CTDEP, pers. comm.). The description of the northern and southern extent of the marine range for the Gulf of Maine DPS was extended to include these areas, and it is described in detail in the final listing rule for the Northeast Region. Recent acoustic tracking data recovered from a receiver in the Back River, Maine, which is associated with the Kennebec River Estuary, also indicated the occurrence of Atlantic sturgeon in this river (G. Zydlewski, pers. comm.).

#### Summary of Comments Received on the Proposed Rule

We solicited comments on the proposed rule from all interested parties including the public and other governmental agencies. Three comments were submitted on the action during the 60-day comment period from interested parties, including environmental and industry groups. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, we contacted and invited comment from the relevant state agencies for Maine, New Hampshire, and Massachusetts as well as the from the Atlantic States Marine Fisheries Commission (ASMFC). All comments received on the proposed rule are summarized and addressed below.

Comment 1: The ASMFC opposed the proposed ESA 4(d) rule on the grounds that extending the section 9 prohibitions to Gulf of Maine DPS Atlantic sturgeon is not warranted at this time and implementing such measures could diminish Gulf of Maine DPS restoration efforts currently being conducted by states and local jurisdictions.

Response: Having determined that the Gulf of Maine DPS of Atlantic sturgeon

warranted listing as a threatened species (77 FR 5880; February 6, 2012), we are required to issue such regulations as deemed necessary and advisable to provide for the conservation of the species. We disagree with the commenter that the implementation of ESA section 9 measures for the Gulf of Maine DPS of Atlantic sturgeon will diminish conservation efforts currently underway. We have taken steps to reduce applicant waiting time for issuance of section 10 scientific research permits for ongoing or anticipated directed scientific research efforts for Atlantic sturgeon, thereby alleviating the primary rationale for this concern. A batch of 10(a)(1)(A) permits authorizing directed research on Atlantic sturgeon was issued on April 4, 2012.

Comment 2: One commenter requested clarification of language on the salvage of dead fish and the rescue of stranded fish, which were exempted in certain portions of the riverine range of the Gulf of Maine DPS in the proposed rule. The commenter specifically requested that the word “agent” be expanded to include the staff biologists, consulting biologists, or other qualified personnel who work for the owners of the hydroelectric projects affected by the rule. The commenter felt that this would allow a more prompt response to rescue or salvage events, which would aid the recovery of the species. The commenter added that some of these personnel already have the ability to work with federally endangered species such as shortnose sturgeon and Atlantic salmon.

Response: Salvage of dead endangered shortnose sturgeon is permitted pursuant to section 10(a)(1)(A) of the ESA under permit number 1614. We have modified the permit to include Atlantic sturgeon. Individuals who are interested in participating in Atlantic sturgeon salvage activities and who are not already identified in the shortnose sturgeon permit should contact the Northeast Region, Protected Resources Division (see ADDRESSES) for further

information about Atlantic sturgeon salvage activities conducted under permit number 1614.

Comment 3: Two comments were received regarding sightings of Atlantic sturgeon in areas not previously described. One commenter felt that NMFS should investigate the Atlantic and shortnose sturgeon within the Scarborough Marsh complex and consider listing them as DPSs, because both species are commonly seen in the Libby River, the Nonesuch River, and the Scarborough River by waterfront residents and resource users (including the commenter). The commenter felt that efforts should be made to understand the sturgeon population in this area. Similarly, information for an Atlantic sturgeon occurrence in the Presumpscot River, immediately below Presumpscot Falls, was provided by another commenter. The commenter felt that additional investigation into the occurrence and status of Atlantic sturgeon using the Presumpscot River may be warranted and provided a reference for the information on the documented catch of the sturgeon (Yoder et al., 2009).

Response: We appreciate the information indicating that both shortnose and Atlantic sturgeon are present in these coastal rivers. Shortnose sturgeons are currently listed as a single species and are not part of the recent listing determinations for Atlantic sturgeon. The recent listing determinations provide information on the status and listing of Atlantic sturgeon as five DPSs (77 FR 5880 and 77 FR 5914; February 6, 2012). Our current understanding of Atlantic sturgeon in the Gulf of Maine DPS is that spawning for the DPS occurs in the Kennebec Complex (77 FR 5880; February 6, 2012). Information on Atlantic sturgeon in the Scarborough Marsh complex and in the Presumpscot River contributes to our knowledge of Atlantic sturgeon distribution and habitat use. We will consider this information when making future decisions about Atlantic sturgeon research priorities and when designating critical habitat.

Atlantic sturgeon are known to make extensive marine migrations and to make use of

rivers other than their natal river (i.e., river of origin) (ASSRT, 2007). Atlantic sturgeon using the Presumpscot River and the Scarborough Marsh Complex are likely to be either migrants from the Kennebec Complex, sturgeon from one of the four endangered DPSs, sturgeons that originate from Canadian rivers (e.g., the St. John or St. Lawrence rivers), or a combination of all of these. We will consider this information provided by these comments when monitoring the status of Atlantic sturgeon in Maine and when completing 5-year status reviews of the listed DPSs. At this time, however, we do not have sufficient information to revise the current listing of particular DPSs.

#### Other Information Received During the Public Comment Period

Although not submitted as official comments to the proposed rule, NMFS became aware of new information on the Atlantic sturgeon's use of non-natal rivers during the public comment period. Researchers from Delaware State University (DSU) provided NMFS with new information on the occurrence of 105 acoustically tracked Atlantic sturgeon within tidal freshwaters of the Delaware and Hudson rivers (D. Fox, DSU, pers. comm.). These sturgeon were captured in marine waters near the mouth of the Delaware Bay where Atlantic sturgeon from different DPSs are known to mix. Genetic analysis of a tissue sample from each sturgeon identified the origin (by DPS) of the 105 sturgeon as: 58 New York Bight DPS sturgeon, 19 Chesapeake Bay DPS sturgeon, 16 South Atlantic DPS sturgeon, 11 Gulf of Maine DPS sturgeon, and 1 Carolina DPS sturgeon. In addition to genetic analyses, each fish was fitted with a tracking tag. Receivers placed in areas of the Delaware and Hudson rivers, including low-salinity waters (salinity values as low as 0.5 ppt), recorded the presence of the tagged fish within a certain distance of the receiver. Based on the data collected by the receivers for three field seasons (2009-2011), 35 of the 105 Atlantic sturgeon appeared one or more times within

low-salinity waters (less than 0.5 ppt) of the Delaware or Hudson rivers. Comparing the tracking results and genetic results, 29 of the 35 Atlantic sturgeon belonged to the New York Bight DPS. The remaining six fish represented three other DPSs: 2 sturgeon from each of the Chesapeake Bay, South Atlantic, and Gulf of Maine DPSs. Of the 70 sampled and tagged Atlantic sturgeon that were not detected in tidal freshwater areas of the Delaware or Hudson rivers, 29 were New York Bight DPS sturgeon, 17 were Chesapeake Bay DPS sturgeon, 14 were South Atlantic DPS sturgeon, 9 were Gulf of Maine DPS sturgeon, and 1 was a Carolina DPS sturgeon. Thus, 50 percent of the New York Bight DPS sturgeon (29 of 58 captured) occurred in low-salinity waters of either the Delaware or Hudson rivers. In comparison, less than 20 percent of the non-New York Bight DPS sturgeon (2 of 19 Chesapeake Bay DPS, 2 of 16 South Atlantic DPS, and 2 of 11 Gulf of Maine DPS) occurred in low-salinity waters of the Delaware or Hudson rivers.

Individual-based assignment and mixed stock analyses of Atlantic sturgeon tissue samples have shown that Atlantic sturgeon tend to aggregate within the geographic region closest to their spawning river (Wirgin *et al.*, in review). For example, individual-based assignment and mixed stock analysis of samples collected from sturgeon incidentally captured in Canadian fisheries in the Bay of Fundy indicated that 35% were from the Gulf of Maine DPS while only about 1 to 2 percent were from the New York Bight DPS. The same tests conducted on samples from Atlantic sturgeon captured in the U.S. Mid-Atlantic Bight Region revealed that greater than 40 percent of the sturgeon were from the New York Bight DPS, approximately 20 percent were from the Chesapeake Bay DPS, and only 8 percent were Gulf of Maine DPS sturgeon (Wirgin and King, 2011).

We considered all of the information received during the public comment period,

including the new information that became available but was not submitted as a public comment. We recognize that the information submitted for the 105 acoustically tracked Atlantic sturgeon (D. Fox, DSU, pers. comm.) has not been peer reviewed or published. We also considered that the information for individual-based assignment and mixed stock analyses of Atlantic sturgeon tissue samples (Wirgin et al., in review) have not yet been published. We concluded, however, that the methods to collect the biological samples from the 105 Atlantic sturgeon for analysis, and the methods for analyzing the biological samples for genetics (mitochondrial DNA and microsatellite DNA) and for determining the river and DPS of origin for sampled sturgeon of each study have been used previously and reported in published and peer-reviewed publications (Atlantic Sturgeon Status Review 2007; Damon-Randall et al., 2010; King et al., 2001; Wirgin et al., 2002). The same methods were also used for the sturgeon genetics data that support the delineations of Atlantic sturgeon into five DPSs, and the determination to list each DPS under the ESA (77 FR 5880 and 77 FR 5904; February 6, 2012). Therefore, we concluded that the information provided by D. Fox (pers.comm.) and Wirgin et al. (in review) do provide the best available information.

We had proposed to apply all of the section 9 prohibitions to the Gulf of Maine DPS with two exemptions: (1) scientific research conducted on Gulf of Maine DPS Atlantic sturgeon within the riverine portion of its range and in accordance with accepted NMFS protocol(s); and, (2) salvage of dead and recovery of live stranded or injured Gulf of Maine DPS Atlantic sturgeon found within the riverine range of the Gulf of Maine DPS (76 FR 34023; June 10, 2011). All Atlantic sturgeon have the same marine range and appearance regardless of the DPS of origin (Stein et al., 2004; USFWS, 2004). Therefore, to ensure that only Atlantic sturgeon listed as threatened (i.e., Gulf of Maine DPS Atlantic sturgeon) would be taken in the

course of the exempted activities, we considered in what areas would we expect to find only Atlantic sturgeon from the Gulf of Maine DPS. Based on Atlantic sturgeon life history information available at the time of the proposed rule, we concluded that using a threshold salinity of less than 20 ppt for rivers draining into the Gulf of Maine would ensure that only Gulf of Maine DPS Atlantic sturgeon would occur in those riverine waters and, thus, only threatened Gulf of Maine DPS Atlantic sturgeon would be taken as a result of the exempted activities. However, the new information from tracked Atlantic sturgeon in the Delaware and Hudson rivers, conflicts with our previous conclusion.

The available information suggests that Atlantic sturgeon in Gulf of Maine marine waters are predominantly Gulf of Maine DPS Atlantic sturgeon, and that the Atlantic sturgeon found in low-salinity waters of the Gulf of Maine DPS are more likely to be Gulf of Maine DPS Atlantic sturgeon than Atlantic sturgeon from another DPS. Nevertheless, the data collected for sturgeon in low-salinity waters of the Delaware and Hudson rivers indicates that Atlantic sturgeon will enter low-salinity waters of rivers that are not part of their DPS and the individual-based assignment and mixed stock analysis do not preclude the likelihood that Atlantic sturgeon will occur in the vicinity of non-natal rivers. Therefore, we concluded that sturgeon belonging to the New York Bight, Chesapeake Bay, Carolina or South Atlantic DPSs may occur in waters of less than 20 ppt within rivers of the Gulf of Maine DPS. Since there is no way of visually identifying a sturgeon to its DPS, the proposed exemptions could result in the illegal take of Atlantic sturgeon listed as endangered. Consequently, this interim final rule applies all of the section 9 prohibitions to the Gulf of Maine DPS with no exceptions.

Removing the exemptions for certain scientific research and rescue/salvage activities will not change as a practical matter the ability to conduct these activities, nor will it change the

conservation benefit of these regulations for the Gulf of Maine DPS of Atlantic sturgeon. All researchers currently conducting scientific research for Atlantic sturgeon within Maine rivers and in the Merrimack River, MA have received authorization under section 10(a)(1)(A) of the ESA to continue their work. Therefore, removing the exemption for scientific research will not deter or prevent these ongoing scientific studies. Similarly, the authority to conduct salvage for Atlantic sturgeon from all five of the DPSs is currently authorized under a permit. Personnel that were already included on the permit when it pertained only to shortnose sturgeon (e.g., State of Maine personnel) were automatically authorized to also conduct salvage activities for Atlantic sturgeon when the permit was modified. Other qualifying individuals (e.g., hydropower personnel) can also be added to the salvage permit as authorized co-investigators. The salvage permit provides for broader participation in Atlantic sturgeon salvage activities than what would have been provided through the salvage exemption in the 4(d) rule. Lastly, the biological opinions to be completed under section 7 of the ESA for federally-managed fisheries and other activities subject to section 7 will include a provision for resuscitating sturgeon. Therefore, while the final 4(d) rule omits the exemption for resuscitation, the authority to conduct the activity will be provided elsewhere.

#### Summary of Changes from the Proposed Rule

Based on the new information collected from sturgeon tracked in low-salinity waters of the Delaware and Hudson rivers and the individual-based assignment and mixed stock analysis, we removed the exemptions for scientific research and the salvage of dead, and the aiding of live, injured Gulf of Maine DPS Atlantic sturgeon. We are publishing this decision as an interim final rule and are allowing 30 days of public comment given that the changes made are based on the new information that was not submitted or posted as public comment on the

proposed rule.

#### Summary of Status and Threats to the Gulf of Maine DPS

Genetic data and tagging information support the conclusion that the Gulf of Maine DPS includes all Atlantic sturgeon spawned in the watersheds extending from the Maine/Canadian border southward to include all watersheds draining into the Gulf of Maine as far south as Chatham, MA. The marine range, including coastal bays and estuaries, of Atlantic sturgeon belonging to the Gulf of Maine DPS extends from Hamilton Inlet, Labrador, Canada to Cape Canaveral, FL and overlaps with the marine range of Atlantic sturgeon that originate from the other four Atlantic sturgeon DPSs.

Because Atlantic sturgeon use both riverine waters and the marine environment, they are affected by a multitude of activities. Coast-wide commercial over-harvesting throughout the 19th century and most of the 20th century caused a precipitous decline in Atlantic sturgeon abundance for all of the U.S. Atlantic sturgeon DPSs. A coast-wide moratorium on harvesting Atlantic sturgeon was implemented in 1998 pursuant to Amendment 1 of the ASMFC Interstate Fishery Management Plan for Atlantic sturgeon (ASMFC, 1998). Retention of Atlantic sturgeon from the U.S. Exclusive Economic Zone (EEZ) was prohibited by NMFS in 1999 (64 FR 9449; February 26, 1999). However, despite these prohibitions on directed fishing for and retention of incidentally caught Atlantic sturgeon, other anthropogenic activities continue to take Atlantic sturgeon. These include incidental bycatch in commercial fisheries, vessel strikes, activities affecting water quality, and habitat disturbances such as dredging.

Spawning has been confirmed only in the Kennebec Complex (i.e., the Kennebec and Androscoggin rivers). Spawning may be occurring in the Penobscot River, but this has not been confirmed. Atlantic sturgeon are captured in directed research projects in the Penobscot River

and are observed in many other Maine rivers (e.g., the Saco River, including the Scarborough Marsh complex, the Presumpscot River, the Back River). These observations suggest that abundance of the Gulf of Maine DPS of Atlantic sturgeon is sufficient such that recolonization to rivers historically suitable for spawning may be occurring. Additional genetic analyses of collected tissue samples are needed to confirm the origin of Atlantic sturgeon observed in Maine rivers historically used by the Gulf of Maine DPS.

Despite the past impacts of exploitation, industrialization and population expansion, the DPS has persisted and is now showing signs of potential recovery (e.g., increased abundance and/or expansion into its historical range). In addition, some of the impact from the threats which facilitated its decline have been removed (e.g., directed fishing) or reduced as a result of improvements in water quality since passage of the Clean Water Act (CWA); removal of dams (e.g., the Edwards Dam on the Kennebec River in 1999); reductions in fishing effort in state and federal water, which may have resulted in a reduction in overall bycatch mortality; and the implementation of strict regulations on the use of fishing gear in Maine state waters that incidentally catch sturgeon. As indicated by the mixed stock analysis results, fish from the Gulf of Maine DPS are not commonly taken as bycatch in areas south of Chatham, MA (Wirgin and King, 2011). Of the 84 observed Atlantic sturgeon interactions with fishing gear in the Mid Atlantic/Carolina region, only 8 percent (e.g., 7 of the 84 fish) were assigned to the Gulf of Maine DPS (Wirgin and King, 2011). Tagging results also indicate that Gulf of Maine DPS fish tend to remain within the waters of the Gulf of Maine and only occasionally venture to points south (Eyler, 2006; Eyler, 2011).

Water quality within the Gulf of Maine has improved significantly since the mid-1970's in part due to mandates following implementation of the Clean Water Act and bans on certain

pesticide use in the early 1970's (Davies and Tsomides, 1999; EPA, 2004; Lichter et al., 2006; EPA, 2008; Courtemanch et al., 2009) and unlike in areas farther south (e.g., portions of the Taunton River and Chesapeake Bay; Taunton River Journal, 2006; ASSRT, 2007; EPA, 2008), it is very rare to have issues with low dissolved oxygen concentrations (that negatively affect Atlantic sturgeon) in the Gulf of Maine.

A significant amount of fishing in the Gulf of Maine is conducted using trawl gear, which has been documented to have a lower mortality rate for Atlantic sturgeon than sink gillnet gear. Given the reduced level of threat to the Gulf of Maine DPS, the anticipated distribution of Gulf of Maine DPS fish predominantly in the Gulf of Maine, and the positive signs regarding distribution and abundance within the DPS, we concluded that the Gulf of Maine DPS is not currently endangered. However, studies have shown that Atlantic sturgeon can only sustain low levels of bycatch and other anthropogenic mortality (e.g., vessel strikes) (Boreman, 1997; ASMFC, 2007; Kahnle et al., 2007; Brown and Murphy, 2010). We anticipate that sink gillnet fishing effort will increase in the Gulf of Maine as fish stocks are rebuilt. In addition, individual-based assignment and mixed stock analysis of samples collected from sturgeon captured in Canadian fisheries in the Bay of Fundy indicated that approximately 35% of the Atlantic sturgeon were from the Gulf of Maine DPS (Wirgin et al., in review). There are no current regulatory measures to address the bycatch threat to Gulf of Maine DPS Atlantic sturgeon posed by U.S. Federal fisheries or fisheries that occur in Canadian waters. Potential changes in water quality as a result of global climate change (temperature, salinity, dissolved oxygen, contaminants, etc.) in rivers and coastal waters inhabited by Atlantic sturgeon will likely affect riverine populations. Therefore, despite some management efforts and improvements, we concluded that the Gulf of Maine DPS is at risk of becoming endangered in

the foreseeable future throughout all of its range (i.e., is a threatened species) as a result of the persistent threats from bycatch, habitat impacts from continued degraded water quality and dredging in some areas, and the lack of measures to address these threats.

#### Protective Regulations for the Gulf of Maine DPS of Atlantic Sturgeon

Protecting the Gulf of Maine DPS of Atlantic sturgeon from direct forms of take, such as physical injury or killing, whether incidental or intentional, will help preserve and recover the DPS. Likewise, protecting Gulf of Maine DPS Atlantic sturgeon from indirect forms of take, such as harm that results from habitat degradation, will help to reduce synergistic, negative effects from other stressors impeding recovery of the DPS. Therefore, we are extending the ESA section 9(a)(1)(A) through 9(a)(1)(G) prohibitions to all activities impacting the Gulf of Maine DPS throughout its range.

#### Identification of Activities That Would Constitute a Violation of Section 9 of the ESA

On July 1, 1994 (59 FR 34272), NMFS and the FWS (collectively, the “Services”) published a policy committing us to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within the species range.

Based upon available information, we believe that the activities that may take Gulf of Maine DPS Atlantic sturgeon include, but are not limited to: (1) commercial and recreational fisheries; (2) scientific research and monitoring of Atlantic sturgeon, (3) emergency rescue/salvage of Atlantic sturgeon; (4) scientific research and monitoring directed at other species; (5) habitat altering activities affecting passage of adult sturgeon to and from spawning areas and availability of habitat for egg, larval or juvenile stages (6) entrainment and

impingement of all life stages of Gulf of Maine DPS sturgeon during the operation of water diversions, dredging projects, and power plants; (7) activities impacting water quality for all life stages of Gulf of Maine DPS sturgeons such as discharge, dumping, or applications of toxic chemicals, pollutants, or pesticides into waters or areas that contain Gulf of Maine DPS sturgeons; (8) vessel strikes; and, (9) introduction or release of non-native species that are likely to alter the habitats of, or to compete for space or food, with Gulf of Maine DPS Atlantic sturgeons.

This list is not exhaustive. It is intended to provide examples of the types of activities that are most likely to result in take of Gulf of Maine DPS Atlantic sturgeons and a violation of this rule. Whether a take results from a particular activity is dependent upon the facts and circumstances of each incident. The fact that an activity may fall within one of these categories does not mean that the specific activity will cause a take. Due to such factors as location, timing, and scope, specific actions may not result in direct or indirect adverse effects on the species. Further, an activity not listed here may in fact result in a take. Questions regarding whether specific activities would constitute a take prohibited by this rule, and general inquiries regarding prohibitions and permits, should be directed to the NMFS Northeast Regional Office (see ADDRESSES).

#### Activities Affecting the Gulf of Maine DPS that Do Not Violate ESA Section 9

Section 9(a)(1)(A), 10(a)(1)(A), and 10(a)(1)(B) of the ESA provide the authority to grant exemptions to the section 9 prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may authorize exemptions to any of the section 9 prohibitions and may be issued to Federal and non-Federal entities conducting research or conservation activities that involve directed (i.e., intentional) take of listed species. Section 10(a)(1)(B) take permits may

be issued to non-Federal entities performing activities that may incidentally take listed species in the course of an otherwise legal activity. Impacts on the Gulf of Maine DPS from actions in compliance with such permits would not constitute violations of this rule. Likewise, federally funded or approved activities that incidentally take Gulf of Maine DPS Atlantic sturgeon would not constitute violations of this rule when the activities are conducted in accordance with an incidental take statement issued through a biological opinion provided by NMFS pursuant to section 7 of the ESA.

#### References Cited

A complete list of the references used in this final rule is available upon request or on our website (see ADDRESSES).

#### Classification

##### National Environmental Policy Act (NEPA)

Whenever a species is listed as threatened, the ESA requires that we issue regulations as we deem necessary and advisable to provide for its conservation. Accordingly, the promulgation of ESA section 4(d) protective regulations is subject to the requirements of NEPA, and we have prepared a final Environmental Assessment (EA) analyzing the 4(d) regulations and alternatives. The EA is available upon request, via our website (see ADDRESSES) or via the Federal eRulemaking Web site at <http://www.regulations.gov>.

##### Executive Order (E.O.) 12866

This interim final rule has been determined to be not significant for the purposes of E.O. 12866.

##### Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the

Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. None of the public comments submitted to NMFS addressed this certification, and no new information has become available that would change this determination. As a result, no final regulatory flexibility analysis is required and none has been prepared.

#### Paperwork Reduction Act (PRA)

This interim final rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

#### E.O. 13132 - Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Pursuant to the Executive Order on Federalism, E.O. 13132, we provided notice of the proposed action and requested comments from appropriate state resource agencies of the states in which riverine range for the Gulf of Maine DPS occurs. No comments were received from the state agencies.

#### E.O. 12898 - Environmental Justice

E.O. 12898 requires that Federal actions address environmental justice in decision-making process. In particular, the environmental effects of the actions should not have a disproportionate effect on minority and low-income communities. We have determined that this interim final rule will not have a disproportionately high effect on minority populations or low-income populations.

#### Coastal Zone Management Act (16 U.S.C. 1451 et seq.)

Section 307(c)(1) of the Federal Coastal Zone Management Act of 1972 requires that all Federal activities that affect any land or water use or natural resource of the coastal zone be consistent with approved state coastal zone management programs to the maximum extent practicable. NMFS has determined that this action is consistent to the maximum extent practicable with the enforceable policies of approved Coastal Zone Management Programs of each of the states within the riverine range of the Gulf of Maine DPS. Letters documenting NMFS's determination, along with the proposed rule, were sent to the coastal zone management program offices in each affected state. A list of the specific state contacts and a copy of the letters are available upon request.

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: November 13, 2013

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Alan D. Risenhoover,  
Director, Office of Sustainable Fisheries,  
performing the functions and duties of the Deputy Assistant Administrator for Regulatory  
Programs,  
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 is amended as follows:

**PART 223—THREATENED MARINE AND ANADROMOUS SPECIES**

1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531-1543; subpart B, § 223.201-202 also issued under 16 U.S.C.

1361 et seq.; 16 U.S.C. 5503(d) for § 223.206(d)(9).

2. In subpart B of part 223, add § 223.211 to read as follows:

§ 223.211 Atlantic sturgeon.

(a) Prohibitions. The prohibitions of sections 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species apply to the threatened Gulf of Maine Distinct Population Segment (Gulf of Maine DPS) of Atlantic sturgeon listed in § 223.102(c)(29).

(b) [Reserved]

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