

DEPARTMENT OF DEFENSE

48 CFR Part 215

[DFARS Case 95-D701]

Defense Federal Acquisition
Regulation Supplement; Contract
Award (Interim)

AGENCY: Department of Defense (DoD).

ACTION: Correction to interim regulation.

SUMMARY: The interim rule published at 60 FR 40106 on August 7, 1995, is corrected to reflect removal of the subsections within the removed section on production special tooling and production special test equipment.

EFFECTIVE DATE: August 7, 1995.

FOR FURTHER INFORMATION CONTACT:

Ms. Melissa D. Rider, DFARS FASTA Implementation Secretariat, at (703) 614-1634. Please cite DFARS Case 95-D701.

SUPPLEMENTARY INFORMATION: The Department of Defense published an interim rule amending 48 CFR Parts 206, 207, 215, 219, and 252 on August 7, 1995, at 60 FR 40106. The amendment to Part 215 removed and reserved section 215.871, but inadvertently did not indicate that subsections 215.871-1 through 215.871-5 are also removed. This correction removes the appropriate subsections.

List of Subjects in 48 CFR Part 215

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition
Regulations Council.

Therefore, 48 CFR Part 215 is amended as follows:

1. The authority citation for 48 CFR Part 215 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 215—CONTRACTING BY
NEGOTIATION

215.871-1, 215.871-2, 215.871-3, 215.871-4, 215.871-5 [Removed]

2. Sections 215.871-1, 215.871-2, 215.871-3, 215.871-4, and 215.871-5 are removed.

[FR Doc. 95-20751 Filed 8-22-95; 8:45 am]

BILLING CODE 5000-04-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric
Administration

50 CFR Part 222

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife
and Plants: Decision on Designation of
Critical Habitat for the Gulf Sturgeon

AGENCIES: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce; and Fish and Wildlife Service, Interior.

ACTION: Notice of decision on critical habitat designation.

SUMMARY: The National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS), collectively the Services, announce a decision on designation of critical habitat for the Gulf sturgeon (*Acipenser oxyrinchus desotoi*), a federally listed threatened species pursuant to the Endangered Species Act of 1973, as amended (Act). Based on lack of benefit to the species, the Services have determined that critical habitat designation is not prudent.

DATES: The finding announced in this notice was made on August 18, 1995.

ADDRESSES: Information, comments, or questions should be submitted to the Field Supervisor, U.S. Fish and Wildlife Service, 6620 Southpoint Drive South, Suite 310, Jacksonville, Florida 32216. The administrative record supporting this decision is available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Dr. Michael M. Bentzien at the above address or telephone 904/232-2580.

SUPPLEMENTARY INFORMATION:

Background

The Gulf sturgeon (*Acipenser oxyrinchus* (= *oxyrhynchus desotoi*), also known as the Gulf of Mexico sturgeon, is a nearly cylindrical fish with an extended snout, ventral mouth, chin barbels, and with the upper lobe of the tail longer than the lower. Adults range from 1.8-2.4 meters (6-8 feet) in length, with adult females larger than males. It is a subspecies of Atlantic sturgeon, *Acipenser oxyrinchus* (= *oxyrhynchus*), and is distinguished from *Acipenser oxyrinchus oxyrinchus*, the East Coast

subspecies, by its longer head, pectoral fins, and spleen. The Gulf sturgeon is restricted to the Gulf of Mexico and its drainages, primarily from the Mississippi River to the Suwannee River, including the States of Louisiana, Mississippi, Alabama, and Florida. Sporadic occurrences are known as far west as Texas (Rio Grande), and marine waters in Florida south to Florida Bay (Wooley and Crateau 1985, Reynolds 1993). As an anadromous species, the Gulf sturgeon migrates between fresh and salt water. For discussion of the ecology, life history, and threats to this subspecies, see the Services' September 30, 1991, final rule listing the Gulf sturgeon as a threatened species (56 FR 49653).

Gilbert (1992) discovered that the specific scientific name of the Atlantic sturgeon had been ". . . misspelled for over 100 years . . ." and pointed out that it should be *oxyrinchus*, not the previously used *oxyrhynchus*. Both spellings are conjuncted in this proposed rule to acknowledge the correct zoological nomenclature and avoid confusion with previous Federal documents and literature references.

Services' involvement with the Gulf sturgeon began with monitoring and other studies of the Apalachicola River population by the FWS Panama City, Florida, Fisheries Assistance Office in 1979. The fish was included as a category 2 species in the FWS December 30, 1982 (47 FR 58454) and September 18, 1985 (50 FR 37958) vertebrate review notices and in the January 6, 1989 (54 FR 554) animal notice of review. Category 2 designation was given to those species for which listing as threatened or endangered is possibly appropriate, but for which additional biological information is needed to support a proposed rule. In 1980, the FWS Jacksonville, Florida Office contracted a status survey report on the Gulf sturgeon (Hollowell 1980). The report concluded that the fish had been reduced to a small population due to overfishing and habitat loss. In 1988, the Panama City, Florida Office completed a report (Barkuloo 1988) on the conservation status of the Gulf sturgeon, recommending that the subspecies be listed as a threatened species pursuant to the Act.

The FWS and NMFS jointly proposed the Gulf sturgeon for listing as a threatened species on May 2, 1990 (55 FR 18357). In that proposed rule, the Services maintained that designation of critical habitat was "not prudent" due to the sturgeon's broad range and the lack of knowledge of specific areas utilized by the subspecies. The final rule for the Gulf sturgeon was published

on September 30, 1991 (56 FR 49653). It included special rules promulgated under section 4(d) of the Act for a threatened species, allowing taking of Gulf sturgeon in accordance with applicable state laws, for educational and scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes. The final rule found that critical habitat designation "may be prudent but is not now determinable." Further comments on the critical habitat issue were solicited from all interested parties following listing. A final decision on designation of critical habitat was to have been made by May 2, 1992.

On August 11, 1994, the Sierra Club Legal Defense Fund, Inc. (Fund), on behalf of the Orleans Audubon Society and Florida Wildlife Federation, gave written notice of their intent to file suit against the Department of the Interior for failure to designate critical habitat for the Gulf sturgeon within the statutory time limits established under the Act. The Fund filed suit (*Orleans Audubon Society vs Babbitt*, Civ. No. 94-3510 (E.D. La)) following a combined meeting and teleconference with the FWS on October 11, 1994.

Critical habitat is defined in section 3(5)(A) of the Act as "(i) the specific areas within the geographic area occupied by a species . . . on which are found those physical or biological features (I) Essential to the conservation of the species, and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed . . . upon determination by the Secretary that such areas are essential for the conservation of the species." The term "conservation," as defined in section 3(3) of the Act, means ". . . to use and the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary," i.e., the species is recovered and can be removed from the list of endangered and threatened species. The Act requires that critical habitat be designated at the time any species is listed as an endangered or threatened species, to the extent prudent and determinable. If a final regulation listing a species finds that critical habitat is not determinable, a decision on whether to designate critical habitat must be made within one additional year (within two years of the date on which the species was proposed for listing).

The Services' criteria for designating critical habitat (50 CFR part 424.12)

state that a designation of critical habitat is not prudent if either of the two following situations exist:

1. The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

2. Such designation of critical habitat would not be beneficial to the species.

The Services' determination not to declare critical habitat for this species is based on the lack of benefit to the species because there are existing conservation measures in place and other management efforts that provide the species with protection above and beyond that of the Act. Therefore, for this reason, the designation of critical habitat will not provide additional protection for the species. A detailed explanation follows.

1. Existing Conservation Measures

As required in section 4(f) of the Act and in accordance with established regulations, the Services have proceeded with the development of a recovery plan for this species. A draft plan was prepared and circulated for comment and a final plan is ready for approval in the near future. The final plan will be both a recovery and management plan. This plan will provide essential guidance for the recovery of the Gulf sturgeon.

In addition to the protection afforded the species by the Act (e.g., section 9 prohibitions on take), because the Gulf sturgeon has been listed as a threatened species, additional extensive protection has been afforded the species. A summary of some of these measures as explained in detail in the recovery plan follow:

a. All states within the range of the Gulf sturgeon have prohibited take.

The Alabama Department of Conservation and Natural Resources established a regulation in 1972 prohibiting all take of sturgeon within the jurisdiction of the State of Alabama.

The Florida Marine Fisheries Commission established a regulation in 1984 prohibiting all take of sturgeon within the jurisdiction of the State of Florida.

The Mississippi Department of Wildlife, Fisheries, and Parks established a regulation in 1974 prohibiting all take of sturgeon within the jurisdiction of the State of Mississippi.

The Louisiana Department of Wildlife and Fisheries established a regulation in 1990 prohibiting all take of sturgeon within the jurisdiction of the State of Louisiana.

b. The Gulf States Marine Fisheries Commission initiated a Gulf Sturgeon Interjurisdictional Fishery Management Plan in 1990, which served as the

foundation for the recovery team and recovery plan.

c. The Services and the States of Alabama, Florida, Louisiana, Mississippi, and Texas have all conducted research on the distribution and abundance of Gulf sturgeon. Research programs to gather more life history and population information will be a continuing coordinated effort.

d. The Mobile District of the U.S. Army Corps of Engineers (Corps) has worked closely with conservation agencies on several projects to improve habitat for Gulf sturgeon. These include efforts to restore important thermal refugia habitat and access into Battle Bend Cutoff in the Apalachicola River. The Corps has also funded studies to monitor the Pearl River Gulf sturgeon populations.

e. The Corps and the National Oceanic and Atmospheric Administration have developed a Cooperative Agreement to Create and Restore Fish Habitat. Under this agreement, much can be accomplished for the recovery of Gulf sturgeon. One such project includes restoration of access to the Blue Spring Run on the Apalachicola River.

f. The FWS has recently produced a draft Mobile River Basin Aquatic Ecosystem Recovery Plan to protect habitat and water quality in this portion of the Gulf sturgeon's range. A Mobile River Basin Aquatic Ecosystem Coalition composed of business leaders, private property owners, State and Federal agencies, and environmental organizations has been established to manage recovery efforts in the Basin.

g. Several State and Federal agencies have recently formed the Suwannee River Cooperative River Basin Study. This project will focus on taking a holistic approach to water quality management in the entire Suwannee River watershed, home to a significant population of the Gulf sturgeon.

h. In September, 1994, fourteen Federal agencies including the FWS, Corps, NMFS, National Park Service, and the Department of Defense signed a Memorandum of Understanding (MOU) on implementation of the Act. The purpose of the MOU was to establish a general framework for cooperation and participation among the agencies in accordance with responsibilities under the Act. The agencies are to work together along with appropriate involvement of the public, States, Indian Tribal governments, and local governments, to achieve the common goal of conserving species listed as threatened or endangered under the Act by protecting and managing their populations and the ecosystems upon

which those populations depend. The cooperating Federal agencies involved in recovery of the Gulf sturgeon will now be able to work closely together under the umbrella of the MOU.

i. Designated critical habitat is protected by the Act only under section 7(a)(2), which provides that activities that are federally funded, permitted, or carried out may not destroy or adversely modify critical habitat. However, section 7(a)(2), which also prohibits Federal activities likely to jeopardize listed species, provides substantial protection to the habitat of listed species even if critical habitat is not designated. For some species, the protection afforded the species' habitat through application of the no jeopardy standard is so strong, the Service believes there would be no direct net conservation benefit from designating critical habitat.

Regulations (50 CFR part 402.02) define "jeopardize the continued existence of" as meaning an action that would reduce appreciably the likelihood of both the survival and recovery of a species by reducing the reproduction, numbers, or distribution of that species. "Destruction or adverse modification" is defined as an alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Because it is a wide-ranging anadromous fish, moving from the marine environment into freshwater rivers to spawn, the Gulf sturgeon is dependent on a variety of habitat features and environmental conditions. During its annual migration, it requires nearshore (bays and estuaries) and offshore (Gulf of Mexico) feeding areas and freshwater rivers with adequate water quality and quantity, hard bottoms for spawning, and spring flows and deep holes for thermal refugia. Destruction or adverse modification of any of these habitat features to the point of appreciably diminishing habitat value for recovery and survival would also jeopardize the species' continued existence by reducing its reproduction, numbers, or distribution.

For example, a dam proposed for construction on a river system used for spawning by the Gulf sturgeon could

affect the species by preventing access to upstream spawning areas. If critical habitat were designated for the Gulf sturgeon, and if the dam impeded access thus reducing the value of the critical habitat for both survival and recovery, the Service would make a "destruction or adverse modification" finding in its biological opinion. However, if critical habitat were not designated, the dam would prevent the Gulf sturgeon from reaching the spawning areas, thereby reducing its distribution, reproduction, and probably numbers. If this loss was sufficient to reduce appreciably the likelihood of both survival and recovery of the species, it would meet the definition of jeopardy (see above), and result in a jeopardy biological opinion. Another example would be the development of a private marina involving the dredging of a basin for boat use. If the dredging altered or destroyed certain habitat features required by the Gulf sturgeon, such as hard bottoms or deep holes, it would violate the "destroy or adversely modify" standard by reducing the value of that habitat for survival and recovery of the species. However, appreciable reduction of any such habitat would also jeopardize the species by reducing the species' reproduction, numbers, or distribution. Loss of hard bottoms would affect reproduction due to the loss of sites for egg deposition, and loss of deep holes used for thermal refugia would change the distribution of the species by preventing it from remaining in formerly suitable river reaches.

For the Gulf sturgeon, the Service therefore believes that designation of critical habitat would not add any protection over that afforded by the jeopardy standard, because any appreciable diminishment of habitat sufficient to appreciably reduce the value of the habitat for survival and recovery would also appreciably reduce the likelihood of survival and recovery by reducing reproduction, numbers, or distribution. The Service has found this to be the case for other aquatic species for which an appreciable reduction in habitat value would trigger the jeopardy standard, for example the Appalachian

elktoe mussel, listed as endangered on November 23, 1994 (59 FR 60324), and three Texas aquatic invertebrates, listed as endangered on June 5, 1995 (60 FR 29537).

Based on the above discussion, the Services have determined that the lack of additional conservation benefit from critical habitat designation for this species makes such designation not prudent.

References Cited

- Barkuloo, J.M. 1988. Report on the conservation status of the Gulf of Mexico sturgeon, *Acipenser oxyrhynchus desotoi*. U.S. Fish and Wildlife Service, Panama City, Florida. 33 pp.
- Gilbert, C.R. 1992. Atlantic sturgeon. Pp. 5-8 in Rare and endangered Biota of Florida, Vol. II: Fishes. University Presses of Florida, Gainesville.
- Hollowell, J.L. 1980. Status report for the Gulf of Mexico sturgeon, *Acipenser oxyrhynchus desotoi* (Vladykov). Unpublished report to U.S. Fish and Wildlife Service, Jacksonville, Florida. 9 pp.
- Reynolds, C.R. 1993. Gulf sturgeon sightings, historic and recent—a summary of public responses. U.S. Fish and Wildlife Service, Panama City, Florida. 40 pp.
- Wooley, C.M., and E.J. Crateau. 1985. Movement, microhabitat, exploitation, and management of Gulf of Mexico sturgeon, Apalachicola River, Florida. North American Journal of Fish Management 5:590-605.

Author

The primary author of this document is Dr. Michael M. Bentzien (see ADDRESSES section).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: August 18, 1995.

John G. Rogers,

Acting Director, Fish and Wildlife Service.

Dated: August 17, 1995.

Gary C. Matlock,

Program Management Officer, National Marine Fisheries Service.

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