

(i) Is wholly the growth, product, or manufacture of an SC/CASA state; or  
(ii) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in an SC/CASA state into a new and different construction material distinct from the material from which it was transformed.

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the WTO GPA, all Free Trade Agreements except NAFTA and the Bahrain Free Trade Agreement, and other waivers relating to acquisitions in support of operations in Afghanistan apply to this acquisition. Therefore, the Balance of Payments Program restrictions are waived for SC/CASA state and designated country construction material other than Bahrainian or Mexican construction material.

(c) The Contractor shall use only domestic, SC/CASA state, or designated country construction material other than Bahrainian or Mexican construction material in performing this contract, except for—

(d) The contractor shall inform its government of its participation in this acquisition and that it generally will not have such opportunity in the future unless its government provides reciprocal procurement opportunities to U.S. products and services and suppliers of such products and services.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR 223 and 224

[Docket No. 0912231440-91443-01]

RIN 0648-XT28

### Endangered and Threatened Wildlife; Notice of 90-Day Finding on a Petition to List Atlantic Sturgeon as Threatened or Endangered under the Endangered Species Act (ESA)

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

**ACTION:** 90-day petition finding; request for information.

**SUMMARY:** We (NMFS) announce a 90-day finding on a petition to list Atlantic

sturgeon (*Acipenser oxyrinchus oxyrinchus*) as endangered, or to list multiple distinct population segments (DPSs) as threatened or endangered and designate critical habitat under the ESA. We find that the petition presents substantial scientific or commercial information indicating that the petitioned actions may be warranted. A status review for Atlantic sturgeon was completed in February 2007, and we are currently preparing a determination on whether listing the species or DPSs of the species as threatened or endangered is warranted. To ensure that the determination considers information that is comprehensive and current, we solicit scientific and commercial information regarding this species.

**DATES:** Information and comments must be submitted to NMFS by February 5, 2010.

**ADDRESSES:** You may submit comments, information, or data, identified by the Regulation Identifier Number (RIN), 0648 XT28, by any of the following methods:

**Electronic Submissions:** Submit all electronic public comments via the Federal eRulemaking Portal: <http://www.regulations.gov>.

**Mail:** Assistant Regional Administrator, Protected Resources Division, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930 (for Atlantic sturgeon populations occurring in the Northeast); or Assistant Regional Administrator, Protected Resources Division, NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701 (for Atlantic sturgeon populations occurring in the Southeast).

**Facsimile (fax):** 978-281-9394 (for Atlantic sturgeon populations occurring in the Northeast); 727-824-5309 (for Atlantic sturgeon populations occurring in the Southeast).

**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. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Interested persons may obtain a copy of this petition and the 2007 status review from the above addresses or

online from the NMFS website: <http://www.nmfs.noaa.gov/pr/species/fish/atlanticsturgeon.htm#documents>.

#### FOR FURTHER INFORMATION CONTACT:

Kimberly Damon-Randall or Lynn Lankshear, (978) 282-8485 and (978) 282-8473, NMFS Northeast Region; Kelly Shotts, NMFS Southeast Region, (727) 824-5312; or Lisa Manning, NMFS, Office of Protected Resources, (301) 713-1401.

#### SUPPLEMENTARY INFORMATION:

##### Background

On October 6, 2009, we received a petition from the Natural Resources Defense Council (NRDC) to list Atlantic sturgeon as endangered under the ESA. As an alternative, the petitioner requested that the species be delineated and listed as the five DPSs described in the 2007 Status Review of Atlantic Sturgeon (SRT, 2007); i.e., Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPS, with the Gulf of Maine and South Atlantic DPSs listed as threatened, and the remaining three DPSs listed as endangered. The petitioner also requested that critical habitat be designated for Atlantic sturgeon under the ESA. The petition summarizes how the species has declined as a result of overfishing during the 19th century and has failed to recover in the time since a coast-wide fishing moratorium was put in place in 1998. The petition cites bycatch, degraded water quality, dams, dredging, and ship strikes as the most important factors contributing to the continued decline of this species. The petition also cites global warming as a factor that will become increasingly significant as a stressor on Atlantic sturgeon populations by exacerbating harmfully low dissolved oxygen (DO) concentrations (or hypoxic water conditions), to which Atlantic sturgeon are particularly sensitive. The petition summarizes the biology, status, and threats for Atlantic sturgeon and for each petitioned DPS.

As described in the petition and in the 2007 status review (SRT, 2007), the historic range of Atlantic sturgeon in the United States included approximately 38 rivers, from the St. Croix River in Maine to the Saint Johns River in Florida. Atlantic sturgeon were also historically present in approximately four river systems in Canada. The Gulf of Maine DPS includes the Penobscot, Saco and Merrimack Rivers, and the estuarial complex of the Kennebec, Androscoggin, and Sheepscot Rivers. The New York Bight DPS includes the Taunton, Connecticut, Hudson, and Delaware River systems. The

Chesapeake Bay DPS includes the York, James, Rappahannock, Potomac, Susquehanna, and Nanticoke Rivers. The Carolina DPS includes the Roanoke River and Abermarle Sound; the Tar and Neuse Rivers and Pamlico Sound; the Cape Fear River; Winyah Bay and Waccamaw, Great Pee Dee, and Sampit Rivers; and the Santee and Cooper Rivers. The South Atlantic DPS includes the Ashepoo, Combahee, and Edisto (ACE) River basin; and the Savannah, Ogeechee, Altamaha, Satilla, St. Mary's, and Saint Johns Rivers.

#### *ESA Statutory Provisions and Policy Considerations*

Section 4(b)(3)(A) of the ESA of 1973, as amended (U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce (Secretary) make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Joint ESA-implementing regulations between NMFS and U.S. Fish and Wildlife Service (USFWS; 50 CFR 424.14) define "substantial information" as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.

In making a finding on a petition to list a species, the Secretary must consider whether the petition: (i) clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (ii) contains a detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (iii) provides information regarding the status of the species over all or a significant portion of its range; and (iv) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)). Within 12 months of receipt of the petition, we shall conclude the review with a finding as to whether the petitioned action is warranted.

Under the ESA, a listing determination may address a species, subspecies, or a distinct population segment of any vertebrate species which interbreeds when mature (16 U.S.C. 1532(15)). In 1996, the USFWS and NMFS published the Policy on the

Recognition of a Distinct Vertebrate Population Segments under the Endangered Species Act (61 FR 4722; February 7, 1996). This policy identifies two criteria that must be considered in determining whether DPSs exist for a species: discreteness and significance. If both criteria are met, then the conservation status of the DPS is evaluated to determine if it is threatened or endangered.

A species, subspecies, or DPS is "endangered" if it is in danger of extinction throughout all or a significant portion of its range, or "threatened" if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively).

#### *Distribution and Life History of Atlantic Sturgeon*

Currently, Atlantic sturgeon presence is documented in 36 rivers in the United States and Canada, combined (SRT, 2007; J. Sulikowski, UNE, pers. comm.). At least 20 rivers are believed to support spawning based on available evidence (i.e., presence of young-of-year or gravid Atlantic sturgeon documented within the past 15 years; SRT, 2007). These rivers include the Saint Lawrence, QB; Annapolis, NS; Saint John, NB; Kennebec, ME; Hudson, NY; Delaware, NJ/DE/PA; James, VA; Roanoke, NC; Tar-Pamlico, NC; Cape Fear, NC; Waccamaw, SC; Great PeeDee, SC; Santee, SC; Cooper, SC; Combahee, SC; Edisto, SC; Savannah, SC/GA; Ogeechee, GA; Altamaha, GA; and, the Satilla, GA (SRT, 2007). Rivers with possible, but unconfirmed, spawning include the St Croix, NB/ME; Penobscot, Androscoggin, and Sheepscot, ME, York, VA; and, Neuse, NC (SRT, 2007).

Comprehensive information on current abundance of Atlantic sturgeon is lacking for any of the spawning rivers (SRT, 2007). In the United States, an estimate of 870 spawning adults per year is available for the Hudson River (Kahnle et al., 2007). However, the estimate is based on data collected from 1985–1995 and may underestimate current conditions (Kahnle et al., 2007). An estimate of 343 spawning adults per year is available for the Altamaha River, GA, based on data collected in 2004–2005 (Schueller and Peterson, 2006). Data collected from the Hudson River and Altamaha River studies cannot be used to estimate the total number of adults in either population since mature Atlantic sturgeon may not spawn every year (Vladkyov and Greeley, 1963; Smith, 1985; Van Eenennaam et al., 1996; Stevenson and Secor, 1999; Collins et al., 2000; Caron et al., 2002), and it is unclear to what extent mature

fish in a non-spawning condition occur on the spawning grounds. Nevertheless, since the Hudson and Altamaha rivers are presumed to have the healthiest Atlantic sturgeon populations within the U.S., other U.S. populations are predicted to have fewer spawning adults than either the Hudson or the Altamaha (SRT, 2007).

It is clear that Atlantic sturgeon underwent significant range-wide declines from historical abundance levels due to overfishing (reviewed in Smith and Clugston, 1997). In 1870, a significant fishery for the species developed when a caviar market was established. Record landings were reported in 1890, when over 3,350 metric tons (mt) of Atlantic sturgeon were landed from coastal rivers along the Atlantic Coast (reviewed in Smith and Clugston, 1997; Secor and Waldman, 1999). The fishery collapsed in 1901, ten years after peak landings, when less than 10% (295 mt) of its 1890 peak landings were reported. During the 1950s, the remaining fishery switched to targeting sturgeon for flesh, rather than caviar. Commercial fisheries were active in many rivers during all or some of the period from 1962 to 1997, although at much lower levels than in the late 1800's to early 1900's (Taub, 1990; Smith and Clugston, 1997). Nevertheless, many of these contemporary fisheries also resulted in overfishing, which prompted the Atlantic States Marine Fisheries Commission (ASMFC) to impose the 1998 coastwide moratorium for fisheries targeting Atlantic sturgeon and prompted NMFS to close the U.S. exclusive economic zone (EEZ) to Atlantic sturgeon retention in 1999.

The general life history pattern of Atlantic sturgeon is that of a long lived (approximately 60 years; Mangin, 1964; Stevenson and Secor, 1999), late maturing, estuarine dependent, anadromous species (SRT, 2007). Atlantic sturgeon can reach lengths of up to 14 feet (4.26 m), and weights of over 800 pounds (364 kg). Atlantic sturgeon are distinguished by armor-like plates and a long snout with a ventrally located protruding mouth. Four barbels crossing in front of the mouth help the sturgeon to locate prey. Sturgeon are omnivorous benthic feeders (feed off the bottom) and filter quantities of mud along with their food. Adult sturgeon diets include mollusks, gastropods, amphipods, isopods, and fish. Juvenile sturgeon feed on aquatic insects and other invertebrates (SRT, 2007).

Fecundity of female Atlantic sturgeon has been correlated with age and body size, with observed egg production ranging from 400,000 to 4 million eggs

per spawning year (Smith *et al.*, 1982; Van Eenennaam *et al.*, 1996; Van Eenennaam and Doroshov, 1998; Dadswell, 2006). Female gonad weight varies from 12–25 percent of the total body weight (Smith, 1907; Huff, 1975; Dadswell, 2006). The average age at which 50 percent of the maximum lifetime egg production is achieved is estimated to be 29 years (Boreman, 1997).

Multiple studies have shown that spawning intervals for Atlantic sturgeon range from 1–5 years for males (Smith, 1985; Collins *et al.*, 2000; Caron *et al.*, 2002) and 2–5 years for females (Vladkyov and Greeley, 1963; Van Eenennaam *et al.*, 1996; Stevenson and Secor, 1999). While there is a window of time for each river during which spawning occurs, spawning females do not migrate upstream en masse. Individual females make rapid spawning migrations upstream and quickly depart following spawning (Bain, 1997). Spawning males usually arrive on the spawning grounds before any of the females have arrived and leave after the last female has spawned (Bain, 1997). Presumably, this provides an opportunity for a single male to fertilize eggs of multiple females.

Spawning is believed to occur in flowing water between the salt front of estuaries and the fall line of large rivers, where optimal flows are 46–76 cm/s and depths are 11–27 meters (Borodin, 1925; Leland, 1968; Scott and Crossman, 1973; Crance, 1987; Bain *et al.*, 2000).

Sturgeon eggs are highly adhesive and are deposited on the bottom substrate, usually on hard surfaces such as cobble (Gilbert, 1989; Smith and Clugston, 1997). Hatching occurs approximately 94 and 140 hours after egg deposition at temperatures of 20 and 18°C, respectively, and, once hatched, larvae assume a demersal existence (Smith *et al.*, 1980). The yolk sac larval stage is completed in about 8–12 days, during which time the larvae move downstream to the rearing grounds (Kynard and Horgan, 2002). During the first half of this migration, larvae move only at night and use benthic structure (e.g., gravel matrix) as refuge during the day (Kynard and Horgan, 2002). During the latter half of migration to the rearing grounds, when larvae are more fully developed, movement occurs during both day and night. Larvae transition into the juvenile phase as they continue to move farther downstream into brackish waters, developing a tolerance to salinity as they go, and eventually becoming residents in estuarine waters for months or years. Juveniles then transition to the subadult phase while commencing oceanic migrations.

Subadults travel widely once they emigrate from rivers (Holland and Yelverton, 1973; Doevel and Berggen, 1983; Waldman *et al.*, 1996; Dadswell, 2006; SRT, 2007). Atlantic sturgeon spend most of their adult life in the marine environment distributed along the eastern coast of North America (SRT, 2007). However, adult Atlantic sturgeon generally return to their natal rivers to spawn (Collins *et al.*, 2000; K. Hattala, NYSDEC, pers. comm. in SRT, 2007).

Atlantic sturgeon exhibit clinal variation in growth rate, age at maturity, and timing of spawning. In general, Atlantic sturgeon originating from more southern river systems show faster growth and earlier age at maturation than fish in northern systems, although not all data sets conform to this trend. For example, Atlantic sturgeon mature in South Carolina at 5 to 19 years (Smith *et al.*, 1982), in the Hudson River at 11 to 21 years (Young *et al.*, 1998), and in the Saint Lawrence River at 22 to 34 years (Scott and Crossman, 1973). Spawning migrations generally occur during February–March in southern systems, April–May in mid-Atlantic systems, and May–July in Canadian systems (Murawski and Pacheco, 1977; Smith, 1985; Bain, 1997; Smith and Clugston, 1997; Caron *et al.*, 2002). In some rivers, predominantly in the south, a fall spawning migration may also occur (Rogers and Weber, 1995; Weber and Jennings, 1996; Moser *et al.*, 1998).

#### Analysis of the Petition

We evaluated the information referenced in the petition and all other information readily available in our files to determine if the petition presents substantial scientific or commercial information indicating that the petitioned actions may be warranted. In the petition, NRDC provided relevant data and citations, a detailed narrative justification for the recommended listings, and available information regarding past and present numbers and distribution of the species. The petition provides a detailed overview of current threats to the species according to the factors in section 4(a)(1) of the ESA: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) over utilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting [the species] continued existence (section 4 (a)(1) of the ESA). Below, we summarize our analysis of the threats information presented in the petition.

The petition cites the 2007 status review (SRT, 2007), which provides information on sources of past and present habitat destruction and modification that have impacted Atlantic sturgeon. Among the most significant sources of habitat modification and destruction are dams and tidal turbines, dredging and blasting, water quality, and climate change. Dams and tidal turbines can block access to spawning and foraging habitat, alter river flow and temperature regimes, and cause physical injury and mortality to migrating fish. Dredging and blasting operations in support of commercial shipping, boating, mining and construction have impacted Atlantic sturgeon habitat through disturbance of benthic prey, elimination of habitat structure (e.g., deep holes), and alteration of benthic substrate (e.g., siltation of rocky substrates). The petition also discusses evidence of diminished water quality in large portions of coastal waters along the East Coast, in particular in the Northeast and in the Chesapeake Bay; however, some improvements have been observed (EPA, 2008). The petitioner cites evidence that indicates climate change has the potential to further threaten Atlantic sturgeon habitat through exacerbation of low DO levels and changes in salinity as a result of rising sea level.

As described previously, Atlantic sturgeon once supported extensive commercial fisheries along the East Coast, and overharvest through these fisheries led to significant reductions in abundance and distribution of Atlantic sturgeon (SRT, 2007). The petition presents information to indicate that, in addition to direct harvest, bycatch of Atlantic sturgeon in commercial fisheries, sink-net and trawl fisheries in particular, is a current source of mortality within inland, coastal and Federal waters along the entire U.S. Atlantic coast (SRT, 2007).

Very little is known about natural predation rates on Atlantic sturgeon. However, the petition discusses management concerns regarding predation of juvenile Atlantic sturgeon by the introduced flathead catfish in various river basins. The petition also indicates that some disease organisms have been identified in wild Atlantic sturgeon, and that pathogens introduced through aquaculture operations and release of aquarium fish are a potential concern.

As summarized here, the petition discusses the numerous Federal (U.S. and Canadian), state and provincial, and inter-jurisdictional laws, regulations, and agency activities directed at

Atlantic sturgeon. The ASMFC manages Atlantic sturgeon through an interstate fisheries management plan (FMP) that was developed in 1990 (Taub, 1990). In 1998, the ASMFC amended the Atlantic sturgeon FMP to establish a moratorium on Atlantic sturgeon commercial fishing until 20 year classes of adults were established, effectively closing the fishery for 20–40 years. The Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), authorized under the terms of the ASMFC Compact, as amended (Public Law 103–206), provides the Secretary with the authority to implement regulations in the EEZ in the absence of an approved Magnuson-Stevens FMP that is compatible with ASMFC FMPs. In 1999, under the authority of the ACFCMA, NMFS implemented regulations to prohibit the retention and landing of Atlantic sturgeon bycatch from federally regulated fisheries. Many states within the riverine and estuarine range of Atlantic sturgeon have regulations for their inshore gillnet fisheries to reduce the likelihood of Atlantic sturgeon bycatch mortality in the nets. However, there are no fishery-specific regulations currently in place to address Atlantic sturgeon bycatch in federally regulated fisheries. In addition, the petitioner cites other Federal laws and regulations that have not adequately addressed threats to Atlantic sturgeon habitat, including poor water quality, dredging, and altered water flows.

The petition presents information on other natural or manmade factors that may affect Atlantic sturgeon, including impingement and entrainment (by commercial, agricultural, and municipal water intake structures), vessel strikes

(by commercial and recreational boats), and artificial propagation (stock enhancement and commercial aquaculture). In summary, vessel strikes are a significant stressor in rivers with large ports and narrow waterways (e.g., the Delaware, James, and Cape Fear Rivers). Impingement/entrainment may represent a significant threat to the species in particular areas, especially when intake structures are located near spawning grounds. Artificial propagation may impact Atlantic sturgeon as a result of escapement and consequent introduction of disease, hybridization, and food competition.

### Petition Finding

We have reviewed the petition, the literature cited in the petition, and other literature and information available in our files. The petition frequently references the status review that was completed in 2007. Based on the literature and information, we find that the petition meets the aforementioned requirements of the regulations under 50 CFR 424.14(b)(2) and, therefore, determine that the petition presents substantial information indicating that the requested listing actions may be warranted.

### Information Solicited

#### *Information on Status of the Species*

The most recent status review of Atlantic sturgeon was completed in 2007 (72 FR 15865; April 3, 2007). We intend that any final action in response to this petition be as accurate and as effective as possible. Therefore, we are soliciting information from the public, government agencies, the scientific

community, industry, and any other interested parties on the status of Atlantic sturgeon throughout its range, including:

(1) Historical and current distribution and abundance of Atlantic sturgeon throughout its range (U.S. and Canada);

(2) Historic and current condition of Atlantic sturgeon habitat and whether any areas should be classified as critical habitat;

(3) Population density and trends;

(4) Information on the effects of climate change on the distribution and condition of Atlantic sturgeon and its habitat over the short- and long-term;

(5) Information on the effects of threats, including bycatch, dredging, dams, pollution, hypoxia, disease, predation, poaching, aquaculture, vessel strikes, climate change, and aquatic invasive species, on the distribution and abundance of Atlantic sturgeon over the short- and long-term; and

(6) Information on management programs or protective efforts for Atlantic sturgeon, including mitigation measures related to any of the threats listed under (5) above, any ongoing efforts to protect and conserve Atlantic sturgeon, as well as information on recently implemented or planned activities and their likely impact(s).

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

Dated: December 30, 2009.

**James W. Balsiger,**  
*Acting Assistant Administrator, National Marine Fisheries Service.*

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