

# **PART 1180—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES**

■ 8. The authority citation for part 1180 continues to read as follows:

**Authority:** 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323–11325.

■ 9. Revise § 1180.4(g)(2)(i) and (g)(2)(ii) to read as follows:

## **§ 1180.4 Procedures.**

\* \* \* \* \*

(g) \* \* \*

\* \* \* \* \*

(2)(i) To qualify for an exemption under § 1180.2(d)(7) (acquisition or renewal of trackage rights agreements), in addition to the notice, the railroad must file a caption summary suitable for publication in the **Federal Register**. The caption summary must be in the following form:

Surface Transportation Board

Notice of Exemption

Finance Docket No.

(1)—Trackage Rights—(2)

(2) (3) to grant (4) trackage rights to (1) between (5). The trackage rights will be effective on (6).

This notice is filed under § 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:  
By the Board.  
[Insert name],  
Director, Office of Proceedings.  
The following key identifies the information symbolized in the summary.

(1) Name of the tenant railroad.  
(2) Name of the landlord railroad.  
(3) If an agreement has been entered use “has agreed”, but if an agreement has been reached but not entered use “will agree.”  
(4) Indicate whether “overhead” or “local” trackage rights are involved.  
(5) Describe the trackage rights.  
(6) State the date the trackage rights agreement is proposed to be consummated.

(ii) To qualify for an exemption under § 1180.2(d)(8) (acquisition of temporary trackage rights), in addition to the notice, the railroad must file a caption summary suitable for publication in the **Federal Register**. The caption summary must be in the following form:

Surface Transportation Board

Notice of Exemption

STB Finance Docket No.

(1)—Temporary Trackage Rights—(2)

(2) (3) to grant overhead temporary trackage rights to (1) between (4). The

temporary trackage rights will be effective on (5). The authorization will expire on (6).

This notice is filed under § 1180.2(d)(8). Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:  
By the Board.  
[Insert name]  
Director, Office of Proceedings.  
The following key identifies the information symbolized in the summary.  
(1) Name of the tenant railroad.  
(2) Name of the landlord railroad.  
(3) If an agreement has been entered use “has agreed,” but if an agreement has been reached but not entered use “will agree.”  
(4) Describe the temporary trackage rights.  
(5) State the date the temporary trackage rights agreement is proposed to be consummated.  
(6) State the date the authorization will expire (not to exceed 1 year from the date the trackage rights will become effective).

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## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 223**

**[Docket No. 070910507–0037–02]**

**RIN 0648–AV94**

### **Endangered and Threatened Wildlife and Plants: Final Rulemaking To Establish Take Prohibitions for the Threatened Southern Distinct Population Segment of North American Green Sturgeon**

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

**ACTION:** Final rule and notice of availability of a final environmental assessment.

**SUMMARY:** This final ESA section 4(d) rule represents the regulations that we, the National Marine Fisheries Service (NMFS), believe necessary and advisable to conserve the threatened Southern Distinct Population Segment of North American green sturgeon (*Acipenser medirostris*; hereafter Southern DPS). We apply the prohibitions listed under ESA section 9 for the Southern DPS, and we highlight specific categories of activities that are likely to result in take of Southern DPS fish. We do not find it necessary and advisable to apply the take prohibitions to certain categories of activities that contribute to conserving the Southern

DPS. We also provide a variety of methods by which take of the Southern DPS may be authorized. This document also announces the availability of a final draft environmental assessment (EA) that analyzes the environmental impacts of promulgating the 4(d) regulations for the Southern DPS.

**DATES:** The effective date of this final rule is July 2, 2010.

**ADDRESSES:** Reference materials regarding this final rule can be obtained via the Internet at <http://www.swr.nmfs.noaa.gov> or by submitting a request to the Assistant Regional Administrator, Protected Resources Division, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213.

**FOR FURTHER INFORMATION CONTACT:** Melissa Neuman, NMFS, Southwest Region (562) 980–4115, or Lisa Manning, NMFS, Office of Protected Resources (301) 713–1401.

#### **SUPPLEMENTARY INFORMATION:**

#### **Background**

We determined that the Southern DPS is at risk of extinction in the foreseeable future throughout all or a significant portion of its range and listed the species as threatened under the ESA on April 7, 2006 (71 FR 17757). At that time we summarized the process for considering the application of ESA section 9 prohibitions to the threatened Southern DPS. In the case of threatened species, ESA section 4(d) states that the Secretary shall decide whether, and to what extent, to extend the ESA section 9(a) prohibitions, including those regarding take of the species, and authorizes us to issue regulations we consider necessary and advisable for the conservation of the species. Such regulations may include any or all of the prohibitions that automatically apply to endangered species. Those prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take the listed species. The term “take” means 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 as any act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering. (50 CFR 222.102).

Whether take prohibitions or other protective regulations are necessary or advisable is in large part dependent on

the biological status of the species and potential impacts of various activities on the species. Green sturgeon have persisted for millions of years through cycles of naturally occurring perturbations that have likely presented short- and long-term challenges to the species' survival. We conclude that the threatened Southern DPS of North American green sturgeon is currently at risk of extinction primarily because of human-induced "takes" involving elimination of freshwater spawning habitat, degradation of freshwater and estuarine habitat quality, water diversions, fishing, and other causes. Therefore, we conclude that extending the take prohibitions to the Southern DPS is necessary and advisable.

When the final rule to list the Southern DPS was published on April 7, 2006, we solicited the public for information that would inform the ESA section 4(d) rulemaking. Specific information requested can be found in the final rule (71 FR 17757; April 7, 2006). No substantive additional comments, beyond those that had been received during prior solicitations for information, were received.

Public scoping workshops held on May 31 and June 1, 2006, helped advance our understanding of the threats that are likely to result in the take of Southern DPS fish. In cases where evidence of direct take due to a particular activity was lacking, activities that have caused take of species that use similar habitats (*i.e.*, migratory, spawning, and rearing), consume similar prey types, have similar morphologies and/or physiologies, and/or share other life history requirements (*e.g.*, white sturgeon (*Acipenser transmontanus*) and Chinook salmon (*Oncorhynchus tshawytscha*)) were identified and considered for their effects on Southern DPS fish. More detailed justification regarding the use of take information for surrogate species (*i.e.*, one that shares a similar life history or habitat requirements) to infer the take potential of an activity on the Southern DPS fish is provided in previous Federal Register notices (70 FR 17386, April 6, 2005; 71 FR 17757, April 7, 2006).

On May 21, 2009, we proposed protective regulations under section 4(d) of the ESA to extend the prohibitions listed under ESA sections 9(a)(1)(A) through 9(a)(1)(G) for the threatened Southern DPS, but included certain exceptions and exemptions from the take prohibitions for activities that we have determined to be adequately protective of the Southern DPS (74 FR 23822).

### Summary of Comments and Information Received in Response to the Proposed Rule and Draft Environmental Assessment

The public comment period for the proposed rule and draft Environmental Assessment (EA) was open from May 21, 2009, through July 6, 2009. During the comment period, NMFS received 7 written comments on the proposed rule and draft EA from various agencies, non-governmental organizations, and individuals. A summary of the comments and NMFS' responses to those comments are presented here.

### Comments and Responses

*Comment 1:* One commenter requested clarification in the draft EA regarding the exception for emergency fish rescue activities under Alternative B. Specifically, the commenter was unclear what 4(d) programs were referred to in the sentence stating that "[p]roject-related activities \* \* \* would not be considered an emergency fish rescue activity and would be subject to review under ESA section 7 or 10, or under another 4(d) program."

*Response:* We corrected the sentence in the final EA to read "Project-related activities \* \* \* would not be considered an emergency fish rescue activity and would be subject to review under ESA section 7 or 10." We removed the phrase "or under another 4(d) program" because the ESA 4(d) Rule does not include a 4(d) program to cover such project-related activities.

*Comment 2:* One commenter stated that the draft EA needs to describe the specific categories of activities to which the take prohibitions would be applied under Alternative C.

*Response:* The final EA was revised to clarify that under Alternative C, the take prohibitions would apply to the same specific categories of activities and in the same areas as described under Alternative A. Those categories of activities are: Commercial, recreational, and tribal fisheries; collecting or handling Southern DPS fish for any purpose; habitat-altering activities affecting passage or spawning and rearing habitat in the Central Valley, California; operation of water diversion, dredging, and power plant activities resulting in entrainment or impingement of Southern DPS fish; application or discharge of pollutants adjacent to or within waterways occupied by Southern DPS fish; and introduction or release of non-native species adjacent to or within waterways occupied by Southern DPS fish.

*Comment 3:* One commenter felt that the proposed rule listed dredging as a

threat to only juvenile green sturgeon and wanted NMFS to acknowledge that adult Southern DPS fish have the potential to be found in dredging areas outside the Central Valley, San Francisco Bay, Suisun Bay and San Pablo Bay.

*Response:* The final rule was revised to acknowledge that dredging is a potential threat to adult green sturgeon. Dredging occurs in the following areas where adults also occur: The Lower Sacramento River, Sacramento-San Joaquin Delta, Elkhorn Slough, Suisun Bay, San Pablo Bay, San Francisco Bay, Noyo Harbor, and Humboldt Bay in California; Coos Bay, Yaquina Bay, Tillamook Bay, and Nehalem Bay in Oregon; the Lower Columbia River Estuary, the Lower Columbia River, Willapa Bay, Grays Harbor, and Puget Sound in Washington; and coastal U.S. marine waters (74 FR 52300, October 9, 2009). Although adults occur in areas where dredging takes place, we don't have any direct evidence of the effect that dredging has on adult green sturgeon.

*Comment 4:* One commenter asked why the draft EA specifically excludes the Channel Islands from the list of areas known to be occupied by Southern DPS green sturgeon, noting that this exclusion was not mentioned in the proposed critical habitat designation for the species (73 FR 52084, September 8, 2008).

*Response:* At this time we do not have any data showing that Southern DPS green sturgeon occur in waters around the California Channel Islands and we specifically noted this in the description of occupied areas in the draft EA. However, the protections under the ESA 4(d) rule would apply to Southern DPS green sturgeon wherever they are found. Thus, if a Southern DPS green sturgeon occurred in the waters around the Channel Islands, the take prohibitions under the ESA 4(d) rule would apply to that fish. Because of similarity of appearance, any green sturgeon occurring in the marine environment (including estuaries in Washington, Oregon, and Humboldt Bay) would be considered the listed species as they cannot be identified as belonging to a particular DPS unless genetic samples are taken and analyzed. The final EA was revised to include a statement clarifying this.

*Comment 5:* Two commenters felt that the five alternative approaches need to be described in greater detail and that the geographic limitations and distinctions of the proposed rule and alternatives are not clearly laid out. Further clarification was requested.

*Response:* The final EA was revised to more clearly describe the geographic limitations and distinctions between the various alternatives considered.

*Comment 6:* One commenter recommended that NMFS consult with the Pacific Fishery Management Council (PFMC) as early in the process as possible concerning the effects of the ESA 4(d) Rule on fisheries managed under the PFMC.

*Response:* NMFS is currently working with the PFMC regarding the potential effects of the West Coast groundfish bottom trawl fishery on the listed Southern DPS of green sturgeon and its designated critical habitat.

*Comment 7:* One commenter stated that the San Francisco Bay is not used as habitat for green sturgeon and that regulating take and requiring consultation on activities that are not limiting the recovery of the Southern DPS diverts staff resources from other permitting actions that would have positive effects.

*Response:* The best available data for the San Francisco Bay indicate that green sturgeon are present in both Central and South San Francisco Bay, albeit in low numbers compared to other parts of the San Francisco Bay/Delta Region. The survey methods and sampling gear used in studies within San Francisco Bay were not designed to target green sturgeon, and thus the data may not be truly representative of the relative levels of green sturgeon use among the bays and the Delta. For example, given that all green sturgeon must pass through Central San Francisco Bay in their migrations to and from the ocean, it is expected that larger numbers of green sturgeon are using this area at certain times of the year. In addition, the catch data do not provide information about the distribution of juvenile green sturgeon throughout the bays and the Delta. Based on the best available information, juvenile green sturgeon are believed to distribute widely throughout the bays and Delta for feeding and rearing and be present in all months of the year. Detailed fishery-dependent data for the San Francisco Bay is provided in the final critical habitat designation (74 FR 52300, October 9, 2009).

*Comment 8:* One commenter strongly supports the 4(d) rule and provided the information that green sturgeon are vulnerable to selenium toxicity from feeding on the overbite clam. The commenter stated that selenium toxicity can cause reproductive failure and the threat of reduced recruitment through selenium toxicity puts additional stress on the Southern DPS population.

*Response:* NMFS appreciates the information provided regarding green sturgeon vulnerability to selenium toxicity. Recent studies have shown that green sturgeon are more sensitive to selenium than white sturgeon and continued monitoring of selenium levels in sediments and research on the sensitivity of green sturgeon to this and other contaminants would be supported (Kaufman *et al.*, 2008).

*Comment 9:* One commenter felt that including marine coastal waters as green sturgeon critical habitat is unjustified as there is no reliable data on the take of the Southern DPS in coastal waters.

*Response:* Comments pertaining to critical habitat were addressed in the final critical habitat designation for green sturgeon (74 FR 52300, October 9, 2009). Activities that occur in coastal marine waters that may cause take of green sturgeon include bottom trawling, disposal of dredged material, hydrokinetic projects and pollution from commercial shipping.

*Comment 10:* One commenter stated that sand mining operations in San Francisco and Suisun Bays are highly regulated and there is very little evidence that sand mining in the San Francisco Bay-Delta Estuary negatively impacts green sturgeon or their habitat. The commenter requested that additional exceptions be included for activities such as sand mining that pose a low risk of take.

*Response:* In 2006, NMFS completed formal consultation with the U.S. Corps of Engineers under section 7 of the ESA for sand mining activities in the San Francisco and Suisun Bay region. The resulting biological opinion concluded that sand mining activities were not likely to jeopardize threatened green sturgeon (NMFS, 2006). An Incidental Take Statement (that remains discretionary until a 4(d) rule has been promulgated) was included with the biological opinion that provides protection to the sand miners for the entrainment of one green sturgeon per year for each of the three sand mining companies operating in the region at the time the biological opinion was written.

*Comment 11:* One commenter stated that we do not have data to differentiate between Northern DPS and Southern DPS green sturgeon in fisheries bycatch, but we require a Fisheries Management and Evaluation Plan (FMEP) to include measures specifically to protect Southern DPS green sturgeon.

*Response:* Acknowledging the fact that we cannot tell the difference between NDPS and SDPS fish due to similarity of appearance, the FMEPs must address green sturgeon and do not require that the DPS be determined.

*Comment 12:* One commenter stated that the green sturgeon fishery was mismanaged and that more care should have been taken to prevent the fishery from becoming overfished.

*Response:* NMFS acknowledges that a lack of monitoring and directed management of the green sturgeon has likely contributed to its current threatened status. However, since the listing, academic institutions, the states, NMFS and the tribes have been conducting more comprehensive studies that focus on green sturgeon in an effort to better understand its biology, status and recovery needs. It is our hope that finalizing this 4(d) rule and enforcing the take prohibitions will further the conservation of the species and aid in its recovery.

*Comment 13:* One commenter provided the information that there is a new surge in the green sturgeon population in Yaquina Bay, and feels that listing green sturgeon as threatened in this area is inaccurate and unfounded.

*Response:* NMFS appreciates the information provided regarding observations of green sturgeon in Yaquina Bay and agrees that additional studies are needed to better understand the use of coastal estuaries (including Yaquina Bay) and coastal marine waters by both DPSs of green sturgeon. Southern DPS presence in Yaquina Bay was confirmed in 2006 by the detection of one tagged Southern DPS green sturgeon (pers. comm. with Dan Erickson, ODFW, September 3, 2008). The Southern DPS was listed based on several threats, including the concentration of spawning to one river. Each Southern DPS green sturgeon carries the listing with it wherever it goes as the listing is not limited by geographic area. We acknowledge the commenter's observations suggesting that the number of green sturgeon using Yaquina Bay has increased. *While this news is promising:* (1) We recognize that green sturgeon may experience sporadic recruitment success depending on many factors that are not well understood; and (2) this uncertainty coupled with a lack of population abundance estimates and a limited understanding of population structure has led us to adopt regulations necessary and advisable for the conservation of the Southern DPS. We will conduct periodic status reviews of both DPSs and as more information becomes available we will revise our regulations if necessary.

*Comment 14:* One commenter felt that the requirement that research or monitoring that involves action, permitting or funding by a Federal agency must still comply with the

requirements of ESA section 7(a)(2) negates the exception from the take prohibitions for all researchers and stated that Federal employees who can fulfill all other requirements cannot use this exception. If non-Federal studies do not need to be analyzed in order to ensure that they would not jeopardize the species, then it seems counterintuitive that Federal studies with the same requirements would create jeopardy. The commenter also felt that the requirement that the activity must comply with required state reviews or permits negates the exception because as part of the application process, state permits require a copy of the authorization from NMFS when working with species listed under the ESA.

*Response:* Under the 4(d) Rule, we can exempt a non-Federal entity from the take prohibitions, but cannot exempt Federal agencies from the jeopardy standard under section 7 of the ESA. Compliance with section 7(a)(2) of the ESA would be required, but the consultation would be limited to an analysis of whether the activity may jeopardize the continued existence of the species or destroy or adversely modify critical habitat, and would not involve an assessment of take. Section 7 of the ESA does not apply to non-Federal entities. Although Federal employees are still subject to the section 7 jeopardy standard, under the exception they would not be required to obtain an ESA section 10(a)(1)(A) permit for their research/monitoring activities if conducted according to the exception criteria. The Federal biologists carrying out research activities would need to obtain state permits regardless of whether Federal take prohibitions are in place or not. The exception simplifies the NMFS review and approval process for research activities and relies on the state review and permits to minimize impacts related to the research activities. In the state application, applicants will need to identify that their activities meet the exception criteria and will need to indicate that they have submitted the information to NMFS or indicate that NMFS has confirmed that their activities meet the exception criteria.

*Comment 15:* One commenter felt that NMFS has not taken into account the extent of the existing regulatory programs and improvement to the health of the San Francisco Bay-Delta ecosystem that has taken place over the last 30 years and stated that certain activities are already regulated under other Federal, state and local programs that directly govern activities that NMFS stated could result in the take of

green sturgeon. The commenter recommended that NMFS provide exceptions from the take prohibitions for navigation channel and harbor berths dredging, dredged material placement, mineral extraction and maintenance and installation of in-water and shoreline structures. The commenter also recommended that exceptions for the small business category of construction activities be considered.

*Response:* NMFS acknowledges that many of the activities that may cause take of green sturgeon are already regulated by existing Federal, state and local laws and regulations, and appreciates any efforts that have been made to protect and improve habitats where green sturgeon reside. However, these laws, regulations, and programs may not specifically address green sturgeon and may not be as protective of green sturgeon as the 4(d) Rule. For example, there is a 50-year dredging program in the San Francisco Bay region that currently has not implemented measures that would specifically protect green sturgeon. Construction activities conducted by small businesses may also not include measures that would be adequately protective of green sturgeon. However, any protections already afforded to green sturgeon through existing programs would be considered in NMFS' analyses under section 7 or section 10 of the ESA.

*Comment 16:* One commenter requested that a public hearing be held in coastal Oregon prior to publishing the final rule.

*Response:* A workshop to discuss the ESA 4(d) rule prohibitions and exceptions/exemptions with state fishery management agencies, NMFS, and representatives from the fishing industry was held in Newport, Oregon on March 15, 2010.

*Comment 17:* One commenter requested clarification on the Protection/Conservation Measures or Benefits under Table 1, as emergency rescue and habitat restoration indicates that there are no benefits provided to green sturgeon in these activities.

*Response:* The Note section under Table 1 was clarified to state that the "Protective/conservation measures or benefits" column refers to whether the activity, as it is currently conducted, includes protections or benefits to green sturgeon. Emergency rescue activities and habitat restoration activities that are not conducted according to the criteria under the exceptions do not provide benefits to green sturgeon and are therefore not covered under the exceptions. If these activities may cause take of green sturgeon, that take must be

covered under section 7 or 10 of the ESA, or come under compliance with the exceptions criteria.

*Comment 18:* One commenter requested clarification in the draft EA regarding which states' recreational fishing regulations, prior to 2006, did not differentiate between white sturgeon and green sturgeon.

*Response:* The final EA was revised to clarify that, prior to 2006, state recreational fishing regulations in Washington, Oregon, and California did not differentiate between white sturgeon and green sturgeon.

*Comment 19:* One commenter suggested updating the 2005 reference for the Environmental Water Account because the program expired in 2007 and a revised program is currently in place with adjusted water amounts to augment instream flows.

*Response:* The final EA was updated to remove the outdated reference for the Environmental Water Account.

#### **Spatial Context for ESA 4(d) Rule Application**

As described in a **Federal Register** notice (68 FR 4433) published on January 23, 2003, we determined that based on genetic and behavioral information, North American green sturgeon is comprised of at least two DPSs that qualify as species under the ESA: (1) A northern DPS consisting of populations originating from coastal watersheds northward of and including the Eel River ("Northern DPS"); and (2) a southern DPS consisting of populations originating from coastal watersheds south of the Eel River ("Southern DPS") and the Central Valley of California. These geographic boundaries were largely defined by genetic evidence indicating that, among samples from rivers where green sturgeon are known to spawn (*i.e.*, the Rogue, Klamath, and Sacramento rivers), the Rogue and Klamath River fish were more similar to one another than to the Sacramento River fish (Israel *et al.*, 2004). Although the Southern DPS boundaries are defined by the species' genetic structure and its likely strong homing capabilities and spawning site fidelity, the spatial extent of the ESA listing and take prohibitions for the Southern DPS is not confined to areas south of the Eel River. Detailed information on occurrences of the Southern DPS green sturgeon is provided in the proposed 4(d) rule (74 FR 23822, May 21, 2009).

Sections 10(a)(1)(A) and 10(a)(1)(B) provide exceptions to the section 9 take prohibitions. NMFS can authorize research and enhancement through section 10(a)(1)(A) permits and

incidental take through section 10(a)(1)(B) permits. While this rule applies the section 9 take prohibitions to any activity that takes the Southern DPS, we wanted to determine which activities would most likely impede efforts necessary to conserve and recover the Southern DPS. To do this, we considered the following questions: (1) For which activities do we have evidence of take of Southern DPS fish; (2) for those activities where evidence of Southern DPS take does not exist, is there evidence of take of surrogate species that share similar biological requirements with Southern DPS fish; (3) are protective/conservation measures underway to reduce or minimize take imposed by some activities; and (4) are there additional protective/conservation measures that, if taken, would reduce take to low enough levels such that particular activities could proceed without appreciably reducing the likelihood of survival and recovery of the Southern DPS?

#### *Commercial and Recreational Fisheries Activities*

Take of Southern DPS fish occurs during commercial and recreational fishing activities throughout the range of North American green sturgeon. However, quantifying fishery-related take reliably and assessing its effects is challenging because: (1) Northern and Southern DPS fish are morphologically indistinguishable from one another and when green sturgeon have been taken, they have rarely been identified to the DPS level; (2) until recently some fisheries did not report green sturgeon take; and (3) in cases where data on take of green sturgeon is available, methods for estimating the total annual take by a fishery are still being developed. The two DPSs co-inhabit some coastal areas and bays in Northern California, Oregon, and Washington, and the proportion of Southern DPS fish contributing to overall populations in these areas may be high (*e.g.*, 80 percent in the Columbia River; J. Israel, UC Davis, 2008, unpublished data). Thus, while we know that fisheries-related take is occurring, we are uncertain how this take is apportioned between the two DPSs, different locales, and different types of fisheries.

Green sturgeon are taken as bycatch in white sturgeon fisheries, salmon gillnet fisheries, coastal groundfish trawl fisheries, and coastal California halibut set net fisheries (Adams *et al.*, 2006; R. Rasmussen, NMFS, 2006, unpublished data; J. Ferdinand *et al.*, NMFS, 2006, unpublished data). These fisheries have taken large numbers of green sturgeon historically and have been cited as

factors in the decline of the species (70 FR 17386, April 6, 2005; 71 FR 17757, April 7, 2006). For example, from 1985 to 1993, the harvest of green sturgeon in commercial fisheries in the Columbia River and in Washington ranged from 3,000 to over 7,500 fish per year. Sport fishing harvest during the same period ranged from less than 100 to over 500 fish, with the majority harvested from the Columbia River. Since 1993, commercial and sport harvest of green sturgeon has declined in the Columbia River and Washington fisheries to about 150 fish harvested in 2003 (Adams *et al.* 2006).

State recreational and commercial fishing regulations have been revised in response to evidence of recent sturgeon declines and to the listing of the Southern DPS. In California, the California Fish and Game Commission approved revised regulations, effective March 1, 2007, to prohibit retention of green sturgeon, alter the slot (size) limit (142 cm) and bag limit (one individual daily; 3 individuals annually) for white sturgeon, and require implementation of a sturgeon report card system. Recently, the California Fish and Game Commission approved revised regulations, effective March 1, 2010, that prohibit all sturgeon fishing in the upper Sacramento River where southern DPS green sturgeon spawn. The Washington Fish and Wildlife Commission adopted a permanent rule to prohibit retention of green sturgeon in recreational fisheries statewide effective May 1, 2007. In addition, the Washington Department of Fish and Wildlife and Oregon Department of Fish and Wildlife voted to prohibit the retention of green sturgeon in Columbia River recreational fisheries from Bonneville Dam to the mouth of the river, effective January 1, 2007. For commercial fisheries, the retention of green sturgeon has been prohibited in the Columbia River by emergency rule since July 2006 and statewide in Washington by permanent rule since January 26, 2007. The Oregon Fish and Wildlife Commission voted to prohibit the retention of green sturgeon in commercial nearshore fisheries, effective January 1, 2010, and is prohibiting the retention of green sturgeon in recreational fisheries statewide, effective April 1, 2010. The State of California has prohibited commercial fishing for sturgeon since 1917. While these emergency and permanent rules offer Southern DPS fish protection, it is unclear whether the state closures will remain in effect over the long-term and ultimately what

overall effect the closures will have on the Southern DPS.

Commercial groundfish trawl fisheries occurring in coastal waters along the West Coast of North America take green sturgeon. Fish are primarily caught as bycatch off the coast of California. Over a 6-year period, from 2001–2007, 450 green sturgeon were reported as bycatch in trawls off the California coast. Almost all green sturgeon caught in this fishery are released alive (J. Majewski, NMFS, 2006, unpublished data), but the long-term fate of these individuals remains unknown. A program for monitoring green sturgeon take was established with the NMFS Observer Program in January 2007 to determine the amount of take, the DPS of the green sturgeon that are caught (through genetic analysis), and in the future to address the long-term fate of these individuals through tagging. Additional measures that may be implemented to protect green sturgeon and the Southern DPS include zero retention of green sturgeon in all fisheries, minimizing incidental catch, monitoring of incidental catch, increased enforcement, fisheries closures in areas important to the species, and outreach and education on proper catch and release methods and green sturgeon conservation issues.

#### *Tribal Fisheries*

Green sturgeon are taken as bycatch in tribal salmon and sturgeon fisheries conducted by the Quinault Tribe in coastal Washington waters. Tribal harvest of green sturgeon occurs in Grays Harbor and at the mouth of tributaries, primarily the Chehalis and Humpulips rivers. The number of green sturgeon taken annually from 1985 to 2003 ranged from less than 10 to almost 200 fish (Adams *et al.*, 2006). In 2006, the Quinault Tribe implemented zero retention of green sturgeon for the Grays Harbor fishery (J. Schumacker, Quinault Indian Tribe, 2006, personal communication). A large proportion of green sturgeon caught in Grays Harbor may be Southern DPS fish, based on hydroacoustic tracking information (Lindley and Moser, 2006) and a genetic study indicating that approximately 50 percent of green sturgeon sampled in Grays Harbor belong to the Southern DPS (J. Israel and B. May, UC Davis, 2006, unpublished data).

Green sturgeon are also taken, though rarely, in tribal commercial and subsistence salmon fisheries occurring in freshwater and coastal marine waters of Washington, including the Strait of Juan de Fuca, Georgia and Rosario straits, and Puget Sound (W. Beattie, NW Indian Fisheries Commission, 2008, personal communication). The Yurok

and Hoopa Tribes harvest green sturgeon in the Klamath River in California, but most of the fish are believed to be Northern DPS green sturgeon (J. Israel, UC Davis, 2006, unpublished data). Overall, the take of green sturgeon in tribal fisheries has been low compared to non-tribal fisheries. Measures that may be implemented to conserve the Southern DPS include a commitment by the Quinault Tribe, and perhaps other Tribes within the occupied range of the Southern DPS, to minimize take and monitor incidental catch of green sturgeon over the long-term.

#### *Poaching*

Poaching is a potential threat to the Southern DPS. In recent years, several arrests have been made for illegal harvest of white sturgeon for their meat and roe from the Sacramento River (CDFG, 2003 and 2006), the Sacramento-San Joaquin Delta (CDFG, 2004), and the lower Columbia River (Cohen, 1997). In the lower Columbia River, an estimated 2,000 sturgeon were killed over a 5-year period by poachers to produce caviar (Cohen, 1997). Poaching may be less significant than incidental take associated with white sturgeon sportfishing (Williamson, 2003). However, the tendency for green sturgeon to form aggregations for long periods of time may make them easy targets for poachers (Erickson *et al.*, 2002). Increased public outreach and awareness, increased enforcement, and heavier sentences and fines for poachers may help to protect green sturgeon from the threats of poaching.

#### *Research and Monitoring Activities*

Scientific research and monitoring of the Southern DPS contributes valuable information for the management, conservation, and future status reviews of the species. However, collection or handling associated with scientific research and monitoring constitutes take and may result in stress, injuries, or mortality of Southern DPS fish. In recent years, much research and monitoring effort has been placed on: (1) Tracking the movements and habitat use of Southern DPS fish by using a variety of non-lethal tagging techniques; and (2) identifying the DPS of origin using non-lethal genetic sampling techniques. These two research and monitoring activities provide information crucial to the development of an effective recovery strategy for the species. The best available information indicates that these procedures, when done according to accepted protocols, result in minimal short-term stress to the fish and do not result in lethal take. Important scientific

information (*e.g.*, genetic, pathologic, taxonomic, meristic) is also gathered from already dead individuals, thereby providing valuable data without putting the species at further risk.

#### *Emergency Rescue and Salvage Activities*

Emergency fish rescue activities, including aiding sick, injured, or stranded fish, disposing of dead fish, or salvaging dead fish for use in scientific studies, are forms of take. Rescue activities would benefit the Southern DPS in the event of emergency situations that result from natural disasters, man-made habitat alterations, national defense activities, security emergencies, etc. Allowing take of the Southern DPS for emergency rescue and salvage activities is likely to enhance survival and recovery of the listed species. However, it is important that measures be taken to investigate emergency events during or after they have occurred in order to determine whether a non-ESA-compliant action(s) necessitated the rescue or salvage.

#### *Habitat-Altering Activities*

Dams and water diversion structures have caused the elimination, obstruction, or delay of passage for green sturgeon and other sturgeon species and may reduce body condition and reproductive success. For example, dams and water diversion structures have been observed to obstruct or disrupt the upstream spawning migrations of shortnose sturgeon in the lower Cape Fear River, NC (Moser and Ross, 1995). White sturgeon have also been found stranded behind the Fremont Weir in the Yolo Bypass, CA (Harrell and Sommer, 2006). Disruptions in migration may cause fish to stop their upstream migration or may delay access to spawning habitats (Moser and Ross, 1995). The inability to reach spawning habitats may cause fish to spawn in habitats of lower quality, resulting in decreased recruitment (Cooke and Leach, 2004). Several dams and water diversion structures exist along the spawning migration route of the Southern DPS and would be expected to have detrimental effects similar to those observed in surrogate species. Fish passage studies at the Red Bluff Diversion Dam (RBDD) in the Sacramento River show that the RBDD blocks the upstream migration of the Southern DPS when the gates are lowered between May 15 and September 15 (Heublein *et al.*, 2006; Brown, 2007). Mitigation measures have been implemented, including the raising of RBDD gates from September 15 to June 15 each year to allow fish passage and

the protection and restoration of spawning and rearing habitat along the Sacramento River, bays, and the Sacramento-San Joaquin Delta. However, when the gates are raised, green sturgeon may become disoriented or suffer injuries due to the high velocity of water passing under the gates (M. Tucker, NMFS, 2007, personal communication). Between May 18 and June 10, 2007, carcasses of 10 adult Southern DPS fish (168–226 cm total length) were found at (n=2) or downstream (n=8) of RBDD (E. Campbell, USFWS, 2007, unpublished data). Locations of the retrieved carcasses and necropsy results suggest that the fish suffered mortality due to injuries inflicted by the gates at RBDD. Installation of adequate fish passage facilities, modification of existing passage facilities, or other provisions to specifically aid sturgeon passage at dams and diversions, and application of other mitigation measures, such as salvage operations, would contribute to the protection of the Southern DPS.

The elimination, obstruction, or delay of downstream passage is a concern for larval and juvenile stages of the Southern DPS, as are habitat-altering activities that destroy, modify, or curtail spawning or rearing habitats for egg, larval, or juvenile stages. Specific concerns include, but are not limited to: Increased sediment input or runoff into streams; filling in or isolation of stream channels, side channels, and intermittent waters; direct removal or alteration of physical structures; and obstruction of downstream migration.

Increased input or runoff of fine sediments into streams may result from a number of activities including, but not limited to, mining, logging, farming, grazing, and bridge and road construction. Increased erosion and sediment input or runoff into streams caused by land use and other human activities have been found to reduce the survival and successful development of eggs and embryos of salmon and other fish species (Scrivener and Brownlee, 1989; Owen *et al.*, 2005). The effects on green sturgeon eggs and embryos are likely to be similar. Green sturgeon eggs are large and dense and likely sink into rock crevices or attach to hard surfaces (Deng *et al.*, 2002; Kynard *et al.*, 2005). Once hatched, green sturgeon embryos remain near the bottom and use rocks as cover (Kynard *et al.*, 2005). Excess fine sediments can compromise successful development by burying already-deposited eggs, reducing interstitial dissolved oxygen available for eggs (Scrivener and Brownlee, 1989), or filling areas used by embryos for cover. Thus, Southern DPS eggs or embryos

may be taken due to habitat-altering activities that increase input of fine sediments or runoff into spawning or rearing habitat. The effect that increased input of fine sediments or runoff has at the individual, population and species levels will depend on the temporal and spatial extent of habitat change. The only way to determine this is to analyze particular activities on a case-by-case basis.

The filling in or isolation of stream channels, side channels, and intermittent waters may destroy or block access to rearing habitats, or impede or delay downstream migration by trapping larvae and juveniles that have entered these areas. Activities that fill in or isolate waters include, but are not limited to, the installation of tide gates, culverts, and debris- or sediment-trapping road crossing structures. These activities and their effects are a concern for listed salmon and steelhead and may also affect larval and juvenile Southern DPS fish. However, we currently lack the information needed to quantitatively assess these effects. Although relatively large numbers of juveniles have been collected in shallow areas of the Santa Clara shoal in the Sacramento-San Joaquin Delta (Radtke, 1966), the use of stream channels, side channels, and intermittent waters as rearing habitat by green sturgeon larvae and juveniles has not been documented. Information regarding the use of these habitats by early life stages of green sturgeon is needed.

Direct removal or alteration of physical structures essential to the integrity and function of the Southern DPS's spawning or rearing habitat, including rocks, soil, gravel, and vegetation, may adversely affect the growth and survival of larvae and juveniles. Green sturgeon likely use specific substrate types at different life stages, but observations of early life stages of green sturgeon in the field are lacking. Studies suggest that spawning most likely occurs over cobble substrates that provide crevices and cover for eggs (Kynard *et al.*, 2005; Nguyen and Crocker, 2006). However, in a laboratory study of substrate use by post-hatch larval green sturgeon, growth and survival was greatest in flat slate-rock substrates that provided cover and sufficient foraging opportunities (Nguyen and Crocker, 2006). Survival was low in cobble substrates, because larvae became trapped in crevices and died; whereas in sand substrates, the cause of lower survival and growth was attributed to the ingestion of sand particles similar in size to food particles (Nguyen and Crocker, 2006). Juveniles likely use deep pool habitats with rock

structure during the winter (Kynard *et al.*, 2005). Removal or alteration of these physical structures (*i.e.* cobble for spawning and egg development; flat rock for larval rearing; deep pool habitats with rock structure for juvenile rearing) may reduce spawning or rearing success rates. Additional studies regarding the use of spawning habitats by Southern DPS early life stages and the effects of removing or altering physical components of Southern DPS spawning habitat on recruitment success are encouraged.

The construction and maintenance of dams and water diversion structures may impede or delay downstream migration and alter habitats important to larval and juvenile stages of the Southern DPS. Dams and water diversions may block downstream migration of larvae and juveniles, unless fish transport or bypass facilities exist. Passage across dams and water diversion structures may also disorient or injure larvae and juveniles and make them more vulnerable to predation, as has been observed for juvenile salmonids at RBDD (Bigelow and Johnson, 1996; Gaines and Martin, 2002). The actual construction of dams and water diversion structures may cause increased erosion and sedimentation and disrupt or alter physical structures in spawning or rearing habitats, with effects as described in the previous paragraphs.

While existing laws require mining, timber harvest, and other resource use plans to address erosion and other adverse impacts on stream habitats, these laws may not be adequate to protect the Southern DPS. Additional measures that would help reduce potential adverse impacts on Southern DPS fish are: (1) Protection of riparian habitat by limiting activities that cause erosion, sediment input or runoff into streams, or roadway and other linear development near or across streams; (2) construction of fish protection and passage facilities; and (3) limiting the temporal and/or spatial scopes of habitat alteration activities that occur in and near spawning and rearing locations.

#### *Habitat Restoration*

The primary purpose of habitat restoration is to restore natural aquatic or riparian habitat conditions or processes over the long-term. Specifically, we define habitat restoration as the process of reestablishing a self-sustaining habitat that closely resembles natural conditions in terms of structure and function for the Southern DPS. A variety of habitat-altering activities such as

barrier removal or modification to restore natural water flows, river and estuarine bed restoration, natural bank protection, restoration of native vegetation, removal of non-native species, and removal of contaminated sediments has been used to reestablish natural river and estuarine functions over the long-term. Although take of green sturgeon could potentially occur during the course of completing restoration activities, we do not have evidence that these types of activities have taken the Southern DPS or a surrogate species. It is likely that these activities are important to the conservation and recovery of the Southern DPS.

#### *Entrainment and Impingement Risks*

The operation of water diversions, power generating projects, and dredging activities pose entrainment and impingement threats to all life stages of the Southern DPS. We define entrainment to mean the incidental trapping of any life stage of fish within waterways or structures that carry water being diverted for anthropogenic use. We define impingement to mean the entrapment of any life stage of fish on the outer part of any structure (*e.g.*, intake structures, screening devices) that separates water traveling a natural course of passage from water that is being diverted for anthropogenic use. Unscreened water diversions number in the hundreds to thousands in the Sacramento River and the Sacramento-San Joaquin Delta (Herren and Kawasaki, 2001). Factors that determine the entrainment risk of fish at diversions include the location and size of fish. A study of fish entrainment at an unscreened diversion in the Sacramento River documented entrainment of fish ranging in size from 9 to 59 mm fork length (FL) in July 2000 and 2001 (Nobriga *et al.*, 2004). Green sturgeon were not among the species documented in the study, but Southern DPS larvae and small juveniles within the size range of 9–59 mm FL occur in the Sacramento River at that time of year and are believed to also be at risk of entrainment at unscreened diversions. Entrainment of juvenile green sturgeon has been documented at the state and Federal fish facilities in the south Sacramento-San Joaquin Delta, where fish are salvaged before they enter the pumps (Adams *et al.*, 2006). Programs to install fish screens at water diversions are being implemented and many major diversions have already been screened. Installation of fish screens, construction of bypass and other fish protection facilities (Bigelow and Johnson, 1996; Gaines and Martin, 2002), adjustments



in the timing of operations, and continuation of fish salvage operations, where applicable, would help minimize and mitigate entrainment of Southern DPS fish at water diversions.

Evidence exists for the impingement of green sturgeon in the operation of coastal power plants using cooling water intake systems, and there is a possibility that green sturgeon are also entrained at power plants. Two juvenile green sturgeon were impinged and died on cooling water intake screens at the now retired Contra Costa Plant Units 1–5 in 1978–1979 and at the Moss Landing Power Plant in 2006 (C. Raifsnider and J. Steinbeck, *Tenera Environmental*, 2006, personal communication). Current conservation efforts include the installation of screens to reduce entrainment, studies of fish impingement and entrainment at power plants, and laws that require the minimization of fish impingement and entrainment. Other actions that can be taken to reduce impingement and entrainment include altering the time of day when water intake pumps are operated, altering the velocity of water intake, and the use of alternative cooling systems that do not require water intake.

Dredging operations in freshwater rivers, bays, and estuaries where Southern DPS fish occur may pose entrainment risk. Although entrainment of green sturgeon in dredging operations has not been documented, the effects could be significant. Approximately 2,000 juvenile white sturgeon were entrained during operation of a large suction dredge in the lower Columbia River (Buell, 1992). Juvenile green sturgeon would be expected to face similar entrainment risks from dredging operations because they are also bottom-oriented and occur in habitats similar to white sturgeon. Dredging may also be a potential threat to adult green sturgeon because they occur in areas where dredging operations take place. Dredging stirs up the sediments causing the release of contaminants that would have adverse impacts on growth, reproductive development, and reproductive success of green sturgeon. Long-term management strategies for San Francisco Bay dredging operations have established regional environmental work windows, or periods of time when certain fish species are not likely to be present in a location. Currently, it is believed that Southern DPS juveniles reside in San Francisco, Suisun, and San Pablo bays year-round so environmental work windows will likely not be effective in reducing the risks of dredging operations to the Southern DPS in these locations (Ganssle, 1966; Miller, 1972; CDFG,

2002; Jahn, 2006; BDAT, 2009). However, the use of specific types of dredging equipment with modified designs would reduce the entrainment risk to Southern DPS fish from dredging operations.

#### *Pesticides and Discharge of Pollutants*

The application of pesticides adjacent to or within waterways that contain any life stage of the Southern DPS may adversely affect their growth and reproductive success. Several pesticides have been detected in the Sacramento River Basin at levels that are likely to be harmful to aquatic life (Domagalski *et al.*, 2000). The accumulation of industrial chemicals and pesticides such as polychlorinated biphenyls (PCBs), dichloro-diphenyl-trichloroethanes (DDTs), and chlordanes in white sturgeon gonad, liver, and muscle tissues affects growth and reproductive development and results in lower reproductive success (Fahey *et al.*, 1997; Foster *et al.*, 2001a; Foster *et al.*, 2001b; Kruse and Scarnecchia, 2002; Feist *et al.*, 2005; Greenfield *et al.*, 2005). Green sturgeon are believed to experience similar risks from contaminants, although their exposure may be reduced because a greater proportion of their subadult and adult lives are spent in marine waters (70 FR 17386, April 6, 2005). Pesticides may also indirectly affect green sturgeon through effects on their prey species. For example, green sturgeon are believed to enter Willapa Bay to feed on burrowing ghost shrimp (*Neotrypaea californiensis*), which have declined in abundance due to the deliberate application of carbaryl (Moser and Lindley, 2006).

The discharge or dumping of toxic chemicals or other pollutants into waters and areas where Southern DPS fish occur would be expected to reduce their growth and reproductive success. Pollutants including mercury, selenium, and arsenic have been detected in white sturgeon gonad, liver, and muscle tissues and are believed to affect growth, reproductive development, and reproductive success (Fahey *et al.*, 1997; Davis *et al.*, 2002; Kruse and Scarnecchia, 2002; Greenfield *et al.*, 2005; Webb *et al.*, 2006). Again, the effects on green sturgeon are likely to be similar.

Under the Federal Clean Water Act, acceptable levels for contaminants in waterways have been established by the States and the U.S. Environmental Protection Agency (EPA). Entities must also obtain National Pollutant Discharge Elimination System (NPDES) permits to discharge contaminants. However, NPDES permits are not required for

irrigated agriculture and agricultural stormwater runoff. Furthermore, the national standards for use of pesticides and toxic substances may not be conservative enough to adequately protect the Southern DPS as was found for listed salmonids in recent draft and final jeopardy biological opinions issued by NMFS to the EPA (NMFS 1998, NMFS 2000, NMFS 2008). Thus, programs to aid agricultural producers in meeting NMFS-imposed water quality standards may be required to minimize adverse impacts on the Southern DPS.

#### *Non-Native Species Introductions*

Non-native species are a continuing problem in freshwater rivers and coastal bays and estuaries and may affect the Southern DPS through trophic interactions. Introduced species, such as striped bass in the Sacramento River and the Sacramento-San Joaquin Delta, may prey on green sturgeon juveniles. Non-native species may also replace prey species of green sturgeon and result in greater bioaccumulation of contaminants. For example, *Potamocorbula amurensis*, a non-native bivalve, has become widespread in the San Francisco Bay and the Sacramento-San Joaquin Delta and has replaced other common prey items for white sturgeon. *P. amurensis* is an efficient bioaccumulator of selenium, a reproductive toxin that causes deformities in embryos and reduced hatchability of eggs, and has been linked with increased selenium levels in white sturgeon (Linville *et al.*, 2002). *P. amurensis* has also been identified in the gut contents of at least one green sturgeon (CDFG, 2002). Non-native species may also alter the Southern DPS' habitat or compete with the Southern DPS for space or food. Although existing laws prohibit the release of non-native species into the environment, accidental and intentional introduction of non-native species remains a problem. Eradication programs for non-native species, increased public education and outreach, and increased fines or penalties for the release of non-native species would help to alleviate this problem.

#### **4(d) Protective Regulations for the Southern DPS**

We apply the prohibitions listed under ESA sections 9(a)(1)(A) through 9(a)(1)(G) for the Southern DPS, including all the ESA section 9(a)(1)(B) and 9(a)(1)(C) prohibitions (the “take prohibitions”) except for specific activities described below (see Exceptions, Criteria for Exceptions, and



Reporting Requirements). ESA section 9(a)(1)(A) states that it is unlawful to import or export endangered species into or from the United States; ESA section 9(a)(1)(B) states that it is illegal to take endangered species within the United States or the territorial sea of the United States; ESA section 9(a)(1)(C) states that it is illegal to take endangered species upon the high seas; ESA section 9(a)(1)(D) states that it is illegal to possess, sell, deliver, carry, transport, or ship, by any means whatsoever, endangered species taken in violation of 9(a)(1)(B) and 9(a)(1)(C); ESA section 9(a)(1)(E) states that it is illegal to deliver, receive, carry, transport, or ship in interstate or foreign commerce by any means whatsoever and in the course of a commercial activity, endangered species; ESA section 9(a)(1)(F) states that it is illegal to sell or offer for sale in interstate or foreign commerce, endangered species; and ESA section 9(a)(1)(G) states that it is illegal to violate any regulation pertaining to endangered species or to any threatened species of fish or wildlife listed pursuant to section 4 of the ESA and promulgated by the Secretary pursuant to authority provided by the ESA.

These prohibitions are necessary and advisable for the conservation of the Southern DPS because human "take" via activities including, but not limited to, detrimental habitat alteration, modification, and curtailment; fisheries catch and bycatch; application of pesticides, toxic chemicals, or other pollutants adjacent to or within waterways; entrainment or impingement of eggs or fish during water diversion operations, dredging, or power generation; unnecessary collection or handling; and introduction of non-native species that disrupt trophic pathways, has contributed to the decline of the Southern DPS and is likely to impede its conservation and recovery. Evaluation of activities that may occur throughout the area affected by the prohibitions for Southern DPS fish, eggs or larvae is shown in Table 1.

#### Exceptions, Criteria for Exceptions, and Reporting Requirements

We establish exceptions to the ESA section 9(a)(1)(B) and 9(a)(1)(C) prohibitions (the "take prohibitions") for specific activities. These exceptions encompass specific activities that may be excluded from the take prohibitions for the Southern DPS through the relatively informal coordination process described below. In determining that it is necessary and advisable to not impose take prohibitions on certain activities, we are mindful that new information may require a reevaluation of that

conclusion at any time. For any of the exceptions to the take prohibitions described below, we would evaluate on a regular basis the effectiveness of the activities in conserving and protecting the Southern DPS. If the activities are not effective in conserving and protecting the Southern DPS, we would identify ways in which the activities need to be altered or strengthened. For habitat-related exceptions to the take prohibitions, changes may be required if the activities are not achieving desired habitat functionality or the habitat is not supporting population productivity levels needed to conserve the Southern DPS. If the agency or entity carrying out the activity does not make changes to respond adequately to the new information, we would publish notification in the **Federal Register** announcing the intention to impose take prohibitions on those activities. Such an announcement would provide for a comment period of not less than 30 days, after which we would make a final determination whether to extend the ESA section 9(a)(1)(B) and (C) take prohibitions to the activities. If the activities do not meet the exception criteria any take must be covered under an ESA section 7 incidental take statement (*i.e.* for activities with a Federal nexus) or ESA section 10(a)(1)(B) incidental take permit. The take of the Southern DPS will not be prohibited during the course of the following activities:

(1) Federal, state, or private-sponsored research or monitoring activities if they adhere to all of the following: (a) The activity must comply with required state reviews or permits; (b) the research or monitoring activity must be directed at the Southern DPS and not be incidental to research or monitoring of another species; (c) take of live mature adults in the lower Feather River from the confluence with the Sacramento River to the Oroville Dam (rkm 116), the lower Yuba River from the confluence with the Feather River to the Daguerre Dam (rkm 19), or Suisun, San Pablo, and San Francisco Bays or the Sacramento-San Joaquin Delta from the Golden Gate Bridge up into the Sacramento River to Keswick Dam (rkm 483) may only occur from July 1 through March 1 so as to substantially increase the likelihood that uninterrupted upstream spawning migrations of adults will occur; (d) take must be non-lethal; (e) take involving the removal of any life stage of the Southern DPS from the wild must not exceed 60 minutes; (f) take must not involve artificial spawning or enhancement activities; (g) a description of the study objectives and justification,

a summary of the study design and methodology, estimates of the total non-lethal take of Southern DPS fish anticipated, estimates of incidental take of other ESA listed species anticipated and proof that those takes have been authorized by NMFS or the USFWS, identification of funding sources, and a point of contact must be reported to the NMFS Southwest Regional Office (see **ADDRESSES:** above) at least 60 days prior to the start of the study, or, for ongoing studies, by August 31, 2010; (h) reports that include the total number of Southern DPS and any other ESA listed species taken, information that supports that take was non-lethal, and a summary of the project results must be submitted to NMFS on a schedule to be determined by NMFS staff; (i) research or monitoring that involves action, permitting, or funding by a Federal agency must still comply with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS. NMFS will respond in a letter either confirming the activities meet the exception criteria or stating that the activities do not meet the exception criteria and are subject to the take prohibitions. The letter would acknowledge receipt of the project information and provide the schedule for submission of research/progress reports and technical assistance to clarify when the ESA section 9 prohibitions apply.

(2) Emergency fish rescue and salvage activities that include aiding sick, injured, or stranded fish, disposing of dead fish, or salvaging dead fish for use in scientific studies, if they adhere to all of the following: (a) The activity must comply with required state or other Federal reviews or permits; (b) activities may only be conducted by an employee or designee of NMFS or the U.S. Fish and Wildlife Service (USFWS), any Federal land management agency, or California Department of Fish and Game (CDFG), Oregon Department of Fish and Wildlife (ODFW), Washington Department of Fish and Wildlife (WDFW), or Alaska Department of Fish and Game (ADFG); (c) the emergency rescue must benefit the Southern DPS; (d) a report must be submitted to the NMFS Southwest Regional Office (see **ADDRESSES:** above) that includes, at a minimum, the number and status of fish handled, the location of rescue and/or salvage operations and the potential cause(s) of the emergency situation within 10 business days after carrying out the rescue.

(3) Habitat restoration activities, including barrier removal or

modification to restore water flows, riverine or estuarine bed restoration, natural bank stabilization, restoration of native vegetation, removal of non-native species, or removal of contaminated sediments, that reestablish self-sustaining habitats for the Southern DPS, if they adhere to all of the following: (a) Compliance with required state and Federal reviews and permits; (b) a detailed description of the restoration activity sent to the NMFS Southwest Regional Office (*see ADDRESSES: above*) at least 60 days prior to the start of the restoration project, or, for ongoing studies, by August 31, 2010, which includes: the geographic area affected; when activities will occur; how they will be conducted; and the severity of direct, indirect, and cumulative impacts of activities on the Southern DPS; identification of funding sources; demonstration that all state and Federal regulatory requirements have been met; a description of methods used to ensure that the likelihood of survival or recovery of the listed species is not reduced; a plan for minimizing and mitigating any adverse impacts to Southern DPS spawning or rearing habitat; an estimate of the amount of incidental take of the listed species that may occur and a description of how that estimate was made; a plan for effective monitoring and adaptive management; a pledge to use best available science and technology when conducting restoration activities; and a point of contact; (c) progress reports that include the total number of Southern DPS fish taken, information regarding whether the take was lethal or non-lethal, a summary of the status of the project, and any changes in the methods being employed, must be submitted to NMFS on a schedule to be determined by NMFS staff; (d) activities that involve action, permitting, or funding by a Federal agency must still comply with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS. NMFS will respond in a letter either confirming the activities meet the exception criteria and are not subject to the take prohibitions, or stating that the activities do not meet the exception criteria and are subject to the take prohibitions and any take must be covered under an ESA section 7 incidental take statement or ESA section 10 permit. The letter would also provide the schedule for submission of progress reports and would provide technical assistance to clarify when the ESA section 9 prohibitions apply.

#### **Exemptions Provided by NMFS-approved ESA 4(d) Programs**

We provide exemptions from the take prohibitions for certain activities included within a NMFS-approved 4(d) program. Activities included in a 4(d) program would be excused from the take prohibitions for the Southern DPS through a formal NMFS 4(d) program approval process described below.

##### *4(d) Program for Commercial and Recreational Fishery Management*

Take of green sturgeon in commercial and recreational fisheries activities would be allowed if fisheries activities were conducted under approved Fisheries Management and Evaluation Plans (FMEPs). We expect that, in many cases, fisheries will have acceptably small impacts on the threatened Southern DPS as long as state fishery management programs are specifically tailored to meet certain criteria. NMFS-approved FMEPs must address limiting take of green sturgeon in order to protect the listed entity, the Southern DPS. We consider this necessary because discrimination between the non-listed Northern DPS and listed Southern DPS, via gear specificity, visual indicators, spatial distribution, etc., is not currently possible. In order for NMFS to exempt commercial or recreational fishing activities from the take prohibitions, an FMEP must: (1) Prohibit retention of green sturgeon (*i.e.*, zero bag limit); (2) set maximum incidental take levels; (3) include measures to minimize incidental take of green sturgeon (*e.g.*, temporal/spatial restrictions, size, gear); (4) provide a biologically based rationale demonstrating that the incidental take management strategy will not significantly reduce the likelihood of survival or recovery of the Southern DPS; (5) include effective monitoring and evaluation plans; (6) provide for evaluating monitoring data and making revisions to the FMEP; (7) provide for effective enforcement and education; (8) provide a timeframe for FMEP implementation; and (9) report the amount of incidental take and summarize the effectiveness of the FMEP to NMFS on a biannual basis. If we find that an FMEP meets these criteria, we will issue a letter of concurrence to the entity that sets forth the terms of the FMEP's implementation and the duties of the parties pursuant to the FMEP.

Section 9(a)(1)(B) and (a)(1)(C) take prohibitions would not apply to ongoing commercial and recreational fisheries activities until September 30, 2010 if a letter of intent to develop an FMEP addressing green sturgeon has been

received by the NMFS Southwest Regional Office (*see ADDRESSES: above*) by July 2, 2010. The exemption will be suspended if the letter of intent is rejected without further review of an FMEP. If the letter of intent is received July 2, 2010, a draft FMEP must be received by NMFS within 6 months from the date of receipt of the letter of intent. A final FMEP must be received by NMFS within 3 months from the date of receipt of NMFS' comments on the draft FMEP. Ongoing commercial and recreational fisheries activities may continue until NMFS issues a letter of concurrence (or denial) for final FMEPs.

*Once a final FMEP has been submitted to NMFS for review, NMFS will:* (1) Provide a public comment period ( $\geq 30$  days) before approval of new or amended FMEPs; (2) provide a letter of concurrence for approved FMEPs that specifies the implementation and reporting requirements; (3) evaluate FMEPs every 5 years and identify changes that would improve their effectiveness; and (4) provide a public comment period ( $\geq 30$  days) before withdrawing approval of an FMEP.

##### *4(d) Program for Tribal Fishery Management*

Fishery harvest or other activities conducted by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent in Willapa Bay, WA, Grays Harbor, WA, Coos Bay, OR, Winchester Bay, OR, Humboldt Bay, CA, and any other area where tribal treaty fishing occurs are eligible to obtain take authorization via the same method outlined in the NMFS final rule for authorizing take of threatened salmon and steelhead for actions under tribal resource management plans (July 10, 2000; 65 FR 42481). This method has been modified below for the Southern DPS. We consider current tribal fishing activities to have acceptably small impacts on the threatened Southern DPS, and if the tribes, either singly or jointly, develop tribal resource management plans for the Southern DPS, or incorporate the Southern DPS into existing tribal resource management plans, that current and future tribal activities are not likely to appreciably reduce the likelihood of survival and recovery of the species.

A tribe intending to exercise a tribal right to fish or undertake other resource management actions that may impact the threatened Southern DPS could create a tribal resource management plan (Tribal Plan) that would assure that those actions would not appreciably reduce the likelihood of survival and recovery of the species. Tribal Plans

should be sent to the NMFS Southwest Regional Office (*see ADDRESSES*). NMFS would stand ready to the maximum extent practicable to provide technical assistance to any tribe that so requests in examining impacts on the listed Southern DPS and in the development of Tribal Plans that meet tribal management responsibilities and needs. In making a determination whether a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the threatened Southern DPS, the Secretary, in consultation with the tribe, would use the best available scientific and commercial data (including careful consideration of any tribal data and analysis) to determine the Tribal Plan's impact on the biological requirements of the species. The Secretary would also assess the effect of the Tribal Plan on survival and recovery in a manner consistent with tribal rights and trust responsibilities. Before making a final determination, the Secretary would seek comment from the public on his pending determination whether implementation of a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the listed Southern DPS. The Secretary would publish notification in the **Federal Register** of any determination regarding a Tribal Plan and the basis for that determination.

#### *4(d) Program for Scientific Research and Monitoring Activities*

State-coordinated research activities for scientific research or enhancement purposes that do not fall into the exception category described above (*see* Exceptions, Criteria for Exceptions, and Reporting Requirements) may receive an exemption from the take prohibitions for the Southern DPS for activities included in a state-sponsored, ESA-compliant, scientific research program between state fishery agencies (*i.e.*, CDFG, ODFW, WDFW, or ADFG) and NMFS, hereafter referred to as a state 4(d) research program. Activities conducted as part of a state 4(d) research program must meet existing state and Federal laws and regulations and would include research and monitoring projects conducted by state employees or by recipients of state fishery agency-issued permits (including Federal and non-Federal entities) that directly or incidentally take Southern DPS green sturgeon. We find that in carrying out their responsibilities to manage state fisheries, state agencies conduct or sponsor research vital for improving our understanding of the status and risks facing the Southern DPS and other listed species that occur in overlapping

habitat, and provide critical information for assessing the effectiveness of current and future management practices.

State 4(d) research programs have been developed and implemented in California, Oregon, and Washington for listed West coast salmon and steelhead and are consistent with ESA requirements for research-related take of these listed species. The Southern DPS would most likely be incorporated into the existing state 4(d) research programs established for listed salmon and steelhead, making use of the system already in place. Otherwise, the state would be required to prepare a program and submit it to the NMFS Southwest Regional Office (*see ADDRESSES* above) for approval. NMFS may approve the program or return the program to the state agency for revision.

In general, we conclude that as long as state biologists and cooperating agencies carefully consider the benefits and risks of activities included in a state 4(d) research program, such programs would help streamline the take authorization process for researchers, state agencies, and NMFS by allowing state fishery agencies to maintain primary responsibility for coordination and oversight of research activities.

Each year, researchers would be required to submit research applications to the state fishery agency preferably through the NMFS online application Web site Authorizations and Permits for Protected Species (APPS) at <https://apps.nmfs.noaa.gov>. *Research applications must include, at a minimum, the following information:* (1) An estimate of the total direct or incidental take of Southern DPS fish that is anticipated; (2) a description of the study design and methodology; (3) a justification for take of Southern DPS fish and the techniques to be used; and (4) a point of contact. The state agency would have access, via NMFS, to the submitted applications, evaluate and determine which projects are eligible for inclusion under the program, and approve or deny individual project applications. Once the state agency review is complete, the state agency would be required to provide for NMFS' review and approval a list of project applications approved for possible inclusion in a 4(d) research program for the coming year. After our review of the applications and follow-ups with the researchers to address concerns if necessary, we would analyze effects of the activities on the Southern DPS. Finally, we would complete the ESA section 7 consultation and NEPA documentation and issue an approval letter to the state fishery agency confirming that the research activities

covered within the 4(d) research program are exempt from the ESA take prohibitions. A section 10(a)(1)(A) research or enhancement permit is not issued. Researchers have to comply with the conditions of the 4(d) research program and must submit an annual report, preferably through the NMFS online application Web site Authorizations and Permits for Protected Species (APPS) at <https://apps.nmfs.noaa.gov>. The annual report must include, for each project: (1) a summary of the number of green sturgeon taken directly or incidentally; and (2) a summary of the results of the project, in order for NMFS to evaluate the effects of the research project on the Southern DPS. We would continue to work with the state fishery agencies to ensure authorized research involving listed Southern DPS fish is both coordinated and conducted in a manner that does not jeopardize the conservation and recovery of the Southern DPS.

Section 9(a)(1)(B) and 9(a)(1)(C) take prohibitions would not apply to ongoing state-supported scientific research and enhancement activities seeking take authorization of the Southern DPS fish through a state 4(d) program, if the above information is provided to NMFS, preferably through the NMFS online application Web site Authorizations and Permits for Protected Species (APPS) at <https://apps.nmfs.noaa.gov>, during the mid-September through mid-October 2010 application period. The take prohibitions would take effect if the state 4(d) program package is rejected as insufficient or is denied. If the state 4(d) research program package is received during the mid-September to mid-October application period, ongoing state-supported scientific research activities may continue until NMFS issues a written decision of approval or denial. If approved, the state 4(d) program authorization will cover one calendar year and state supported researchers would have to renew authorizations annually during subsequent application periods.

#### **Take Exemptions Provided By ESA Sections 7 or 10**

Federally funded, authorized, or implemented activities that may require take coverage (*see* Proposed 4(d) Protective Regulations for the Southern DPS), and are not covered under Exceptions, Criteria for Exceptions, and Reporting Requirements or Exemptions Provided by NMFS-approved 4(d) Programs above, will be examined on a case-by-case basis through interagency consultation as prescribed by ESA section 7. All other activities (*i.e.*, those

not federally funded, authorized, or implemented) that may require take coverage, and are not covered under Exceptions, Criteria for Exceptions, and Reporting Requirements or Exemptions Provided by NMFS-approved 4(d) Programs above, will be examined on a case-by-case basis as prescribed by ESA section 10.

Federal, state, and private-sponsored research activities for scientific research or enhancement purposes that are not covered under Exceptions, Criteria for Exceptions, and Reporting Requirements or Exemptions Provided by NMFS-approved 4(d) Programs above, may take Southern DPS fish pursuant to the specifications of an ESA section 10 permit. Section 9(a)(1)(B) and (a)(1)(C) take prohibitions would not apply to ongoing research activities if an application for an ESA section 10 (a)(1)(A) permit is received by NMFS, preferably through the NMFS online application Web site <https://apps.nmfs.noaa.gov>, no later than

November 29, 2010. The take prohibitions would take effect if the permit application is rejected as insufficient or a permit is denied. If the permit application is received by November 29, 2010, ongoing research activities may continue without take prohibitions until NMFS issues or denies a permit.

Evaluation of activities that may occur throughout the area affected by the prohibitions for Southern DPS fish, eggs, or larvae is shown in Table 1. Evidence of take of the Southern DPS during the course of an activity is indicated; if there is no such evidence, then evidence of take of a surrogate species is indicated. Existence of protective/conservation measures to minimize take of or benefit the Southern DPS fish during the course of the activity as it is currently conducted is indicated. Based on best available information, whether an activity requires take authorization or is illegal according to other laws and therefore

cannot be authorized is indicated, and whether methods for allowing take resulting from a particular activity exist through ESA sections 7 or 10 or through an ESA section 4(d) Program is specified. This is not an exhaustive list of all activities that occur throughout the area affected by the take prohibitions. Please see 4(d) *Protective Regulations for the Southern DPS* for the full range of activities for which NMFS is prohibiting take.

Table 1. This table indicates whether evidence of take of the Southern DPS or take of a surrogate species exist (yes or no; Y or N) and whether protective/conservation measures to minimize take are currently in place (Y or N). The table also indicates whether under this rule an activity requires take authorization (Y or N), or cannot be authorized (N/A), and whether methods that allow take exist through ESA sections 7 or 10 (Y or N) or through an ESA section 4(d) program (Y or N)

Activity	Take	Take of surrogate species	Protective/Conservation measures or benefits	Take authorization necessary	Methods of take authorization	
					ESA section 7 or 10	4(d) Program
Fishing						
Commercial .....	Y		Y	Y	Y	Y
Recreational .....	Y		Y	Y	Y	Y
Tribal .....	Y		Y	Y	Y	Y
Poaching .....	N	Y	N	N/A	N	N
Collection or Handling						
Research/monitoring						
Federal, State or Private-sponsored (compliant with Exceptions) .....	Y		Y	N		
State-sponsored (outside scope of Exceptions) .....	Y		Y	Y	Y	Y
Federal or Private-sponsored (outside scope of Exceptions) .....	Y		Y	Y	Y	N
Emergency Rescue (compliant with Exceptions) .....	N	Y	Y	N		
Emergency Rescue (outside scope of Exceptions) .....	N	Y	N	Y	Y	N
Detrimental Habitat-Altering Activities						
Activities that Eliminate, Obstruct, or Delay Passage						
Dam installation, repair, modification, operation .....	Y		Y	Y	Y	N
Diversion installation, repair, modification, operation .....	Y		Y	Y	Y	N
Activities that Destroy, Modify, or Curtail Spawning or Rearing Habitat						
Input of fine sediments/runoff ....	N	Y	Y	Y	Y	N
Dam installation, repair, modification, operation .....	Y		Y	Y	Y	N
Diversion installation, repair, modification, operation .....	Y		Y	Y	Y	N
Filling/isolation of channels/intermittent waters .....	N	N	Y	Y	Y	N
Removal/alteration of physical structure that provides spawning/rearing habitat .....	N	N	Y	Y	Y	N
Habitat Restoration (compliant with Exceptions)						
Barrier removal/modification to restore flows .....	N	N	Y	N		

Activity	Take	Take of surrogate species	Protective/ Conservation measures or benefits	Take authorization necessary	Methods of take authorization	
					ESA section 7 or 10	4(d) Program
Riverine or estuarine bed restoration	N	N	Y	N		
Natural bank protection .....	N	N	Y	N		
Restoration of native vegetation .....	N	N	Y	N		
Removal of non-native species .....	N	N	Y	N		
Removal of contaminated sediments	N	N	Y	N		
Habitat Restoration (outside scope of Exceptions) .....	N	N	N	Y	Y	N
Entrainment/Impingement						
Water diversions .....	Y		Y	Y	Y	N
Power generating projects .....	Y		Y	Y	Y	N
Dredging .....	N	Y	Y	Y	Y	N
Pesticide/Pollutant Discharge .....	N	Y	Y	Y	Y	N
Non-native Species Introductions .....	N	Y	Y	N/A	N	N

Under section 9(b)(1) of the ESA, people holding Southern DPS fish in captivity or in a controlled environment prior to the ESA listing are exempt from the prohibitions of section 9(a)(1)(A) and (a)(1)(G) of the ESA and would therefore also be exempt from the prohibitions of this regulation, provided that holding and any subsequent holding or use of the fish is not for commercial activity. The burden of proof that Southern DPS fish were taken prior to listing lies with the individual holding the animals. The prohibitions of this regulation would, however, apply to any progeny of Southern DPS fish taken prior to listing. Any activity involving Southern DPS fish taken pre-listing that is authorized, funded, or carried out by a Federal agency would also be subject to the consultation requirements of section 7 of the ESA.

We apply the section 9 take prohibitions to the Southern DPS, while providing exceptions for some activities (*i.e.*, some types of research/monitoring, enforcement, emergency rescue/salvage, and habitat restoration; see Exceptions, Criteria for Exceptions, and Reporting Requirements) that NMFS finds will not impede, and in most cases will promote, the conservation of the species. However, if the activity is federally funded, authorized, or implemented, it will still be subject to NMFS' review under the ESA jeopardy standard (*i.e.*, ESA section 7(a)(2)). Apart from the subset of activities defined in "Exceptions, Criteria for Exceptions, and Reporting Requirements" above, if the Southern DPS is anticipated to be taken during the course of an activity, several methods may be pursued to obtain take authorization depending on the specific circumstances of the activity. For federally funded, authorized, or implemented activities, the traditional method of seeking take coverage is through ESA section 7. For activities that are not federally funded,

authorized, or implemented, take authorization may be obtained through ESA section 10, by establishing a NMFS-approved 4(d) program (*i.e.*, for commercial or recreational fishing activities or state-sponsored research outside the scope of those activities defined in Exceptions, Criteria for Exceptions, and Reporting Requirements) that adequately protects the Southern DPS, or by developing a tribal resource management plan that will not appreciably reduce the likelihood of survival and recovery of the Southern DPS (see Exemptions Provided by NMFS-approved ESA 4(d) Programs). Take of the Southern DPS due to poaching and non-native species introductions is illegal according to existing state and/or Federal laws, thus no method of take authorization is being provided for these activities.

#### Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review (Peer Review Bulletin) establishing minimum peer review standards, a transparent process for public disclosure, and opportunities for public input. The Peer Review Bulletin, implemented under the Information Quality Act (Pub. L. 106 554), is intended to provide public oversight on the quality of agency information, analyses, and regulatory activities. The text of the Peer Review Bulletin was published in the **Federal Register** on January 14, 2005 (70 FR 2664). The Peer Review Bulletin requires Federal agencies to subject "influential" scientific information to peer review prior to public dissemination. Influential scientific information is defined as "information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions," and the Peer Review

Bulletin provides agencies broad discretion in determining the appropriate process and level of peer review. The Peer Review Bulletin establishes stricter standards for the peer review of "highly influential" scientific assessments, defined as information whose "dissemination could have a potential impact of more than \$500 million in any one year on either the public or private sector or that the dissemination is novel, controversial, or precedent-setting, or has significant interagency interest." We do not consider the scientific information underlying the protective regulations to constitute influential scientific information as defined in the Peer Review Bulletin. The information is not novel; similar information for listed salmonids whose range substantially overlaps with that of the Southern DPS has been used in support of protective regulations that have been in existence for a number of years. Therefore the agency expects the information to be non-controversial and have minimal impacts on important public policies or private sector decisions.

#### References

A complete list of the references used in this final rule is available upon request (*see ADDRESSES*) or via the Internet at <http://www.swr.noaa.gov>.

#### Classification

##### *Regulatory Flexibility Act*

This final ESA 4(d) rule has specific requirements for regulatory compliance and sets an enforceable performance standard (do not take listed fish) when conducting specific activities unless those activities are within a carefully circumscribed set of activities on which NMFS will not impose the take prohibitions. Hence, the universe of entities reasonably expected to be

directly or indirectly impacted by the prohibition is broad.

Based on the language of the 4(d) rule, as well as a review of existing section 7 consultations for the Southern DPS of green sturgeon and co-existing salmon and steelhead species, the FRFA identified the following activities that may be affected by this final rule: commercial, recreational and tribal fisheries; dams and water diversions; power production (electric services and gas distribution); crop agriculture and point source pollutants (NPDES-permitted activities); habitat-altering activities; and in-water construction and dredging activities. A great deal of uncertainty exists with regard to how potentially regulated entities will attempt to avoid take of the Southern DPS. This is caused by two factors: relatively little data exist on green sturgeon abundance and behavior, and NMFS has a short history of managing the Southern DPS. In addition, the spatial distribution of the Southern DPS overlaps nearly entirely with habitat for salmon and steelhead species. Several key variables, such as whether current fish passage facilities and fish screens designed to protect salmon species will be considered adequate to provide passage for the Southern DPS over the long term, remain undetermined at this time. Thus, while baseline protections are expected to be afforded to the Southern DPS on behalf of salmon and steelhead species, the degree to which incremental measures would be required for the Southern DPS has not been determined. As such, the FRFA does not provide estimates of total costs of conservation measures likely to be undertaken for the Southern DPS. Instead, the analysis characterizes potential impacts on affected industries.

In formulating this rule, we considered five alternative approaches, described in more detail in the FRFA. These are: (1) A No Action Alternative where no ESA section 9(a)(1) prohibitions or any other protective regulations are applied to the Southern DPS; (2) a Full Action Alternative where all ESA section 9(a)(1) prohibitions are applied to the Southern DPS; (3) Alternative A where the prohibitions listed under ESA section 9(a)(1)(A) and 9(a)(1)(D) through 9(a)(1)(G) are applied to the Southern DPS and the take prohibitions (ESA section 9(a)(1)(B) and 9(a)(1)(C)) are applied to specific categories of activities that either cause take of Southern DPS fish; (4) Alternative B (Proposed Action) where ESA section 9(a)(1) prohibitions are applied to the Southern DPS as in the Full Action Alternative, but with exceptions and exemptions for activities

that NMFS has determined to be adequately protective of the Southern DPS; and (5) Alternative C where the ESA section 9(a)(1) prohibitions are applied as described in Alternative A, but with exceptions from the take prohibitions (ESA section 9(a)(1)(B) and 9(a)(1)(C)) for activities that NMFS has determined to be adequately protective of the Southern DPS.

The comparative analysis of the alternatives is described in more detail in the FRFA. In summary, the Full Action Alternative and Alternative B (Proposed Action) are anticipated to affect the largest number of industries, but the impacts Alternative B will have on those industries is expected to be less severe because certain activities may be allowed to continue (e.g., some habitat restoration, emergency rescue, and research/monitoring activities) under this alternative. Alternatives A and C are anticipated to affect a smaller number of industries than the Full Action Alternative and Alternative B. For reasons similar to those explained above, Alternative C is expected to have a less severe impact on the affected industries than Alternative A.—The No Action Alternative will have no effect on industries.

#### *Executive Order (E.O.) 12866—Regulatory Planning and Review*

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

#### *E.O. 12988—Civil Justice Reform*

We have determined that this final rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of E.O. 12988. We are providing protective regulations pursuant to provisions in the ESA using an existing approach that improves the clarity of the regulations and minimizes the regulatory burden of managing ESA listings while retaining the necessary and advisable protections to provide for the conservation of threatened species.

#### *E.O. 13175—Consultation and Coordination with Indian Tribal Governments*

E.O. 13175 requires that, if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments, or the Federal Government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. This rule may impose substantial direct compliance costs on the communities of Indian tribal

governments within the range of this DPS. Accordingly, the requirements of section 5(b) and (c) of E.O. 13175 may apply to this rule. During the development of the proposed and final rules, we provided drafts of relevant sections of the 4(d) Rule to potentially affected tribes and held conference calls with potentially affected tribes to discuss the 4(d) Rule and obtain the tribes' input.

#### *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). Neither of those circumstances is applicable to this rule. In fact, this notice provides mechanisms by which NMFS, in the form of 4(d) exceptions to take prohibitions, may defer to state and local governments where they provide necessary protections for the Southern DPS. Even though this rule does not have federalism implications, we requested information from appropriate State resource agencies in California, Oregon, and Washington regarding the proposed action. As subsequent issues with ESA compliance and rulemaking arise (e.g., issuance of permits, critical habitat designation, recovery planning), we will continue to communicate with the States, and other affected local or regional entities, giving careful consideration to all concerns and comments received.

#### *Paperwork Reduction Act (PRA)*

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

This final rule contains collection-of-information requirements subject to the PRA, which have been submitted to OMB for review and approval. Public reporting burden per response for this collection of information is estimated to average: (1) 40 hours for development of a Fisheries Management and Evaluation Plan; (2) 20 hours for development of a Tribal Fishery Management Plan; (3) 40 hours for development of a State-sponsored scientific research program; (4) 5 hours to prepare reports on emergency rescue, salvage, or disposal of Southern DPS fish; (5) 40 hours to prepare reports on restoration activities;

and (6) 40 hours to prepare reports on Federal and private-sponsored research and monitoring. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. We invite comments regarding these burden estimates, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attention: NOAA Desk Officer).

*National Environmental Policy Act (NEPA)*

Whenever a species is listed as threatened, the ESA requires that we shall issue such 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 (see **ADDRESSES**), via our Web site at <http://swr.nmfs.noaa.gov>, or via the Federal eRulemaking Web site at <http://www.regulations.gov>.

*E.O. 13211—Energy Supply, Distribution, or Use*

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. According to E.O. 13211, “significant energy action” means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under E.O. 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. NMFS has determined that this rule is not a significant energy action. First, this rule is not significant under E.O. 12866. Second, this rule would not be likely to result in significant adverse effects on the supply, distribution, or use of energy, because the spatial scope of this rule overlaps with areas where protections for ESA-listed salmonids are in effect and it is likely that the modifications required for ESA-listed salmonids are similar to those that would be required for the Southern DPS. Thus, no Statement of Energy Effects is required for this rule.

**List of Subjects in 50 CFR Part 223**

Endangered and threatened species, Exports, Imports, Transportation.

Dated: May 25, 2010.

**Eric C. Schwaab,**

*Assistant Administrator for Fisheries,  
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 § 223.210 to read as follows:

**§ 223.210 North American green sturgeon.**

(a) *Prohibitions.* The prohibitions of section 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 Southern Distinct Population Segment (DPS) of North American green sturgeon listed in § 223.102(c)(1).

(b) *Exceptions.* Exceptions to the take prohibitions described in section 9(a)(1)(B) and (C) of the ESA (16 U.S.C. 1538(a)(1)(B) and (C)) applied in paragraph (a) of this section to the threatened Southern DPS listed in section 223.102(c) are described in the following paragraphs (b)(1) through (b)(3).

(1) *Scientific Research and Monitoring Exceptions.* The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to ongoing or future Federal, state, or private-sponsored scientific research or monitoring activities if:

- (i) The scientific research or monitoring activity complies with required state reviews or permits;
- (ii) The research or monitoring activity is directed at the Southern DPS and is not incidental to research or monitoring of another species;
- (iii) Take of live mature adults in the lower Feather River from the confluence with the Sacramento River to the Oroville Dam (rkm 116), the lower Yuba River from the confluence with the Feather River to the Daguerre Dam (rkm 19), or Suisun, San Pablo, and San Francisco Bays or the Sacramento-San Joaquin Delta from the Golden Gate Bridge up into the Sacramento River to Keswick Dam (rkm 483) occurs from July 1 through March 1 so as to substantially increase the likelihood that uninterrupted upstream spawning migrations of adults will occur;
- (iv) Take is non-lethal;

(v) Take involving the removal of any life stage of the Southern DPS from the wild does not exceed 60 minutes;

(vi) Take does not involve artificial spawning or enhancement activities;

(vii) A description of the study objectives and justification, a summary of the study design and methodology, estimates of the total non-lethal take of Southern DPS fish anticipated, estimates of incidental take of other ESA listed species anticipated and proof that those takes have been authorized by NMFS or the USFWS, identification of funding sources, and a point of contact is reported to the NMFS Southwest Regional Office in Long Beach at least 60 days prior to the start of the study, or by August 31, 2010 for ongoing studies;

(viii) Reports that include the total number of Southern DPS and any other ESA listed species taken, information that supports that take was non-lethal, and a summary of the project results is submitted to the NMFS Southwest Regional Office in Long Beach on a schedule to be determined by NMFS; and

(ix) Research or monitoring that involves action, permitting, or funding by a Federal agency still complies with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS.

(2) *Enforcement Exception.* The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to any employee of NMFS, when the employee, acting in the course of his or her official duties, takes the Southern DPS listed in § 223.102(c)(1) without a permit, if such action is necessary for purposes of enforcing the ESA or its implementing regulations.

(3) *Emergency Fish Rescue and Salvage Exceptions.* The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to emergency fish rescue and salvage activities that include aiding sick, injured, or stranded fish, disposing of dead fish, or salvaging dead fish for use in scientific studies, if:

(i) The activity complies with required state or other Federal reviews or permits;

(ii) The activity is conducted by an employee or designee of NMFS or the U.S. Fish and Wildlife Service (USFWS), any Federal land management agency, or California Department of Fish and Game, Oregon Department of Fish and Wildlife, Washington Department of Fish and Wildlife, or Alaska Department of Fish and Game;



(iii) The activity benefits the Southern DPS; and

(iv) Those carrying out the activity submit a report to the NMFS Southwest Regional Office in Long Beach that includes, at a minimum, the number and status of fish handled, the location of rescue and/or salvage operations, and the potential causes(s) of the emergency situation within 10 days after conducting the emergency rescue.

(4) Habitat Restoration Exceptions. The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to habitat restoration activities including barrier removal or modification to restore water flows, riverine or estuarine bed restoration, natural bank stabilization, restoration of native vegetation, removal of non-native species, or removal of contaminated sediments, that reestablish self-sustaining habitats for the Southern DPS, if:

(i) The activity complies with required state and Federal reviews and permits;

(ii) Those carrying out the activity submit a detailed description of the restoration activity to the NMFS Southwest Regional Office in Long Beach at least 60 days prior to the start of the restoration project, or, for ongoing studies, by August 31, 2010, which includes: the geographic area affected; when activities will occur; how they will be conducted; and the severity of direct, indirect, and cumulative impacts of activities on the Southern DPS; identification of funding sources; demonstration that all state and Federal regulatory requirements have been met; a description of methods used to ensure that the likelihood of survival or recovery of the listed species is not reduced; a plan for minimizing and mitigating any adverse impacts to Southern DPS spawning or rearing habitat; an estimate of the amount of incidental take of the listed species that may occur and a description of how that estimate was made; a plan for effective monitoring and adaptive management; a pledge to use best available science and technology when conducting restoration activities; and a point of contact;

(iii) Those carrying out the activity submit progress reports that include the total number of Southern DPS fish taken, information regarding whether the take was lethal or non-lethal, a summary of the status of the project, and any changes in the methods being used, to the NMFS Southwest Regional Office in Long Beach on a schedule to be determined by NMFS; and

(iv) An activity that involves action, permitting, or funding by a Federal

agency complies with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS.

(c) *Exemptions via ESA 4(d) Program Approval.* Exemptions from the take prohibitions described in section 9(a)(1)(B) and (C) of the ESA (16 U.S.C. 1538(a)(1)(B) and (C)) applied in paragraph (a) of this section to the threatened Southern DPS listed in § 223.102(c) are described in paragraphs (c)(1) through (c)(3) of this section.

(1) Scientific Research and Monitoring Exemptions. The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to ongoing or future state-sponsored scientific research or monitoring activities that are part of a NMFS-approved, ESA-compliant state 4(d) research program conducted by, or in coordination with, state fishery management agencies (California Department of Fish and Game, Oregon Department of Fish and Wildlife, Washington Department of Fish and Wildlife, or Alaska Department of Fish and Game), or as part of a monitoring and research program overseen by, or coordinated by, one of these agencies. State 4(d) research programs must meet the following criteria:

(i) Descriptions of the ongoing and future 4(d) research or monitoring activity, as described in paragraph (c)(1)(ii) of this section, must be received by the NMFS Southwest Regional Office in Long Beach during the mid-September through mid-October 2010 application period. This exception to the section 9 take prohibitions expires if the proposal is rejected as insufficient or is denied. If the state 4(d) research program package is received during the mid-September to mid-October application period, ongoing state-supported scientific research activities may continue until NMFS issues a written decision of approval or denial. If approved, the state 4(d) program authorization will cover one calendar year and state-supported researchers would have to renew authorizations annually during subsequent application periods.

(ii) Descriptions of ongoing and future state-supported research activities must include the following information and should be submitted to NMFS by the State: an estimate of total direct or incidental take; a description of the study design and methodology; a justification for take and the techniques employed; and a point of contact.

(iii) NMFS will provide written approval of a state 4(d) research program.

(iv) The State agency will provide an annual report to NMFS that, at a minimum, summarizes the number of Southern DPS green sturgeon taken directly or incidentally, and summarizes the results of the project.

(2) Fisheries Exemptions. The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to fisheries activities that are conducted in accordance with a NMFS-approved Fishery Management and Evaluation Plan (FMEP). If NMFS finds that an FMEP meets the criteria listed below, a letter of concurrence which sets forth the terms of the FMEP's implementation and the duties of the parties pursuant to the FMEP, will be issued to the applicant.

(i) An FMEP must prohibit retention of green sturgeon (*i.e.*, zero bag limit); set maximum incidental take levels, include restrictions to minimize incidental take of the green sturgeon (*e.g.*, temporal/spatial restrictions, size of fish, gear used); provide a biologically based rationale demonstrating that the incidental take management strategy will not significantly reduce the likelihood of survival or recovery of the Southern DPS; include effective monitoring and evaluation plans; provide for evaluating monitoring data and making revisions to the FMEP; provide for effective enforcement and education; provide a timeframe for FMEP implementation; and report the amount of incidental take and summarize the effectiveness of the FMEP to NMFS on a biannual basis.

(ii) The ESA section 9(a)(1)(B) and (a)(1)(C) take prohibitions will not apply to ongoing commercial and recreational fisheries activities until September 30, 2010 if a letter of intent to develop an FMEP that is protective of green sturgeon has been received by NMFS by July 2, 2010. The exemption will expire if the letter of intent is rejected without further review of a FMEP. If the letter of intent is received by August 31, 2010, a draft FMEP must be received by NMFS within 6 months from the date of receipt of the letter of intent. A final FMEP must be received by NMFS within 3 months from the date of receipt of NMFS' comments on the draft FMEP. Ongoing commercial and recreational fisheries activities may continue until NMFS issues a letter of concurrence or denial for final FMEPs.

(iii) NMFS will provide a public comment period (≥30 days) before approval of new or amended FMEPs; provide a letter of concurrence for

approved FMEPs that specifies the implementation and reporting requirements; evaluate FMEPs every 5 years and identify changes that would improve their effectiveness; and provide a public comment period (≥30 days) before withdrawing approval of an FMEP.

(3) Tribal Exemptions. The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to fishery harvest or other activities undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent in Willapa Bay, WA, Grays Harbor, WA, Coos Bay, OR, Winchester Bay, OR, Humboldt Bay, CA, and any other area where tribal treaty fishing occurs, if those activities are compliant with a tribal resource management plan (Tribal Plan), provided that the Secretary determines that implementation of such Tribal Plan will not appreciably reduce the likelihood of survival and recovery of the Southern DPS. In making that determination the Secretary shall use the best available biological data (including any tribal data and analysis) to determine the Tribal Plan's impact on the biological requirements of the species, and will assess the effect of the Tribal Plan on survival and recovery, consistent with legally enforceable tribal rights and with the Secretary's trust responsibilities to tribes.

(i) A Tribal Plan may include, but is not limited to, plans that address fishery harvest, artificial production, research, or water or land management, and may be developed by one tribe or jointly with other tribes. The Secretary will consult on a government-to-government basis with any tribe that so requests and will provide, to the maximum extent practicable, technical assistance in examining impacts on the Southern DPS as tribes develop Tribal Plans. A Tribal Plan must specify the procedures by which the tribe will enforce its provisions.

(ii) Where there exists a Federal court proceeding with continuing jurisdiction over the subject matter of a Tribal Plan, the plan may be developed and implemented within the ongoing Federal Court proceeding. In such circumstances, compliance with the Tribal Plan's terms shall be determined within that Federal Court proceeding.

(iii) The Secretary shall seek comment from the public on the Secretary's pending determination whether implementation of a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the listed Southern DPS.

(iv) The Secretary shall publish notification in the **Federal Register** of any determination regarding a Tribal Plan and the basis for that determination.

(d) The exceptions of section 10 of the ESA (16 U.S.C. 1539) and other exceptions under the ESA relating to endangered species, including regulations in part 222 of this chapter II implementing such exceptions, also apply to the threatened Southern DPS of North American green sturgeon listed in § 223.102(c)(1). Federal, state, and private-sponsored research activities for scientific research or enhancement purposes that are not covered under Scientific Research and Monitoring Exceptions as described in paragraph (b)(1) of this section or Scientific Research and Monitoring Exemptions as described in paragraph (c)(1) of this section, may take Southern DPS fish pursuant to the specifications of an ESA section 10 permit. Section 9(a)(1)(B) and (a)(1)(C) take prohibitions would not apply to ongoing research activities if an application for an ESA section 10(a)(1)(A) permit is received by NMFS, preferably through the NMFS online application Web site <https://apps.nmfs.noaa.gov>, no later than November 29, 2010. The take prohibitions would take effect if the permit application is rejected as insufficient or a permit is denied. If the permit application is received by November 29, 2010, ongoing research activities may continue without take prohibitions until NMFS issues or denies a permit.

(e) *Affirmative Defense*. In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened Southern DPS of North American green sturgeon listed in § 223.102(c)(1), any person claiming that his or her take is authorized via methods listed in paragraph (b) of this section shall have a defense where the person can demonstrate that the take authorization is applicable and was in force, and that the person fully complied with the take authorization requirements at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 635

RIN 0648-XW54

#### Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

**ACTION:** Temporary rule; inseason General category retention limit adjustment.

**SUMMARY:** NMFS has determined that the Atlantic tunas General category daily Atlantic bluefin tuna (BFT) retention limit should be adjusted for the June through August 2010 time period, based on consideration of the regulatory determination criteria regarding inseason adjustments. This action applies to Atlantic tunas General category permitted vessels and Highly Migratory Species Charter/Headboat category permitted vessels (when fishing commercially for BFT).

**DATES:** Effective June 1, 2010, through August 31, 2010.

**FOR FURTHER INFORMATION CONTACT:** Sarah McLaughlin or Brad McHale, 978-281-9260.

**SUPPLEMENTARY INFORMATION:** Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, per the allocations established in the 2006 Consolidated Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006).

The 2010 BFT fishing year, which is managed on a calendar-year basis and subject to an annual calendar year quota, began January 1, 2010. The General category season, which was open for the month of January 2010, resumes on June 1, 2010, and continues through December 31, 2010. Starting on June 1, the General category daily retention limit (§ 635.23(a)(2)), is