• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, pertaining to Pennsylvania's control of NO_X emissions from glass melting furnaces, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: May 25, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2011–14455 Filed 6–9–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 100813359–1195–01]

RIN 0648–AY96

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

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

ACTION: Proposed rule; request for comments; notice of availability of an environmental assessment.

SUMMARY: This proposed rule proposes to extend the Endangered Species Act (ESA) section 9(a)(1)(A) through 9(a)(1)(G) prohibitions to all activities impacting the Gulf of Maine (GOM) Distinct Population Segment (DPS) of Atlantic sturgeon throughout its range except for two types of activities, scientific research and rescue/salvage activities, when those activities occur within the riverine range of the GOM DPS. The ESA section 9 prohibitions are comprehensive and pertain to any person subject to the jurisdiction of the United States. Specifically, section 9 of the ESA prohibits the import, export, taking, possession, sale or offering for sale in interstate or foreign commerce, delivery, receiving of, carrying, transportation, or shipping in interstate or foreign commerce any such species, or violation of any regulation pertaining to such species. On October 6, 2010, we, the National Marine Fisheries Service (NMFS), proposed to list the DPS of Atlantic sturgeon in the GOM as threatened under the ESA. When a species is listed as "threatened" under the ESA, we are required to issue protective regulations under section 4(d) of the ESA. Such protective regulations are ones deemed "necessary and advisable for the conservation of the species" and may include any act prohibited for endangered species under section 9(a)(1) of the ESA. The prohibitions and exceptions proposed in this rule are deemed necessary and advisable for the conservation of this species. We expect that the result of extending such prohibitions will be to protect the GOM DPS of Atlantic sturgeon from direct forms of take, such as physical injury or killing, and from indirect forms of take, such as harm that results from habitat degradation while still allowing scientific research as well as salvage of dead fish and rescue of injured fish by experienced personnel. These actions will help preserve and recover the GOM DPS of Atlantic sturgeon by addressing the negative effects from stressors impeding recovery of the DPS.

DATES: Comments on this proposal must be received by August 9, 2011.

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

• *Federal eRulemaking Portal: http// www.regulations.gov.* Follow the instructions for submitting comments.

• *Fax:* To the attention of Lynn Lankshear at (978) 281–9394.

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

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

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

The proposed rule and other reference materials regarding this determination are available electronically at *http:// www.nero.noaa.gov/prot_res/ atlsturgeon/under* the section titled "What's New" or by submitting a request to the Assistant Regional Administrator, Protected Resources Division, NMFS, Northeast Region, 55 Great Republic Dive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Lynn Lankshear, NMFS, Northeast Region (978) 282–8473, Kimberly Damon-Randall, NMFS, Northeast Region (978) 282–8485 or Lisa Manning, NMFS, Office of Protected Resources (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

As described in the **Federal Register** notices published October 6, 2010 (75 FR 61872 and 75 FR 61904), NMFS determined that there are five Atlantic sturgeon DPSs within the United States. Along with the GOM DPS, there are also the New York Bight (NYB), Chesapeake Bay (CB), Carolina, and South Atlantic DPSs. NMFS has determined that listing all of the U.S. Atlantic sturgeon DPSs except the GOM DPS as endangered is warranted.

The prohibitions listed under section 9(a)(1) of the ESA automatically apply when a species is listed as endangered but not when listed as threatened. Section 9 of the ESA prohibits any person subject to the jurisdiction of the United States from: (a) Importing any such species into, or exporting any such species from the U.S.; (b) taking any such species within the U.S. or the U.S. territorial sea; (c) taking any such species upon the high seas; (d)

possessing, selling, delivering, carrying, transporting, or shipping, by any means whatsoever, any such species that was illegally taken; (e) delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species; (f) selling or offering for sale in interstate or foreign commerce any such species; or (g) violating any regulation pertaining to such species or to any threatened species of fish or wildlife. The ESA defines "take" as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct (16 U.S.C. 1532(19)). The term "harm" is defined in the regulations as any act which kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation that results in death or injury of wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering (50 CFR 222.102). The term "harm" is used in this proposed rule as defined in the regulations.

In the case of a species listed as threatened, section 4(d) of the ESA requires the Secretary of Commerce (Secretary) to issue such regulations as deemed necessary and advisable to provide for the conservation of the species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1). Whether section 9(a)(1) prohibitions are necessary and advisable for a threatened species is largely dependent on the biological status of the species and the potential impacts of various activities on the species. The proposed rule (75 FR 61872) and Atlantic Sturgeon Status Review (Atlantic Sturgeon Status Review Team (ASSRT), 2007) provided extensive information on the status of the GOM DPS and impacts to Atlantic sturgeon belonging to the GOM DPS. The information is summarized here.

Genetics data and tagging information support the conclusion that the GOM DPS includes all anadromous Atlantic sturgeon whose freshwater range occurs in the watersheds from the Maine/Canadian border southward to include all associated watersheds draining into the Gulf of Maine as far south as Chatham, MA. Within this range, Atlantic sturgeon have been documented from the Penobscot, Kennebec, Androscoggin, Sheepscot, Saco, Piscataqua, and Merrimack rivers. The marine range, including coastal bays and estuaries, of Atlantic sturgeon belonging to the GOM DPS extends from the Bay of Fundy, Canada to the St. Johns River, FL and overlaps throughout with the marine range of Atlantic sturgeon that originate from the other four U.S. DPSs that are proposed to be listed as endangered.

Because Atlantic sturgeon use both riverine waters and the marine environment, they are affected by a multitude of activities. Coast-wide commercial over-harvesting throughout the 19th century and most of the 20th century caused a precipitous decline in Atlantic sturgeon abundance for all of the U.S. Atlantic sturgeon DPSs. A coast-wide moratorium on harvesting Atlantic sturgeon was implemented in 1998 pursuant to Amendment 1 of the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fishery Management Plan for Atlantic sturgeon (ASMFC, 1998). Retention of Atlantic sturgeon from the U.S. Exclusive Economic Zone (EEZ) was prohibited by NMFS in 1999 (64 FR 9449; February 26, 1999). However, despite these prohibitions on directed fishing for and retention of incidentally caught Atlantic sturgeon, other anthropogenic activities continue to take Atlantic sturgeon. These include incidental bycatch in commercial fisheries, vessel strikes, activities affecting water quality, and habitat disturbances such as dredging. Bycatch, water quality and dredging are primary stressors for the GOM DPS of Atlantic sturgeon (ASSRT, 2007). As described in the proposed rule (75 FR 61872), new analyses suggest that the level of bycatch mortality is not sustainable for the GOM DPS in the long-term (ASMFC, 2007). With respect to habitat, the water quality for coastal waters north of Cape Cod is generally fair to good (EPA, 2008), and the majority of historical Atlantic sturgeon spawning habitat is accessible in all but the Merrimack River of the GOM DPS (ASSRT, 2007). Nevertheless, it is difficult to verify whether Atlantic sturgeon spawning habitat in the GOM DPS is fully functional. In addition, NMFS has not implemented any bycatch reduction measures specifically for Atlantic sturgeon, and existing bycatch reduction measures are inadequate for reducing bycatch of Atlantic sturgeon in federally regulated fisheries. NMFS does not have the authority or discretion to require action to reduce the effects of in-water projects (e.g., dredging) specifically for Atlantic sturgeon and there are no specific regulations requiring action(s) to reduce effects of in-water projects to Atlantic sturgeon. NMFS has limited authority and discretion by which to regulate vessel activities in areas where Atlantic sturgeon occur.

Comprehensive information on current abundance for the GOM DPS of Atlantic sturgeon does not exist (ASSRT, 2007). However, surveys have provided qualitative information on Atlantic sturgeon abundance for the GOM DPS, including river-specific information on abundance, trends, evidence of spawning, and/or documentation of multiple year-classes. For example, new evidence of Atlantic sturgeon year-round presence in the Saco River, where they have not been observed for many years, suggests that the numbers of Atlantic sturgeon in the GOM DPS may be increasing. Additionally, the catch-per-unit effort (CPUE) of subadult Atlantic sturgeon during gill net surveys in the Kennebec River increased considerably from 1977–2000 (1977 B 1981 CPUE = 0.30 versus 1998 B 2000 CPUE = 7.43) while the CPUE of adult Atlantic sturgeon showed a slight increase over the same time period (1977–1981 CPUE = 0.12 versus 1998–2000 CPUE = 0.21) (Squiers, 2004).

The Kennebec River is currently the only known spawning river for the GOM DPS. Spawning likely occurs in the Penobscot River, and Atlantic sturgeon that use other historical spawning rivers may represent additional spawning groups (ASSRT, 2007). However, there is, as yet, no evidence that Atlantic sturgeon of the GOM DPS spawn in any river other than the Kennebec River (ASSRT, 2007).

Protecting the GOM DPS of Atlantic sturgeon from direct forms of take, such as physical injury or killing, whether incidental or intentional, will help preserve and recover the DPS's remaining subpopulations. Protecting the GOM DPS of Atlantic sturgeon from indirect forms of take, such as harm that results from habitat degradation, will likewise help preserve the DPS's subpopulations and also decrease synergistic, negative effects from other stressors impeding recovery of the DPS. We therefore propose to extend the ESA section 9(a)(1)(A) through 9(a)(1)(G) prohibitions to all activities impacting the GOM DPS throughout its range except for two types of activities, scientific research and rescue/salvage activities, when those activities occur within the riverine range of the GOM DPS. Specifically, we propose to exempt from the section 9(a)(1)(B) take prohibitions: (a) Scientific research of Atlantic sturgeon belonging to the GOM DPS when conducted in the manner specified in this proposed rule; and, (b) salvaging dead and aiding/resuscitating live Atlantic sturgeon belonging to the GOM DPS by NMFS personnel or their designated agents as specified in this

proposed rule. NMFS is proposing to exempt these activities from the ESA section 9 take prohibitions only when these activities occur within the riverine range of the GOM DPS to ensure that only Atlantic sturgeon belonging to the GOM DPS are taken. We have determined that exempting these activities as specified is necessary and advisable for the conservation of this DPS.

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

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

Based upon available information, we believe that the activities that may take Atlantic sturgeon belonging to the GOM DPS include, but are not limited to: (1) Commercial and recreational fisheries; (2) scientific research and monitoring of Atlantic sturgeon, (3) emergency rescue/salvage of Atlantic sturgeon; (4) scientific research and monitoring directed at other species; (5) habitat altering activities affecting passage of adult sturgeon to and from spawning areas and availability of habitat for egg, larval or juvenile stages; (6) entrainment and impingement of all life stages of GOM DPS sturgeon during the operation of water diversions, dredging projects, and power plants; (7) activities impacting water quality for all life stages of GOM DPS sturgeon such as discharge, dumping, or applications of toxic chemicals, pollutants, or pesticides into waters or areas that contain GOM DPS sturgeon; (8) vessel strikes; and, (9) introduction or release of non-native species that are likely to alter the habitats of, or to compete for space or food, with GOM DPS sturgeon.

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

Activities Affecting the GOM DPS That Do Not Violate Section 9 Including Exemptions

Section 9(a)(1)(A), 10(a)(1)(A), and 10(a)(1)(B) of the ESA provide the authority to grant exemptions to the section 9 prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may authorize exemptions to any of the section 9 prohibitions and may be issued to Federal and non-Federal entities conducting research or conservation activities that involve directed (i.e., intentional) take of listed species. Section 10(a)(1)(B) take permits may be issued to non-Federal entities performing activities that may incidentally take listed species in the course of an otherwise legal activity. These section 10 permits are mechanisms for providing exemptions to the section 9(a)(1)(B) prohibitions should the GOM DPS become listed, and impacts on the GOM DPS from actions in compliance with such permits would not constitute violations of this proposed rule.

Likewise, should the GOM DPS become listed, federally funded or approved activities that incidentally take Atlantic sturgeon belonging to the GOM DPS would not constitute violations of this proposed rule when the activities are conducted in accordance with an incidental take statement issued through a biological opinion provided by NMFS pursuant to section 7 of the ESA. Section 7 of the ESA requires all Federal agencies to consult with NMFS if actions they fund, authorize, or carry out may affect any ESA-listed species under NMFS jurisdiction. Section 7 authorizes NMFS to issue an incidental take statement with a biological opinion if NMFS has determined that the activity may adversely affect, but will not jeopardize, the continued existence of the listed species. Therefore, if this rule and the proposed rule to list the GOM DPS are finalized, incidental take of GOM DPS Atlantic sturgeon resulting from federally funded, authorized, or implemented activities would not violate the section 9(a)(1)(B) or 9(a)(1)(C) take prohibitions, provided the activities are conducted in accordance with an incidental take statement and all reasonable and prudent measures and terms and conditions to minimize the effects of the taking on the listed species.

As described above, we have determined that in certain circumstances, extending the ESA section 9(a)(1)(B) take prohibitions to the GOM DPS of Atlantic sturgeon is not necessary and advisable. We are proposing two exemptions to these prohibitions for activities that provide for the conservation of the GOM DPS: (1) Scientific research conducted on GOM DPS Atlantic sturgeon within the riverine portion of its range and in accordance with accepted NMFS protocol(s); and, (2) salvage of dead and recovery of live stranded or injured GOM DPS Atlantic sturgeon found within the riverine range of the GOM DPS. These exemptions are described in more detail rule in later sections (see "Exemption for Scientific Research" and "Salvage and Recovery" below).

The prohibitions of section 9(a)(1)(B) apply to all other activities that do not meet the specific exemptions for scientific research, salvage and recovery as described in this proposed rule. All other prohibitions of sections 9(a)(1)(A) and 9(a)(1)(C) through 9(a)(1)(G) would apply to the GOM DPS unless authorized under a section 10 permit or through consultation under section 7 as previously described.

In determining that it is not necessary and advisable to apply ESA section 9 take prohibitions on the certain activities described here, we recognize that new information may require a reevaluation of that conclusion at any time. For any of the exemptions from the prohibitions described in this proposed rule, we will periodically evaluate the activity's effect on the conservation of the GOM DPS of Atlantic sturgeon. We will impose take prohibitions on the activities previously exempted through rulemaking if we determine that it is necessary and advisable for the conservation of the species.

Exemption for Scientific Research

Adult and subadult Atlantic sturgeon that originate from different rivers mix in the marine environment (Stein *et al.,* 2004; USFWS, 2004), and are visually indistinguishable from each other regardless of the river or DPS of origin. However, mixing is not known to occur within the riverine environment. Atlantic sturgeon use the riverine environment for spawning and are intolerant of saline environments from the egg stage through the first year of life

(Van Eenennaam *et al.,* 1996; Niklitschek, 2001). Thus, the spawning adults must enter the riverine environment to spawn. Genetic analyses and other information support that Atlantic sturgeon originating from the Kennebec River are part of a discrete population segment (ASSRT, 2007). This means that straying of Atlantic sturgeon from other Atlantic sturgeon DPSs into riverine waters of the GOM DPS of Atlantic sturgeon does not typically occur and is unlikely to occur. Therefore, Atlantic sturgeon that occur in riverine waters of the GOM DPS are considered GOM DPS Atlantic sturgeon.

To ensure that the proposed exemption would result in the taking of only GOM DPS Atlantic sturgeon, we are proposing that the scientific research exemption to the section 9(a)(1)(B) take prohibitions apply only to Atlantic sturgeon found within the riverine range of the GOM DPS (Table 1). Within-river boundaries for the proposed exemptions were selected using reported salinity data, threshold salinities of less than 20 ppt (highest reported value for bottom salinity was used, when available), and identification of easily recognizable landmarks, such as a bridge, located at or upstream of the location where the referenced salinity measurement was taken. For example, for the Kennebec River (and Androscoggin, which flows into the Kennebec above the salinity-based cutoff point), the location where salinity is unlikely to exceed 20 ppt was determined using Mayer *et al.* (1996), who reported a maximum salinity of 19.38 at 15 m depth in September 1994 at a sampling station approximately 5 km downstream of the U.S. Route 1 bridge crossing in Bath, ME. In order to clearly demarcate the area in which the proposed exemptions would apply, the U.S. Route 1 Bridge in Bath, ME is proposed as the exemption boundary. The exemption to the section 9(a)(1) prohibitions for scientific research would apply upstream of this boundary; whereas downstream, the exemption would not apply. Exemption boundaries for other river systems within the range of the GOM DPS were determined using similar methodology. Latitude and longitude are also provided for points on either side of each river. The straight line between the two points can be used to help identify the exemption boundary.

TABLE 1—EXEMPTION BOUNDARY FOR EACH NAMED RIVER. THE EXEMPTIONS APPLY TO WATERS UPSTREAM OF THE EXEMPTION BOUNDARY. LATITUDE AND LONGITUDE ARE PROVIDED FOR A SINGLE POINT ON EITHER SIDE OF EACH RIVER TO HELP IDENTIFY THE EXEMPTION BOUNDARY. THE REPORTED SALINITIES AND THE DATA SOURCES USED TO IDENTIFY EXEMPTED WATERS ARE INDICATED.

River	Exemption boundary	Right and left bank points	Salinity (ppt) and source
Merrimack	U.S. Rt. 1 Bridge Newburyport, MA	42.813848N, 70.874524W 42.817869N, 70.870277W	20.74; EPA NCA.
Piscataqua	Leigh's Mill Pond South Berwick, ME	43.218014N, 70.813416W 43.217966N, 70.811286W	17.9; EPA NCA.
Saco	Main St. Bridge Biddeford, ME (2 spans).	43.492736N, 70.449813W 43.493564N, 70.448071W 43.495848N, 70.447886W 43.496733N, 70.446901W	20; Gupta *et al.,* 1994.
Kennebec	U.S. Rt. 1 Bridge Bath, ME	43.911797N, 69.813828W 43.911835N, 69.802635W	19.38; Mayer *et al.,* 1996.
Androscoggin	U.S. Rt. 1 Bridge Bath, ME	43.911797N, 69.813828W 43.911835N, 69.802635W	19.38; Mayer *et al.,* 1996.
Sheepscot	Sheepscot Rd Bridge Newcastle, ME	44.05154N, 69.613313W 44.049814N, 69.609584W	19.38; Mayer *et al.,* 1996.
Penobscot	Cove Brook Winterport, ME	44.693549N, 68.849642W 44.696325N, 68.831188W	0–26.7[1]; Goulette, 2004.

[1] Source Goulette (2004, unpub. data) reported a maximum bottom salinity of 26.7 ppt during low flows at Bald Hill Cove in Winterport, ME. However, because this value was significantly higher than the next highest reported bottom salinity (17 ppt) and was measured during very low flow conditions, NMFS considered it to be an outlier.

Many important aspects of Atlantic sturgeon life history are still unknown (Murawski and Pacheco, 1977; Van den Avyle, 1983; Smith and Dingley, 1984; Smith and Clugston, 1997; Bain, 1997; Bemis and Kynard, 1997; Kynard and Horgan, 2002; ASSRT 2007). Scientific research (including monitoring) is vital for improving our understanding of the status and risks facing Atlantic sturgeon, and providing critical information for assessing the effectiveness of current and future management practices. Research activities aid in the conservation of listed species by furthering our understanding of the species' life history and biological requirements. We recognize, however, that many scientific research activities involve take and may pose some level of risk to individuals or to the species. Therefore, it is necessary for research activities to be carried out in a manner that minimizes the adverse impacts of the activities on individuals and the species while obtaining crucial information that will benefit the species.

Properly planned and implemented research and assessment are critical to minimizing the risks and maximizing the conservation benefit of the research. Guidelines developed by sturgeon researchers in cooperation with NMFS for Atlantic and other sturgeon species have helped facilitate standardization of research protocols while minimizing risk to the species as a result of handling and sampling. In 2000, Moser *et al.* developed guidelines for shortnose and Atlantic sturgeons that described the most acceptable methods (i.e., minimizing stress and mortality) at that time for short-term holding, identification and measurement, tagging, tissue sampling, gastric lavage, and collection. In 2007, NMFS provided funding to the ASMFC to co-host a workshop in order to identify necessary activities, techniques and methodologies for updating Moser *et al.* (2000), which was intended to be a 'living document' to be revised as new or refined techniques were developed. As a result of this workshop, a subgroup of sturgeon researchers was formed to write a comprehensive document, subject to peer review, describing research protocols and techniques specifically for Atlantic sturgeon. The resulting document, titled "Atlantic

Sturgeon Research Techniques" (Damon-Randall *et al.,* 2010), is intended as a guide that describes the purpose and application of common Atlantic sturgeon research techniques. A second document, titled "A Protocol for Use of Shortnose, Atlantic, Gulf, and Green Sturgeons" (Kahn and Mohead, 2010), was also developed by NMFS to provide a comprehensive review of safe, standardized research practices for the multiple sturgeon species under NMFS's jurisdiction. This document was intended as a guide to assist researchers in applying for appropriate research permits and includes safe handling and sampling protocols in cases where Atlantic sturgeon co-occur with other ESA-listed fishes (e.g. shortnose sturgeon). As described in more detail below, any research activities exempted under this proposed rule would first be required to undergo review by NMFS to ensure consistency with recommended protocols.

Technologies and methods for research that do not require capture of individual sturgeon are becoming more widely available (e.g., side-scan sonar, Didson, in-water detection technology). These technologies have been shown to be effective at providing needed information on, among other things, Atlantic sturgeon habitat use and abundance, while eliminating the likelihood of injury or mortality to the sturgeon that can result from capture and handling. Technological advances are also making it possible to use non-invasive methods (e.g., ultrasound) in place of invasive methods (e.g., laparoscopy) for sturgeon research, thus reducing the risk of harm to the sturgeon even when capture and handling is necessary. Damon-Randall *et al.* (2010) includes a recommendation on using passive techniques such as sonar, video, and a combination of both whenever possible. These non-invasive techniques have not been shown to negatively affect Atlantic sturgeon behavior (i.e., do not cause harm), may increase the likelihood of successfully obtaining data, reduce the effort needed to achieve the research objectives, and reduce the potential for gear loss (e.g., nets used for capturing sturgeon).

As described above, the collection of needed scientific information provides a conservation benefit to ESA-listed species. The permitting process (see 50 CFR parts 222, 223 and 224) is intended to ensure that, in the course of conducting bona-fide research, work is conducted in a manner that minimizes harm (including injury and death) to the species and individual animals. However, research of the GOM DPS that is already in progress may potentially be impeded if researchers are required to suspend work and obtain a section 10(a)(1)(A) permit, given that permit processing times can take 90 days or more, and that NMFS cannot process and finalize a permit request until publication of a final rule listing the GOM DPS under the ESA. Delay or interruption of research could negatively affect the ability to maintain time-series data and acquisition of information necessary for the survival and recovery of the species. Therefore, we conclude that it is not necessary and advisable to impose the ESA-take prohibitions on research that results in take, but not harm, of Atlantic sturgeon belonging to the GOM DPS under certain specified conditions.

To comply with the research exemption proposed in this rule, researcher(s) would be required to submit a notice to NMFS's Northeast Regional Administrator (RA) at least 60 days prior to the commencement of such research, providing: (a) A statement describing the purpose of the research; (b) a detailed description of the study design, including all techniques and methodologies for sampling, and the data to be collected; (c) a list of the researchers performing the proposed research activities, including information demonstrating the level of experience for each of the technologies/methods to be used and the institution to which each is affiliated; (d) an estimate of the total take anticipated from such research by life stage; and, (e) the time period and specific location(s) of the research. To ensure that Atlantic sturgeon belonging to the GOM DPS, Atlantic sturgeon belonging to other DPSs, or any other ESA-listed species are not harmed as a result of this exemption to the 9(a)(1)(B) take prohibitions, and to monitor and enforce the use of this exemption, research activities: (a) Must be conducted in accordance with NMFS-approved methods for Atlantic sturgeon or use technologies that do not require capture or handling of Atlantic sturgeon; (b) must be directed at Atlantic sturgeon of the GOM DPS and not be incidental to research of another species; (c) must be conducted within the riverine range of the GOM DPS as specified in this rule; (d) must be intended as involving only non-lethal take; (e) must not take Atlantic sturgeon for artificial spawning or enhancement activities; (f) must comply with all other laws, including state permits, if applicable; and, (g) must be conducted by researchers with documented experience conducting the proposed methodologies/techniques on Atlantic sturgeon or another sturgeon species. Once the RA receives information for scientific research as described above, the RA will review the information and respond to the researcher(s) with a letter acknowledging that the research meets the exemption to the take prohibitions applied to Atlantic sturgeon GOM DPS, or a letter informing the researcher(s) that the exemption does not apply to the proposed research. The RA's letter is not a permit, and the letter does not provide authorization to conduct the research. Rather, the letter is intended as an acknowledgement that the specified research is or is not consistent with the exemption to the take prohibitions for scientific research provided in this rule. In order to give researchers enough time to submit a letter to the RA, we propose that ESA section 9 take prohibitions not apply to the scientific research that would otherwise fall under the exemption until two months after publication of a final section 4(d) rule.

The researcher(s) must provide a report of the research results to the RA no later than 60 days following completion or termination of the research activity, including the total take (by life stage) and the method of take (e.g., harassment, capture, handling, etc.). For multi-year studies, researchers must provide an annual report to the RA summarizing the results to date, including the number of Atlantic sturgeon takes (by life stage) and the method of take (e.g., harassment, capture, handling, etc.). The research must be immediately suspended and the RA notified if any aspect of the research results in or is believed to have resulted in take causing harm (i.e., injury or death) to any Atlantic sturgeon belonging to the GOM DPS, or take (with or without causing harm) of any other ESA-listed species for which the researcher does not have an incidental take permit issued in accordance with Section 10(a)(1)(B).

Salvage and Recovery

To ensure that only Atlantic sturgeon listed as threatened would be affected, this proposed exemption would apply only to Atlantic sturgeon found within the riverine range of the GOM DPS (Table 1) given the overlap in distribution of all five U.S. DPSs within marine waters.

Atlantic sturgeon carcasses and live, stranded sturgeon can provide pertinent life history data and information on activities affecting the GOM DPS. Collection of samples, as appropriate, from carcasses and live stranded or injured sturgeon can also help reduce the need for the intentional capture of Atlantic sturgeon for scientific research.

Therefore, salvage of dead Atlantic sturgeon and recovery of live, stranded Atlantic sturgeon belonging to the GOM DPS affords a conservation benefit to the species by providing valuable data without putting the DPS at further risk.

In order to obtain the most information, carcasses must be collected and transported as quickly as possible to an appropriate facility. Similarly, prompt attention to a live, stranded or injured sturgeon will increase its chances of survival. NMFS does not have sufficient personnel throughout the riverine range of the GOM DPS to respond promptly to all Atlantic sturgeon salvage and recovery events. NMFS does, however, work cooperatively with the U.S. Fish and Wildlife Service (FWS) and state wildlife agencies for salvage and recovery events involving other protected species including shortnose sturgeon, sea turtles and marine mammals. Some exemptions to the ESA take prohibitions for salvage or to aid a sick or injured animal already exist for some of these species. Therefore, we propose a similar exemption from the take prohibitions of section 9(a)(1)(B) for any agent or employee of NMFS, FWS, or any other Federal land or water management agency, or any agent or employee of a state agency responsible for fish and wildlife who is designated by his or her agency for such purposes, when acting in the course of his or her official duties to take Atlantic sturgeon belonging to the GOM DPS without a permit if such taking is necessary to salvage a dead specimen, which may be useful for scientific study; dispose of a dead specimen; or aid a sick, injured, or stranded specimen. Whenever possible, live specimens must be returned to their aquatic environment as soon as possible. This exception to the take prohibitions would only apply if the action is reported to the NMFS Northeast Regional Administrator within 30 days of occurrence of the event.

References Cited

A complete list of the references used in this proposed rule is available upon request (see **ADDRESSES**).

Classification

National Environmental Policy Act (NEPA)

Whenever a species is listed as threatened, the ESA requires that we 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 draft Environmental Assessment (EA) analyzing the proposed 4(d) regulations and alternatives. We are seeking comment on the draft EA, which is available on the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) or upon request (see **DATES** and **ADDRESSES**, above).

Executive Order (E.O.) 12866

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

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows.

The proposed action would establish protective regulations for the Gulf of Maine Distinct Population Segment (GOM DPS) of Atlantic sturgeon. NMFS has proposed to list the GOM DPS of Atlantic sturgeon as threatened, and to list four other Atlantic sturgeon DPSs as endangered (75 FR 61872 and 75 FR 61904; October 6, 2010). All five DPSs share the same marine range, but each DPS has a unique riverine range.

The prohibitions under section 9(a)(1) of the ESA apply automatically when a species is listed as endangered but not when a species is listed as threatened. In the case of threatened species, section 4(d) of the ESA leaves it to the Secretary's discretion whether and to what extent to extend the section 9 prohibitions of the ESA and directs the agency to issue regulations it considers necessary and advisable for the conservation of the species. Protecting the GOM DPS of Atlantic sturgeon from direct forms of take (including harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect; or to attempt any of these) and indirect forms of take, such as harm that results from habitat degradation, will help preserve and recover the DPS. However, applying the section 9(a)(1) prohibitions to all forms of take for GOM DPS Atlantic sturgeon could impede necessary scientific research given the lengthy processing time to acquire a section 10(a)(1)(A) scientific research permit. Scientific research activities aid in the conservation of listed species by furthering our understanding of the species' life history and biological requirements. Collection of samples, as appropriate, from carcasses and live stranded or injured sturgeon can also help reduce the need for the intentional capture of Atlantic sturgeon for scientific research. Therefore, we propose to extend the ESA section 9(a)(1)(A) through 9(a)(1)(G) prohibitions to all activities impacting the GOM DPS throughout its range except for: (1) Scientific research conducted on GOM DPS Atlantic sturgeon within the riverine portion of its range and in accordance with accepted NMFS protocol(s); and, (2) salvage of dead and recovery of live stranded or injured GOM DPS Atlantic sturgeon found within the riverine range of the GOM DPS.

Within the marine range of the GOM DPS of Atlantic sturgeon, the section 9(a)(1) prohibitions proposed by this action are the same as the prohibitions that will automatically apply to the same area upon listing of any of the other four DPSs as endangered. Therefore, the entities affected by this action are those which conduct the activities exempted from the section 9 prohibitions for GOM DPS Atlantic sturgeon. These are Federal and state agencies, research institutions and universities which conduct scientific research, salvage, and recovery activities for Atlantic sturgeon within the river range of the GOM DPS. The only impact to these entities would be that scientific research, salvage of dead and recovery of live injured GOM DPS Atlantic sturgeon in the river portion of its range could take place without a section 10(a)(1)(A) permit. This action would not impose any additional economic impacts on these affected entities.

As a result, an initial regulatory flexibility analysis is not required and has not been prepared.

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 OMB Control Number. This proposed rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) and 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 to prepare reports on research of GOM DPS Atlantic sturgeon; and (2) 5 hours to prepare reports on emergency rescue, salvage or disposal of GOM DPS Atlantic sturgeon. 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).

Information Quality Act

The Information Quality Act directed the Office of Management and Budget to issue government wide guidelines that "provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies." Under the NOAA guidelines, this action is considered a Natural Resource Plan. It is a composite of several types of information from a variety of sources. Compliance of this document with NOAA guidelines is evaluated below.

- *Utility:* The information disseminated is intended to describe a management action and the impacts of that action. The information is intended to be useful to state and Federal agencies, non-governmental organizations, industry groups and other interested parties so they can understand the management action, its effects, and its justification.
- *Integrity:* No confidential data were used in the analysis of the impacts associated with this document. All information considered in this document and used to analyze the proposed action, is considered public information.
- *Objectivity:* The NOAA Information Quality Guidelines standards for Natural Resource Plans state that plans be presented in an accurate, clear, complete, and unbiased manner. NMFS strives to draft and present proposed management measures in a clear and easily understandable manner with detailed descriptions that explain the decision making process and the implications of management measures on natural resources and the public. This document was reviewed by a variety of biologists, policy analysts, and NOAA attorneys.

E.O. 13132—Federalism

In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, this proposed rule will be given to the relevant state agencies in each state in which Atlantic sturgeon belonging to the GOM DPS occurs as well as the ASMFC, and they will be invited to comment. We intend to continue engaging in informal and formal contacts with the States and ASMFC, and other affected local or regional entities, giving careful consideration to all written and oral comments received.

E.O. 12898—Environmental Justice

E.O. 12898 requires that Federal actions address environmental justice in decision-making process. In particular, the environmental effects of the actions should not have a disproportionate effect on minority and low-income communities. The proposed protective regulations are not expected to have a disproportionately high effect on minority populations or low-income populations.

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

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

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: June 6, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be 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, add § 223.211 to read as follows:

§ 223.211 Atlantic sturgeon.

(a) *Prohibitions.* The prohibitions of sections 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species apply to the threatened Gulf of Maine Distinct Population Segment (GOM DPS) of Atlantic sturgeon listed in § 223.102(c)(30).

(b) *Exemptions.* Exemptions to the take prohibitions described in section 9(a)(1)(B) of the ESA (16 U.S.C. 1538(a)(1)(B)) applied in paragraph (a) of this section to the threatened GOM DPS listed in § 223.102(c)(30) are described in paragraphs (b)(1) and (2) of this section.

(1) *Scientific research exemption.* The prohibitions of paragraph (a) of this section relating to the threatened GOM DPS listed in § 223.102(c)(30) do not apply to ongoing or future scientific research if:

(i) The scientific research is conducted in accordance with NMFS-approved methods for Atlantic sturgeon or uses technologies that do not require capture or handling of Atlantic sturgeon;

(ii) The research is directed at Atlantic sturgeon of the GOM DPS and is not incidental to research of another species;

(iii) The research is conducted upstream of the U.S. Route 1 Bridge at Newburyport, MA on the Merrimack River, upstream of Leigh's Mill Pond, South Berwick, ME on the Piscataqua River, upstream of the Main Street Bridge, Biddeford, ME on the Saco River, upstream of the U.S. Route 1 Bridge at Bath, ME on the Kennebec River, upstream of the Sheepscot Road Bridge at Newcastle, ME on the Sheepscot River, or upstream of Cove Brook at Winterport, ME on the Penobscot River (i.e., within the riverine range of the GOM DPS);

(iv) The research is conducted in compliance with all other laws, including state permits, if applicable;

(v) The research is conducted by researchers with documented experience conducting the proposed methodologies/techniques on Atlantic sturgeon or another sturgeon species;

(vi) Researchers make every effort to ensure that take is non-lethal;

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

(viii) The researcher provides the following to the NMFS Northeast Regional Administrator at least 60 days prior to the commencement of such research (or, for ongoing research, within 60 days of issuance of a final

rule): a description of the study objectives and justification; a summary of the study design and methodology; a list of the researchers who will perform the study, including information demonstrating prior experience with Atlantic sturgeon or another sturgeon species for each of the technologies/methods to be used; the institution to which each participating researcher is affiliated; an estimate of the total take (by life stage) anticipated from the study; and the time period and location of the research;

(ix) Reports that include the total take (by life stage) and the method of taking (e.g., harassment, capture, handling) are provided to the NMFS Northeast Regional Administrator no later than 60 days following completion or termination of the research activity, or annually for multi-year studies; and

(x) The researcher(s) immediately suspend field studies and report to the NMFS Northeast Regional Administrator if any aspect of the research results in or is believed to have resulted in take causing injury or mortality of any Atlantic sturgeon belonging to the GOM DPS, or take (with or without causing injury or mortality) of any other ESA-listed species for which the researcher does not have an incidental take permit issued in accordance with section 10(a)(1)(B) of the ESA.

(2) *Salvage and Recovery Exemption.* The prohibitions of paragraph (a) of this section relating to the threatened GOM DPS of Atlantic sturgeon listed in § 223.102(c)(30) do not apply to Atlantic sturgeon salvage and rescue activities performed by persons described in paragraph (b)(2)(i) of this section, that include disposing of dead fish, salvaging dead Atlantic sturgeon for use in scientific studies or aiding sick, injured, or stranded Atlantic sturgeon, if:

(i) The activity is conducted by an employee of NMFS, the U.S. Fish and Wildlife Service, any other Federal land or water management agency, or any agent or employee of a state agency responsible for fish and wildlife who is designated by his or her agency for such purposes, when acting in the course of his or her official duties;

(ii) The activity is conducted in compliance with all other laws, including state permits, if applicable;

(iii) The activity is conducted upstream of the U.S. Route 1 Bridge at Newburyport, MA on the Merrimack River, upstream of Leigh's Mill Pond, South Berwick, ME on the Piscataqua River, upstream of the Main Street Bridge, Biddeford, ME on the Saco River, upstream of the U.S. Route 1 Bridge at Bath, ME on the Kennebec River, upstream of the Sheepscot Road Bridge at Newcastle, ME on the Sheepscot River, or upstream of Cove Brook at Winterport, ME on the Penobscot River (i.e., within the riverine range of the GOM DPS);

(iv) Live specimens are returned to their natural environment as soon as the sturgeon is no longer in danger (i.e., sick or injured); and

(v) The Northeast Regional Administrator is notified within 30 days after such an event whether the activity was a salvage or recovery, the individual(s) who salvaged or recovered the sturgeon, his or her agency affiliation, and the disposition of the specimen.

[FR Doc. 2011–14454 Filed 6–9–11; 8:45 am]

BILLING CODE 3510–22–P