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Subject: RIN 0648-AV94: Endangered and Threatened Wildlife and Plants: Proposed Rulemaking to Establish Take Prohibitions for the Threatened Southern Distinct Population Segment of North American Green Sturgeon

Dear Melissa,

The Bay Planning Coalition (BPC) appreciates the opportunity to submit comments on the above-Proposed Rulemaking.

The Coalition is a membership-based, not for profit organization representing a broad spectrum of the maritime industry, including the ports of Oakland, San Francisco, Richmond, Redwood City, Stockton, West Sacramento, AMPORTS-Port of Benicia, several marine terminals and related shoreline business, landowners, local governments, recreational users, labor unions, residential and commercial builders, professional service firms and allied organizations.

We are engaged in commerce and international trade, related business, recreation, environmental restoration and building and construction activity and are a vital component in the San Francisco Bay-Delta region and northern California economy. The Coalition is a recognized leader in collaborating with public sector agencies, such as National Marine Fisheries Service (NMFS) and other groups who share a common goal of continually improving the economic, environmental and social vitality of the Bay and Delta region.

We have organized our comments into three sections: Biological Analysis, Exception (or Exemption) of Activities from Take Prohibition; and Recommendations for Consultation Procedures. Generally, we believe 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 past thirty years. Ecosystem improvement is ongoing and will continue to occur in the future due to a combination of environmental regulatory compliance and stewardship carried out by the regulated public and organizations such as the Bay Planning Coalition.

These regulatory and restoration programs include the use of Best Management Practices (BMPs) for dredging operations, environmental windows developed for other species, other overlapping critical habitat designations, research and mitigation measures to promote species conservation on an ecosystem-wide basis, habitat restoration on a large scale, improved management by Publicly Owned Treatment Works (POTWs), implementation of Total Maximum Daily Loads (TMDLs) and a greatly enhanced storm water treatment regime throughout the watersheds that drain in to the San Francisco Bay.

Taken as a whole, the existing regulatory regime for the activities described in the 4(d) rule, is already achieving the goals for the conservation and protection of the Southern DPS. Some of the existing state and federal regulatory programs are referred to in the document prepared by Industrial Economics, Inc (IEc). for NMFS entitled, Proposed Rulemaking to Establish Take Prohibitions for the Threatened Southern Distinct Population Segment of North American Green Sturgeon: Initial Regulatory Flexibility Analysis. We will provide more detail later in this letter on existing protective conservation measures that reduce take in such a manner that “particular activities could proceed without appreciably reducing the likelihood of survival and recovery of the Southern DPS” (P. 23824 Federal Register/Vol. 74, No. 97) to further amplify the IEC report.

Due to the existing regulatory structure for the majority of activities presumed to cause take described in the section 4(d) rule combined with restoration programs, we recommend that NMFS provide exceptions from the take prohibitions for activities that NMFS has determined to be adequately protective of the Southern DPS. These activities include navigation channel and harbor berths’ dredging and dredged material placement, mineral extraction, maintenance and installation of in-water and shoreline structures, such as docks, wharfs, pilings, tide gates, culverts, levees, bridges and related infrastructure. Also, we recommend that you consider exceptions for the small business category of some of these construction activities, such as recreational marinas.

I. Biological Analysis

BPC submitted a report, Green Sturgeon Critical Habitat Analysis (Report), prepared for BPC by biologists, Michael McGowan and Michael Josselyn, on Dec. 22, 2008 in response to the Proposed Rule for the Designation of Critical Habitat. For reference we are including the Report with these comments. Although the Report evaluated the available information to draw conclusions specific to the designation of critical vs. non-essential habitat, a general conclusion was drawn that there is a lack of adequate data on occupation of areas: “The data on green sturgeon are sparse, are scattered over different times and different areas, and are often incidental to data collected for white sturgeon.” (P.1 Report) Lack of hard data on distribution in San Francisco Bay and what is known about life-history traits of the green sturgeon suggest that some areas where many about-to-be-regulated activities occur (channel dredging, levee reinforcement, ...) are not utilized as habitat by green sturgeon, and therefore are not critical habitat. 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

To fill the data gap, BPC has been instrumental in establishing a joint state-federal, Bay-wide scientific study program being implemented by the LTMS Environmental Windows Work Group and has secured federal funding for this program over several years. The approximately \$3m annual appropriation has funded studies under the Framework for Assessment of Potential Effects of Dredging on Sensitive Fish Species in San Francisco Bay prepared by Philip Lebednik, Principal Scientist, LFR, Inc. for the U. S. Army Corps of Engineers and the Environmental Windows Work Group Program.

Our ongoing acoustic telemetry (fish tracking) for salmon, which now includes green sturgeon, is funded under this program. During discussions with NMFS on the proposed Critical Habitat (CH) rule, NMFS indicated that it recognizes the value of this program and as information becomes available will include it in the Endangered Species Act (ESA) consultation decisionmaking process.

II. Exception (or Exemption) of Activities from Take Prohibition

Certain well defined types of activities are already regulated under other federal, state, and local programs that directly govern the very aspects of those activities that the NMFS has observed conceivably could result in take of green sturgeon. The comprehensive nature of some of these regulatory programs is such that that it is difficult to envision what additional protective measures the regulated public would need to or practicably could undertake to further reduce the risk of taking green sturgeon. The IEC cited over 30 examples of existing state and federal legislative mandates and regulations that overlap and/or duplicate the proposed section 4(d) rule and “may protect green sturgeon even in the absence of section 4(d) take prohibitions”.

If activities that pose some risk of taking green sturgeon are already regulated under a federal, state or local program in a comprehensive and appropriate manner such that little or nothing more or different likely would be implemented under the ESA to further address the risk of take, then such activities covered by such a program logically and reasonably should be excepted or exempted from the take prohibition proposed in the 4(d) rule.

Here, we identify give such programs. The activities covered by these programs, we submit, should be excepted or exempted from the proposed take prohibition.

1. The State Water Resources Control Board and the S. F. Bay Regional Water Quality Control Board, under the state's Porter Cologne Act and the federal Clean Water Act, regulate wastewater discharges, including stormwater discharges. Local governments (including the public ports), industrial facilities, and construction sites are prohibited from discharging stormwater into waters used by green sturgeon except in compliance with the Porter-Cologne Act and Clean Water Act. Under this program, those discharging stormwater may do so only in compliance with permits from the State Board and/or Regional Board—permits requiring a panoply of measures to prevent and minimize pollutants, including particularly sediment, from reaching waters used by green sturgeon.
2. Individual ports have a Contract Project Manual(s) that govern activities with the harbor areas such as maintenance dredging, berth deepening, pile driving and related facility repairs and improvements. For example, at the Port of Oakland, its Project Manual includes directives that dredging shall be done to minimize turbidity, prohibit discharging overflow or decant water from any barge, requires that trash, debris and other miscellaneous "manmade" and natural objects encountered during excavation and dredging shall be disposed of outside of limits of the work on a land disposal site/location. The Port's SWPPP requires the elimination of non-stormwater discharges to S.F. Bay or its tributaries that result from a Contractor's work/activities. BMPs are also required to minimize discharges of pollutants in storm water runoff to S. F. Bay and its tributaries to the maximum extent practicable.
3. Bay Area flood control agencies have environmental management plans specifying BMPs for water quality and sediment control.
4. Memoranda of Understanding (MOUs): The U. S. Army Corps of Engineers' South Pacific Division, U. S. Fish and Wildlife Service (USFWS) and National Oceanic and Atmospheric Administration (NOAA) signed an MOU for Endangered Species Protection in Feb, 2007. This is a 41-page Programmatic Letter of Concurrence which concluded a programmatic consultation on several endangered and threatened species. It covers eight activities specifying procedures occurring in California for five years and specifies procedures for bank stabilization, boat docks, bridge repairs, culvert replacements, dredging, levee maintenance, pile installation and pipeline repairs.
5. Wetland restoration projects include Middle Harbor Enhancement Area (Oakland), Bair Island (Redwood City), and Hamilton Army Airfield Wetlands Restoration (Marin County).

III. Recommendations for Consultation Procedures

We encourage NMFS to work with the Army Corps of Engineers to establish a Programmatic Permit for dredging and dredged material disposal, mineral extraction and other construction activities similar to the existing programmatic permit governing salmon and other species and the Nov. 2007 MOU as soon as possible after the adoption of the section 4(d) rule. This will enable the construction work essential for commerce, transportation, recreation, flood risk damage reduction and environmental restoration affected by the section 4(d) rule to proceed with essential predictability and certainty.

Thank you for your consideration of our recommendations for exceptions to the prohibitions on the taking of the species. We look forward to working with you in our ongoing stewardship for the protection and conservation of the Southern DPS as well as other endangered and threatened species.

Sincerely yours,

Ellen Joslin Johnck
Executive Director

Enclosure

Cc: Dick Butler, Supervisor, NOAA, Santa Rosa, CA
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