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December 22, 2008

Melissa Neumann
Chief, Protected Resources Division
Southwest Region
National Marine Fisheries Service
650 Capitol Mall
Sacramento, CA 95814-4706

Re: Proposed Green Sturgeon Critical Habitat

Dear Ms. Neumann:

The Bay Planning Coalition is a membership-based, non-profit organization representing a broad spectrum of the maritime industry, including the ports of Oakland, San Francisco, Richmond, Redwood City, Stockton, 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 S. F. Bay-Delta region and northern California's economy. The Bay Planning Coalition is a recognized leader in collaborating with other groups who share a common goal of continually improving the economic, environmental and social vitality of the Bay and Delta region.

We are concerned that the proposed subject critical habitat designation will have much greater economic impact to the \$6 billion+ maritime commercial and recreational activities in the S. F. Bay and Delta region than set out in the economic analysis that accompanies the proposed designation. As we expressed to you on October 15, 2008, our view is that a smaller, more focused critical habitat designation will provide at least the same ecological benefit to the green sturgeon while avoiding unnecessary economic losses and threats to jobs and the quality of people's lives. We express these concerns at a time when the State of Californian and indeed the entire country is in the grips of the most serious economic crisis since the Great Depression. The BPC members have been hit particularly hard by this downturn, can ill afford any additional expenses and should not have to bear the costs of excessive and unneeded regulation.

We have attempted to pursue a collaborative process with NMFS to address our concerns. We appreciate that we have had a number of opportunities to meet with staff, but have not been able to make much progress in narrowing our differences. In light of the deadline for comment, we are proceeding to file our comments.

1. Overview of Comments

In preparing its comments, BPC has engaged experts to address both the biological issues and economic issues raised by the proposed designation. We have attached the Green Sturgeon Critical Habitat Biological Analysis (WRA Dec. 22, 2008) ("BPC Biological Analysis") and Comments on the Economic Analysis of the Impacts of Designating Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon (Berkeley Economic Consulting Dec. 22, 2008) (BPC Economic Analysis) for your consideration. We incorporate those comments fully into this letter. We have retained these

experts so we would be able to proceed on an equal footing with NMFS's experts. We have relied on these experts both in the collaborative process and in drafting these comments.

The advice of our experts and the review by BPC has lead us to conclude that the Proposed Rule does not comply with the standards that Congress set out in the ESA. It fails to define which "specific areas" are actually critical habitat, instead merely identifying virtually every inch of the range of the species and creating a vastly overbroad designation. While NMFS provided some biological explanation of its reasoning, the BPC Biological Analysis shows that the explanation does not hold together upon examination. Similarly, while the proposed rule does contain an economic analysis, the BPC Economic Analysis shows that there is no evidence that the government's estimated impacts are accurate because the needed information to assess economic impacts is absent.

We are greatly concerned about the basic approach taken in the proposed rule to establishing critical habitat. The proposed rule identifies vast areas of habitat as uniformly being "high quality." It then adopts an inflexible standard that all "high quality" habitat areas must remain critical habitat no matter how high the economic cost may be from that designation. As a result, NMFS designated lands as critical habitat that are not essential to conservation of the species. It designated lands as critical habitat that do not require special management and protection. This approach is not consistent with the Endangered Species Act and is on its face arbitrary and unreasonable. In addition, NMFS did not properly evaluate the economic impacts of designation or take into account the economic and other impacts of designation. While we cannot accurately estimate the economic impact from the designation in the San Francisco Bay area it is likely to be significant just in terms of time and process. Finally, NMFS dismissed an important procedural safeguard by failing to comply with the National Environmental Policy Act ("NEPA").

BPC does not object to the designation of critical habitat provided that the NMFS does so in the way that Congress intended. By the use of such terms as "essential," "specific areas" and "special management," Congress required the critical habitat designation process to provide clear notice of exactly where lands that needed protection would be located. Congress required a focused designation of "specific areas," not the "wide-ranging" approach used here. The Proposed Rule unnecessarily envelops millions of acres of resources within the web of federal regulation and permitting, delaying and in some cases potentially precluding projects. In our comment letter, we make specific suggestions on how to revise the proposed designation. We hope you will do so.

2. Legal Standards

For any species that the NMFS determines to be threatened or endangered, Section 4(b)(3)(A) of the ESA requires the agency to designate "critical habitat to the maximum extent prudent and determinable." 16 U.S.C. § 1533(b)(3)(a). As a result of amendments to the ESA in 1978, the ESA defines critical habitat in a very specific way, and imposes very specific procedural and substantive requirements on any designation. The ESA defines critical habitat to be (1) the "*specific areas within the geographic area occupied by the species, at the time it is listed*"; (2) that contain "physical or biological features . . . *essential to the conservation of the species*"; and (3) which require "*special management*." 16 U.S.C. § 1532(5)(A)(i)(emphasis added). The ESA further specifies that areas that are not occupied can be designated as critical habitat only on a showing that they are essential for conservation. *Id.* § 1532(5)(A)(ii). The Service's designation of land as critical habitat must be based on "the best scientific data available" and must take into consideration "*the economic impact and any other relevant impact, of specifying any particular area as critical habitat*." 16 U.S.C. § 1533(b)(2) (emphasis added). The ESA also requires that "[t]he publication in the Federal

Register of any proposed or final regulation which is necessary . . . *shall* include a summary by the Secretary of the data on which . . . [the] regulation is based and shall show the relationship of such data to such regulation." *Id.* § 1533(b)(8) (emphasis added). *See also* 50 C.F.R. § 424.16(b). The ESA gives the NMFS no authority to designate lands that vary from this definition or from these requirements.

Thus, the plain language of the ESA restricts "critical habitat" to "specific areas" within the "geographic area" occupied by the species. The specific areas must be "essential to the conservation of the species." Simply put, the NMFS has no authority under the ESA to include any lands that do not fit this definitional requirement. The ESA requires that NMFS articulate why the lands it selects are essential. 16 U.S.C. § 1533(b)(8). Moreover, the legislative history of the ESA unambiguously supports the clear statutory direction: "essential" means "essential."

One of the managers for the bill in the House described the amendments as including "an extremely narrow definition of critical habitat." 124 Cong.Rec. H38,665 (daily ed. Oct. 14, 1978). *See also id.* at S10,909 (daily ed. Jul. 17, 1978) (Sen. Chafee) ("[W]e can avoid many of these extinctions and endangerments by protecting a relatively small area of critical habitat."); *id.* at S11,130 (daily ed. Jul. 19, 1978) (Sen. Garn) ("It is also my intent that the extent of 'critical habitat' not necessarily be coterminous with the entire range of the endangered or threatened species. In fact, I would expect that in most cases it would not be.").

Floor debate on the 1978 Amendments highlighted Congressional concerns about expansive approaches to critical habitat. Representative Bowen criticized the federal agencies for ". . . designating territory as far as the eyes can see. . . . What we want . . . [is] a very careful analysis of what is actually needed for survival of this species." *See* 124 Cong.Rec.

H12,876 (daily ed. Oct. 14, 1978) (Rep. Bowen); see also *id.* at H12,876, H12,897 (Rep. Duncan) (the word "critical" implies habitat essential to a species' survival).

On the Senate side, Senator Wallop criticized the federal agencies for using the term "critical" beyond its intent. See 124 Cong.Rec. S10,899 (daily ed. July 17, 1978). See also S. Rep. No. 95 874, at 10 (1978) ("Much of the [10 million acres of land] involved in this proposed designation is not habitat that is necessary for the continued survival of the bear. It instead is being designated so that the present population within the true critical habitat can expand.") Thus, Congress added the term "essential" to ensure that excessive areas were not included as had been prior to the 1978 Amendments.

Once critical habitat is designated, Section 7 of the ESA requires other federal agencies to consult with the NMFS about any proposed federal action that may affect critical habitat and prohibits the agency from taking any action that results in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536. This has the potential to have a tremendous effect on the BPC's members which include private landowners, home builders and commercial and office developers, state and local agencies, shipping companies, ports and other entities because the Section 7 consultation requirements apply to federal actions that authorize private activity – including permits which the U.S. Army Corps of Engineers issues under Section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act. Designation of critical habitat can greatly increase the number of consultations as it requires consultation not only where the action "may affect" a species, but also where it "may affect" critical habitat.

As a practical matter, BPC and its members directly bear the burden of complying with the ESA when the Corps or another federal agency consults with the NMFS under Section 7. The private party bears the cost of gathering the data for the consultation, suffers the cost of

delay while the consultation is pending and bears the cost and reduced revenue from changes to the project that the federal agencies deem necessary to protect the listed species. The overall impact of the ESA on the economy in California, a state with nearly 300 species listed, is enormous. *See generally* 50 C.F.R. § 17.95. In this instance, and in these economic times, any additional costs are burdensome.

3. Areas of Major Concern

We have a number of areas of major concern that are described in more detail in the attached reports and elsewhere in this letter. We summarize them as follows:

- a. NMFS identifies and describes the “primary constituent elements” of critical habitat with such generality as to be useless for actually distinguishing one type of habitat from another or for identifying habitat essential for the conservation of the green sturgeon.
- b. NMFS proposes to designate certain areas as critical habitat even though the best available scientific and commercial information falls far short of showing those areas to be essential for the conservation of the green sturgeon.
- c. The best available scientific and commercial information reveals significant differences in the habitat characteristics of various areas in the San Francisco Bay and the Delta. In light of that information, NMFS may not lump disparate areas together and thereby obscure the real and substantial differences between these areas.
- d. The rare observation of green sturgeon in certain areas, notably the South Bay, deep channels, and very near shore developed and industrial areas, (both in terms of absolute numbers and relative to observations elsewhere) do not support the view that those areas are essential to the conservation of the green sturgeon especially in light of other available habitat.
- e. While Congress requires designating critical habitat in only those areas where “special management considerations” are necessary, NMFS has failed to identify or describe any need for special management considerations in areas it has proposed for designation as critical habitat.
- f. While listing several types of activities that could affect green sturgeon habitat, NMFS has failed to show the need for special management considerations pertinent to those activities or identify the types of special management considerations that might apply to those activities.

- g. NMFS has failed to identify or consider the many legal programs and restrictions already in place that serve to protect and conserve any “primary constituent elements” of green sturgeon habitat located in various areas of San Francisco Bay and the Delta and has failed to identify any additional special management considerations needed to protect those elements.
- h. NMFS has abused its discretion in setting standards to decide whether to exclude certain areas from critical habitat. While NMFS has broad discretion whether to exclude any areas from critical habitat, once it decides to exercise its discretion in this regard, it must do so properly—without acting arbitrarily and capriciously.
- i. NMFS fashioned and applied a so-called “rule of decision” under which it first characterized the conservation value of various areas as “high,” “medium,” “low,” or “ultra-low,” and then does not allow any consideration of the economic and other impacts of a critical habitat designation in those areas deemed of “high” conservation value—thus arbitrarily blinding itself to factors Congress required it to consider in determining whether to exclude areas from critical habitat.
- j. In assigning these values to various areas, NMFS did not undertake to determine whether various areas were “essential to the conservation” of the green sturgeon, the standard established by Congress; rather, NMFS determined merely whether various areas had a high, medium, or low “likelihood of promoting conservation” of the green sturgeon, a lesser standard of uncertain origin and relevance.
- k. NMFS failed adequately to define or describe the baseline from which the economic and other impacts of a critical habitat designation may be assessed.
- l. Because NMFS has yet to issue a 4(d) rule specifying protective measures regarding the taking of green sturgeon, it has been unable to describe and consider the regulatory consequences of the green sturgeon listing itself, even while acknowledging the need to do so.
- m. In analyzing the economic impacts of the critical habitat designation, NMFS has failed to ascertain the incremental impacts of that designation beyond the impacts of existing circumstances and measures and, rather, has arbitrarily attributed to the designation of critical habitat a portion of the impacts already resulting from existing circumstances and measures.
- n. In analyzing the economic impacts of the critical habitat designation, NMFS has failed to identify and consider many substantial economic activities that may be affected by the designation of critical habitat.

4. Overview of Biological Considerations

The biggest threats to green sturgeon in SF Bay ecosystem according to NMFS are (a) barriers to historic spawning above Shasta Dam; (b) lack of more than one spawning river such as the upper Yuba or Feather, also due to dams, this means that if there were a catastrophic spill or other loss of existing spawning areas then there wouldn't be an alternative or reserve population; (c) water diversions: primarily the state and federal pumps in the south Delta because they change the natural flow patterns of the rivers, they impinge small fish on screens, they subject small fish to predation in the forebays, change the natural pattern of outflow of rain and snowmelt, including smaller diversions in the Delta may be a problem, too, if unscreened; and (d) fishing mortality. The future Section 4(d) rule will presumably address recreational take allowing an unknown amount of mistaken identity, poaching, and incidental take when fish exhausted from being fought and reeled in do not recover after release.

Overall, fishing mortality is less important than the others because it is not a fundamental degradation of essential habitat. With a fish that lives 70+ years and may only spawn once a decade after it reaches 20 years, it takes a long time to see the long term effects of loss of spawning habitat. If loss of the above-dam spawning areas has resulted in fewer young sturgeon getting to the Delta and Bay, then that would partially explain low catches and would eventually lead to fewer adults: a cycle in which there is some natural mortality each year for the 70+ years so then even less spawning takes place. The lack of a large number of eggs and juveniles cannot be offset by protecting feeding habitat which is not in short supply either for existing or expanded population levels. Even without the added protection that comes from critical habitat, protection of the Central and South Bays will provide only marginal benefit to the species and the benefit does not warrant increased costs to the NMFS or the regulated community.

Moreover, we believe that NMFS has not properly taken into account the extent of the existing regulatory programs and the improvement to the health of the San Francisco Bay ecosystem that has taken place over the past thirty years and that will continue to occur in the future. These regulatory programs include the use of best management practices 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 POTW's, implementation of TMDL's and a greatly enhanced storm water treatment regime throughout the watersheds that drain in to the San Francisco Bay. BPC will continue to advocate and secure federal funding for LTMS scientific studies to provide information necessary in regulatory decision making for endangered species protection. Further, all activity that has the potential to cause take are already subject to the Section 7 process.

Taking all of these points together and as we explain in more detail, we do not believe that there is a biological justification for constraining any of the activities in the San Francisco Bay area by a designation of critical habitat.

5. Overview of Economic Concerns

The Final DEA is not sufficient as a basis for consideration for economics under 4(b)(2) of the Endangered Species Act (ESA) because the conservation measures that may be triggered by green sturgeon critical habitat designation have not been defined by NOAA's National Marine Fisheries Service (NMFS). Normally, an economic analysis measures the loss in economic surplus resulting from measures that may be recommended to conserve the species and its critical habitat. The analysts conducting the Final DEA for NMFS were not provided this information and hence the Final DEA is arbitrary and lacks foundation. Moreover, we

have concerns with the methodology employed and the sufficiency of data used to measure future economic activities in critical habitat areas.

NMFS has not identified the conservation measures that would be triggered by designation of critical habitat for the green sturgeon. Those conservation measures are a fundamental component of the Final DEA. After establishing the existing and expected level of economic activities that may be affected by green sturgeon conservation efforts, the Final DEA estimates the potential economic impacts of implementing green sturgeon conservation measures. The total cost of green sturgeon critical habitat designation depends heavily on what the conservation measures for green sturgeon are.

To compensate for the lack of specific conservation measures for the green sturgeon, the Final DEA relies on conservation recommendations for other species. For example, for dredging and in-water construction activities and for NPDES-permitted facilities, the costs of conservation measures to address critical habitat for salmon and steelhead species were used to approximate the measures that could be requested for green sturgeon. The similarities, however, in the habitat requirements between green sturgeon and Pacific salmon and steelhead are uncertain. Without more specific information regarding what is needed to conserve the green sturgeon, the economic impacts of the proposed critical habitat designation cannot be reliably estimated.

In addition to relying on unspecified conservation measures, the Final DEA does not consider potential losses in economic activity. The Final DEA quantifies the costs associated with conservation measures that may be applied to future economic activities. However, critical habitat designation could also lead to some economic activities not being carried out. For example, as a result of critical habitat designation for the green sturgeon, dredging

activities may be prohibited during a certain time frame, resulting in consumer surplus losses. This needs to be addressed.

The Final DEA has problems with its use of scaling and underestimates the number of economic activities in San Francisco and San Pablo Bays. By refining the activity projections, the level of NPDES-permitted facilities and in-Water Construction activities is higher than what is presented in the Final DEA resulting in an underestimate of .costs.

In addition to these points raised in the BPC Economic Report, one of the issues BPC raised at the public meeting was the disconnect between the proposed rule and the economic analysis with respect to shoreline development activities (residential, mixed use, infrastructure, etc.). While the proposed rule identifies development as a category of activity that may adversely modify critical habitat and therefore may need to be “altered” or “built in a manner to ensure that crucial habitat is not destroyed or adversely modified”, the economic analysis does not consider the potential impact of the proposed designation on shoreline development.

In response, Industrial Economics prepared a memo to NMFS (dated Nov. 21, 2008) suggesting that there will be minimal, if any, economic impacts to shoreline development from the proposed designation. IE’s memo is incorrect when it states that the proposed rule only makes one reference to these activities and their potential to impact critical habitat (memo, p.1). In fact, besides the specific reference at p. 52102, the proposed rule also broadly describes upland activities, which would clearly include shoreline development, as having not just a potential, but arguably probable, impact on critical habitat: “[T]he quality of aquatic and estuarine habitats within stream channels and bays and estuaries is intrinsically related to the adjacent riparian zones and floodplain, to surrounding wetlands and uplands, and to non-fish-bearing streams above occupied stream reaches. Human activities that occur outside of designated streams, bays, or estuaries can destroy or adversely modify the essential [PCEs]

within these areas. In addition, human activities occurring within and adjacent to reaches upstream or downstream of designated stream reaches or estuaries can also destroy or adversely modify the essential [PCEs]. Similarly, human activities that occur outside of designated coastal marine areas inundated by extreme high tide can destroy or adversely modify the essential [PCEs].” (p.52101). The second point is that economic activities that fall within this description include not just shoreline residential development but a vast array of projects, yet the IE memo addresses only residential.

Third, and most importantly, if the IE memo is going to be the extent of the “additional” economic analysis for shoreline development/projects, then it is imperative that the final rule be substantially modified to reflect the conclusion reached by the IE memo, i.e., that shoreline development is very unlikely to even to have to consult on the sturgeon. In other words, if NMFS is going to take the position that its economic analysis does not need to be substantially broadened because it has a solid basis for concluding that shoreline development is unlikely to trigger consultation or project modification or mitigation for this species, the final rule must clearly reflect that. Otherwise, if the language regarding upland activities and shoreline development remain, there will be a presumption that shoreline development may affect critical habitat.

6. Specific Changes Requested.

The major differences between our proposed critical habitat and that proposed by National Marine Fisheries Service (NMFS) are the following:

- a. The South Bay should not be considered part of the Central Bay because of geographical and ecological differences.
- b. The South Bay is not essential to the conservation of the green sturgeon because use of this area is moderate. To the extent this area is used, its use does not act a limiting factor to the recovery of the green sturgeon and the area will remain available whether or not critical habitat is designated. In addition, all essential

requirements are found in the Central and North Bays and the upstream Sacramento River.

- c. Deep channels and near shore industrial and developed areas are not essential to the recovery of the green sturgeon because they are unsuitable or low quality habitat for green sturgeon and these areas are seldom used by green sturgeon.
- d. To the extent that NMFS determines that any of these areas and other areas used for economic development in the Bay as shown in the attached materials are essential to the conservation of the green sturgeon, these areas should be excluded from critical habitat to avoid the potential for the designation to impose increased cost to the key industries in a time of economic crisis. The Section 7 consultation process will address potential harm to the green sturgeon and the additional regulation is not needed to avoid the extinction of species.
- e. In fact, rather than actions in the San Francisco Bay leading to a decline in habitat for the green sturgeon, the ongoing regulation and habitat improvement programs will only continue to increase the habitat values of the Bay continuing a thirty year trend on a positive direction.

7. Conclusion

The undersigned organizations' are linked through an interdependent system of waterways and infrastructure for the efficient transportation of goods and services which extend beyond the immediate region and throughout Northern California and the 11-state western region of the U. S. The cumulative economic effects of the proposed critical habitat designation should be revised and amended to address the concerns we have raised and the critical habitat designation revised to exclude the areas we have identified.

Thank you for your immediate attention to this urgent matter.

Very truly yours,



Ellen Joslin Johnck
Executive Director