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NOAA/NMFS Proposes Threatened Listing for Gulf of Maine Atlantic Sturgeon

On October 6, 2010, the National Oceanic and Atmospheric Administration (NOAA) and National Marine Fisheries Service (NMFS) proposed listing as endangered or threatened five distinct population segments (DPSs) of Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*): Gulf of Maine (GOM), New York Bight, Chesapeake Bay, Carolina and South Atlantic. NOAA and NMFS proposed listing the GOM DPS as threatened.

Background

In October 2009, the Natural Resources Defense Council (NRDC) filed a petition requesting that NMFS list the Atlantic sturgeon as endangered under the federal Endangered Species Act (ESA). In the alternative, NRDC requested that the Atlantic sturgeon along the eastern coast between Maine and Florida be divided into five distinct population segments, with three of the population segments listed as endangered and two of the segments - including the GOM DPS - listed as threatened. NRDC also petitioned NMFS to designate critical habitat for the threatened or endangered fish. (Notably, in the 2007 Status Review of Atlantic sturgeon prepared for NMFS by a panel of scientists, the scientists favored treating the DPSs differently and did not recommend listing the GOM DPS as either threatened or endangered.)

The GOM Atlantic sturgeon DPS includes the Penobscot River and the estuarial complex of the Kennebec, Androscoggin, and Sheepscot rivers, all of which are in Maine. The DPS also extends south and includes the Merrimack River in Massachusetts and New Hampshire. While along the eastern seaboard dams blocking Atlantic sturgeon from accessing historic spawning grounds have been identified as posing one of the greatest threats to the fish, in Maine only the Veazie Dam on the Penobscot River inhibits the sturgeon from accessing historic habitat. Dams on the Kennebec, Androscoggin, and Sheepscot rivers either are above or at the historic upstream range of the Atlantic sturgeon. This means that in the Gulf of Maine the primary threats to Atlantic sturgeon, at least in these four rivers and in the estuarial complex associated with the Kennebec/Androscoggin/Sheepscot rivers, likely are related to dredging activities and water quality.

October 6, 2010 Notice

On October 6, 2010 NMFS announced that it had determined that listing as threatened is warranted for the GOM DPS. 75 Fed. Reg. 61872 (Oct. 6, 2010). NMFS stated that it was soliciting scientific and commercial information to inform the listing determinations for the GOM DPS. NMFS particularly seeks comments concerning: information on the abundance and distribution of Atlantic sturgeon belonging to the GOM; information concerning the viability of and/or threats to Atlantic sturgeon belonging to the GOM DPS; efforts being made to protect Atlantic

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sturgeon belonging to the GOM DPS; and the mixing of fish from different DPSs in parts of their ranges, particularly the marine environment.

NMFS is not proposing critical habitat for the GOM DPSs at this time, given that further analysis of GIS mapping data is necessary for determining critical habitat. Therefore, NMFS will propose to designate critical habitat for each DPS in a separate Federal Register notification once analysis of the data is complete. If the proposed listing is finalized, a recovery plan will be prepared. In addition, any protective regulations determined to be necessary and advisable for the conservation of the GOM DPS under ESA section 4(d) will be proposed in a subsequent Federal Register document.

As this is a proposed rule, stakeholders will have until January 4, 2011 to submit comments on the listing. Four public hearings will be held on the proposed listings, including one in Portland, Maine, on November 3, 2010.

Interestingly, in one location the NMFS Federal Register notice refers not to the Gulf of Maine DPS, but to the "Gulf of Mexico (GOM) DPS." Some have wondered whether that's the reason NMFS believes the GOM DPS of Atlantic sturgeon qualifies as a threatened species under the ESA.

Draft NMFS Policy on Assessment of Civil Administrative Penalties and Permit Sanctions

In related news, on October 21, 2010, NMFS issued its draft policy for the Assessment of Civil Administrative Penalties and Permit Sanctions for public review and comment. The draft penalty policy is available at <http://www.nmfs.noaa.gov/ole/penaltypolicy.html>.

The policy is intended to provide guidance for the assessment of civil administrative penalties and permit sanctions under the statutes and regulations enforced by NOAA, including the ESA. When finalized, this penalty policy will supersede previous guidance regarding assessment of penalties or permit sanctions and previous penalty and permit sanction schedules issued by the NOAA Office of the General Counsel.

NOAA must receive the written comments by December 20, 2010. You may submit them by e-mail (penaltypolicy@noaa.gov) or fax (301.427.2210). For more information on submission, please see the Federal Register notice at 75 Fed. Reg. 64987 (Oct. 21, 2010).

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If you have questions about either the proposed listing of the Atlantic sturgeon GOM DPS or NOAA's draft penalty policy, please contact Matt Manahan at mmanahan@pierceatwood.com or (207) 791-1189, Brian Rayback at brayback@pierceatwood.com or (207) 791-1188, or Bill Taylor at wtaylor@pierceatwood.com or (207) 791-1213.

Environmental Alert

A periodic update of recent developments concerning environmental issues.

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