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John T. Butler
Senior Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420
(561) 304-5639
(561) 691-7135 (Facsimile)

January 5, 2007

-VIA OVERNIGHT DELIVERY -

Blanca S. Bayó
Director, Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 070007-EI

Dear Ms. Bayó:

I am enclosing for filing in the above docket the original and seven (7) copies of Florida Power & Light Company's Petition for Approval of the St. Lucie Plant Cooling Water System Inspection and Maintenance Project for Environmental Cost Recovery, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows XP, and the word processing software in which the document appears is Word 2003.

If there are any questions regarding this transmittal, please contact me at 561-304-5639.

CMP ____
COM 5
CTR ____
ECR DISKETTE
GCL ____
OPC ____
RCA ____
SCR ____
SGA ____
SEC 1
OTH Enclosure

Sincerely,

Karl M. Rahn for JTB

John T. Butler

cc: Counsel for Parties of Record (w/encl.)

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FPSC-COMMISSION CLERK

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Environmental Cost Recovery Clause.)	Docket No. 070007-EI Filed: January 8, 2007

PETITION OF FLORIDA POWER & LIGHT COMPANY FOR APPROVAL OF ST. LUCIE PLANT COOLING WATER SYSTEM INSPECTION AND MAINTENANCE PROJECT FOR ENVIRONMENTAL COST RECOVERY

Florida Power & Light Company ("FPL"), pursuant to Section 366.8255, Florida Statutes and prior orders of the Commission, hereby petitions this Commission for approval of the St. Lucie Plant Cooling Water System Inspection and Maintenance Project (the "Project") as an "environmental compliance activity," such that prudent Project costs incurred after the date of this Petition may be recovered as "environmental compliance costs" through the Environmental Cost Recovery Clause ("ECRC"). In support of this Petition, FPL states as follows:

1. FPL is a public utility subject to the regulatory jurisdiction of the Commission under Chapter 366, Florida Statutes. The Company's principal offices are located at 700 Universe Boulevard, Juno Beach, Florida.

2. All notices, pleadings and other communications required to be served on the petitioner should be directed to:

John T. Butler, Esq.
Senior Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: (561) 304-5639
Facsimile: (561) 691-7135
e-mail: john_butler@fpl.com

3. Section 366.8255 authorizes the Commission to review and approve recovery through the ECRC of prudently incurred "environmental compliance costs," which are defined as "costs or expenses incurred by an electric utility in complying with environmental laws or

regulations." In turn, section 366.8255 defines "environmental laws or regulations" broadly to include "all federal, state, or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment." The Commission has adopted the following test for determining whether costs qualify for ECRC recovery:

> We find that the following policy is the most appropriate way to implement the intent of the environmental cost recovery statute:
>
> Upon petition, we shall allow the recovery of costs associated with an environmental compliance activity through the environmental cost recovery factor if:
>
> 1. such costs were prudently incurred after April 13, 1993;
>
> 2. the activity is legally required to comply with a governmentally imposed environmental regulation enacted, became effective, or whose effect was triggered after the company's last test year upon which rates are based; and,
>
> 3. such costs are not recovered through some other cost recovery mechanism or through base rates.

Order No. PSC-94-0044-FOF-EI, Docket No. 930613-EI, dated January 12, 1994, at 6-7.

4. As explained below and in the affidavit of Randall R. LaBauve that is attached hereto as Exhibit 1 and incorporated by reference (the "LaBauve Affidavit"), the Project is being undertaken in order to comply with "environmental laws or regulations" and meets the Commission's three-part test for ECRC cost recovery.

5. The purpose of the Project is to inspect and, as necessary, maintain the cooling water system at FPL's St. Lucie nuclear plant (the "Cooling System") such that it minimizes injuries and/or deaths of endangered species and thus helps FPL to remain in compliance with the federal Endangered Species Act, 16 U.S.C. Section 1531, et seq. (the "ESA") The St. Lucie Plant is an electric generating station on Hutchinson Island in St. Lucie County, Florida. The plant consists of two nuclear-fueled 850 net MWe units, both of which use the Atlantic Ocean as

a source of water for once-through condenser cooling. This cooling water is supplied to the units via the Cooling System. The St. Lucie Plant cannot operate without the Cooling System. Compliance with the ESA is a condition to the operation of the St. Lucie Plant.

6. The initial projected activity under the Project is inspection and cleaning of the intake pipes that are part of the Cooling System. Additional inspection, maintenance and/or modification activities may be required for the Cooling System in the future to comply with the Act, but FPL is not aware of any such requirements at this time.

7. The specific "environmental law or regulation" requiring inspection and cleaning of the intake pipes are terms and conditions that will be imposed pursuant to a Biological Opinion ("BO") that is to be issued by the National Oceanic and Atmospheric Administration ("NOAA") pursuant to section 7 of the ESA. NOAA will finalize the BO in 2007. NOAA sent the Nuclear Regulatory Commission ("NRC") a letter dated December 19, 2006, confirming its intent to issue the BO and stating the requirements that will be imposed pursuant to the BO with respect to inspection and cleaning of the intake pipes. A copy of NOAA's letter is Attachment 1 to the LaBauve Affidavit.

8. The BO is being issued as the result of a "take" of a Smalltooth Sawfish *(Pristis pectinata)* at the St. Lucie Plant. The Smalltooth Sawfish is an endangered species under the ESA, which means that the "take" triggered a review process by the NRC and NOAA that led ultimately to the decision to issue the BO.

9. All Project costs will be incurred after April 13, 1993. The BO was not issued at the time of the last test year upon which FPL's rates are based, and there are no costs for the activities required by the BO included in the test year. FPL is not presently recovering Project costs through base rates or any other recovery mechanism. Thus, the Project meets the Commission's three-part test for ECRC recovery.

10. As explained in the LaBauve Affidavit, FPL needs to conduct the Cooling System inspection and maintenance work required by the terms and conditions of the BO while the St. Lucie Plant is shut down, because it is not feasible to perform that work while cooling water is flowing through the intake pipes at the velocities needed for plant operation. FPL intends to sequence this work so that it coincides with planned outages that are scheduled for April and October 2007. This scheduling will provide the best chance of avoiding incremental outage time to perform the Cooling System work and thus limits customer exposure to replacement power costs. Moreover, this schedule is specifically contemplated in the terms and conditions for the BO stated in NOAA's December 19, 2006 letter. In order to perform the Cooling System work on the intended schedule, FPL must begin the work early in 2007. The NRC has informed FPL that it expects the Cooling System work to commence as soon as needed to meet the intended schedule, notwithstanding that the BO likely will not yet be final when the work starts.

11. FPL presently estimates that it will incur O&M costs for the Project in 2007 totaling between $3.0 and $6.0 million for inspection and cleaning of the intake pipes, including planning and preparation for that work, evaluating the impact of cleaning the intake pipes on the functionality of the balance of the Cooling System, and the purchase of equipment to support the intake pipe inspection. The ultimate cost of the intake pipe inspection and cleaning will depend upon how much material needs to be removed and the method of removal. FPL presently anticipates that the intake pipe inspection and cleaning will be completed in 2007.

12. As discussed in the LaBauve Affidavit, it is possible that additional work on the Cooling System, of a similar or perhaps different nature, may have to be performed in the future in order to satisfy "take" limitations imposed under the ESA and/or to address plant operational impacts resulting from work done to satisfy those limitations. For example, in addition to the concern over "taking" endangered Smalltooth Sawfish, the NRC and NOAA are evaluating the

potential adverse impacts on endangered turtle species from the Intake System. The NRC will reinitiate an Endangered Species Act Section 7 Consultation with NOAA early in 2007. This reinitiation is specifically the result of the St. Lucie Plant exceeding the incidental take limit in the current BO regarding endangered sea turtles. NOAA intends to combine the sea turtle and sawfish Consultations, and to address both in the BO that will be issued in 2007. It is possible that the results of the sea turtle Consultation will lead to additional requirements to inspect, repair and/or modify the Cooling System. In the event that additional work on the Cooling System is required, FPL will provide updated cost information as a supplement to this Petition and/or in its future ECRC filings.

WHEREFORE, Florida Power & Light Company respectfully requests the Commission to approve the Project as an "environmental compliance activity," such that prudent Project costs incurred after the date of this Petition may be recovered through the ECRC.

Respectfully submitted,

R. Wade Litchfield, Esq.
Associate General Counsel
John T. Butler, Esq.
Senior Attorney
Law Department
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561-304-5639
Fax: 561-691-7135

By: Kenl M. Mehi for JTB
John T. Butler
Florida Bar No. 283479

CERTIFICATE OF SERVICE
Docket No. 070007-EI

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Petition for Approval of the St. Lucie Plant Cooling Water System Inspection and Maintenance Project for Environmental Cost Recovery has been furnished by overnight delivery (*) or U.S. Mail on January 5, 2007 to the following:

Martha Brown, Esq. *
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

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Florida

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Russell A. Badders, Esq.
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Attorneys for Gulf Power Company
P.O. Box 12950
Pensacola, Florida 32576-2950

By: Karl M. Dahi for JTB
John T. Butler

EXHIBIT 1

AFFIDAVIT OF RANDALL R. LABAUVE

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF PALM BEACH

BEFORE ME, the undersigned authority, personally appeared Randall R. LaBauve, who being first duly sworn deposes and says:

1. My name is Randall R. LaBauve, and I occupy the position of Vice President of Environmental Services, Florida Power & Light Company, 700 Universe Boulevard, Juno, Florida. In this position I have knowledge of and have familiarity with the matters addressed in this affidavit.

2. I received a Bachelor of Arts degree in Psychology from Louisiana State University in 1983 and a Juris Doctor degree from Louisiana State University in 1986. I joined FPL in 1995 as an Environmental Lawyer and in 1996 assumed the responsibility of Director of Environmental Services. In July of 2002, I assumed the responsibility of Vice President of Environmental Services. Prior to joining FPL I was the Director of Environmental Affairs for Entergy Services, Incorporated located in Little Rock, Arkansas and prior to that practiced law with Milling, Benson, Woodward, Hilliard, Pierson and Miller in New Orleans, Louisiana.

3. I am responsible for directing the overall corporate environmental planning, programs, licensing, and permitting activities to ensure the basic objective of obtaining and maintaining the federal, state, regional and local government approvals necessary to site, construct and operate FPL's power plants, transmission lines, and fuel facilities and maintain compliance with environmental laws.

4. The purpose of the proposed St. Lucie Plant Cooling Water System Inspection and Maintenance Project (the "Project") is to inspect and, as necessary, maintain the cooling water system at FPL's St. Lucie nuclear plant (the "Cooling System") such that it minimizes injuries and/or deaths of endangered species and thus helps FPL to remain in compliance with the federal Endangered Species Act, 16 U.S.C. Section 1531, et seq. (the "ESA") The St. Lucie Plant is an electric generating station on Hutchinson Island in St. Lucie County, Florida. The plant consists of two nuclear-fueled 850 net MWe units, both of which use the Atlantic Ocean as a source of water for once-through condenser cooling. This cooling water is supplied to the units via the Cooling System. The St. Lucie Plant cannot operate without the Cooling System. Compliance with the ESA is a condition to the operation of the St. Lucie Plant.

5. The initial projected activity under the Project is inspection and cleaning of the intake pipes that are part of the Cooling System. Additional inspection, maintenance and/or modification activities may be required for the Cooling System in the future to comply with the Act, but FPL is not aware of any such requirements at this time.

6. Inspection and cleaning of the intake pipes is an "environmental compliance cost" under section 366.8255, Florida Statutes. The specific "environmental law or regulation" requiring inspection and cleaning of the intake pipes are terms and conditions that will be imposed pursuant to a Biological Opinion ("BO") that is to be issued by the National Oceanic and Atmospheric Administration ("NOAA") pursuant to section 7 of the ESA. NOAA will finalize the BO in 2007. NOAA sent the Nuclear Regulatory Commission ("NRC") a letter dated December 19, 2006, confirming its intent to issue the BO and stating the requirements that will be imposed pursuant to the BO with respect to inspection and cleaning of the intake pipes. A copy of NOAA's letter is Attachment 1 to this Affidavit.

7. The BO is being issued as the result of a "take" of a Smalltooth Sawfish *(Pristis pectinata)* at the St. Lucie Plant. As shown on Attachment 2 to this affidavit, the Smalltooth Sawfish is an endangered species under the ESA, which means that the "take" triggered a review process by the NRC and NOAA that led ultimately to the decision to issue the BO.

8. FPL needs to conduct the Cooling System inspection and maintenance work required by the terms and conditions of the BO while the St. Lucie Plant is shut down, because it is not feasible to perform that work while cooling water is flowing through the intake pipes at the velocities needed for plant operation. FPL intends to sequence this work so that it coincides with planned outages that are scheduled for April and October 2007. This scheduling will provide the best chance of avoiding incremental outage time to perform the Cooling System work and thus limits customer exposure to replacement power costs. Moreover, this schedule is specifically contemplated in the terms and conditions for the BO stated in NOAA's December 19, 2006 letter. In order to perform the Cooling System work on the intended schedule, FPL must begin the work early in 2007. The NRC has informed FPL that it expects the Cooling System work to commence as soon as needed to meet the intended schedule, notwithstanding that the BO likely will not yet be final when the work starts.

9. There are two phases to the work required to comply with the terms and conditions stated in the December 19 NOAA letter, as follows:

   Phase 1:

   FPL must inspect one 16' and two 12' diameter pipes. All three pipes are 1200' long. Each pipe will be inspected individually. During the time the actual inspection of the pipe is taking place that pipe will have to be isolated by fabricating a coffer dam or shutting a sluice gate if one is installed. Because of equipment limitations (stability, drag, mobility) the flow velocity is required to be less than 1 foot per second (fps) to perform an acceptable inspection and avoid damage/loss of vendor's equipment. To achieve flow velocities less than 1 fps the flow through the pipe will be required to be blocked. Based on engineering evaluation blocking the flow through any one of the pipes will be required to be performed during an outage or when at least 4 Circulating Water Pumps are shut down. After isolation a Remote Operating Vehicle (ROV) will enter the pipe to conduct a survey to determine if debris has accumulated on the pipe or if there is some other type of obstruction. After all three pipe inspections are complete the estimated amount of debris removal will be calculated. If there are any obstructions in the pipes they will need to be removed.

   Phase 2:

   FPL must remove debris and obstructions identified during the Phase 1 inspections. The amount or extent or work required for this phase will be determined from the result of the pipe inspections. The details of this phase will be clearer after the inspections, but one option is to fabricate a "pig". A "pig" is a type of equipment that crawls through the inside of a pipe and cleans and debris off the walls of the pipe.

10. FPL has two outages scheduled for the St. Lucie Plant during 2007. The first is scheduled to commence on April 2, 2007 and last for 36 days, with the second scheduled to commence on October 1, 2007 and last for 86 days. FPL intends to conduct inspections required by Phase 1 during the first outage, to complete the evaluations required under Phase 1 and to mobilize for any required repairs during the time between the outages, and finally to implement the Phase 2 repairs during the scheduled duration of the second outage. If it is possible to complete the inspection and repairs on this schedule, it will allow FPL to avoid having to schedule any additional outage time to comply with the BO. This would be in the best interests of FPL and its customers due to the substantial replacement power costs that FPL incurs when its nuclear units are off line.

11. FPL considered several alternatives for the prevention of Smalltooth Sawfish mortalities that would not require plant shutdown to implement, but none proved feasible. FPL considered inspecting the pipes while the St. Lucie Plant is operating, but it was determined that the velocities in the intake pipes are too fast to inspect the inside of the pipes safely during operation. Due to issues associated with safety, mobility, drag, stability, and visibility, no available technology was

identified that would be able to inspect the pipes at their normal operating flow velocities. Remote operating vehicles, underwater cameras, cable crawling vehicles, diving (SCUBA and hard hat), and external sonar penetrating devices were considered but rejected. Based on this evaluation of alternatives, it was determined that flow through the piping would have to be shut off to obtain useful inspection results. FPL also considered taking only one intake pipe out of service at a time for inspection while the plant continued to operate. However, based on evaluation it was determined that there would not be sufficient flow to support operation of both reactors with flow through one of the pipes shut off. Moreover, two of the three pipes do not have a headwall structure that allows the flow to be shut off. Various methods were considered for shutting off the flow, such as sheet piling around velocity caps, panels to close off opening at velocity caps, cofferdam type structure in canal, and construction of new headwall structures, but none appears to be a cost-effective alternative to performing the inspections and repairs while the St. Lucie Plant is shut down.

12. FPL expects to begin incurring expenses for the Project in January of 2007, when it will start planning and mobilizing for the inspections that will occur during the outage that commences in April. FPL presently estimates that it will incur O&M costs for the Project in 2007 totaling between $3.0 and $6.0 million for inspection and cleaning of the intake pipes, including planning and preparation for that work, evaluating the impact of cleaning the intake pipes on the functionality of the balance of the Cooling System and the purchase of equipment to support the intake pipe inspection. The ultimate cost of the intake pipe inspection and cleaning will depend upon how much material needs to be removed and the method of removal.

13. It is possible that additional work on the Cooling System, of a similar or perhaps different nature, may have to be performed in the future in order to satisfy "take" limitations imposed under the ESA and/or to address plant operational impacts resulting from work done to satisfy those limitations. For example, in addition to the concern over "taking" endangered Smalltooth Sawfish, the NRC and NOAA are evaluating the potential adverse impacts on endangered turtle species from the Intake System. The NRC will reinitiate an Endangered Species Act Section 7 Consultation with NOAA early in 2007. This reinitiation is specifically the result of the St. Lucie Plant exceeding the incidental take limit in the current BO regarding endangered sea turtles. NOAA intends to combine the sea turtle and sawfish Consultations, and to address both in the BO that will be issued in 2007. It is possible that the results of the sea turtle Consultation will lead to additional requirements to inspect, repair and/or modify the Cooling System. In the event that additional work on the Cooling System is required, FPL will provide updated cost information as a supplement to this Petition and/or in its future ECRC filings.

14. Affiant says nothing further.

Randall R. LaBauve

SWORN TO AND SUBSCRIBED before me this 4 day of January 2007, by Randall R. LaBauve, who is personally known to me or who has produced FPL (type of identification) as identification and who did take an oath.

Notary Public, State of Florida

My Commission Expires:

PETER E MCGOVERN
MY COMMISSION # DD498804
EXPIRES: Mar. 12, 2010
(407) 398-0153 Florida Notary Service.com

ATTACHMENT 1

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service

LETTER REGARDING TERMS AND CONDITIONS OF DRAFT BIOLOGICAL OPINION

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southeast Regional Office
263 13th Avenue South
St. Petersburg, Florida 33701
(727) 824-5317 FAX 824-5300
http://sero.nmfs.noaa.gov

F/SER31:SN

DEC 19 2006

Ms. Harriet Nash
Environmental Scientist
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dear Ms. Nash:

We have enclosed a copy of the Terms and Conditions for the smalltooth sawfish contained in the draft biological opinion for the continued operation of the St. Lucie Nuclear Power Plant. We are postponing the finalization of this biological opinion based on our conversations regarding your need to request reinitiation of consultation for sea turtles in January 2007. We will provide one comprehensive biological opinion for all species listed under our jurisdiction once we receive your request and information regarding reinitiation of consultation for sea turtles.

If you have any questions regarding this consultation please contact Shelley Norton by phone (727-824-5312) or e-mail (shelley.norton@noaa.gov).

Sincerely,

Shelley Norton

Shelley Norton
Natural Resource Specialist

Ref: F/SER/2006/00832

Draft Reasonable and Prudent Measures and Terms and Conditions for Smalltooth Sawfish and the Continued Operation of the St. Lucie Nuclear Power Plant (SLNPP)

9.3 Reasonable and Prudent Measures (RPMs)

Section 7(b)(4) of the ESA requires that when an agency action is found to comply with section 7(a)(2) of the ESA and the proposed action may incidentally take individuals of listed species, NMFS will issue a statement specifying the impact of any incidental taking. It also states that RPMs necessary and appropriate to minimize impacts, and terms and conditions to implement those measures must be provided and must be followed to minimize those impacts. Only incidental taking by the federal agency or applicant that complies with the specified terms and conditions is authorized.

The RPMs and terms and conditions are specified as required by 50 CFR 402.14 (i)(1)(ii) and (iv) to document the incidental take by the proposed action and to minimize the impact of that take on smalltooth sawfish. These measures and terms and conditions are non-discretionary, and must be implemented by the NRC in order for the protection of section 7(o)(2) to apply. The NRC has a continuing duty to regulate the activity covered by this incidental take statement. If the NRC fails to adhere to the terms and conditions of the incidental take statement through enforceable terms, and/or fails to retain oversight to ensure compliance with these terms and conditions, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of the incidental take, the NRC must report the progress of the action and its impact on the species to NMFS as specified in the incidental take statement [50 CFR 402.14(i)(3)].

NMFS has determined that the following RPMs are necessary and appropriate to minimize impacts of the incidental take of smalltooth sawfish during the continued operation of the SLNPP.

1. FPL biologists must be aware of the endangered status of the smalltooth sawfish and ensure that any smalltooth sawfish take is handled in such a way as to minimize stress to the animal and increase its potential for survival. The animal's time out of the water must be minimized. The animal's spiracles must be kept wet during transporting. Placing a wet towel over the spiracles during transporting is recommended to minimize stress on the animal.

2. A rescue and transportation plan must be developed by the SLNPP and approved by NMFS, including maintenance and operation of appropriate equipment. The rescue and transportation plan must reduce the animal's out-of-water time to less than 10 minutes.

3. Monitoring and reporting of any smalltooth sawfish encountered (1) detect any adverse effects resulting from the SLNPP; (2) assess the actual level of incidental take in comparison with the anticipated incidental take documented in that opinion; (3) detect when the level of anticipated take is exceeded; and (4) collect improved data from future encounters.

4. Survey the intake pipe in 2007 to determine if the pipe contains debris or structural obstructions which could harm animals that enter the structure.

9.4 Terms and Conditions

In order to be exempt from liability for take prohibited by section 9 of the ESA, NRC must comply with the following terms and conditions, which implement the RPMs described above. These terms and conditions are non-discretionary.

The following term and condition implements RPM No. 1.

> All FPL sea turtle biologists must receive safe handling and transporting training. Once an FPL representative has received safe handling and release training by a NMFS approved trainer they are considered qualified to train any new sea turtle biologists.

The following term and condition implements RPM No. 2.

> FPL shall develop an interim draft transportation plan that will be reviewed and approved by NMFS by June 2007. NMFS will provide comments on the plan no later than 60 days after receipt. FPL will finalize the plan after receiving sawfish transportation training at a NMFS approved training facility (i.e., Baltimore Aquarium) and after receiving comments from NMFS.

The following term and condition implements RPM No 3.

> The following information shall be collected and reported to NMFS in the event of a take: a total length measurement or estimate, time and location (i.e., lat./long. and approximate water depth) of capture, circumstances of capture (e.g., position of sawfish in the trawl net), and status (i.e., dead, alive, injured) upon return to the water.

The following term and condition implements RPM No 4.

> FPL representatives shall survey the intake pipe during a scheduled outage in 2007. FPL shall remove any debris and repair any structural obstructions, as appropriate, during the 2007 outage. If repairs and/or debris cannot be accomplished during the 2007 outage period, FPL shall provide NMFS with an appropriate repair and/or debris removal schedule.

ATTACHMENT 2

DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

50 CFR Part 224

ENDANGERED AND THREATENED SPECIES; FINAL ENDANGERED STATUS FOR A DISTINCT POPULATION SEGMENT OF SMALLTOOTH SAWFISH (*PRISTIS PECTINATA*) IN THE UNITED STATES

used to cross-reference this action with the Unified Agenda

List of Subjects in 49 CFR Part 665

Vehicle testing, Grant programs—transportation, Mass Transportation

■ Accordingly, the interim rule amending 49 CFR part 665 which was published at 58 FR 58732, November 3, 1993, is adopted as a final without change.

Issued on: March 24, 2003.

Jennifer L. Dorn,

Administrator.

[FR Doc. 03-7549 Filed 3-31-03; 8:45 am]

BILLING CODE 4910-17-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 000303059-3034-03; I.D. No. 021700B]

RIN No. 0648-XA49

Endangered and Threatened Species; Final Endangered Status for a Distinct Population Segment of Smalltooth Sawfish (*Pristis pectinata*) in the United States

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

ACTION: Final rule; technical amendment

SUMMARY: NMFS published a proposed rule to list the U.S. population of smalltooth sawfish as endangered on April 16, 2001. After considering public comments on the proposed rule, NMFS is issuing a final rule to list the distinct population segment (DPS) of smalltooth sawfish in the United States as an endangered species. NMFS has determined that the U.S. DPS is in danger of extinction throughout its range.

NMFS is also making a technical amendment to the list of endangered marine and anadromous species to reinsert the listing of Atlantic salmon.

DATES: Effective May 1, 2003.

ADDRESSES: The complete administrative record for this regulation is available at NMFS, Southeast Regional Office, Protected Resources Division, 9721 Executive Center Drive North, St. Petersburg, FL 33702. The status review and proposed rule are also available electronically at the NMFS Web site at *http://www.nmfs.noaa.gov*

FOR FURTHER INFORMATION CONTACT: Shelley Norton, NMFS, at the address above, 727-570-5312, or David O'Brien, NMFS, 301-713-1401.

SUPPLEMENTARY INFORMATION:

Background

NMFS designated the smalltooth sawfish as a candidate species under the Endangered Species Act (ESA) on June 23, 1999 (64 FR 33467). On November 30, 1999, NMFS received a petition from the Center for Marine Conservation (now The Ocean Conservancy) requesting that NMFS list the North American populations of smalltooth sawfish and largetooth sawfish as endangered under the ESA. The petitioner's request was based on four criteria: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) the inadequacy of existing regulatory mechanisms; and (4) other natural or manmade factors affecting its continued existence. On March 10, 2000, NMFS published its determination that the petition presented substantial information indicating that listing may be warranted for smalltooth sawfish, but not for largetooth sawfish. Concurrently, NMFS announced the initiation of a smalltooth sawfish formal status review (65 FR 12959, March 10, 2000).

In order to conduct a comprehensive review of smalltooth sawfish, NMFS created a status review team to investigate the status of the species with regard to the listing criteria provided by the ESA. In addition to its own resources and data, the status review team gathered all known records and data of smalltooth sawfish by contacting fishery managers, museums and other research collectors. The status review contains the best scientific and commercial information available on smalltooth sawfish at the time of the report. The document addresses the status of the species, the five listing determination criteria, and the effect of efforts underway to protect the species.

The Smalltooth Sawfish Status Review was completed in December 2000 and has undergone peer review. The findings of the Status Review have been accepted by NMFS and some of the findings are summarized here. The Status Review contains a more complete discussion and complete literature citations for the information summarized in this final rule. The Status Review is available at on the NMFS Web site (see **ADDRESSES**).

NMFS published the proposed rule to list the smalltooth sawfish on April 16, 2001 (66 FR 19414). Comments received on the proposed rule are discussed below.

In addition to this final rule to list the U.S. population of smalltooth sawfish as endangered, NMFS is also making a technical amendment to the list of endangered species (50 CFR 224.101) to reinsert the listing for Atlantic salmon, which was inadvertently deleted from the list.

Summary of Comments Received on the Proposed Rule

During the 60-day public comment period, NMFS received a total of 12 written comments: four from private citizens, seven from non-governmental organizations, and one from a local non-profit research laboratory. All commenters supported the proposed rule. Three of the commenters also requested that critical habitat be designated for the smalltooth sawfish. Several commenters requested that NMFS develop a recovery plan or program for the species. One commenter also requested the listing of the largetooth sawfish. A brief summary of the comments received on the proposed rule is presented below, along with NMFS' response to each comment.

Comment 1: Three commenters stated that critical habitat designation is necessary for the smalltooth sawfish and urged NMFS to designate critical habitat.

Response: Section 4(a)(3)(A) of the ESA requires that critical habitat be designated concurrently with a determination that a species is endangered or threatened, to the maximum extent prudent and determinable. When such a designation is not determinable at the time of final listing of a species, section 4(b)(6)(C)(ii) of the ESA, 16 U.S.C. 1533(b)(6)(C)(ii), provides for additional time to promulgate a critical habitat designation. NMFS has determined that designation of critical habitat for the sawfish is not determinable at this time.

NMFS has and continues to fund research that is necessary to identify the biological and physical habitat features that are essential to the conservation of the species. While more information is required before critical habitat can be designated, the available data suggest that shallow water, 1 meter or less, may be important nursery areas for the smalltooth sawfish; that river and creek mouths are important habitat elements; and that channels through shallow habitats may be important mating aggregation areas. During the next year NMFS will be gathering and reviewing the current and ongoing studies on the habitat use and requirements of

smalltooth sawfish. NMFS believes that this knowledge is extremely important for its determination relating to critical habitat.

Comment 2: Several commenters urged NMFS to initiate recovery efforts for the smalltooth sawfish and requested that NMFS develop a Recovery Program or Recovery Plan.

Response: Section 4(f) of the ESA requires that NMFS develop recovery plans for ESA listed species, unless such a plan will not promote the conservation of the species. NMFS will convene a recovery team to develop a recovery plan for the smalltooth sawfish, after finalizing this rule and the critical habitat designation. NMFS recognizes that the U.S. DPS of smalltooth sawfish is at risk of extinction and that there is an urgent need to begin recovery efforts for this species as soon as possible. NMFS is committed to the recovery effort and intends to take the lead role in smalltooth sawfish recovery and research efforts even before a final recovery plan is developed. NMFS is currently funding studies to better define abundance, movements, and habitat requirements for smalltooth sawfish. NMFS believes that these research efforts are important in the development of the recovery plan and that they are important for the survival and recovery of the species. NMFS is also cooperating with state agencies and academia on their ongoing research and conservation efforts.

Comment 3: One commenter requested that NMFS also list the largetooth sawfish because of the similarity in appearance to the smalltooth sawfish.

Response: Section 4(e) of the ESA allows NMFS to treat any non-listed species as an endangered or threatened species if: (1) the species so resembles a listed species that enforcement personnel would have substantial difficulty differentiating the listed and non-listed species; (2) the effect of this substantial difficulty is an additional threat to the listed species; and (3) such a treatment of an unlisted species will substantially facilitate the enforcement and further the policy of the ESA. NMFS does not believe that treating largetooth sawfish as endangered due to its similarity of appearance to smalltooth sawfish is warranted. NMFS recognizes that largetooth sawfish and smalltooth sawfish closely resemble each other, and that law enforcement personnel may have substantial difficulty differentiating the two species. However, historic records indicate that largetooth sawfish were rarely found in North America, and that all largetooth sawfish captured in U.S. waters were caught along the coast of Texas and Louisiana, outside of the known current range of smalltooth sawfish (see the sawfish 90–day finding, March 10, 2000; 65 FR 12959). Therefore, the possibility of confusing the two species in the U.S. is very small. It is unlikely that the similarity in appearance of the two species would pose an additional threat to smalltooth sawfish, or that treating largetooth sawfish as endangered would facilitate the enforcement of regulations to protect smalltooth sawfish.

Peer Review

NMFS solicited expert opinions on the status review documents in compliance with the July 1, 1994, Peer Review Policy (59 FR 34270). The responses received from the reviews support the proposed listing action.

Consideration as a "Species" Under the Endangered Species Act

Section 3(16) of the ESA, 16 U.S.C. 1532 (16), defines a species as "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." This definition allows for the listing of DPSs at levels below taxonomically recognized species or subspecies. On February 7, 1996, the U.S. Fish and Wildlife Service (FWS) and NMFS published a joint policy to clarify the phrase "distinct population segment (DPS)" for the purposes of listing, delisting and reclassifying species under the ESA (61 FR 4722). This policy identifies two criteria that must be met for a population segment to be considered a DPS under the ESA: (1) The discreteness of the population segment in relation to the remainder of the species or subspecies to which it belongs; and (2) the significance of the population segment to the species or subspecies to which it belongs.

Discreteness of the U.S. Population of Smalltooth Sawfish

A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors; or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA.

The status review team did not find any indication that the current U.S. population of smalltooth sawfish interacts with smalltooth sawfish elsewhere, suggesting that the U.S. population may be effectively isolated from other populations. However, there are few scientific data on the biology of smalltooth sawfish, and it is not possible to conclusively subdivide this species into discrete populations on the basis of genetics, morphology, behavior, or other biological characteristics. The DPS policy provides for the delineation of a DPS based on international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist. Although several southeastern U.S. states have regulations in place prohibiting fishing for this species, the smalltooth sawfish status review team was unable to identify any mechanisms regulating the exploitation of this species anywhere outside of the U.S. These differences are directly relevant to the inadequacy of existing regulatory mechanisms as a basis for considering the U.S. DPS as a species for purposes of the listing determination, particularly because the review team found no recent verifiable records of smalltooth sawfish populations outside of the U.S. Therefore, NMFS has determined that the U.S. population of smalltooth sawfish is discrete as defined under the DPS policy.

Significance of the U.S. Population of Smalltooth Sawfish

The DPS policy identifies several factors that may be considered in making a determination of a population's significance to the taxon to which it belongs. Among these considerations is evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon. The smalltooth sawfish has already been wholly or nearly extirpated from large areas of its former range in the North Atlantic (Mediterranean, U.S. Atlantic and Gulf of Mexico) and the Southwest Atlantic by fishing and habitat modification, and its status elsewhere is uncertain but likely to be similarly reduced. In fact, the status review did not find any recent verifiable records of smalltooth sawfish populations outside the United States. Reports of this species from outside the Atlantic may be misidentifications of other pristids. Therefore, smalltooth sawfish populations in U.S. waters, while extremely depleted, may be the largest population of smalltooth sawfish in the Western Atlantic. The U.S. population of smalltooth sawfish

comprises an important component of the sawfishes' remaining global biological diversity, as sawfish in general are suffering worldwide declines. The U.S. population of smalltooth sawfish is also the northernmost population in the western hemisphere. Loss of the U.S. population of smalltooth sawfish would clearly result in a significant gap in the range of this species. For these reasons, the U.S. population of smalltooth sawfish is significant as defined under the DPS policy.

Based on the above analysis of the discreteness and significance of smalltooth sawfish, the population of smalltooth sawfish that occurs in waters of the eastern United States is both discrete and significant and constitutes a DPS. Therefore, consideration of the conservation status of the U.S. DPS of smalltooth sawfish in relationship to the ESA's listing standards is appropriate.

Distribution and Abundance

Smalltooth sawfish are tropical marine and estuarine fish that have the *northwestern terminus of their Atlantic* range in the waters of the eastern United States. In the United States, smalltooth sawfish are generally a shallow water fish of inshore bars, mangrove edges, and seagrass beds, but larger animals can be found in deeper coastal waters.

In order to assess both the historic and the current distribution and abundance of the smalltooth sawfish, the status review team collected and compiled literature accounts, museum collection specimens, and other records on the species. This information indicates that prior to around 1960, smalltooth sawfish occurred commonly in shallow waters of the Gulf of Mexico *and eastern seaboard up to North* Carolina, and more rarely as far north as New York. Subsequently their distribution has contracted to peninsular Florida and, within that area, they can only be found with any regularity off the extreme southern portion of the state. The current distribution is centered in the Everglades National Park, including Florida Bay.

Smalltooth sawfish have declined dramatically in U.S. waters over the last century, as indicated by publication and museum records, negative scientific survey results, anecdotal fisher observations, and limited landings per unit effort (from Louisiana). The "Fisheries Statistics of the United States" data sets from 1945–1978 report that smalltooth sawfish landings in Louisiana declined from a high of 34,900 lbs (15,830 kg) in 1949 to less than 1,500 lbs (680 kg) in most years after 1967. The decline is likely greater than indicated by numbers or frequencies of catches because during the past century, both fishing and scientific sampling effort have increased by orders of magnitude. The fact that documented smalltooth sawfish catch records have declined during this period despite these tremendous increases in fishing effort underscores the population reduction in the species. While NMFS lacks time-series abundance data to quantify the extent of the DPS's decline, the best available information indicates that the abundance of the U.S. DPS of smalltooth sawfish is at an extremely low level relative to historic levels.

Summary of Factors Affecting the Species

Section 4 of the ESA (16 U.S.C. 1533) and regulations promulgated to implement the listing provisions of the ESA (50 CFR part 424) set forth the procedures for adding species to the Federal list. Section 4 requires that listing determinations be based solely on the best scientific and commercial data available, without consideration of possible economic or other impacts of such determinations. A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1) of the ESA.

NMFS has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species and conservation efforts that are underway in determining to promulgate this final rule. The ESA defines an endangered species as one that is in danger of extinction throughout all or a significant portion of its range. NMFS has determined that the U.S. DPS of smalltooth sawfish is in danger of extinction throughout all or a significant portion of its range from a combination of four listing factors: The present threatened destruction, modification, or curtailment of habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; inadequacy of existing regulatory mechanisms; and other natural and manmade factors affecting the continued existence of the species. For these reasons, NMFS is listing the U.S. DPS of smalltooth sawfish as endangered. The listing factors and their application to the U.S. DPS of smalltooth sawfish are described below.

(a) The Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range

Loss and degradation of habitat has contributed to the decline of many marine species, and is judged to have impacted the distribution and abundance of smalltooth sawfish. The continued urbanization of the southeastern coastal states has resulted in substantial loss of coastal habitat through such activities as agricultural and urban development, commercial activities, dredge and fill operations, boating, erosion, and diversions of freshwater run-off. Animal wastes and fertilizers from agricultural runoff contribute large amounts of non-point source nutrient loading and introduce a wide range of toxic chemicals into habitats important to smalltooth sawfish. The rate of urban development in the southeast coastal zone is more than four times the national average, destroying or degrading significant amounts of coastal and estuarine habitat. Commercial activities in the southeast eliminate or degrade substantial amounts of marine and estuarine fish habitat, although the exact amount is unknown. An analysis of 18 major southeastern estuaries recorded over 703 miles (1,131 km) of navigation channels and 9,844 miles (15,842 km) of *shoreline modifications. Profound* impacts to hydrological regimes have been produced in South Florida through the construction of a 1,400–mile (2,253–km) network of canals, levees, locks, and other water control structures that modulate freshwater flow from Lake Okeechobee, the Everglades, and other coastal areas.

Potential detrimental impacts from the activities listed above on habitat of the U.S. DPS of smalltooth sawfish include: (1) loss of wetlands, (2) eutrophication, (3) point and non-point sources of pollution, (4) increased sedimentation and turbidity, and (5) hydrologic *modifications. Smalltooth* sawfish may be especially vulnerable to coastal habitat degradation due to their affinity for shallow, estuarine systems. The cumulative impacts from habitat degradation discussed above may reduce habitat quality and limit habitat quantity available to the species. Given *current low levels of abundance, and its* current retracted range, efforts need to be undertaken to better understand, avoid, minimize and mitigate these factors.

(b) Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Smalltooth sawfish have historically been caught as bycatch in various fishing gears throughout their historic range, including gillnet, otter trawl, trammel net, seine, and, to a lesser degree, hand line. There are frequent accounts in early literature of smalltooth sawfish being entangled in fishing nets from areas where smalltooth sawfish were once common, but are now rare or extirpated (Evermann and Bean, 1898). Their long, toothed rostrum makes it difficult to avoid entanglement in virtually any kind of large mesh gillnet gear. The saw penetrates easily through nets and causes the animal to become entangled when it attempts to escape. Shrimp trawling is another source of incidental mortality on smalltooth sawfish. Entangled specimens frequently have to be cut free, causing extensive damage to nets and presenting a substantial hazard if brought on board. For these reasons, most smalltooth sawfish caught by fishermen are either killed outright or released only after removal of their saws.

Large-scale directed fisheries for smalltooth sawfish have not existed; however, smalltooth sawfish bycatch has been commercially landed in various regions, primarily in Louisiana. Total Gulf of Mexico landings dropped continually from 1950 to 1978, ranging from a high of 9.3 metric tons to less than 0.1 metric tons during this time period. NMFS does not have any records of landings since 1978 (NMFS Fisheries Statistics and Economic Division's Database, commercial landings data).

A data set from "Fisheries Statistics of the United States" (1945–1978) of smalltooth sawfish landings in Louisiana by shrimp trawlers, containing both landings data and crude information on effort (number of vessels, vessel tonnage, number of gear units), underscores that landings have dramatically declined, even as fishing effort increased. Annual smalltooth landings in Louisiana declined from a high of 34,900 lbs (15,830 kg) in 1949 to less than 1,500 lbs (680 kg) in most years after 1967. During this period of time, the number of fishing vessels, the size of the fishing vessels, and the amount of gear that they deployed increased substantially. Landings per unit effort (LPUE) was calculated using three different units of effort (number of vessels, tonnage of vessels, and number of gear units). All three data series showed dramatic declines in LPUE, from high levels in the 1950s to very low levels in the 1970s. The magnitude of these declines is such that the LPUE values in the 1970s are less than one percent of those in the 1950s, indicating a severe decline in the population. The lack of landings since 1978 shows that smalltooth sawfish have been commercially unavailable for over 20 years.

Anecdotal information collected by NMFS port agents indicates that smalltooth sawfish are now taken very rarely in the shrimp trawl fishery. The most recent records from Texas are from the 1980s. Through 1999, smalltooth sawfish were still occasionally documented in shrimp trawls in Florida (4 from 1990 to 1999). Mote Marine Laboratory records documented a smalltooth sawfish taken in a shrimp trawler and one caught on a long-line off the coast of Florida, in 2002.(Simpfendorfer, pers. comm., 2002).

In historical recreational fisheries records, smalltooth sawfish have occasionally occurred as bycatch. Occasional takes with harpoon or hook-and-line by recreational fishers in Florida were recorded during the first half of the twentieth century. In Texas, many sawfish were reportedly taken incidentally by sport fishermen in the bays and surf prior to the 1960s. Most of these fish were released. However, prior to their live release the saws of many individuals were removed. This practice may have contributed to the decline of smalltooth sawfish in Texas.

Today, recreational catches of sawfish are very rare, and poorly documented for the most part, except within the Everglades National Park. Long-term abundance data are not available, but there are recent (1989–1999) recreational catch per unit effort (CPUE) data for the Everglades. These CPUE data indicate that a sustaining population still exists there, with consistent annual catches by private recreational anglers and guide boats. Direct take of smalltooth sawfish has been of little importance or remains obscure. Although there is a market for smalltooth sawfish saws, the species is not commonly taken and any captures are apparently incidental. Smalltooth sawfish have also been taken by collectors and sold live to aquaria. The recent high prices aquaria are willing to pay for this species ($1,000 per ft; $3,200 per m) may be providing increased incentive for their collection. The smalltooth sawfish has rarely been taken for scientific purposes.

(c) Disease or Predation

There is no information regarding predation or disease affecting smalltooth sawfish. The decline of the species appears to have been one of slow attrition over the course of the twentieth century, primarily from bycatch in fisheries and secondarily by coastal habitat destruction rather than from some acute epizootic event. The few living specimens examined (Colin Simpfendorfer, Mote Marine Laboratory and Jose Castro, NMFS, pers. comm., 2000) appear to be in good health.

(d) Inadequacy of Existing Regulatory Mechanisms

Numerous Federal, state, and inter-jurisdictional laws, regulations and policies govern activities in U.S. waters that have the potential to affect the abundance and survival of smalltooth sawfish and their habitat. While these laws, regulations, and policies lead to overall environmental enhancements indirectly aiding smalltooth sawfish, very few have been applied specifically for the protection of smalltooth sawfish. For example, NMFS and FWS consult with other agencies on projects that may impact fish and wildlife and provide recommendations to avoid any adverse impacts, but there has never been a recommendation directed at the protection of sawfish. Any general recommendations that are implemented and reduce habitat loss in shallow coastal areas may provide some benefit to smalltooth sawfish by curbing increased habitat degradation.

There are no Federal regulations for the protection of sawfish. With the exception of Florida and Louisiana, smalltooth sawfish can also still be legally harvested in state waters.

As noted above, a century of net fisheries combined with the low reproductive potential of the sawfish (typical of most elasmobranchs) has resulted in a very severe decline in sawfish populations. Smalltooth sawfish bycatch in gillnets has likely been reduced due to recent regulations prohibiting or limiting the use of gillnets in some state waters, but bycatch in other gears such as trawls may still present a threat to this species. Recent reports of smalltooth sawfish caught with their saws already removed indicate that smalltooth sawfish are still being harmed by commercial or recreational fishing activities. Based on this information, NMFS believes that existing Federal and state laws, regulations, and policies are inadequate to protect smalltooth sawfish.

(e) Other Natural or Manmade Factors Affecting its Continued Existence

Current and future abundance of smalltooth sawfish is limited by its life history characteristics. While little is

known directly about smalltooth sawfish life history, inferences can be drawn from closely related species for which more information is available, such as the largetooth sawfish and other elasmobranchs. These species have slow growth, late maturity, a long life span, and low fecundity, and it is highly likely that smalltooth sawfish share these characteristics These combined characteristics result in a very low intrinsic rate of population increase and are associated with the life history strategy known as "k-selection." K-selected animals are usually successful at maintaining relatively small, persistent population sizes in relatively constant environments. Conversely, they are not able to respond effectively (rapidly) to additional sources of mortality, such as overexploitation and habitat degradation. Smalltooth sawfish have been and are currently subjected to both overexploitation and habitat degradation.

The intrinsic rate of population growth can be a useful parameter to estimate the capacity of a species to withstand exploitation Animals with low intrinsic rates of increase are particularly vulnerable to excessive mortalities and rapid stock collapse, after which recovery may take decades. The estimated intrinsic rate of natural increase for smalltooth sawfish ranges from 0 08 per year to 0.13 per year, and population doubling times range from 5.4 years to 8.5 years (Simpfendorfer, 2000a). The American Fisheries Society considers smalltooth sawfish in North America to be at a high risk of extinction (Musick et al , 2000)

Listing Determination

The U.S. DPS of smalltooth sawfish is at a critically low level of abundance based on the status review team's review of literature accounts, museum collection specimens, and other records of the species. The U S DPS of smalltooth sawfish continues to face threats from: (1) loss of wetlands, (2) eutrophication, (3) point and non point sources of pollution, (4) increased sedimentation and turbidity, (5) hydrologic modifications, and (6) incidental catch in fisheries Commercial bycatch has played the primary role in the decline of this DPS Quantitative data are limited, but indicate that smalltooth sawfish have been taken by commercial fishermen and that this species has experienced severe declines in its abundance. While Federal, state, and interjurisdictional laws, regulations, and policies lead to overall environmental enhancements indirectly aiding smalltooth sawfish, very few have been applied specifically for the protection of smalltooth sawfish Based on the species' low intrinsic rate of increase resulting from their slow growth, late maturation, and low fecundity, population recovery potential for the species is limited and the species is at risk of extinction. Therefore, under current circumstances, the U S DPS of smalltooth sawfish is in danger of extinction.

Current protective measures and conservation efforts underway to protect the U S DPS of smalltooth sawfish are confined to: actions directed at increasing general awareness of this species and the risks it faces; possession prohibitions in the state waters of Florida and Louisiana; and research being pursued by the Mote Marine Laboratory's Center for Shark Research There are no Federal or state conservation plans for the smalltooth sawfish

Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the ESA include development and implementation of recovery plans, requirements that Federal agencies use their authorities to conserve the species, and prohibitions against certain practices, such as taking individuals of the species Recognition through listing encourages and results in conservation actions taken by Federal agencies, state agencies, private organizations, groups, and individuals The ESA also provides for possible land acquisition and cooperation with the states The conservation measures required of Federal agencies and the prohibitions against taking and harm are discussed, in part, here.

The ESA and its implementing regulations set forth a series of general prohibitions that apply to all endangered wildlife. The prohibitions of section 9 of the ESA, in part, make it illegal for any person subject to the jurisdiction of the United States to take (to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct), to import into, or export from, the United States, to ship in interstate or foreign commerce in the course of commercial activity, or to sell or offer for sale in interstate or foreign commerce any endangered wildlife It is also unlawful to possess, sell, deliver, carry, transport, or ship endangered wildlife that has been taken illegally is also prohibited

Section 7 of the ESA imposes special duties on Federal agencies for the protection and conservation of endangered and threatened species Section 7(a)(1) requires Federal agencies to use their authorities to conserve listed species and their habitats by carrying out conservation programs for endangered and threatened species Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the NMFS or the FWS Regulations implementing this interagency cooperation provision of the ESA are codified at 50 CFR part 402

ESA sections 10(a)(1)(A) and 10(a)(1)(B) provide NMFS with authority to grant exceptions to the section 9 takings prohibitions Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) conducting research that involves a take of listed species NMFS has issued section 10(a)(1)(A) research and enhancement permits for other listed species for these purposes ESA section 10(a)(1)(B) incidental take permits may be issued to non-Federal entities performing activities that may incidentally take listed species The types of activities potentially requiring a section 10(a)(1)(B) incidental take permit include agricultural or development activities that affect sawfish habitat and the management of state fisheries that may interact with sawfish.

The ESA also provides some exceptions to the prohibitions, without permits, for certain antique articles and species held in captivity at the time of listing ESA section 10(h) allows antique articles of listed species to be excluded from essentially all the ESA prohibitions as long as they are at least 100 years old and meet certain other specified conditions. Section 9(b)(1) provides a narrow exemption for animals held in captivity at the time of listing: those animals are not subject to the import/export prohibition or to protective regulations adopted by the Secretary, so long as the holding of the species in captivity, before and after listing, is not in the course of a commercial activity; however, 180 days after listing there is a rebuttable presumption that the exemption does not apply. Thus, in order to apply this exemption, the burden of proof for confirming the status of animals held in captivity prior to listing lies with the holder. The section 9(b)(1) exemption for captive wildlife would not apply to any progeny of the captive animals that may be produced post-listing.

Take Guidance

On July 1, 1994, NMFS and FWS published a series of policies regarding listing under the ESA, including a policy to identify, to the maximum extent possible, those activities that would or would not constitute a violation of section 9 of the ESA (59 FR 34272). The intent of this policy is to increase public awareness of the effect of ESA listings on proposed and ongoing activities within the species' range. Although not binding, NMFS has identified specific activities that would likely not be considered a violation of section 9, as well as activities that would likely be considered a violation. Activities that NMFS believes would result in violation of section 9 prohibitions with respect to the U.S. DPS of smalltooth sawfish include, but are not limited to, the following:

(1) Taking or attempting to take smalltooth sawfish, including as by-catch in commercial and recreational fisheries;

(2) Possessing, delivering, transporting or shipping any smalltooth sawfish or smalltooth sawfish part that was illegally taken;

(3) Delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce any smalltooth sawfish or smalltooth sawfish part, in the course of a commercial activity, even if the original taking of the smalltooth sawfish was legal;

(4) Selling or offering for sale in interstate or foreign commerce any smalltooth sawfish or smalltooth sawfish part, except antique articles at least 100 years old;

(5) Importing or exporting smalltooth sawfish or any smalltooth sawfish part to or from the United States;

(6) Degradation or modification of the smalltooth sawfish's coastal habitat through, for example, such activities as agricultural and urban development, commercial activities, dredge and fill operations, boating, and diversions of freshwater run-off to the extent that such habitat modification would result in death or injury to smalltooth sawfish by significantly impairing essential behavioral patterns including breeding, rearing, migrating, feeding, or sheltering;

(7) Collecting or handling wild smalltooth sawfish, even for scientific or conservation purposes, without the required permits;

(8) Releasing a captive smalltooth sawfish into the wild. Although smalltooth sawfish held non-commercially in captivity at the time of listing are exempt from certain prohibitions, the individual animals are considered listed and afforded most of the protections of the ESA, including most importantly the prohibition against injuring or killing. Release of a captive animal has the potential to injure or kill the animal if the release is not properly planned and the animal is not properly acclimated. Of an even greater conservation concern, the release of a captive animal has the potential to affect wild populations of sawfish through introduction of diseases or inappropriate genetic mixing. Depending upon the circumstances of the case, NMFS may authorize the release of a captive animal through a section 10(a)(1)(A) permit for enhancement of survival; and

(9) Harming captive smalltooth sawfish by, among other things, injuring or killing a captive smalltooth sawfish, through, for example, provision of experimental or potentially injurious veterinary care or conducting research or breeding activities on captive smalltooth sawfish, outside the bounds of normal animal husbandry practices. Specifically, NMFS has not found any records of successful captive breeding of smalltooth sawfish and, therefore, believes that captive breeding is inherently experimental and potentially injurious. Furthermore, the production of smalltooth sawfish progeny has conservation implications (both positive and negative) for wild populations of smalltooth sawfish. Experimental or potentially injurious veterinary procedures and research or breeding activities on smalltooth sawfish may, depending upon the circumstances, be authorized by NMFS through an ESA section 10(a)(1)(A) permit for scientific research or the enhancement of the propagation or survival of the species.

Although not binding, NMFS believes that the following actions, depending on the circumstances, would not result in a violation of section 9 prohibitions with respect to the U.S. DPS of smalltooth sawfish:

(1) Take of smalltooth sawfish authorized by, and carried out in accordance with, the terms and conditions of an ESA section 10(a)(1)(A) permit issued by NMFS for purposes of scientific research or the enhancement of the propagation or survival of the species;

(2) Incidental take of smalltooth sawfish resulting from Federally authorized, funded, or conducted projects for which consultation under section 7 of the ESA has been completed, and when the otherwise lawful activity is conducted in accordance with any terms and conditions granted by NMFS in an incidental take statement in a biological opinion pursuant to section 7 of the ESA;

(3) Incidental take of smalltooth sawfish resulting from otherwise lawful, non-Federal activities for which an ESA section 10(a)(1)(B) permit has been issued. Permittees may be individuals, groups (e.g., an agricultural cooperative whose farming activities affect habitat), or local or state governments (e.g., a state marine fisheries agency seeking incidental take authorization for fisheries managed by the state);

(4) Continued possession of smalltooth sawfish parts that were in possession at the time of this listing. Such parts may be non-commercially exported or imported; however, the importer or exporter must be able to provide sufficient evidence to show that the parts meet the criteria of an ESA section 9(b)(1) (i.e. held in a controlled environment at the time of listing, non-commercial activity).

(5) Continued possession of live smalltooth sawfish that were in captivity or in a controlled environment (e.g. in aquaria) at the time of this listing, so long as the prohibitions under an ESA section 9(a)(1) are not violated. Again, facilities should be able to provide evidence that the smalltooth sawfish were in captivity or in a controlled environment prior to listing. NMFS suggests that such facilities submit information to NMFS on smalltooth sawfish in their possession (e.g., size, age, and description of animals, and the source and date of acquisition) to establish their claim of possession (see **FOR FURTHER INFORMATION CONTACT**); and

(6) Provision of care for live smalltooth sawfish that were in captivity at the time of this listing. As stated previously, animals held in captivity at the time of listing are still protected under the ESA and may not be killed or injured, or otherwise harmed, and, therefore, must receive proper care. Normal care of captive animals necessarily entails handling or other manipulation of the animals, and NMFS does not consider such activities to constitute take or harassment of the animals so long as adequate care, including adequate veterinary care is provided. Such veterinary care includes confining, tranquilizing, or anesthetizing smalltooth sawfish when such practices, procedures, or provisions are not likely to result in injury.

Section 11(f) of the ESA gives NMFS authority to promulgate regulations that may be appropriate to enforce the ESA. Future regulations may be promulgated to regulate trade or holding of smalltooth sawfish, if necessary. The

public will be given the opportunity to comment on future proposed regulations

Critical Habitat

"Critical habitat" is defined in section 3 of the ESA (16 U.S.C. 1532(3)) as: (1) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the ESA, in which are found those physical or biological features (a) essential to the conservation of the species and (b) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed upon a determination that such areas are essential for the conservation of the species. "Conservation" is defined as the use of all methods and procedures needed to bring the species to the point at which listing under the ESA is no longer necessary.

Section 4(a)(3)(A) of the ESA (16 U.S.C. 1533(a)(3)(A)) requires that, to the maximum extent prudent and determinable, critical habitat be designated, concurrently, with the listing of a species. Section 4(b)(6)(C)(ii) of the ESA, 16 U.S.C. 1533(b)(6)(C)(ii), provides for additional time to promulgate a critical habitat designation if such designation is not determinable at the time of final listing of a species. Designations of critical habitat must be based on the best scientific data available and must take into consideration the economic and other relevant impacts of specifying any particular area as critical habitat.

NMFS has determined that designation of critical habitat is not determinable at this time. NMFS will complete ongoing research and gather and review other ongoing studies on the habitat use and requirements of smalltooth sawfish to attempt to identify smalltooth sawfish nursery and breeding areas. Once these and other habitat areas are identified and mapped, NMFS will publish, in a separate rule, a proposed designation of critical habitat for the U.S. DPS of smalltooth sawfish, to the maximum extent prudent and determinable.

References Cited

Evermann, B.W. and B. A. Bean. 1897(1898). Indian River and its fishers. U. S. Comm. Fish. Rep. Comm. 22:227–248.

Musick, J. A., M. M. Harbin, S. A. Berkeley, G.H. Burgess, A. M. Eklund, L. Findley, R.G. Gilmore, J. T. Golden, D.S. Ha, G.R. Hunstman, J.C. McGovern, S.J. Parker, S.G. Poss, E. Sala, T.W. Schmidt, G.R. Sedberry, H. Weeks, and S.G. Wright. 200. Marine estuarine, and diadromous fish stocks at risk of extinction in North America. Fisheries 25(11):6–30.

Simpfendorfer, C.A. 2000(a). Predicting population recovery rates for endangered western Atlantic sawfishes using demographic analysis. Environmental Biology of Fishes 58: 371–377.

Classification

Regulatory Flexibility Act and Executive Order 12866

The Conference Report on the 1982 amendments to the ESA notes that economic considerations have no relevance to determinations regarding the status of species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, listing actions are not subject to review under Executive Order 12866.

National Environmental Policy Act

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus*, 675 F.2d 825 (6th Cir.1981), NMFS has concluded that ESA listing actions are not subject to the environmental assessment requirements of the National Environmental Policy Act. (See also NOAA Administrative Order 216–6.)

Executive Order 13132, Federalism

Smalltooth sawfish records and data were collected by the status review team from appropriate state fishery managers and incorporated into the Status Review. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, NMFS intends to engage in formal and informal contacts with states, other affected local and regional entities, and those engaged in ongoing conservation and recovery efforts for the smalltooth sawfish.

List of Subjects in 50 CFR Part 224

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: March 25, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For reasons set out in the preamble, 50 CFR part 224 is amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 1. The authority for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

■ 2. In § 224.101, paragraph (a) is revised by inserting the following text after "Shortnose sturgeon (*Acipenser brevirostrum*)" and before "Totoaba (*Cynoscian macdonaldi*)": "Smalltooth sawfish (*Pristis pectinata*) in the United States; Atlantic salmon (*Salmo salar*) Gulf of Maine population, including naturally reproducing populations and those river-specific hatchery populations cultured from them;"

[FR Doc. 03–7786 Filed 3–31–03; 8:45 am]
BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 230

[Doc. No. 030324070–3070–01, I.D. 030703C]

Whaling Provisions: Aboriginal Subsistence Whaling Quotas

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

ACTION: Notification of aboriginal subsistence whaling quota.

SUMMARY: NMFS announces the aboriginal subsistence whaling quota for bowhead whales, and other limitations deriving from regulations adopted at the 2002 Special Meeting of the International Whaling Commission (IWC). For 2003, the quota is 75 bowhead whales struck. This quota and other limitations will govern the harvest of bowhead whales by members of the Alaska Eskimo Whaling Commission (AEWC).

DATES: Effective April 1, 2003.

ADDRESSES: Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Chris Yates, (301) 713–2322.