

**SUPPORTING STATEMENT
GREEN STURGEON ESA 4(D) RULE TAKE EXCEPTIONS AND EXEMPTIONS
OMB NUMBER 00648-0xxx**

A. JUSTIFICATION

1. Explain the circumstances that make the collection of information necessary.

The Southern Distinct Population Segment (Southern DPS) of North American green sturgeon (*Acipenser medirostris*; hereafter, “Southern DPS”) was listed as a threatened species in April 2006. Section 4(d) of the Endangered Species Act of 1973 (ESA) authorizes the Secretary of Commerce to adopt regulations determined to be necessary and advisable for the conservation of species listed as threatened. Such regulations may include any or all of the prohibitions described in section 9(a)(1) of the ESA.

As the agency with jurisdiction over the species, the National Oceanic and Atmospheric Administration’s (NOAA) National Marine Fisheries Service (NMFS) determined that protective regulations (a “4(d) rule”) are necessary and advisable for the conservation of the Southern DPS. A proposed rule, RIN 0648-AV94, will establish protective regulations for the Southern DPS and will apply all of the prohibitions listed under section 9(a)(1) of the ESA prohibiting the import, export, possession, sale, delivery, carrying, transport, shipment, and receipt in interstate or foreign commerce, or for commercial activity, of Southern DPS fish. The proposed rule would also prohibit the take of Southern DPS fish within the United States (U.S.), the U.S. territorial sea, or upon the high seas. Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct [ESA section 3(18)].

The proposed rule would establish exceptions to and exemptions from the take prohibitions for activities that NMFS determines to be adequately protective of the Southern DPS. Under the exceptions, specific activities would be excluded from the take prohibitions for the Southern DPS through a relatively informal coordination process. Under the exemptions, take of Southern DPS fish would be covered under a NMFS 4(d) program established and approved by NMFS through a formal process. The proposed rule also describes traditional methods for authorizing takes through ESA section 7 or 10. In all of these circumstances, NMFS will depend on voluntary adherence to criteria and reporting requirements, preparation of formal 4(d) program packages, or submission of materials necessary to receive ESA permits so that: NMFS can: 1) assess the effects of the takes; 2) determine what category those takes fall under (i.e., excepted, exempted, prohibited); 3) approve 4(d) program plans or ESA applications that ultimately will authorize the takes.

2. Explain how, by whom, how frequently, and for what purpose the information will be used. If the information collected will be disseminated to the public or used to support information that will be disseminated to the public, then explain how the collection complies with applicable information quality guidelines.

To comply with the ESA and the regulations, entities must obtain take authorization prior to engaging in activities involving take of Southern DPS fish unless take is covered by an exception, an exemption, an ESA section 7 incidental take statement, or an ESA section 10

permit. Under an exception, certain activities would not be subject to the take prohibitions if they adhere to specific criteria and reporting requirements as specified in the 4(d) rule. Under an exemption, the take prohibitions would not apply to scientific research or monitoring, fisheries, or tribal resource management activities conducted under an approved 4(d) Program. Take authorization for Federal agency actions may be granted under an ESA section 7 incidental take statement. Take authorization for non-Federal actions may be granted under an ESA section 10(a)(1)(A) or 10(a)(1)(B) permit.

In order to ensure that activities qualify under the exceptions to or exemptions from the take prohibitions, local, state, and federal agencies, non-governmental organizations, academic researchers, and private organizations are asked to voluntarily submit detailed information regarding their activity on a schedule to be determined by NMFS staff. This information will be used by NMFS to (1) track the number of Southern DPS fish taken as a result of each action; (2) understand and evaluate the cumulative effects of each action on the Southern DPS; and (3) determine whether additional protections are needed for the species, or whether additional exceptions may be warranted. NMFS designed the criteria to ensure that plans meeting the criteria would adequately limit impacts on threatened Southern DPS fish, such that additional protections in the form of a federal take prohibition would not be necessary and advisable.

The information collection for exceptions is described below:

- (1) Federal, state or private-sponsored research or monitoring activities; entities are asked to:
 - (a) Show that the activity complies with required state reviews or permits and NMFS sturgeon research protocols that are currently under development and will be finalized when the final 4(d) rule is published;
 - (b) Show that the research or monitoring activity is directed at the Southern DPS and not be incidental to research or monitoring of another species;
 - (c) Show that take of live mature adults in the lower Feather River from the confluence with the Sacramento River to the Oroville Dam (river kilometer (rkm) 116), the lower Yuba River from the confluence with the Feather River to the Daguerre Dam (rkm 19), or Suisun, San Pablo, and San Francisco Bays or the Sacramento-San Joaquin Delta from the Golden Gate Bridge up into the Sacramento River to Keswick Dam (rkm 483) only occurs from July 1 through March 1 so as to substantially increase the likelihood that uninterrupted upstream spawning migrations of adults will occur;
 - (d) Show that take is non-lethal;
 - (e) Show that take involving the removal of any life stage of the Southern DPS from the wild does not exceed 60 minutes;
 - (f) Show that take does not involve artificial spawning or enhancement activities;
 - (g) Provide a description of the study objectives and justification, a summary of the study design and methodology, estimates of the total non-lethal take of Southern DPS fish anticipated, estimates of incidental take of other ESA listed species anticipated and proof

that those takes have been authorized by NMFS or the U.S. Fish and Wildlife Service (USFWS), identification of funding sources, and a point of contact to NMFS at least 60 days prior to the start of the study;

(h) Include in the report the total number of Southern DPS and any other ESA listed species taken, information that supports that take was non-lethal, and a summary of the project results and submit this report to NMFS on a schedule to be determined by NMFS staff;

(i) Show that research or monitoring that involves action, permitting or funding by a federal agency complies with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS.

(2) Emergency fish rescue and salvage activities; entities are asked to:

(a) Show that the activity complies with required state or other Federal reviews or permits;

(b) Show that activities are conducted by an employee or designee of NMFS or the USFWS, any Federal land management agency, or California Department of Fish and Game (CDFG), Oregon Department of Fish and Wildlife (ODFW), Washington Department of Fish and Wildlife (WDFW), or Alaska Department of Fish and Game (ADFG);

(c) Show that the emergency rescue occurs because of emergency situations that result from natural disasters or national defense or security emergencies (see 50 CFR 402.05);

(d) Show that the emergency rescue benefits the Southern DPS;

(e) Submit a report to NMFS that includes, at a minimum, the number and status of fish handled and the location of rescue and/or salvage operations within 30 days after conducting the emergency rescue.

(3) Habitat restoration activities; entities are asked to:

(a) Show that the activity complies with required state and Federal reviews and permits;

(b) Send a detailed description of the restoration activity to NMFS at least 60 days prior to the start of the restoration project which includes: the geographic area affected; when activities will occur; how they will be conducted; and the severity of direct, indirect, and cumulative impacts of activities on the Southern DPS; identification of funding sources; demonstration that all state and federal regulatory requirements have been met; a description of methods used to ensure that the likelihood of survival or recovery of the listed species is not reduced; a plan for minimizing and mitigating any adverse impacts to Southern DPS spawning or rearing habitat; an estimate of the amount of incidental take of the listed species that may occur and a description of how that estimate was made; a

plan for effective monitoring and adaptive management; a pledge to use best available science and technology when conducting restoration activities; and a point of contact;

(c) Send progress reports that include the total number of Southern DPS taken, information regarding whether the take was lethal or non-lethal, a summary of the status of the project, and any changes in the methods being employed, to NMFS on a schedule to be determined by NMFS staff;

(d) Show that activities that involve action, permitting or funding by a federal agency comply with the requirements of ESA section 7(a)(2) in order to ensure that the action will not jeopardize the continued existence of the threatened Southern DPS.

The information collections for 4(d) Program exemptions below:

(a) Fishery Management and Evaluation Plans (FMEP): Commercial and recreational fisheries activities would not be subject to the take prohibitions if conducted under an approved FMEP. Green sturgeon are not targeted, but are taken as bycatch in fisheries for other species, such as white sturgeon, salmon, and groundfish. To qualify for the exemption, fishery management agencies would prepare an FMEP and submit the plan to NMFS. NMFS would evaluate the plan based on its completeness and potential impact on the Southern DPS. NMFS may approve the plan or return the plan to the agency for revision. New or amended FMEPs would be published in the Federal Register for public comment prior to approval by NMFS. Decisions to withdraw approval for an FMEP would also be published in the Federal Register and subject to public comment.

Fishery management agencies seeking take authorization under an FMEP would be required to submit in writing to NMFS:

(i) The FMEP, including: prohibitions on the retention of green sturgeon; a bycatch management strategy, including maximum bycatch levels for green sturgeon and biologically-based rationale demonstrating how the measures will protect the Southern DPS; and plans for monitoring and evaluation, enforcement, and education. NMFS would use this information to evaluate the potential impacts of the plan on the Southern DPS.

(ii) Biannual reports to NMFS, including: the number of green sturgeon taken in the fishery and an evaluation and summary of the effectiveness of the FMEP. NMFS would use the reports to evaluate the FMEPs and recommend changes to improve the effectiveness of the FMEPs.

(b) Tribal Fishery Management Plans (TFMP): Fishery harvest activities conducted by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent would not be subject to the take prohibitions if conducted in compliance with an approved TFMP. A TFMP may be developed by one tribe or jointly with other tribes and may vary in content. The Secretary of Commerce would consult with the tribe(s) on a government-to-government basis to provide technical assistance during development of a TFMP. The tribe or tribes would prepare a plan addressing fishery harvest activities and submit it to NMFS. NMFS would evaluate the plan based on its completeness and potential impact

on the Southern DPS. Approval would also be contingent on a determination by the Secretary of Commerce that the TFMP would not appreciably reduce the likelihood of survival or recovery of the Southern DPS. NMFS may approve the plan or return the plan to the tribe for revision. New or amended TFMPs and the Secretary's determination on the TFMP would be published in the Federal Register for public comment prior to approval.

- (c) State-sponsored scientific research programs: Scientific research activities involving incidental or direct take of listed species are typically authorized under ESA section 7 or 10. Establishment of state-sponsored scientific research programs between state fishery agencies and NMFS would provide an additional method for researchers to obtain take authorization. The programs would cover research and monitoring projects involving Southern DPS fish that are conducted by a state fishery agency (i.e., CDFG, ODFW, WDFW, or ADFG) or by recipients of a state fishery agency-issued permit. Such programs would help streamline the process for researchers, state agencies, and NMFS by allowing state fishery agencies to maintain primary responsibility for coordination and oversight of research activities. Each year, researchers would be required to submit research applications to the state fishery agency. State fishery agencies would evaluate and determine which projects are eligible for inclusion under the program and then transmit approved applications to NMFS for review and approval. Researchers would not be required to apply for a separate permit from NMFS. NMFS would continue to work with the state fishery agencies to ensure authorized research involving listed Southern DPS fish is both coordinated and conducted in a manner that prevents over-utilization of the resource.

State ESA 4(d) research programs have been developed and implemented in California, Oregon, and Washington for listed west coast salmon and steelhead. Within these programs, the state permit process has been adapted consistent with ESA requirements for research-related take of listed species. Green sturgeon would most likely be incorporated into the existing state ESA 4(d) research programs established for listed salmon and steelhead. Otherwise, the state would be required to prepare a program and submit it to NMFS for approval. NMFS may approve the program or return the program description to the agency for revision.

Under a state-sponsored scientific research program, the state fishery agency would be required to provide for NMFS' review and approval a list of all scientific research activities involving Southern DPS fish for the coming year, including for each project:

- (i) An estimate of the total direct or indirect take of Southern DPS fish that is anticipated;
- (ii) A description of the study design and methodology;
- (iii) A justification for take of Southern DPS fish and the techniques to be employed;
- (iv) A point of contact.

The state fishery agency would also be required to submit to NMFS an annual report that includes, for each project:

- (i) A summary of the number of green sturgeon taken directly or incidentally; and
- (ii) A summary of the results of the project, in order for NMFS to evaluate the effects of the research project on the Southern DPS.

It is anticipated that some of the information collected will be disseminated to the public or used to support publicly disseminated information. As explained in the preceding paragraphs, the information gathered has utility. NOAA's NMFS will retain control over the information and safeguard it from improper access, modification, and destruction, consistent with NOAA standards for confidentiality, privacy, and electronic information. See response to Question 10 of this Supporting Statement for more information on confidentiality and privacy. The information collection is designed to yield data that meet all applicable information quality guidelines. Prior to dissemination, the information will be subjected to quality control measures and a pre-dissemination review pursuant to Section 515 of Public Law 106-554.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.

The rule would not require any particular method of submission of plans or reports. A web-based system was developed for the state of Oregon's ESA 4(d) research program for listed salmon and steelhead Evolutionarily Significant Units (ESU), and is currently available for use by applicants in Oregon, Washington, and Idaho. Such a web-based system has also been developed for CDFG's ESA 4(d) research program for listed salmonids. The web-based system has helped streamline and standardize the application and authorization process for researchers, as well as the review process for state and NOAA biologists. Any state sponsored scientific research program developed for Southern DPS green sturgeon would likely be able to use the web-based system, or develop a similar web-based system.

Web-based systems have not been developed for the other exceptions or exemptions, but may be developed in the future. At the least, a summary of the criteria and instructions on how to apply for each exception would be posted on the NMFS website.

4. Describe efforts to identify duplication.

Several of the exemptions under the proposed 4(d) rule were modeled after "limits" established in a 4(d) rule for listed West Coast salmon and steelhead. Thus, several of the information collections are similar to those required under the 4(d) rule for listed salmon and steelhead: (1) FMEPs; (2) TFMPs; and (3) state-sponsored scientific research programs. The collections for exceptions are unique to the Southern DPS. Although several of the collections are similar, separate collections are necessary for the Southern DPS because: (1) the plans and reports collected for listed salmon and steelhead do not address Southern DPS fish; and (2) the specific criteria for the plans and reports differ from those under the collections for listed salmon and steelhead.

In some cases, Southern DPS green sturgeon may be incorporated into existing programs. For example, NMFS would plan to incorporate Southern DPS green sturgeon into existing state-sponsored scientific research programs developed for listed salmon and steelhead ESUs in California, Oregon, and Washington. This would reduce the number of burden hours required by state fishery agencies to develop the programs. State fishery agencies may also choose to combine the annual reports for Southern DPS fish and listed salmon and steelhead ESUs into one report, because several studies may involve both Southern DPS fish and listed salmon and steelhead ESUs. In addition, existing water diversion screening programs may be revised to address concerns specific to Southern DPS green sturgeon.

In the absence of exceptions and the 4(d) rule exemptions, NMFS provides ESA coverage through section 10 research, enhancement, and incidental take permits for private entities, or through section 7 consultation with Federal agencies. The ESA section 7 and section 10 processes have their own specific reporting requirements associated with them.

5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.

None of these collections would have a significant impact on small entities. Most of the affected entities are state, local, tribal or Federal government.

6. Describe the consequences to the Federal program or policy activities if the collection is not conducted or is conducted less frequently.

If NMFS were not to provide exceptions or exemptions to the take prohibitions, then entities would be required to obtain take authorization under an ESA section 10 permit for non-Federal agency actions, or an ESA section 7 consultation for Federal agency actions. Without an ESA section 10 permit or a completed ESA section 7 consultation, the entity would remain at risk of ESA enforcement for violation of the take prohibitions. In some cases, the exceptions would provide a more stream-lined process and facilitate coordination among the entities, the States, and NMFS. In addition, the protective measures implemented under the plans and programs may benefit other species.

The information collections under the exceptions and exemptions would serve several purposes, each vital to NMFS' ability to protect and conserve the Southern DPS. The information collections (i.e., the plans, programs, and reports) would: (1) inform NMFS of proposed actions that may result in take of Southern DPS fish; (2) allow NMFS to evaluate and provide feedback on the potential effects of actions on the Southern DPS and to determine whether the actions meet criteria under the exceptions; and (3) provide NMFS with data and regular updates on the actions. Not collecting plans and programs, or collecting reports less frequently, would hinder NMFS' ability to provide for the conservation of the Southern DPS.

7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.

This information collection is consistent with OMB guidelines (5 CFR 1320.6).

8. Provide information on the PRA Federal Register Notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

A proposed rule, Regulation Identifier Number (RIN) 0648-AV94, to establish protective regulations under section 4(d) of the ESA for the threatened Southern DPS of green sturgeon, was published in the Federal Register on May 21, 2009 (74 FR 23822) seeking public comment on the proposed protective regulations and the proposed information collections.

9. Explain any decisions to provide payments or gifts to respondents, other than remuneration of contractors or grantees.

No payments, gifts, or remuneration are associated with these voluntary collections of information.

10. Describe any assurance of confidentiality provided to respondents and the basis for assurance in statute, regulation, or agency policy.

There are no assurances of confidentiality associated with these voluntary collections of information. The information supplied would be a matter of public record.

11. Provide additional justification for any questions of sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

No questions of a sensitive nature are included in this information collection.

12. Provide an estimate in hours of the burden of the collection of information.

The estimated total number of respondents is 38. The total number of annual responses is 67, and the recordkeeping and reporting burden to the general public for the green sturgeon 4(d) rule take exceptions is estimated to be 1,528 hours per year. The estimated annual labor cost to the general public to apply for coverage under the green sturgeon 4(d) rule take exceptions and to comply with the requirements under the exceptions is approximately \$27,495. Table 1 summarizes the estimated annual number of responses, average hours per response, total annual hours, labor cost per response, and total annual labor costs for each information collection.

13. Provide an estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection (excluding the value of the burden hours in Question 12 above).

The estimated total number of respondents is 38, and the estimated annual cost to the general public, excluding burden hours, such as maintenance and submission costs associated with the green sturgeon 4(d) rule take exceptions and exemptions, is approximately \$185.63 (rounded to

\$189 in ROCIS). There are no capital or start-up costs associated with this information collection. Table 2 summarizes the annual number of responses, average operations and maintenance costs per response, and total annual operations and maintenance costs for each information collection.

14. Provide estimates of annualized cost to the Federal government.

The estimated annual costs for processing submissions for the green sturgeon 4(d) rule take exceptions and exemptions and responding to the reporting requirements to the Federal government was determined by calculating the total time necessary for staff to complete the response and multiplying the amount by \$18 per hour. The total annual estimated cost to the Federal government is \$17,406. Table 3 summarizes the annual number of responses, average processing time per response, total annual processing hours, cost per response, and total annual costs for each information collection.

15. Explain the reasons for any program changes or adjustments.

Not applicable. This is a new information collection.

16. For collections whose results will be published, outline the plans for tabulation and publication.

As described above under Question 2, several of the plans and programs would be required to be published in the Federal Register for public comment prior to approval under the exceptions. NMFS plans to make available on the NMFS Southwest Region website the approved plans and programs and annual reports submitted in compliance with the requirements under the exceptions.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.

Not applicable.

18. Explain each exception to the certification statement.

Not applicable.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable. This information collection request does not employ statistical methods.

Table 1. Summary of the estimated annual number of responses, average hours per response, total annual burden hours, labor cost per response, and total annual labor costs to the public resulting from the information collections.

Information Collection	Annual # Responses	Av. Hours Per Response	Total Annual Hours	Labor Cost Per Response (@\$18/Hr)	Total Annual Labor Costs
Scientific Research/monitoring exception	10	40	400	\$720	\$7,200
Scientific Research/monitoring exception report	10	5	50	\$90	\$900
Emergency fish rescue reports	3	5	15	\$90	\$270
Habitat Restoration exception	10	40	400	\$720	\$7,200
Habitat Restoration exception report	10	5	50	\$90	\$900
FMEP	10	40	400	\$720	\$7,200
FMEP report (biannual)	5	2.5	12.5	\$45	\$225
TFMP	1	20	20	\$360	\$360
State research program	4	40	160	\$720	\$2,880
Research reports	4	5	20	\$90	\$360
TOTAL	67		1,527.5		\$27,495

Table 2. Summary of the estimated annual number of responses, average operations and maintenance costs per response, and total annual operations and maintenance costs to the public resulting from the information collections.

Information Collection	Annual # Responses	Av. Operations & Maintenance Costs Per Response	Total Annual Operations & Maintenance Costs
Scientific Research/monitoring exception	10	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$26.50
Scientific Research/monitoring exception report	10	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$26.50
Emergency fish rescue reports	3	\$1.00 (copy) + \$1.65 (postage) = \$1.65	\$7.95
Habitat Restoration exception	10	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$26.50
Habitat Restoration exception report	10	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$26.50
FMEP	10	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$26.50
FMEP report (biannual)	5	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$13.25
TFMP	1	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$2.65
State research program	4	\$2.00 (copy) + \$2.67 (postage) = \$4.67	\$18.68
Research reports	4	\$1.00 (copy) + \$1.65 (postage) = \$2.65	\$10.60
TOTAL	67		\$185.63 (ROCIS rounded to \$189)

Table 3. Summary of the estimated annual number of responses, average Federal government processing hours per response, total annual processing hours, average cost to process each response, and total annual costs to the Federal government resulting from the information collections.

Information Collection	Annual # Responses	Av. Processing Hours Per Response	Total Annual Processing Hours	Cost Per Response (@\$18/Hr)	Total Annual Costs
Scientific Research/monitoring exception	10	20	200	\$360	\$3,600
Scientific Research/monitoring exception report	10	8	80	\$144	\$1,440
Emergency fish rescue reports	3	5	15	\$90	\$270
Habitat Restoration exception	10	20	200	\$360	\$3,600
Habitat Restoration exception report	10	8	80	\$144	\$1,440
FMEP	10	20	200	\$360	\$3,600
FMEP report (biannual)	5	8	40	\$72	\$720
TFMP	1	40	40	\$720	\$720
State research program	4	20	80	\$360	\$1,440
Research reports	4	8	32	\$144	\$576
TOTAL	67		967		\$17,406