



TULANE LAW SCHOOL

TULANE ENVIRONMENTAL LAW CLINIC

May 17, 2018

Via Certified Mail # 7013 0600 0001 9892 2990

Return Receipt Requested

Chuck Carr Brown,
Secretary
Louisiana Department of Environmental Quality
602 North Fifth Street
Baton Rouge, LA 70802

Via Certified Mail # 7013 0600 0001 9892 3102

Return Receipt Requested

Ryan Zinke, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Via Certified Mail # 7013 0600 0001 9892 3133

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Scott Pruitt, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code 1101A
Washington, DC 20460

Via Certified Mail # 7013 0600 0001 9892 3119

Return Receipt Requested

Wilbur Ross, Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Via Certified Mail # 7013 0600 0001 9892 3126

Return Receipt Requested

Anne Idsal, Regional Administrator
U.S. EPA, Region 6
Fountain Place 12th Floor, Suite 1200
1445 Ross Avenue
Dallas, TX 75202-2733

**Re: Sixty-Day Notice of Intent to Sue: Violations of the Endangered Species Act
Regarding the Effects of the Agencies' Approval and Promulgation of
Revised Dissolved Oxygen Criteria on Listed Species and Critical Habitat**

Dear Secretary Brown, Mr. Pruitt, Ms. Idsal, Mr. Zinke and Mr. Ross:

We write to provide notice under Endangered Species Act (ESA) Section 11(g)(2)(A)(i), 16 U.S.C. § 1540(g)(2)(A)(i), that the Gulf Restoration Network, Little Tchefuncte River Association, Sierra Club Delta Chapter, Louisiana Audubon Council, and the Louisiana Environmental Action Network ("Parties") intend to file a citizen suit pursuant to ESA section 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A), against the U.S. Environmental Protection Agency, Administrator Scott Pruitt and Regional Administrator Anne Idsal (collectively, EPA) for violations of Section 7 of the ESA.

Tulane Environmental Law Clinic

6329 Freret St., Ste. 130, New Orleans, LA 70118-6248 tel 504.865.5789 fax 504.862.8721 www.tulane.edu/~telc

Further, the parties intend to file a citizen suit against Louisiana Department of Environmental Quality (LDEQ) and/or Secretary Chuck Carr Brown (collectively, LDEQ) for violations of Section 7 and Section 9 of the ESA.

When, in 2015, the LDEQ promulgated WQ091, putting in place drastically lower dissolved oxygen criteria applicable to thirty-one Louisiana inland rivers and streams, pursuant to Section 303(c) of the Clean Water Act, it failed to insure, through consultation with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (collectively, “Services”), that its action was not likely to jeopardize the continued existence of ESA-listed species, including the Atlantic sturgeon (Gulf subspecies) (hereinafter “Atlantic sturgeon”) and the Alabama (inflated) heelsplitter mussel (hereinafter “Alabama heelsplitter”), and that the criteria would not likely result in the destruction or adverse modification of the Atlantic sturgeon’s critical habitat.[1] These failures constitute violations of ESA section 7(a)(2).[2] Additionally, LDEQ is issuing LPDES permits which allow pollutants to be discharged into streams based on the revised criteria. These permits include, but are not limited to, LAG53000. The LDEQ’s issuance of permits allowing discharges based on the revised criteria into subsegments where the Atlantic sturgeon and Alabama heelsplitter may occur and which are listed as critical habitat for the Atlantic sturgeon constitutes a taking under the ESA Section 9.

Nor did the EPA consult with the Services before approving the criteria. To date, EPA has failed to complete consultation on the effect of its approval on listed species. EPA, therefore, violated, and continues to be in violation of, ESA Section 7. EPA is additionally in violation of Section 7 because it has failed to ensure that its approval action is not likely to jeopardize the Alabama heelsplitter or Atlantic sturgeon or result in the destruction or adverse modification of the Atlantic sturgeon’s critical habitat. Indeed, EPA’s approval in fact jeopardizes the continued existence of the Atlantic sturgeon and the Alabama heelsplitter and results in the adverse modification of Atlantic sturgeon critical habitat.

Factual Background

On December 20, 2015, the LDEQ published a rule—designated WQ091—lowering the dissolved oxygen criteria from 5.0 mg/L to 2.3 mg/L for the months of March through November for thirty-one inland streams north and west of Lakes Pontchartrain and Maurepas extending south and west to the Mississippi River (“revised criteria”) (see map attached as Exhibit A). On June 3, 2016, EPA approved the criteria as promulgated by LDEQ. Neither the EPA nor the LDEQ consulted with the FWS or the NMFS prior to promulgating and approving the revised criteria. Neither agency evaluated the impacts of the revised criteria on species listed under the Endangered Species Act, including the Atlantic sturgeon and the Alabama heelsplitter, before promulgating and approving the criteria.

The Atlantic sturgeon and Alabama heelsplitter occur in many of the waterbody subsegments to which the revised criteria apply, and the revised criteria apply to subsegments designated as critical habitat for the Atlantic sturgeon. The LDEQ-EPA Memorandum of Understanding implementing the ESA attached as Exhibit B includes the FWS’s listing of waterbody subsegments in Louisiana in which listed species are known to occur and which are designated critical habitat for the Gulf sturgeon. FWS lists the Atlantic sturgeon as occurring in many of the subsegments which are subject to the new dissolved oxygen criteria: 040302, 040305, 040401, 040402, 040502 (which is now 040506), 040503 (part of which is now 040507), 040505 (part of which is now 040508), 040601, 040604, 040702, 040801 (part of which is now 040807), 040802 (which is now 040808), 040901 and 040902 (part of which are now 040912 and 040913), 040904 (part of which is now 040914), 040905 (part of which is now included in 040915), and 040908 (part of which is now included in 040917).

Exhibit B. The Alabama heelsplitter is known to occur in subsegment 040302, formerly “Amite River From LA 37 to Amite River Diversion Canal.” Though current subsegment 040302 is not one of the subsegments to which the new criteria apply, the new criterion applies to newly-created subsegment 040306 (“Amite River-From LMRAP Ecoregion boundary to Amite River Diversion Canal”), which contains part of what was formerly designated as 040302.

Evidence indicates that the drastically lower dissolved oxygen criteria in thirty-one rivers in the eastern Lower Mississippi River Alluvial Plains Ecoregion (“the Ecoregion”) will jeopardize and adversely affect the Atlantic sturgeon, particularly the most susceptible stages of the Atlantic sturgeon’s life cycle – the larval and juvenile stages. According to the 2007 status review of the Atlantic sturgeon jointly produced by NMFS, FWS, and USGS, “juvenile Atlantic sturgeon are less tolerant of summer-time hypoxia than juveniles of other estuarine species,” and in order to mitigate unnecessary risk to such susceptible life stages, “most Atlantic states impose work restrictions during sensitive time periods (spawning, migration, feeding) when anadromous fish, [like the Atlantic sturgeon] are present.” February 23, 2007, *Status Review of Atlantic Sturgeon* at 34. Because the revised DO criterion of 2.3 mg/L applies from March through November, it will apply in the freshwater streams and designated critical habitats where the Atlantic sturgeon goes to spawn at the same time the sturgeon spawns.

Further, the agencies’ promulgation and approval of the revised criteria harm the Atlantic sturgeon by significantly modifying or degrading habitat in such a way as to actually kill or injure Atlantic sturgeon. Permits for new and expanded discharges into the affected streams are based on the lower dissolved oxygen standard. Thus, the Atlantic sturgeon’s sensitive life stages that occur in those very waters could, as a result, be faced with “complete mortality.” Chesapeake Bay Guidance at 29 (finding that DO levels of 2.8 to 3.3 mg/L at 26 degrees Celsius for a period of ten days resulted in complete mortality in three of four replicates). Further, the lowered dissolved oxygen level impairs the Atlantic sturgeon’s behavior patterns of breeding, feeding, and sheltering.

The parties previously notified the EPA of their intent to sue under the ESA for failure to consult before approving the revised criteria.[3] After receiving the notice letter, EPA initiated informal consultation on its approval action with the FWS and completed a Biological Evaluation on October 5, 2017. EPA provided its Biological Evaluation to the FWS on October 27, 2017. In its January 24, 2018, response, the FWS indicated that it could not consult on the EPA approval action because it cannot consult on already-completed actions. Exhibit C. It, nevertheless, told EPA: “We believe the Action may allow subsequent State actions that may cause adverse effects to the Alabama heelsplitter within stream segment 040306 of the Amite River and to the Atlantic sturgeon in multiple stream segments within the Lake Pontchartrain Basin.” The FWS copied LDEQ with this information.

Upon information and belief, EPA has not promulgated dissolved oxygen criteria in the place of the revised criteria to prevent jeopardy to the Atlantic sturgeon or Alabama heelsplitter or the destruction or adverse modification of Atlantic sturgeon critical habitat at any time during its informal consultation process, and, upon information and belief, has not done so to date. Likewise, on information and belief, LDEQ has taken no action since promulgating the revised criteria to prevent jeopardy to the Atlantic sturgeon or Alabama heelsplitter or the destruction or adverse modification of Atlantic sturgeon critical habitat. Instead, upon information and belief, LDEQ is issuing permits allowing the discharge of pollutants into the affected streams based on the revised criteria.

Alleged Violations of the Endangered Species Act

The citizen suit provision of the Endangered Species Act provides that “any person may commence a civil suit on his own behalf [] to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.”[4]

Section 7(a)(2) of the ESA requires that agencies “shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . .” [5] Further, Section 9 of the ESA provides “with respect to any endangered species of fish or wildlife . . . it is unlawful for any person . . . to . . . [B] take any such species with the United States . . .” [6] Take means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or any attempt to do the above actions. [7] Federal regulations further define harm, within the scope of a taking, to mean “act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” [8] One of the primary constituent elements of the Atlantic sturgeon’s critical habitat is “oxygen content, and other chemical characteristics, necessary for normal behavior, growth, and viability of all life stages . . .”[9]

The revised dissolved oxygen criteria are likely to jeopardize the Atlantic sturgeon and pose a particular threat to the sensitive life stages of the Atlantic sturgeon. Atlantic sturgeon are especially sensitive to lowered dissolved oxygen, and a dissolved oxygen level of 2.3 mg/L in the listed subsegments poses a direct threat to the larval and juvenile stages of the Atlantic sturgeon as they are unable to survive and thrive in hypoxic conditions. Further, because the revised dissolved oxygen criterion of 2.3 mg/L applies from March through November, it will apply in the freshwater streams where the Atlantic sturgeon goes to spawn at the same time that the sturgeon spawns.

Through its action approving the revised criteria, the EPA is in violation of section 7(a)(2) of the ESA because it: 1) failed, and continues to fail, to complete consultation with the FWS prior to approving the revised criteria; 2) failed, and continues to fail, to ensure that its approval action is not likely to jeopardize the continued existence of the Alabama heelsplitter and the Atlantic sturgeon or result in the destruction or adverse modification of the Atlantic sturgeon’s critical habitat; and 3) jeopardizes the continued existence of the Gulf sturgeon and Alabama heelsplitter and results in the adverse modification of the Gulf sturgeon’s critical habitat. EPA’s Biological Evaluation concluding that “the approval of Louisiana’s minimum DO criterion of 2.3 mg/L is not likely to adversely affect (NLAA) the Atlantic sturgeon” or the Alabama heelsplitter is arbitrary and capricious and inadequate to ensure that its approval action is not likely to jeopardize the continued existence of the Alabama heelsplitter and the Atlantic sturgeon. As the FWS stated, the BE “did not evaluate how listed species individuals and relevant physical and biological features of designated critical habitat are reasonably certain to respond to exposure to water quality conditions as specified under the revised criteria . . .” Exhibit C at 2. Further, because EPA cannot complete consultation on its approval, EPA will remain in violation of the Endangered Species Act unless and until it rescinds its approval, issues a disapproval, and promulgates a criterion of 5.0 mg/l (4.0 mg/L for estuarine waters).

Through its action promulgating the revised criteria, the LDEQ is in violation of Section 7(a)(2) of the ESA because it: 1) failed, and continues to fail, to complete consultation with the FWS prior to promulgating the revised criteria; 2) failed, and continues to fail, to ensure that its promulgation of the revised criteria is not

5/17/18

Page 5 of 7

likely to jeopardize the continued existence of the Alabama heelsplitter and the Atlantic sturgeon or result in the destruction or adverse modification of the Atlantic sturgeon's critical habitat; and 3) jeopardizes the continued existence of the Gulf sturgeon and Alabama heelsplitter and results in the adverse modification of the Gulf sturgeon's critical habitat.

Further, the LDEQ's issuance of permits allowing the discharge of pollutants, based on the revised criteria, into the above-listed subsegments in which the Alabama heelsplitter and Atlantic sturgeon are likely to occur, and subsegments which are listed as critical habitat for the Atlantic sturgeon constitutes a taking in violation of Section 9 of the ESA. The LDEQ's permitting actions harm the Atlantic sturgeon by significantly modifying or degrading habitat in such a way as to actually kill or injure Atlantic sturgeon. The lowered dissolved oxygen impairs essential behavioral patterns of the Atlantic sturgeon, including breeding, feeding, and sheltering.

Persons Giving Notice

The full name, address, and telephone number of the parties providing this notice are as follows:

Gulf Restoration Network
P.O. Box 2245
New Orleans, Louisiana 70176
(504) 525-1528

Little Tchefuncte River Association
c/o Matthew Allen
13058 Major Lane
Folsom, LA 70437
(985) 867-1499

Louisiana Audubon Council
c/o Barry Kohl
1522 Lowerline Street
New Orleans, LA 70118
(504) 861-8465

Sierra Club, Delta Chapter
c/o Julie Rosenzweig
P.O. Box 52503
Lafayette, LA 70505
(337) 577-8494

Louisiana Environmental Action Network
P.O. Box 66323
Baton Rouge, LA 70896
(225) 928-1315

Identification of Counsel

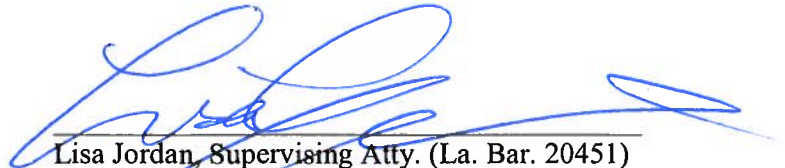
Lisa Jordan, La. Bar No. 20451
Tulane Environmental Law Clinic
6329 Freret Street
New Orleans, LA 70118
Phone: (504) 865-5789
Direct: (504) 314-2481
Fax: (504) 862-8721
Email: lwjordan@tulane.edu

Conclusion

If a lawsuit is necessary to resolve this matter, the Gulf Restoration Network, Little Tchefuncte River Association, Sierra Club Delta Chapter, Louisiana Audubon Council, and the Louisiana Environmental Action Network may seek declaratory and injunctive relief, as well as costs of litigation.

If you believe any of the contents of this letter to be in error, or otherwise wish to discuss the violations alleged in this letter, please contact counsel for the citizen groups. Thank you.

Sincerely,



Lisa Jordan, Supervising Atty. (La. Bar. 20451)
Tulane Environmental Law Clinic
6329 Freret Street
New Orleans, LA 70118
Tel. No. (504) 865-5789
Direct: (504) 314-2481
Fax No. (504) 862-8721

cc: Via Certified Mail # 7013 0600 0001 9892 3096

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Attorney General Jefferson Beauregard Sessions III
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Via Certified Mail # 7013 0600 0001 9892 3140

Return Receipt Requested

United States Fish and Wildlife Service
Office of Endangered Species
4401 N. Fairfax Drive, Rm. 420
Arlington, VA 22303

[1] Both species are listed at 50 C.F.R. § 17.11(h). The Atlantic sturgeon was listed in 56 Fed. Reg. 49653 (Sept. 30, 1991) and the Alabama heelsplitter was listed in 55 Fed. Reg. 39868 (Sept. 28, 1990).

[2] 16 U.S.C. § 1536.

[3] January 10, 2017, Sixty-Day Notice of Intent to Sue.

[4] 16 U.S.C. § 1540(g)(1)(A).

[5] 16 U.S.C. § 1536(a)(2).

[6] 16 U.S.C. § 1538(a)(1).

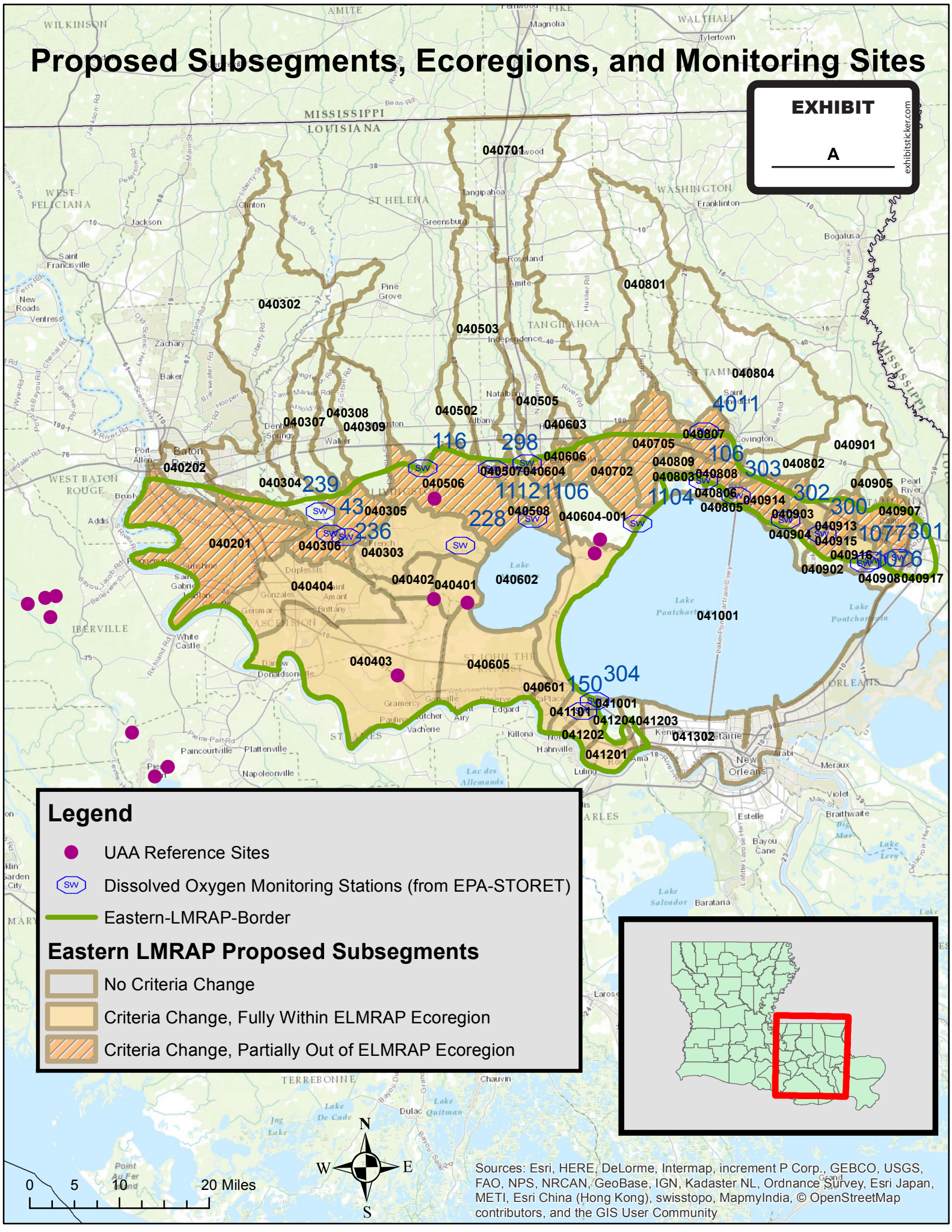
[7] 16 U.S.C. § 1532(19).

[8] 50 C.F.R. § 17.3.

[9] 50 CFR § 226.214.

Proposed Subsegments, Ecoregions, and Monitoring Sites

EXHIBIT
A
exhibitsticker.com



Legend

- UAA Reference Sites
- SW Dissolved Oxygen Monitoring Stations (from EPA-STORET)
- Eastern-LMRAP-Border

Eastern LMRAP Proposed Subsegments

- No Criteria Change
- Criteria Change, Fully Within ELMRAP Ecoregion
- Criteria Change, Partially Out of ELMRAP Ecoregion



Sources: Esri, HERE, DeLorme, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), swisstopo, MapmyIndia, © OpenStreetMap contributors, and the GIS User Community



United States Department of the Interior

FISH AND WILDLIFE SERVICE
646 Cajundome Blvd.
Suite 400
Lafayette, Louisiana 70506



May 18, 2016

Mr. Elliot B. Vega
Assistant Secretary
Office of Environmental Services
Louisiana Dept. of Environmental Quality
Post Office Box 4313
Baton Rouge, Louisiana 70821-4313

Dear Mr. Vega:

Please reference our March 22, 1996, Memorandum of Understanding (MOU) with the Louisiana Department of Environmental Quality (LDEQ) regarding federally listed threatened and endangered species, and the Louisiana Pollutant Discharge Elimination System (LPDES) program. In accordance with the terms of that MOU, the Fish and Wildlife Service (Service) is pleased to provide LDEQ with the enclosed current list of sensitive areas (i.e., waters deemed important for the conservation of threatened and endangered species). In September 1996, our agencies developed an implementation strategy for the Scope-of-Work section of the subject MOU. That strategy (which has been updated annually since 1997) included a list of sensitive areas, types of permits, notices of intent, substances of concern, and listed species for which the Service has requested coordination, in accordance with provisions of the Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.).

As we have done in the past, the Service intends to continue that implementation strategy (enclosed) for this federal fiscal year (October 2015 through September 2016). We have also reviewed the revised subsegment boundaries LDEQ provided us on March 21, 2016. We have also enclosed some specific species information that should provide additional guidance in determining whether LDEQ should coordinate with the Service for certain permitted discharges to the listed sensitive waterbodies. In addition, please take note of the inclusion of selenium in the list of substances of interest in Section II.2.1.

The Service appreciates the continuing cooperation of LDEQ in the conservation of federally listed species. If you or your staff have any comments or require further information, please have them contact Ms. Amy Trahan (337/291-3126) of this office.

2016 MAY 20 10:10:19

Sincerely,

A handwritten signature in black ink, appearing to read "Darryl Clark". The signature is fluid and cursive, with a large initial "D" and a long, sweeping underline.

Darryl Clark
Acting Field Supervisor
Louisiana Ecological Services Office

Enclosures

cc: Mr. Matt Hubner, EPA, 6WQ-EW, Dallas, TX
Mr. Scott Guilliams, LDEQ-WQAD, Baton Rouge, LA
Mr. Bruce Fielding, LDEQ, Baton Rouge, LA
Ms. Heather Babin, LDEQ, Baton Rouge, LA
Ms. Steph Braden, LDEQ, Baton Rouge, LA
LDWF, Natural Heritage Program, Baton Rouge, LA

**2015-2016 Implementation Strategy for the
Louisiana Department of Environmental Quality
and the U.S. Fish and Wildlife Service
Memorandum of Understanding**

Section II. Scope of Work

Section II.1 LDEQ and the Service will follow the procedures described in the MOU. The Service, by November 1, 2016, will provide LDEQ a list of all federally listed threatened and endangered species in Louisiana that are dependant on aquatic habitat.

<u>SPECIES</u>	<u>HYDROLOGIC SUBSEGMENTS</u>
Alabama (= inflated) heelsplitter mussel	040101, 040103, 040302
Fat pocketbook mussel	070101, 070201
Atlantic sturgeon, critical habitat*	040102, 040103, 040301, 040302, 040303, 040304, 040305, 040401, 040402, 040501-040503, 040505, 040601, 040602, 040604, 040701- 040704, 040801-040804, 040901, 040902, 040904, 040905, 040906, 040908, 040910, 040911, 041001, 041002, 041301, 041302, 041401, 041701, 041702, 041703, 041704, 041901, 042001-042004, 042201, 042202, 042203-042206, 042207, 042209, 070601, 090101-090107, 090201-090208, 090301, 090401, 090501, 090506
	<i>*See Addendum for additional information.</i>
Louisiana pearlshell mussel	060208, 060209, 101301, 101302
Louisiana quillwort	040804, 040904, 090501, 090506
Pallid sturgeon	010101, 010201, 010501, 010502, 010801-010803, 070101, 070103, 070201, 070301, 070502, 100101, 100201
Pink mucket pearly mussel	080101, 080401, 080701

Rabbitsfoot mussel	080101, 080401, 080701
Ringed map (= sawback) turtle	090101-090106 (excluding 090104), 090201-090207, 090501, 090502
West Indian manatee	040302, 040401, 040403, 040501, 040502, 040503, 040601, 040602, 040702, 040902, 040904, 040906, 040908, 040911, 041001, 041002, 041701, 041703, 041704, 042001, 042101, 042202

Section II.2 LDEQ and the Service will follow the procedures described in the MOU except that the Service will only request coordination on those permits that fall into one or more of the following seven categories:

1. The proposed permit occurs in a subset of sensitive waters defined as those subsegments where the following species occur, and the regulated discharge contains one or more of the substances listed below:

<u>SPECIES</u>	<u>HYDROLOGIC SUBSEGMENTS</u>
Alabama (= inflated) heelsplitter mussel	040101, 040103, 040302
Fat pocketbook mussel	070101, 070201
Atlantic sturgeon, critical habitat*	040102, 040103, 040301, 040302, 040303, 040304, 040305, 040401, 040402, 040501-040503, 040505, 040601, 040602, 040604, 040701- 040704, 040801-040804, 040901, 040902, 040904, 040905, 040906, 040908, 040910, 040911, 041001, 041002, 041301, 041302, 041401, 041701, 041702, 041703, 041704, 041901, 042001-042004, 042201, 042202, 042203-042206, 042207, 042209, 070601, 090101-090107, 090201-090208, 090301, 090401, 090501, 090506

*See Addendum for additional information.

Louisiana pearlshell mussel	060208, 060209, 101301, 101302
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Louisiana quillwort	040804, 040904, 090501, 090506
Pallid sturgeon	010101, 010201, 010501, 010502, 010801-010803, 070101, 070103, 070201, 070301, 070502, 100101, 100201
Pink mucket pearly mussel	080101, 080401, 080701
Rabbitsfoot mussel	080101, 080401, 080701
Ringed map (= sawback) turtle	090101-090107 (excluding 090104), 090201-090206, 090501, 090502
West Indian manatee	040302, 040401, 040403, 040501, 040502, 040503, 040601, 040602, 040702, 040902, 040904, 040906, 040908, 040911, 041001, 041002, 041701, 041703, 041704, 042001, 042101, 042202

Substances

Endosulfan
 Hexachlorobenzene
 2,3,7,8-Tetrachlorodibenzo-p-dioxin (2,3,7,8-TCDD)
 Arsenic
 Chromium III
 Chromium VI
 Zinc
 Cadmium
 Copper
 Lead
 Mercury
 Nickel
 Cyanide
 Pentachlorophenol (PCP)
 Selenium; or

2. The proposed permit is for a major (i.e., flow of one million gallons per day or more) sanitary sewage treatment facility (not covered under a General Permit for Class I, II, III, or IV Sanitary Dischargers), and is located in the sensitive areas described in Section II.2.1; or
3. The proposed permit is for a landfill (other than those covered under Construction/Demolition Debris and Woodwaste Landfill [LAG780000] and

Municipal Solid Waste Landfill [LAG660000] General Permits) and is located in the subset of sensitive areas described in Section II.2.1; or

4. The proposed permit is for a facility applying for coverage under the General Permit for Cement, Concrete, and Asphalt Facilities (LAG110000) and is located in the sensitive areas described in Section II.2.1; or
5. The proposed permit is for an electrical generating facility located in the sensitive areas described in Section II.2.1; or
6. The proposed permit is for a sand and gravel operation (including those applying for coverage under the General Permit for Sand and Gravel Extraction Facilities [LAG490000]) and is located in a subset of sensitive waters expected to support the Louisiana quillwort (subsegments 040804, 040904, 090501, 090506), the Alabama heelsplitter mussel, the Louisiana pearlshell mussel, the fat pocketbook mussel, the pink mucket pearly mussel, the rabbitsfoot mussel, the Atlantic sturgeon, the pallid sturgeon, or the ringed map turtle; or,
7. The proposed permit is for a facility utilizing a cooling water intake structure that is regulated under §316(b) of the Clean Water Act and is located in the sensitive areas described in Section II.2.1.

If a proposed permit falls into one or more of the above categories, the proposed discharge may affect a listed species and coordination should be initiated with the Service to: (1) determine if an adverse effect exists, and (2) explore ways to remove the effect.

Because hydrologic subsegments often cover large geographic areas, it is expected (for species with restricted distributions) that some proposed permits located in sensitive areas may not affect a species because the species is not actually present at that proposed discharge site. However, if an effect exists and that effect can be removed, a “not likely to adversely affect” determination will be made by LDEQ on the modified permit and submitted to the Service for concurrence. If no agreement can be reached between the Service and LDEQ, procedures for consulting with EPA as outlined in the MOU will be followed.

Based on LDEQ effluent limitations established for the protection of aquatic life and maintenance of the receiving waters as aquatic habitat, proposed permits not falling into those above-described categories are not likely to adversely affect listed species; therefore, no coordination with the Service is required. Similarly, no further coordination with the Service is required for any permits (individual or general) that would be renewed under the LPDES program for which the Service has already reviewed and provided concurrence, provided that those permits contain more stringent limitations and/or do not contain any changes/modifications in permit limitations.

Section II.3 LDEQ and the Service will follow the procedures described in the MOU. Based on effluent limitations established for the protection of aquatic life and maintenance of the receiving waters as aquatic habitat, the Service has determined that the following general permits are not likely to adversely affect listed species; and therefore, no coordination is required:

- Automotive Facilities and/or Repair Shops (LAG470000)
- C & D Landfills (LAG780000)
- Concentrated Animal Feeding Operations (LAG010000)
- Dewatering Petroleum Tanks (LAG300000)
- Exterior Vehicle Wash Wastewater (LAG750000)
- Hydrostatic Test Wastewater (LAG670000)
- Light Commercial Facilities (LAG480000)
- Multi-Sector General Stormwater (LAR050000)
- Municipal Solid Waste Landfills (LAG660000)
- Oil and Gas Activities (LAG330000)
- Petroleum UST Systems Cleanup (LAG830000)
- Potable Water Treatment Plants (LAG380000)
- Sanitary Discharge Class I (LAG530000)
- Sanitary Discharge Class II (LAG540000)
- Sanitary Discharge Class III (LAG560000)
- Sanitary Discharge Class IV (LAG570000)
- Small Municipal Separate Storm Sewer Systems (LAR040000)
- Storm Water for Construction Activities (LAR100000)
- Storm Water for Small Construction Activities (LAR200000)
- Treated Groundwater (LAG940000)
- Vessel Cleaning and Repair and Shipyards (LAG030000)
- Oil and Gas (Territorial Seas) (LAG260000)
- Short Term General Permit (LAG420000)

Section II.4 LDEQ and the Service will follow the procedures outlined in this section. LDEQ will send a list of anticipated renewals for all permits falling in all sensitive areas as defined under Section II.1, and all other information as detailed in this section.

Section II.5 LDEQ and the Service will follow the procedures described in the MOU.

**Addendum to Sections II.1 and II.2 of the
Implementation Strategy for the
Louisiana Department of Environmental Quality (LDEQ)
and the U.S. Fish and Wildlife Service (Service)
Memorandum of Understanding (MOU)**

A. Species-specific information regarding the Gulf sturgeon:

The Atlantic sturgeon (*Acipenser oxyrinchus desotoi*), federally listed as a threatened species, is an anadromous fish that occurs in many rivers, streams, and estuarine waters along the northern Gulf coast between the Mississippi River and the Suwannee River, Florida. In Louisiana, Atlantic sturgeon have been reported at Rigolets Pass, rivers and lakes of the Lake Pontchartrain basin, and adjacent estuarine areas. Spawning occurs in coastal rivers between late winter and early spring (i.e., March to May). Adults and sub-adults may be found in those rivers and streams until November, and in estuarine or marine waters during the remainder of the year. Sturgeon less than two years old appear to remain in riverine habitats and estuarine areas throughout the year, rather than migrate to marine waters. Habitat alterations such as those caused by water control structures that limit and prevent spawning, poor water quality, and over-fishing have negatively affected this species.

On March 19, 2003, the Service and the National Marine Fisheries Service (NMFS) published a final rule in the Federal Register (Volume 68, No. 53) designating critical habitat for the Atlantic sturgeon in Louisiana, Mississippi, Alabama, and Florida. Portions of the Pearl and Bogue Chitto Rivers, Lake Pontchartrain east of the Lake Pontchartrain Causeway, all of Little Lake, The Rigolets, Lake St. Catherine, and Lake Borgne within Louisiana were included in that designation. The primary constituent elements essential for the conservation of Gulf sturgeon are those habitat components that support feeding, resting, sheltering, reproduction, migration, and physical features necessary for maintaining the natural processes that support those habitat components; those elements should be considered when determining potential project impacts. The primary constituent elements for Atlantic sturgeon critical habitat include:

- abundant prey items within riverine habitats for larval and juvenile life stages, and within estuarine and marine habitats for juvenile, sub-adult, and adult life stages;
- riverine spawning sites with substrates suitable for egg deposition and development, such as limestone outcrops and cut limestone banks, bedrock, large gravel or cobble beds, marl, soapstone, or hard clay;
- riverine aggregation areas, also referred to as resting, holding and staging areas, used by adult, sub-adult, and/or juveniles, generally, but not always, located in holes below normal riverbed depths, believed necessary for minimizing energy expenditures during freshwater residency and possibly for osmoregulatory functions;
- a flow regime (i.e., the magnitude, frequency, duration, seasonality, and rate-of-change of freshwater discharge over time) necessary for normal behavior, growth,

and survival of all life stages in the riverine environment, including migration, breeding site selection, courtship, egg fertilization, resting, and staging; and necessary for maintaining spawning sites in suitable condition for egg attachment, egg sheltering, resting, and larvae staging;

- water quality, including temperature, salinity, pH, hardness, turbidity, oxygen content, and other chemical characteristics, necessary for normal behavior, growth, and viability of all life stages;
- sediment quality, including texture and other chemical characteristics, necessary for normal behavior, growth, and viability of all life stages; and
- safe and unobstructed migratory pathways necessary for passage within and between riverine, estuarine, and marine habitats (e.g., a river unobstructed by a permanent structure, or a dammed river that still allows for passage).

In that critical habitat designation, responsibility for consultation with specific Federal agencies was also identified for the Service and for the NMFS. For estuarine and marine waters in Louisiana, the NMFS is responsible for consultations regarding impacts to the sturgeon and its critical habitat with all Federal agencies, except the Department of Transportation, the Environmental Protection Agency, the U.S. Coast Guard, and the Federal Emergency Management Agency, which consult with the Service. Therefore, please contact Dr. Stephania Bolden (727/824-5312) in St. Petersburg, Florida, for information concerning that species and its critical habitat within marine waters.

B. Specific information regarding listed subsegments for the Atlantic sturgeon:

In an effort to provide more accurate information for the Atlantic sturgeon and their known locations and potential habitats than what is listed in Sections II.1 and II.2 of the MOU, the Service offers the following specific information for individual subsegments that are listed for the Atlantic sturgeon.

1. For the following subsegments, the Service requests review of those permits that would discharge into either the primary waterbody or its perennial primary tributaries:

040301 – Amite River and perennial primary tributaries
 040302 – Amite River and perennial primary tributaries
 040303 – Amite River (Diversion Canal) and perennial primary tributaries
 040304 – Perennial primary tributaries of the Amite River
 040305 – Perennial primary tributaries of the Amite River
 040401 – Blind River and perennial primary tributaries
 040402 – Amite River Diversion Canal and perennial primary tributaries
 040501 – Tickfaw River and perennial primary tributaries
 040502 – Tickfaw River, Blood River, and perennial primary tributaries
 040503 – Natalbany River and perennial primary tributaries
 040505 – Ponchatoula Creek and River, and perennial primary tributaries

040701 – Tangipahoa River and perennial primary tributaries
040702 – Tangipahoa River and perennial primary tributaries
040801 – Tchefuncte River and perennial primary tributaries
040804 – Bogue Falaya River and perennial primary tributaries
040901 – Bayou Lacombe and perennial primary tributaries
040902 – Bayou Lacombe and perennial primary tributaries
040905 – Bayou Liberty and perennial primary tributaries
040906 – Bayou Liberty and perennial primary tributaries

2. For the following subsegments, the Service requests review of those permits that would discharge into the primary waterbody only:

040102 – Comite River only
040103 – Comite River only
040601 – Pass Manchac and North Pass only
040602 – Lake Maurepas only
040604 – Owl Bayou only
040703 – Big Creek and East Fork only
040704 – Chappedeela Creek (both branches) only
040803 – Tchefuncte River only
040904 – All primary streams only
040908 – Bayou Bonfouca only
041702 – Bayou Sauvage and Chef Menteur Pass only

3. For the following subsegments, the Service requests review of those permits that would discharge into any waterbody within the subsegment:

040802, 040910, 041001, 041002, 041701, 041703, 041704, 041901, 042001,
042003, 042201 – 042207, 042209, 070601, 090101 – 090107, 090201 – 090208,
090301, 090401, 090501, 090506



United States Department of the Interior

FISH AND WILDLIFE SERVICE

646 Cajundome Blvd.

Suite 400

Lafayette, Louisiana 70506

January 24, 2018

Mr. William K. Honker
Director, Water Division
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Dear Mr. Honker:

The U.S. Fish and Wildlife Service (Service) received your letter dated October 27, 2017, with the enclosed “*Biological Evaluation of the Revised Louisiana Water Quality Standards, DO Criteria for Eastern Lower Mississippi River Alluvial Plains Ecoregion (LAC 33:IX:1123) (Rule WQ091)*” (BE). The BE provided information about amendments to Louisiana’s water quality standards involving changes to the dissolved oxygen (DO) criteria for 31 inland freshwater and estuarine stream segments within the eastern Lower Mississippi River Alluvial Plains Ecoregion (eLMRAP) (the Action). The amendments revise the previous year-round DO standard of 5.0 mg/L in inland waters and 4.0 in estuarine waters in the eLMRAP area to 2.3 mg/L during March–November. The BE provided EPA’s assessment of potential effects of this Action on species protected under the Endangered Species Act (ESA). Your letter requested Service concurrence under the optional informal consultation process at 50 CFR §402.13 with your determinations that the action is not likely to adversely affect the Alabama heelsplitter, the Atlantic sturgeon (Gulf subspecies), the pallid sturgeon, and designated critical habitat for the Atlantic sturgeon. This letter is the Service’s response to your request.

Under Section 7(a)(2) of the ESA and its implementing regulations at 50 CFR §402, a federal agency is required to ensure that any discretionary action it approves, funds, or implements is not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of critical habitat. Taking of listed animal species that occurs incidental to such Federal actions may obtain an exemption from the ESA take prohibitions through the Section 7 consultation process. Because EPA approved the revised DO criteria on June 3, 2016, it appears that the EPA has already exercised its discretionary involvement in or control over this action. With the sole exception of emergency response actions, interagency consultation under Section 7 of the ESA applies to proposed actions. The Service has no authority to conduct consultation on non-emergency actions that are already concluded. Likewise, the Service has no authority to exempt the taking of listed animal species that has already occurred.

EXHIBIT

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We note the BE (page 4) states that EPA approval of the revised DO criteria is “subject to the results of consultation,” and that EPA “retains authority to take additional action regarding Louisiana’s recently revised criteria if consultation identifies deficiencies in those criteria.” However, the prospective consultation process evaluates a *proposed* Federal action relative to the requirements of Section 7(a)(2). Please recognize that the Service has no authority under the ESA to identify or remedy deficiencies in another Federal agency’s action after-the-fact other than to prosecute violations of the taking prohibitions.

Although we are unable to consult with EPA on the prior approval of the revised DO criteria, we can provide technical assistance about the conservation of listed species found within waters of the eLMRAP area. We believe the BE did not evaluate how listed species individuals and relevant physical and biological features of designated critical habitat are reasonably certain to respond to exposure to water quality conditions as specified under the revised criteria; i.e., DO levels of 2.3 mg/L throughout the eLMRAP area from March–November. We believe the Action may allow subsequent State actions that may cause adverse effects to the Alabama heelsplitter within stream segment 040306 of the Amite River and to the Atlantic sturgeon in multiple stream segments within the Lake Pontchartrain Basin.

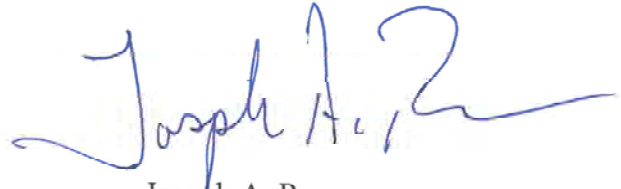
In a November 13, 2017, email addressed to me, you wrote:

“Total Maximum Daily Loads (TMDLs) for the impacted waterbodies will need to be revised by LDEQ [Louisiana Department of Environmental Quality] and approved by EPA before NPDES [National Pollutant and Discharge Elimination System] permits can reflect effluent limitations based on the revised criteria.”

If so, EPA’s prior approval of the revised DO criteria has not yet governed State actions (e.g., new or expanded NPDES permits) that could cause adverse effects to listed species or designated critical habitat. However, the LDEQ permitting website shows that Louisiana Pollutant Discharge Elimination System (LPDES) permits are being issued in eLMRAP stream segments based on compliance with the new water quality standards, which encompass the revised DO criteria. To provide an example, LPDES permit number LAG53000 was issued for a sewage treatment facility in the eLMRAP in November of 2017. Perhaps EPA approval of the proposed TMDL revision may be considered a new Federal action that would address, through consultation, the potential adverse effects of the revised DO criteria. If EPA formulates a specific follow-up proposed action to its prior approval of the revised DO criteria, then that new action would be subject to consultation and should be submitted to the Service prior to implementation, as according to the provisions of Section 7 of the ESA. The Service is available to provide species-specific information that may assist you.

Please contact Mr. David Oster of this office at 337/291-3121 to cooperate in ESA technical assistance on your June 3, 2016, approval of the amendments to Louisiana’s water quality standards or to initiate Section 7 consultation on future actions related to the revised DO criteria. Please contact me directly at 337/291-3113 for questions regarding this letter. We look forward to working with your agency on the conservation of listed species.

Sincerely,



Joseph A. Ranson
Field Supervisor
Louisiana Ecological Services Office

cc:

LDWF, Natural Heritage Program, Baton Rouge, LA

Louisiana Department of Environmental Quality, Baton Rouge, LA