

will be delayed due to consultations regarding sturgeon protection. Current EPA water quality standards take protection of endangered and threatened species and their habitat, including Gulf sturgeon, into account.

*Comment 53:* One comment asserted that the economic analysis should cover at least a 20-year period.

*Our Response:* To be credible, the economic analysis must estimate economic impacts based on activities that are reasonably foreseeable. The revised economic analysis does include annualized cost estimates to 10 years. It is difficult to predict the costs of consultations on activities beyond a 10-year window. Costs for section 7 consultations may increase or decrease dependent on factors other than inflation or deflation. For example, changes in requirements for development of a biological assessment may occur, or fluctuations in the cost of biologists and consultants. In order to maintain reasonable confidence in the estimated total section 7 costs, the analysis quantifies costs occurring within a ten year time frame. However, the final economic analysis does include annualized cost estimates, to the extent that these may inform the commenter's projections of costs over a 20-year period (see Section 4.3).

*Comment 54:* A few commenters stated that the economic analysis may underestimate impacts on small businesses secondarily impacted by consultations with Federal agencies.

*Our Response:* The courts have held that the Regulatory Flexibility Act requires an agency to perform a regulatory flexibility analysis only when a rule directly regulates them (*Mid-Tex Elec. Coop, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985) and *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1991)). Accordingly, the economic analysis considered the total costs that may affect small entities through section 7 of the Act. Activities likely to be impacted include those associated with operation and maintenance of navigation projects, highway bridge construction, and pipeline construction projects. The analysis found that less than one percent of these industries in the region would be affected and that it was likely that most of the costs imposed by the designation would be passed through to the Federal government as the government contracts for such services.

#### Issue I: Potential Impact to Commercial Shrimp Fishery

*Comment 55:* Three commenters requested clarification on how designation of critical habitat would

impact the commercial shrimp fishery, and if sturgeon are a bycatch of shrimping.

*Our Response:* Shrimp trawling may impact both the Gulf sturgeon and its critical habitat. Shrimp trawling may directly affect Gulf sturgeon by capturing them in trawl nets. There is one documented non-lethal take of a sturgeon during testing of a Turtle Excluder Device (TED) equipped flounder trawl off Long Island, New York; the Atlantic sturgeon was approximately 1 m (3 ft) in total length, and was released alive (J. Mitchell, NOAA Fisheries, Pascagoula Laboratory, pers. comm. 2002). In addition, a single sturgeon is reported in the NOAA Fisheries shrimping bycatch database (E. Scott-Denton, NOAA Fisheries, Galveston Laboratory, pers. comm. 2002) as taken by shrimp trawling; an Atlantic sturgeon was captured off Georgia (Atlantic Ocean) in 1995. Anecdotal information indicates that while some sturgeon are taken by shrimp trawlers, many fish are alive as local researchers are often contacted so they may tag and release the fish (H. Rogillio, LADWF, pers. comm. 2002). Currently shrimp fishers report fewer sturgeon are being caught in the nets, which may reflect escapement through the TED or fewer incidents being reported. Regardless of critical habitat, the Gulf sturgeon was listed as a threatened species under the Act on September 30, 1991, and it, therefore, is protected wherever it occurs. Take of Gulf sturgeon that is not authorized (e.g., through a section 7 consultation or through an incidental take permit) is unlawful.

The most likely effect of shrimp trawling on Gulf sturgeon critical habitat would be the disturbance of the benthic environment by trawling gear. This issue is being investigated at the NOAA Fisheries Galveston Laboratory. Until such time as conclusive data becomes available, any correlation between shrimp trawling and a negative effect on Gulf sturgeon critical habitat would be tenuous. While benthic molluscan and crustacean prey items favored by Gulf sturgeon could conceivably be disturbed as the shrimp trawl passes over the bottom, a possible effect of that disturbance would be to make them more susceptible to predation by Gulf sturgeon, possibly enhancing foraging opportunities. Although shrimp trawls may capture Gulf sturgeon, and the benthos within critical habitat may be disturbed, there is little to suggest that shrimp trawling significantly affects the Gulf sturgeon or its critical habitat at this time.

#### Issue J: Policy and Regulations

*Comment 56:* One commenter stated that the proposed action serves to provide an additional layer of bureaucracy without any tangible benefits and appears to be a redundant and reaction to litigation filed against the Services in 1994 by the Sierra Club Legal Defense Fund and the Florida Wildlife Federation. Three commenters stated that the Services previously made not prudent determinations regarding critical habitat and requested additional information (data/biological factors) and detail to explain the Services change in position.

*Our Response:* We had previously determined that designation of Gulf sturgeon critical habitat was not prudent given that such designation would not benefit the species based upon a view that jeopardy and adverse modification were essentially wholly overlapping standards under the Act. After the Fifth Circuit Court of Appeals rejected this interpretation, as stated in the proposed rule (67 FR 39112), we have reconsidered and found that designation will be clearly beneficial to the species. Recent research has determined and qualified numerous areas important for Gulf sturgeon spawning, resting, staging, and foraging. Many of these important areas are only utilized seasonally, and therefore not afforded the protection when the species is absent. By designating critical habitat, the Services will be able to manage impacts to those physical and biological features (primary constituent elements) that are essential to the conservation of the species regardless of the species presence or absence through the consulting mechanism under section 7 of the Act. For example, other Federal agencies will be required to consult with us on actions they carry out, fund, or authorize, to ensure that their actions will not destroy or adversely modify critical habitat. In this way, a critical habitat designation will protect areas that are necessary for the conservation of the species. It may also serve to enhance awareness within Federal agencies and the general public of the importance of Gulf sturgeon habitat and the need for special management considerations.

#### Summary of Changes From the Proposed Rule

Seven changes have been made from the proposed to the final rule designating Gulf sturgeon critical habitat—calculation of the total area included in designation; inclusion of identical amendments to both 50 CFR parts 17 and 226; verification of bridge