

### 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