



**Billing Code: 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RTID 0648-XA107**

**Endangered Species; File No. 23861**

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that Midwest Biodiversity Institute (MBI) has applied in due form for a permit pursuant to the Endangered Species Act of 1973, as amended (ESA). The permit application is for the incidental take of ESA-listed shortnose sturgeon (*Acipenser brevirostrum*), Gulf of Main Distinct population segment (GOM DPS) Atlantic sturgeon, or the New York Bight (NYB DPS) of Atlantic sturgeon. (*A. oxyrinchus*) and the GOM DPS Atlantic salmon (*Salmo salar*) associated with the otherwise lawful sampling of non-ESA listed fish in the Lower Kennebec River. The duration of the proposed permit is 10 years. NMFS is furnishing this notice in order to allow other agencies and the public an opportunity to review and comment on the application materials. All comments received will become part of the public record and will be available for review. An electronic copy of the revised application and proposed conservation plan may be obtained by contacting NMFS Office of Protected Resources (see **FOR FURTHER INFORMATION CONTACT**) or visiting <https://www.fisheries.noaa.gov/action/incidental-take-permit-midwest-biodiversity-institute>.

**DATES:** Written comments must be received at the appropriate address or fax number (see **ADDRESSES**) on or before [*insert date 30 days after date of publication in the FEDERAL REGISTER*].

**ADDRESSES:** The application is available for download and review at <https://www.fisheries.noaa.gov/action/incidental-take-permit-midwest-biodiversity-institute> under the section heading ESA Section 10(a)(1)(B) Permits and Applications. The application is also available upon written request or by appointment in the following office: Endangered Species Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13752, Silver Spring, MD 20910; phone (301) 427-8402; fax (301) 713-4060.

You may submit comments, identified by NOAA-NMFS-2020-0059, by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to [www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0059](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0059) click the “Comment Now” icon, complete the required fields, and enter or attach your comments.
- *Fax:* (301) 713-4060; Attn: Celeste Stout.
- *Mail:* Submit written comments to Endangered Species Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13631, Silver Spring, MD 20910; Attn: Celeste Stout.

*Instructions:* You must submit comments by one of the above methods to ensure that we receive, document, and consider them. Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not

be considered. All comments received are a part of the public record and will generally be posted for public viewing on <http://www.regulations.gov> without change. All personal identifying information (*e.g.*, name, address, etc.) confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

**FOR FURTHER INFORMATION CONTACT:** Celeste Stout, Phone: (301) 427-8436 or E-mail: [celeste.stout@noaa.gov](mailto:celeste.stout@noaa.gov).

**SUPPLEMENTARY INFORMATION:** Section 9 of the ESA and Federal regulations prohibit the ‘taking’ of a species listed as endangered or threatened. The ESA defines “take” to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. NMFS may issue permits, under limited circumstances to take listed species incidental to, and not the purpose of, otherwise lawful activities. Section 10(a)(1)(B) of the ESA provides for authorizing incidental take of listed species. NMFS regulations governing permits for threatened and endangered species are promulgated at 50 CFR 222.307.

### **Background**

NMFS received a permit application from MBI on January 31, 2020. Based on our initial review of the application and conservation plan, we requested further information and clarification. On March 30, 2020, MBI submitted a revised and complete application for the take of ESA-listed shortnose sturgeon, Atlantic sturgeon and Atlantic salmon due to the sampling of non-ESA listed fish in the Lower Kennebec River. MBI proposes to continue an 18 yearlong (2002-19) systematic assessment of the fish

assemblages at seven sites in an approximate 17.5 mile (28.2 km) reach of the Lower Kennebec River and three sites in a 6 mile (9.7 km) reach of the Sebasticook River. MBI will conduct boat electrofishing where electric current is generated by a Smith-Root Generator Powered Pulsator and transmitted into the water by an electrode array suspended from the bow of 16-18 foot long (25-29 km) jon boats or a 16 foot long inflatable Wing raft. NMFS determined that the application contained sufficient information for review and consideration under section 10(a)(1)(B) of the ESA. MBI is requesting a total annual incidental take of four Atlantic salmon, four Atlantic sturgeon and five shortnose sturgeon for a permit duration of 10-years.

#### *Conservation Plan*

Section 10 of the ESA specifies that no permit may be issued unless an applicant submits an adequate conservation plan. The conservation plan prepared by MBI describes measures designed to minimize and mitigate the impacts of any incidental take of ESA-listed shortnose sturgeon, Atlantic sturgeon and Atlantic salmon. To avoid and minimize take of ESA listed species, MBI will: 1) Only sample during the late summer and early fall to avoid potential risk to early life stages and juveniles, as these life stages of shortnose and Atlantic sturgeon species are not present in the river during that time period. There is no risk to Atlantic salmon early life stages because spawning and rearing occurs in tributaries well outside of the proposed study area. 2) MBI will notify NOAA, Maine Department of Marine Resources (DMR) and Maine Department of Inland Fisheries & Wildlife (IF&W) at least one week prior to any planned sampling activities. The notification will include a general schedule and inclusive dates of sampling. 3) All MBI and accompanying non-MBI personnel conducting the sampling will have received

appropriate training in electrofishing and in the identification of listed species. At the start of each sampling day, each crewmember will receive instruction about the procedures to follow if a listed species is encountered. 4) The conduct of sampling and operation of the electrofishing gear will be done in a manner that minimizes the potential for injury or mortality of listed species. 4a) The electric current and the sampling activity will immediately cease upon an encounter with a listed species. Affected fish will not be netted, touched, or handled. Species identification and estimation of length will be made visually. To minimize effects to Atlantic salmon, sampling will not be conducted when ambient water temperature is  $>22^{\circ}\text{C}$  (per Maine DMR specifications). 4b) Sampling activities will cease and the electric current will be shut off for a period of 5 minutes or until the individual fish is observed to have departed the area. The physical condition of the fish will be recorded, including their reaction to the electric field and whether they were able to leave the area under their own power. 5) Any encounter with a listed species will be promptly reported to the Office of Protected Resources, Endangered Species Conservation Division.

MBI considered and rejected other gear alternatives to conduct the sampling because the alternative means of sampling the study area are too resource intensive and cost-ineffective compared to the single gear of boat-mounted pulsed direct current (DC) electrofishing. Other possible alternatives would require the direct handling of listed species and thus increase the risk of injury or mortality to the fish. MBI believes that combination of that risk and the comparative inefficiency and ineffectiveness of alternate fish collecting gear types makes boat-mounted pulsed DC electrofishing the safest and most effective sampling method available.

At present, the project is funded by MBI research and development funds, but MBI continues to seek external funding. This project has been ongoing for 18 years and is one of the longest running biological monitoring projects in New England and the only sustained effort that focuses on large river fish assemblages.

*National Environmental Policy Act*

Issuing an ESA section 10(a)(1)(B) permit constitutes a Federal action requiring NMFS to comply with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) as implemented by 40 CFR parts 1500-1508 and NOAA Administrative Order 216-6, Environmental Review Procedures for Implementing the National Policy Act (1999). An initial determination has been made, by NMFS, that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

*Next Steps*

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the application, associated documents, and comments received during the comment period to determine whether the application meets the requirements of section 10(a) of the ESA. If NMFS determines that the requirements are met, a permit will be issued for incidental takes of ESA-listed shortnose and Atlantic sturgeon and Atlantic salmon. The final NEPA and permit determinations will not be made until after the end of the comment period. NMFS will publish a record of its final action in the **Federal Register**.

Dated: April 13, 2020.

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Angela Somma,

Chief, Endangered Species Conservation Division,

Office of Protected Resources, National Marine Fisheries Service.

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