

**MARINE MAMMAL COMMISSION**  
**4340 EAST-WEST HIGHWAY, ROOM 905**  
**BETHESDA, MD 20814**

24 January 2003

Mr. David Hankla  
Field Supervisor  
Jacksonville Field Office  
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Dear Mr. Hankla:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the 14 November 2002 proposed rule (67 Fed. Reg. 69078-69104) published by Fish and Wildlife Service to authorize the taking of Florida manatees incidental to government programs related to watercraft operations and watercraft access facilities in Florida. We also have reviewed the accompanying draft environmental impact statement (DEIS).

The Commission understands the difficult situation in which the Service finds itself regarding its efforts to improve manatee protection within the time constraints imposed by the settlement agreement reached in ongoing litigation. We believe that modification of the agreement schedule will likely be necessary to provide the Service with the opportunity to resolve issues raised in this letter and to allow adequate opportunity for public input.

It is unfortunate that opportunities for agencies to develop carefully designed local plans with adequate stakeholder involvement have not been taken in the past. For example, in the wake of Florida's 1986 Growth Management Act, opportunities for local governments to develop balanced manatee protection plans were ignored by most counties, and the State did not push the issue. For this and other reasons, matters have now reached a crisis stage where options are limited and expensive, and the debate is charged with emotion. Some important opportunities for building partnerships and anticipating future problems have largely been squandered.

Manatees face a number of threats throughout Florida. The Commission remains concerned about the deteriorating condition of manatee habitat, particularly the likely decrease of preferred habitat over the next decade as power plant warm-water discharges are reduced and rapid population growth and urbanization continue in Florida. The DEIS does not adequately consider how likely it is that the population may be affected by declines in available manatee habitat during the period covered by the proposed incidental take authorization.

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The Commission has commented to the Service on several occasions about the need to strengthen manatee protection through the adoption of plans by local and county governments. Development of such plans offers the most effective process for considering all aspects of manatee protection that affect local populations of manatees and the views of the people who use the waterways. For this reason, the Marine Mammal Commission recommends that the Service work with other federal agencies, the State of Florida, county and other local governments, and affected citizens to expand efforts to develop and implement an issue resolution process that will lead to the adoption of effective county manatee protection plans. The Marine Mammal Commission would welcome the opportunity to participate in these efforts.

The Commission believes that many problems exist with the proposed rule and alternatives described in the DEIS. We find it difficult to assess and justify the proposed action in relation to either existing biological or legal standards for determining whether proposed actions are likely to have a “negligible” impact on marine mammal populations or to understand how the Service plans to implement the regulations. The Commission has four basic concerns:

1. The Service has not provided an adequate rationale to justify its conclusion that the proposed regulations would ensure that take levels do not exceed negligible impact levels.
2. The Service has not sufficiently described the model and standards it will use to determine what constitutes a negligible level of take.
3. The Service has not provided a full opportunity for public review of and comment on the various findings required to be made under the Marine Mammal Protection Act before small take regulations can be issued.
4. The Service has not adequately described the linkage between letters of authorization that would be issued to government agencies and incidental take coverage for individuals who are most directly responsible for incidentally taking manatees.

In light of these concerns, the Commission offers the following comments and recommendations.

#### Watercraft-Related Manatee Mortality

With two important exceptions, the proposed rule and DEIS provide an excellent and thorough summary of available information on the status of Florida manatees. Both exceptions concern data on watercraft-related manatee deaths. First, information on the annual number of watercraft-related manatee deaths by region (which are now provided in Appendix L) should be discussed and referenced in the various analyses of watercraft impacts. Using the average annual number of watercraft-related manatee deaths over the past five years would provide a better measure for assessing potential watercraft deaths for each region during the five-year period to be covered by the proposed rule than would data collected over a longer time frame. This is because manatee deaths attributed to vessel collisions have been increasing, on average, by seven percent per year in recent years. Even these data, however, may not provide the best estimates of watercraft-related manatee mortality that can be expected over the period covered under the proposed rule. That is, if the present trend continues over the next five years, manatee mortalities will continue to increase

over the record-high levels experienced in recent years as more people and more boats populate Florida's waterways. Thus, the Commission believes that the Service should undertake a trend analysis to develop the best possible estimates of likely watercraft-related manatee mortality over the next five years.

Second, data should be provided identifying the proportion of total manatee mortality caused by watercraft in each region. That information is not provided and cannot readily be derived from the tables included in the DEIS. Information on the proportion of deaths caused by watercraft in each region provides an important means of assessing whether recent watercraft-related manatee deaths have been negligible and for considering the justification and merits of the Service's conclusions in this regard.

Therefore, the Marine Mammal Commission recommends that the summary of regional watercraft-related mortality in the DEIS (page 78) be expanded to (1) provide the number of watercraft-related manatee deaths by region for the past five years and for the prior five-year increments for which data are available, (2) identify the proportion of total documented deaths caused by watercraft for each region over the past five years and the preceding five-year increments, and (3) project likely mortality levels by region over the next five years based on results of the trend analysis recommended above. The Marine Mammal Commission also recommends that this information be incorporated into the negligible impact analysis and conclusions section of the DEIS (pages 34 to 42).

#### Determining What Constitutes a "Negligible" Impact Level

The Service concludes that (1) no additional actions are required to maintain a negligible impact level for two of the four Florida regions (the upper St. Johns River and northwestern Florida); (2) additional mitigation measures may be needed in the Atlantic coast region to ensure that take levels are negligible; and (3) it currently is unable to make a negligible impact finding for southwestern Florida. In reaching these conclusions, the Service apparently believes that recent levels of take have not exceeded negligible levels in the upper St. Johns River and northwestern Florida regions and that they are close to being negligible in the Atlantic coast region.

In the proposed rule, the Service appears to "generally accept" two standards for measuring what constitutes a negligible impact for depleted marine mammal populations:

1. A large majority of annual net productivity should be reserved for recovery of the stock and only a "small portion" (not to exceed 10 percent) of net productivity should be allocated to incidental take by the requested activity.
2. Incidental take by the requested activity should not significantly increase the time needed (typically no more than a 10 percent increase) for a stock to reach its optimum sustainable population (OSP) level.

When making a negligible impact finding, the Commission believes that the Service should meet both of these standards. It appears to the Commission that, in this instance, the Service plans to consider only the effects of the proposed action on the time needed to reach OSP. The generally accepted approach cited for defining a negligible impact, however, calls for consideration of both the proportion of net productivity that can be taken and the time required to reach OSP, not one or the other. Even if only one of those standards needs to be met, the Service's discussion does not indicate why it believes that the proportion of net productivity standard is not the more appropriate measure for manatees, or why the estimate of recovery time to OSP levels is more appropriate to use in this case. Accordingly, the Marine Mammal Commission recommends that, in making its negligible impact finding, the Service either (1) consider both proportion of net productivity and the potential delay in reaching OSP levels or (2) expand the DEIS to explain why it believes only one of those standards needs to be met and why the standard concerning the time needed to recover to OSP levels is more appropriate than the standard using a proportion of net productivity.

In addition, the basis for the Service's conclusions regarding negligible impact levels is difficult to assess and seems questionable. Given the death of at least 95 manatees by watercraft in Florida in 2002, the net productivity of manatees in Florida would need to be 950 manatees per year for watercraft-related deaths to be considered a "small portion" (i.e., no more than 10 percent) of the total stock's net productivity. The maximum net productivity rate adopted by the Service in its Florida manatee stock assessment report is four percent. Assuming this rate is correct, and using a minimum abundance estimate of 3,276 for the total Florida manatee population (the best available estimate of the minimum population size), the current maximum net productivity level for the state-wide population should be about 131 manatees per year. Thus, to consider watercraft deaths in 2002 to be negligible, the overall maximum net productivity level would need to be more than seven times higher than what reasonably might be estimated to be the current net productivity level. Unless the proportion of manatee deaths due to watercraft was disproportionately low by a considerable margin in the three regions covered by the proposed rules and most watercraft deaths were concentrated in the southwestern Florida region, recent watercraft-related mortality levels have exceeded negligible levels in all three regions in recent years and may have far exceeded negligible levels in the Atlantic coast region.

Neither the proposed rule nor the DEIS provides any quantitative analyses to explain or support the Service's conclusions that recent levels of watercraft-related mortality have not increased recovery time to OSP levels by more than 10 percent in the upper St. Johns River and northwestern Florida or that watercraft deaths in the Atlantic coast region are close to this standard. Rather, the Service assesses the extent to which the status of these stocks meets certain population "benchmarks." We do not believe those benchmarks, which were developed for downlisting and delisting decisions under the Endangered Species Act, equate to the negligible impact standards under the Marine Mammal Protection Act or to the manatee stocks' OSP level. These levels also do not guarantee population growth and recovery.

Based on these points, it appears possible, if not likely, that watercraft-related manatee deaths currently exceed negligible levels in all areas of Florida. As such, the Commission believes

the Service has not adequately justified its conclusions that existing impacts are negligible for the three regions. To justify such conclusions, the Service needs to relate the current population status and recent watercraft-related mortality rates in each of the four regions to the generally accepted negligible impact standards rather than to the recovery plan's population benchmarks. Therefore, the Marine Mammal Commission recommends that the Service expand the "negligible impact assessment and conclusions" section of the DEIS to include calculations that would justify its determinations that (1) recent levels of watercraft-related manatee deaths in the upper St. Johns and northwestern Florida regions have not significantly increased the time needed for their respective manatee populations to reach OSP levels, and (2) recent levels of watercraft-related manatee deaths along the Atlantic coast are close to meeting that standard for the Atlantic coast region. In addition, the Service should identify the maximum number of watercraft-related manatee deaths by region that the Service believes would currently meet the negligible impact standard.

Although manatee deaths associated with watercraft-related activities in Florida are the most pressing concern, the Service should keep in mind that the definition of taking under the Marine Mammal Protection Act includes harassment and habitat modification that has the potential to injure or disrupt the behavioral patterns of manatees. Virtually every adult manatee in Florida has multiple scars on its back. Accordingly, the Service should include its rationale for determining that non-lethal harassment and habitat degradation associated with increased vessel traffic would be dealt with under the rule.

#### The Manatee Demographic Model

The notice and DEIS state that a model described in Appendix H of the DEIS can and will be used to assess the time needed to meet certain demographic benchmarks established in the manatee recovery plan and thereby provide an appropriate means for making negligible impact determinations for Florida manatees. The Commission commends the Service for its efforts to encourage its development. However, the model is not yet complete and has not been used. Until that is done, it is not possible to comment on its use for determining when impacts are negligible. Given this model's fundamental importance in the Service's proposed approach, its incomplete development at this time, and the court-ordered time line under which the Service is operating, we do not expect to be able to assess the utility of the model prior to the time by which the Service expects to publish its final rule.

The Commission has two immediate concerns regarding model development. First, the Service suggests that certain model parameters, such as adult manatee survival rates, will be based on averages from data collected over the past 15 years. Such values may have changed significantly over that period. For example, the DEIS cites a paper by Langtim et al. (2000) that suggests adult survival rates in the Atlantic coast region have declined in recent years. Averaging these recent lower survival rates with higher rates from past years seems unlikely to accurately reflect current population trends or population-level effects of watercraft-related manatee deaths. Thus, the modeling effort should include an analysis of trends in the parameters used in the model to determine that modelers used the most appropriate values. Second, we do not believe that it is

appropriate to use an estimate of time needed to achieve population benchmarks in the recovery plan as a surrogate for the time needed to reach OSP. In light of the above points, we believe it would be inappropriate to adopt the rule as proposed until such time as there has been an opportunity for all interested parties and the public to review and comment on (1) the final model, (2) the values to be used for model parameters, and (3) and model results that demonstrate that recent levels of watercraft-related manatee deaths have been below or close to negligible levels in the three areas covered by the proposed action. Further, the Marine Mammal Commission recommends that (1) the Service involve independent experts to review the model prior to relying on it in the final rule (a review that, we recently learned, has been scheduled), and (2) the public be provided a chance to review and comment on the model and its results before the Service acts on requests for letters of authorization.

#### Proposed Mitigation Measures To Reduce Manatee-Related Deaths and Injuries

The Service is relying on five categories of mitigation measures to ensure that watercraft-related manatee deaths do not exceed negligible levels: (1) watercraft speed and access regulations, (2) enforcement of those rules, (3) watercraft operator education, (4) watercraft facility siting, and (5) technological measures (e.g., propeller guards). The Service states that those measures are listed in decreasing order of effectiveness. The identified measures appear to be appropriate and complete. However, their effectiveness may differ depending on circumstances. For example, near warm-water refuges, where speed and access zones already exist, restrictions on the construction of new facilities would likely be a more effective means of preventing an increase in taking. Also, the Service references county manatee protection plans only with respect to their usefulness as facility siting measures. These county plans also include countywide systems of boat speed zones and boater education measures. In our comments on the advance notice of this proposed rulemaking, we noted our belief that the process for development of manatee protection plans that address all of these measures on a local level may be the most effective approach for protecting manatees from watercraft impacts.

#### Adequacy of Other Requirements of Section 101(a)(5)

As acknowledged by the Service, the proposal to authorize the taking of manatees incidental to several government programs under a single rulemaking represents a novel use of the section 101(a)(5) authority. Heretofore, this provision has been used to authorize the taking of marine mammals incidental to a discrete activity or group of activities, or at least a fairly well-defined set of activities, being undertaken by a single applicant. Here the Service is contemplating issuing a broad taking authorization to itself on behalf of multiple, as yet unidentified, government agencies to cover virtually all activities related to watercraft operations throughout the State of Florida. As a result, the Commission and others are unable at this stage to comment specifically on whether and how the proposed authorization for incidental taking might be structured to satisfy all of the requirements of the applicable statutory provisions.

For example, section 101(a)(5)(A)(ii) requires that incidental taking regulations specify the “permissible methods of taking...and other means of effecting the least practicable adverse impact on [the affected] species or stock and its habitat...” That clause also requires that regulations issued under this section set forth “requirements pertaining to the monitoring and reporting of such takings.” The proposed regulations, however, do not specify what will be required of those authorized to take marine mammals to ensure that the least practicable impact standard is met and do not set forth specific monitoring and reporting requirements. They would require that letter of authorization holders conduct activities in a manner that minimizes, to the greatest extent practicable, adverse impacts on manatees and their habitat, deferring until the letter of authorization stage the identification of conditions and methods of taking specific to an activity and location. Likewise, the proposed regulations would defer monitoring and reporting requirements until the issuance of letters of authorization.

In addition to concerns as to whether the Service has met the substantive requirements of the Act by not including specific requirements in its proposed regulations, the Commission has misgivings about procedural shortcomings of the Service’s approach. Whereas proposed regulations are subject to the public notice and comment requirements of the Administrative Procedure Act under the Service’s regulations at 50 C.F.R. § 18.27, there is no public notice nor is there an opportunity for public review of decisions on letters of authorization before they are issued. Thus, by deferring the establishment of specific requirements until the letter of authorization stage, the Service effectively eliminates meaningful public participation in the process. In light of this problem, if the Service proceeds with this proposal, the Marine Mammal Commission recommends that the Service deviate from normal procedures by specifying in any final rule that requests for letters of authorization under this rule will be subject to public review and comment before they are issued.

Section 101(a)(5)(A) anticipates that it will be individuals (or entities) that engage in activities that will incidentally take marine mammals who will request incidental take authorizations. In this case, the Service has initiated the rulemaking on its own behalf and prospectively on behalf of other agencies who engage in activities that directly or indirectly result in taking manatees. Although not clear from the proposed rule, the Service also seems to be expecting that incidental takings of manatees by individuals who engage in related activities (e.g., the construction of docks and piers authorized by those agencies or operation of vessels that occurs because of, or that is facilitated by, those activities) will also be covered under the incidental take authorization. If this is the case, the Marine Mammal Commission recommends that the Service explain this explicitly and describe fully the structure that it envisions for authorizing such takings. This process should include mechanisms for binding those who own or build vessel-related facilities and those who operate watercraft to the requirements of the regulations and underlying letters of authorization. That is, anyone who enjoys coverage under the incidental taking authorization should also be accountable for compliance with provisions of that authorization.

## Conclusions

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As indicated above, the Commission does not believe that the DEIS provides an adequate description of how the proposed regulations would be implemented or how the Service reached its negligible impact findings for manatees in the upper St. Johns River, northwestern Florida, or the Atlantic coast regions. We also are concerned that it will be difficult for the Service to meet the underlying requirements of section 101(a)(5) of the Marine Mammal Protection Act for such a broad, open-ended purpose, and that, by relying on a demographic model that is not yet complete, the Service has not provided reviewers with the opportunity to review critical information relevant to its decision. Accordingly, we suggest that the Service consider working with litigants to modify the schedule established in the settlement agreement to allow time for adequate public review of the model and model runs prior to issuing a final rule in this matter.

We continue to believe that a more appropriate and effective means of developing and implementing necessary protection measures for Florida manatees would be through the development of well-conceived county manatee protection plans that all agencies and groups could use as a decision-making framework. The development of such plans, however, would be lengthy and require broad involvement and cooperation of all concerned parties. In this regard, we understand that the Service is considering the development of an issue resolution process that would bring together all concerned parties to help identify and develop an optimal manatee protection strategy. The Marine Mammal Commission strongly endorses such an effort and recommends that the Service proceed with this process immediately.

If you or your staff have questions concerning the Commission's comments and recommendations, please call.

Sincerely,



David Cottingham  
Executive Director

cc: Sam Hamilton, Fish and Wildlife Service  
Anne Klee, Department of the Interior  
Craig Manson, Department of the Interior