

Comments on the US Fish and Wildlife Service Proposed Designation of Three Federal Manatee Protection Areas in five Florida counties (sic)

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Florida Marine Contractors Association (FMCA) offers extensive comments regarding the US Fish & Wildlife Service's (FWS) manatee protection plans for five counties, proposed under the Endangered Species Act and the Marine Mammal Protection Act (MMPA). This proposed Rulemaking is a specific requirement of a legal settlement between the Federal Government and Save the Manatee Club, et. al.

Standing

Florida Marine Contractors Association (FMCA) is a not-for-profit association representing highly credentialed, professional marine contractors throughout the State of Florida. FMCA members build, maintain and repair residential and marina dock facilities throughout Florida. Family and commercial boaters use these facilities for recreation, business and employment. FMCA members also serve public welfare by dredging and maintaining waterway rights-of-way, and by assisting in the building and maintenance of bridges, causeways, channels, canals, seawalls and other marine structures vital to Florida's environment and its transportation and economic network.

Information Quality Guidelines (IQG) Complaints

FMCA is submitting these comments to the proposed Rule as IQG compliance complaints as well as general Rule comments. Pursuant to IQG guidelines, the Service must satisfactorily respond to these complaints within an established timeline.

Economic Benefit of the Rule

Rather boldly, the Service maintains there is "strong public support" for more "protection regulations," a statement thoroughly disproved at every public hearing. Indeed, the fact that FMCA has filed suit to stop MMPA Rulemaking in Florida, and to end the illegal dock-building moratorium, paints quite a different portrait than the one offered by the Service. People are "Fed up with the Feds" and vigorously oppose these and other Service actions.

Regulatory Flexibility Act Assessments

FMCA strongly disagrees with the Service contention that this Rule will not have significant economic impact. The Service by its own admission does not have the authority to grant Rule exemptions based on economic hardship (see Brevard Rule). FMCA is submitting these comments to the Office of Advocacy of the Small Business Administration for RFA Assessment review and compliance.

Stipulated Content

As FMCA objects to the legal premise of the Rules, their scientific premise, their assumed cause-and-effect and their economic impact, there is no stipulated content.

Overview

The rationale for these proposed federal “refuges” is fundamentally flawed, based on erroneous assumptions, inappropriate measurements, misapplied procedures and misunderstood data. Indeed, rather than benefiting man or manatee, Federal policy actually punishes both. As manatee populations increase, more and more waterways are restricted, causing economic harm to local small businesses, job loss, and the sacrifice of the dreams of Floridians to enjoy a boat from their own dock. However, these slow-speed refuges have never been shown to reduce or even lessen the likelihood of boat/manatee collision deaths. Indeed, the best available science (Gerstein, 2002), proved that in many cases, the slow speed zones demanded by the Service actually exacerbate, rather than reduce, collision risks.

In short, this Rule is based on a rationale that is doomed to utter failure.

We can do better. This comment will recommend the specific changes in policy that should and can be implemented.

Economic Impact

As the Service has learned from literally thousands of Floridians, the proposed Rules will result in businesses closing, jobs being lost, tax bases reduced, and critical downtown revitalization plans stalled or destroyed.

It is redundant to repeat all the concerns of dock builders, fishing guides, restauranteurs, ferry services, local governments, homeowners, repair facilities, bait and tackle stores, boat manufacturers, marinas, etc., except to note that each of the three hearings revealed potential impact costing millions of dollars and in some cases tens of millions.

FMCA also notes that past “emergency” rules have demonstrably hurt local economies. In Brevard County, the Service’s Barge Canal slow speed zone resulted in the closing of one marina (Tingley’s) and idled a brand-new boat manufacturing plant. The plant owners petitioned the Service for a speed zone exemption to allow them to test their vessels; the petition was denied because the Service does not believe it has authority to grant exemptions caused by economic hardship. Consequently, the new plant was open one day, then closed for good. The older plant is operating at only partial capacity. Before the Service imposed its ‘emergency’ rule, that plant was operating on double, even triple shifts.

Erroneous Assumptions

Unfortunately, the proposed Federal refuges, like the “emergency” refuges established last year, are based on a series of erroneous assumptions.

We *assumed*, quoting an anti-boat lawyer, that “endangered manatees are being killed in droves and literally ripped to shreds.” But State researchers just concluded there is no risk of manatee extinction even in 100 years — as far ahead as their projections can peer.

We *assumed* speed zones are an effective protective measure, until Dr. Edmond Gerstein proved slow speed in many cases exacerbates the danger to manatees.

We *assumed* the manatee population was “depleted” and therefore must increase very rapidly to “recover,” but the just-released Federal “take” model suggests the manatee *may already be* recovered, and that last year’s poorly received “recovery criteria” may in fact be wrong.

We *assumed* limiting or even banning dock building — the Service still hasn’t approved a single dock permit in Brevard this year — would reduce risk to manatees. It doesn’t. In Lee County, some 2,000 docks were built since 2001 *without* Federal permits and manatee deaths dropped from 13 to 2.

And we *assumed* taking the pleasure out of boating for Florida families by slathering shorelines with speed zones would reduce collision deaths. But deaths kept rising, in no small part because many collisions are caused by tugs, barges, and even law enforcement vessels that are exempt from the restrictions.

Inappropriate Measurements

FWS uses its presumptive authority under the Marine Mammal Protection Act to promulgate rules in areas where one or more manatees are “taken” by watercraft. This results in three logical disconnects:

- 1) FWS cannot demonstrate which watercraft actually cause the “take.” Rather, it wrongly assumes that “take” is caused by watercraft the Service intends to restrict, or “mitigate.”
- 2) “Take” is not measured or correlated against any other variable, such as population growth or decline. As the Service’s own preliminary “take” model notes, watercraft collisions are directly related to manatee population. As population increases, so, too, will collisions. On the other hand, if manatee population declined, so, too, will collisions. The Service thus relies on a measurement that punishes success and rewards failure.
- 3) Attempting to apply this “take” standard to the Service’s own proposed (and flawed) recovery criteria merely exacerbates these logical disconnects. The recovery

criteria are based on percentages derived from observation of “scar catalog” manatees. But “take” standards are based solely on raw numbers. In effect, even if all manatee populations were declared “recovered,” the Service still could and likely would restrict recreational boating based on the high levels of “take” the “recovered” population would experience.

These logical disconnects showcase that MMPA was never meant to be applied to such incidental, unintentional “take” of manatees by non-commercial vessels.

This is an “apples and oranges” policy. On the one hand, the Service uses percentage-based observations of a known population to measure recovery. But on the other hand, it uses numeric deaths in a population universe of unknown size, to determine “mitigation.”

This approach hasn’t worked in 30 years, and won’t ever work in 300.

The disconnect between percentage-based “recovery” but numbers-based “mitigation” is, in and of itself, reason to discard Service management proposals.

However, the problem is much worse. When calculating “take,” the Service counts all presumed watercraft-related deaths, but the Service only “mitigates” for a fraction of those deaths.

A controversial study of collision deaths in the Brevard Barge Canal concluded that just three of some 30 deaths counted over the years were caused by small, family recreational boats. The balance of deaths were caused by large cruising vessels, which operate at slow speed in the Canal, and by barges and tugs moving to and from local power plants, also at slow speed.

In short, Service “mitigation” has the possibility of preventing just three of the 30+ recorded deaths!

In other parts of the State where high mortalities occur, barges and tugs are responsible for a sizable number of deaths. In Lee County, for example, deaths dropped from 13 to 2 in a year. The Service is claiming this is the result of better enforcement. But why would enforcement work in Lee County and nowhere else in the State, where deaths this past year set another record?

In fact, the drop in Lee County deaths was almost certainly the result of a cessation of barge runs to the local power plant, which changed from fuel oil, brought in by barge, to natural gas, which is piped in to the plant.

Rather sadly, in all the recent Federal pronouncements regarding Lee County and manatees, this obvious, salient, and laudable fact is not mentioned even once.

In Broward County, the Florida Inland Navigation District stated that three of four deaths

in a recent year were caused by a single commercial vessel operating one day in Port Everglades. The rest of the year: one manatee death in Broward County.

In Duval County, which has had an approved State Manatee Protection Plan since 1999, but is now targeted for more FWS “management,” an FWS researcher 20 years ago concluded a high correlation between large commercial vessels and manatee mortality. In the Jax Navy Yard, where recreational vessels are of course prohibited, manatee deaths occurred regularly until the Navy placed omnidirectional, rimmed props on its tugs and began using “yokohama bumpers” – large fenders that keep Navy ships several feet away from wharves. Navy Yard deaths effectively dropped to 0.

Volusia County’s Halifax River sees extremely heavy barge traffic every day every day of the year, a pattern that FWS researchers 20 years ago urged the Service to investigate.

Yet in none of these locations slated for new, court-ordered “refuges,” has the Service proposed any form of mitigation that would manage or seek to reduce manatee deaths caused by large, slow-moving, commercial tugs and barges.

Unbelievably, the Service could ban all family recreational boats from the water, yet still experience “take” well beyond the incidental numbers discussed in the Runge Model. Of course, if that happened, anti-boating groups would simply claim that we careless boaters must be violating the ban!

In sum, the logical disconnects in policy extend to two levels. The first level is the Service recovers by percentage, but mitigates by the number. And the second level is the Service only “mitigates” for a fraction of the “takes” it records.

There is yet a third level of disconnect. “Recovery” is based on observations of a known group of manatees, described in what is referred to as the “scar catalog.” There are some 1,000 manatees listed. We know, however, that more than 3,000 manatees have been counted by air. And a 3-year FWC study in Tampa Bay indicates that aerial surveys are likely undercounting by the thousands.

The number of “take” therefore compares total watercraft deaths versus a total population of unknown, but much larger than previously believed, size. Obviously, a “take” of 90 manatees/year is much less significant when compared to a total population of 30,000 than when compared to a population of 3,000. But because the Service does not know the approximate size of the herd, the Service inherently cannot develop a management program that addresses the honest “in the water” status of the manatee. This same problem fundamentally flaws the Runge Math Model, which likewise attempts to tally all known and all presumed watercraft deaths, and all known and all presumably unrecovered deaths from all causes.

Misapplied Procedures and Misunderstood Data

The three logical disconnects described above are the result of misapplied procedures and misunderstood data. Obviously, when data cannot be correlated, misapplication is the inevitable result!

Michael Runge points out several of these misapplied procedures, although he characterizes them less unkindly:

“The current recovery criteria pose some conceptual difficulties. In particular, requiring that a positive growth rate be sustained over a long period of time only makes sense in a severely depleted stock; it does not make sense for a population that is nearing its carrying capacity. Since there is considerable uncertainty about what the carrying capacity is in each region, it is difficult to know whether this criterion is currently appropriate.”

Runge and the Service also mischaracterize the relationship between population growth and the rate of increase in watercraft-related deaths. Runge writes:

“To interpret these rates of increase (in watercraft mortality), however, it is important to compare them to the historic growth rates (1990-1999) in each region, to account for the increase in watercraft-related mortalities that would be expected due to increases in manatee population size.”

This is a puzzling proposal, because the rate of increase in population *is already net* of the rate of increase in watercraft deaths. In other words, the observed manatee population represents the net increase in population after all deaths and emigration are subtracted. For Runge to make a valid comparison, he needs to compare the rate of increase in watercraft deaths with the gross rate of population increase.

Quite obviously, if the manatee population grew over the past decade (as Runge, the Service, et. Al., concede, then the gross population was growing at a rate equal to or faster than watercraft-related mortality. (See Fraser 2003).

This sort of mismatch is endemic in manatee management. For example, the Service, in Volusia County, proposes to reduce daytime channel speeds from 30 to 25MPH. Why? No one knows!

Although FMCA has unresolvable difficulties with the Runge Model premise, we do note that he is correct regarding the need for more comprehensive understanding of the manatee herd:

“the goals for recovery depend on the sampling effort exerted to monitor the population.”

Unfortunately, an aggressive sampling effort is not taking place.

Solutions

We have shown that the Service's protection plan is based on a series of logical disconnects that have led to the misapplication of procedures and the distortion of data. Is it any wonder that, after 30 years of policy based on these decisions, that the Service is sunk even further into the miasma of mismanagement than ever before?

It is our firm opinion that the Service needs to withdraw its Rules and rescind its existing Emergency Rules immediately. They serve no useful purpose and take away funds that could be – indeed, must be – devoted to clearing out the incorrect assumptions and validating management practices before ANY new Rule-making moves forward.

There are six simple steps that FWS must take and complete before it attempts to implement any Rules:

1. Use the scar catalog as your basis for all management decisions.
2. Enlarge the scar catalog with an aggressive campaign to tag every manatee we find.
3. As you analyze watercraft deaths, count only those manatees listed in the scar catalog and struck by restricted – that is, mitigatable – vessels.
4. Funding or applying new technology must be a form of mitigation. Using technology, deaths caused by any boat could be mitigated.
5. Cost-effectiveness research must be ongoing. Do speed zones work? The body of evidence says they are ineffective, expensive, and nearly impossible to enforce. Are the Recovery Criteria workable? Is the manatee even “depleted?”
6. ACOE review and FWS concurrence on single residential dock construction is pointless, wasteful and enormously destructive. It must be rescinded.

These six steps are the foundation for effective policy. The Crap the Club has been feeding the press is just that. It's a model the Club uses because they know it means perpetual feeding for them at the public trough of money and influence.

Twenty years ago, an FWS researcher concluded that Duval manatees are most often killed by large, slow-moving, barges, tugs and ocean-going vessels. She urged you to conduct more research into the types of vessels that strike and kill manatees.

Today, the Club still fights to prevent that kind of research, which is why this miasma continues.

There are more intelligent decisions and choices that can and must be made. Your failure to make these decisions over the past 30 years means that John and Jane Q. Public must spend their own money, their own time, their own knowledge, to sue you to fix this mess poor public policy and worse scientific assumptions have spawned.

If you have any questions about our suit, or our other proposals to fix this misbegotten mess, I will be happy to respond.