

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION



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February 10, 2003

Mr. Andrew J. Turner
Hunton and Williams
1900 K. Street, NW
Washington, D.C. 20016-1109

Re: Save The Manatee Club, Inc. v. Ballard, Case No: 1:00CV00076 EGS/JMF

Dear Mr. Turner:

The Fish and Wildlife Conservation Commission (FWC) has authorized me to prepare a position statement (attached) with respect to the Proposed Stipulated Order now before the United States District Court for the District of Columbia in the above-cited case. I am also authorized to submit this position statement to you, as representative of the Intervenor, so that you may attach it to your comments on the Proposed Stipulated Order. While the FWC is not a party in this case, it submits this position statement in hopes that it can be communicated to the Court as part of your objections to the Proposed Stipulated Order.

Your cooperation in assisting FWC in this matter is greatly appreciated.

Sincerely,

Kenneth D. Haddad
Executive Director

KDH/JVA/pm
cc: Ms. Cindy Bartin

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FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION'S
POSITION ON Proposed STIPULATED ORDER IN
SAVE THE MANATEE CLUB, INC. v. BALLARD
United States District Court, District of Columbia, Case No. 1:00CV00076 (EGS/JMF)

SUMMARY OF POSITION

- **The Florida Fish and Wildlife Conservation Commission respectfully offers its comments on the Proposed Stipulated Order.**
- **The Proposed Stipulated Order may prematurely mandate unwarranted new Federal manatee refuges and sanctuaries that are inconsistent with State manatee conservation efforts and that do not meet United States Fish and Wildlife Service (USFWS) site-selection criteria.**
- **The Proposed Stipulated Order recognizes a USFWS Section 7 Consultation Directive that cannot reasonably be implemented and that hurts Floridians.**

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Introduction Introduction Introduction Introduction

The Florida Fish and Wildlife Conservation Commission (Commission) is the agency vested with State authority for manatee conservation. It respectfully submits its comments and suggests that in its present form, the Order creates regulations that will undermine existing federal law and state manatee conservation efforts. First, the Order appears to prematurely require additional Federal regulations that are not consistent with the Commission's manatee protection rules and conservation efforts and that do not meet USFWS's criterion that manatee refuges or sanctuaries be adequately posted and enforced. Second, the Order appears to recognize a new Endangered Species Act Section 7 consultation process which cannot be reasonably implemented for the foreseeable future and will be detrimental to Floridians.

The Commission's Manatee Settlement Order

In 1999, Save the Manatee Club, Inc. and other parties sued the Commission for inadequate manatee protection. The suit was resolved by a federal Consent Decree without any

finding of liability on the part of the Commission. [November 7, 2001 Order in Save the Manatee Club, et al. v. Egbert, Case No. 4:00CV17/RV United States District Court, Northern District of Florida][Copy attached]. The Consent Decree committed the Commission to consider adoption of State manatee protection rules throughout peninsular Florida. To date, additional State manatee protection rules, which regulate speeds of vessel, establish buffer zones and other protection measures, have been adopted for waterways in Brevard, Hillsborough, Manatee, Indian River, Citrus, Charlotte, DeSoto, and Sarasota Counties. That Consent Decree further obligates the Commission to review the adequacy of existing State manatee protection rules adopted in 1999-2000 for Lee County and downtown-Jacksonville/Duval County this Fall - two areas presently under consideration in the Proposed Stipulated Order (“Order”).

While the parties and this Court have previously recognized the “critical role” of the Commission’s manatee conservation efforts, the Order fails to acknowledge sufficiently the Commission’s prospective manatee conservation activities in Lee and Duval Counties under the terms of the Consent Decree. In fact the Order in its present form, undermines the Commission’s manatee conservation activities, a result which neither the court nor USFWS could possibly intend.

Today, some 298,817 acres of Florida waters are protected by State manatee rules and additional areas will be considered under the Commission's Consent Decree. In contrast, only 10,058 or so acres are designated as federal manatee refuges or sanctuaries. The State of Florida has significantly increased law enforcement in manatee protection areas, has developed measurable biological goals to help define recovery of the manatee population and has instituted additional public education programs to enhance manatee conservation.

Establishment of Federal Manatee Zones

One of the four criteria for establishing manatee refuges and sanctuaries includes "a determination that it could implement effective measures at the site to address the identified problem." 67 Federal Register 684. USFWS recognizes that the ability to adequately post and enforce designated sites are key to the effectiveness of refuges and sanctuaries.

The criteria were said to be used in establishing the manatee sanctuaries and refuges under the Save the Manatee Club v. Ballard Consent Decree. In finding that the USFWS had violated that Consent Decree, the Court stated that had USFWS finalized rules for the areas Proposed on August 10, 2001 USFWS would have met the general distribution requirement for new refuges and sanctuaries. (July 9, 2002, Memorandum Opinion, p.10). In the Environmental

Assessment supporting those rules, USFWS said:

It was determined that the budget allowance for this activity would allow for the designation, marking and enforcement of a limited number of small protected areas. There are many more areas that have been suggested as possible protected areas; however, the funding to manage those sites is not available at this time.

[Environmental Assessment, Section V.E.2].

Thus, the USFWS has already acknowledged that there are insufficient federal resources for managing the additional sanctuaries the Order purports to create. There is nothing in the Proposed Stipulated Order to suggest that USFWS can honor its site-selection criterion and make the required “determination that it could implement effective measures at the site to address the identified problem.”¹ Inevitably, the Commission will be held to publicly account for the adequacy of posting and enforcement of these additional Federal refuges and sanctuaries. Such premature federal rulemaking will diminish the “critical role” of the Commission’s manatee conservation efforts and will further aggravate public confusion over manatee protection in Florida. The Proposed Stipulated Order would have USFWS expend limited federal funds for rulemaking procedures to propose additional manatee refuges and sanctuaries – refuges and sanctuaries that it has recently stated that it lacks the resources to post, publicize, and enforce.

The Proposed Stipulated Order is unclear as to whether additional federal manatee sanctuaries and refuges are mandated, or whether the USFWS has the discretion, after receipt of comments from the Commission and the public, to determine whether any area meets all four of

¹ The Proposed Stipulated Order recognizes the Service’s January 22, 2003, Law Enforcement memorandum, but it is not part of the agreement; there is nothing to suggest that “weekend and mid-week Task Forces” are “effective measures” to justify new Federal refuges and sanctuaries in many miles of waterways spread over five Florida counties.

USFWS's site selection criteria. The Commission submits that the USFWS should have the discretion to determine, after public and agency comments are received, whether the scientific information still supports the rule proposals.

The Commission is apparently expected to continue to performing the lion's share of manatee conservation and recovery actions in Florida while limited Federal resources are expended to expand Federal manatee refuges and sanctuaries that Federal agencies cannot adequately implement.

Section 7 Consultation

The Proposed Stipulated Order purports to recognize a January 22, 2002 USWFS Directive -- "Consultation Procedures to be Followed for All Watercraft-Related Access Activities Within Peninsular Florida." The Directive is applicable until the May 5, 2003, deadline for final "incidental takings" rules under the Marine Mammal Protection Act. This Directive requires a Biological Opinion from the USFWS for any federal action that is likely to affect manatees. Thus, it brings into its scope all Corps' decisions regarding permitting for any dock in Florida.

USFWS lacks the personnel to issue a timely Biological Opinion for each federal action that is likely to affect manatees. Thus, if all permitting were subject to Biological Opinions, the

delays would likely halt dock building in many areas of Florida. It is unlikely that USFWS can finalize the MMPA rules by May 5, 2003 -- the Commission and many others have commented on serious deficiencies with the Proposed rules.

As a result, Florida's economy and citizens will suffer from procedural delays in Federal actions and, depending upon the outcome of that rulemaking, those Federal actions may result in a dead-end for those actions that require Section 7 incidental taking authorization under the Endangered Species Act.

Conclusion

The Florida Fish and Wildlife Conservation Commission believes that the Proposed Stipulated Order is contrary to the public interest, and would not further manatee recovery. This proposal is inconsistent with the Commission's manatee Consent Decree and at odds with the Commission's primary role in manatee conservation in Florida.

Assuming that the USFWS failed to honor the Consent Decree, the remedy for such a violation should not be to prematurely create additional Federal manatee refuges and sanctuaries

that cannot be enforced adequately by the USFWS. Moreover, it is unfair to the Commission and to all Floridians to thrust burdens on them because of the alleged failure of USFWS efforts. The Court should, at minimum, take into consideration existing efforts at the state level to promote manatee conservation. It should also consider the futility of creating additional sanctuaries and refuges that cannot be protected with current available resources. The extent that additional Federal manatee protection areas have been predetermined, we submit that this remedy will strain Federal-State relations on manatee conservation in Florida and will diminish the State's critical role in manatee conservation -- in effect setting back the cause of manatee recovery. The balance of considerations weigh against the Proposed Stipulated Order.