

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SAVE THE MANATEE CLUB, et al.,

Plaintiffs,

LT. GENERAL JOE N. BALLARD,  
et al.,

Defendants.

Civ. No. 00-76 (EGS/JMF)

INTERVENORS' OBJECTIONS  
TO THE PROPOSED STIPULATED ORDER

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Intervenors object to the Proposed Stipulated Order. It would have the government shirk its statutory obligations, ignore the rights of the public, and violate the law at its core. In return for Plaintiffs' agreement that "no contempt citation should be issued against the federal defendants," Prop. Stip. Ord. ¶ 11, Federal defendants are agreeing to yet another round of manatee protection area rulemaking to restrict waterborne activities in Florida, this time in the very areas that the Fish & Wildlife Service (FWS) has consistently determined do not meet the scientific and legal criteria for designation. Federal defendants are also adopting new "consultation" procedures which violate their own regulations.

The new round of agreed-upon rulemaking is contrary to basic administrative law principles under the Administrative Procedure Act (APA). It succumbs to Plaintiffs' persistent demands for designations of four targeted locations despite repeated FWS determinations that none of the four locations meet the legal threshold for designation. It is therefore arbitrary and capricious. It "proposes" four predetermined locations based on predetermined scientific

findings, and it predetermines the outcome. And, by asserting that the proposed designations are "based on the best available data," the Proposed Stipulated Order bargains away the science and FWS's discretion, thereby effectively guaranteeing one outcome: that which is proposed will be designated. A rulemaking with such a foregone conclusion is an illegal rulemaking under the APA. It deprives the public, including state and local governments, of a genuine opportunity to be heard on a matter that will affect them in a major way.<sup>1</sup> Finally, the Proposed Stipulated Order includes a plan to force an entire category of United States Army Corps of Engineers (Corps) permits into an unnecessary consultation process that violates established consultation procedures and deadlines. Federal defendants have effectively handed the reins over to Plaintiffs to decide where and how to regulate the public. But only the sovereign can be the sovereign.

The practical effects of the new restrictions will be devastating. Fishermen, fishing charter services, and tour operators will be hit hard. Changing the speed zones in most of a 15 mile or so stretch of the Caloosahatchee River in Fort Myers from 25 mph or higher to slow speed (approximately 6 mph) would mean that a round trip boat ride from some areas of this water-oriented City to the Gulf of Mexico would go from 1½ hours to over 4 hours. See Prop. Stip. Ord., Exhibit A (Caloosahatchee River—Lee County).<sup>2</sup> Moreover, in an area valued for its

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<sup>1</sup> Indeed, judging from the attached documents from the Florida Fish & Wildlife Conservation Commission, Lee County, the City of Cape Coral, and the City of Jacksonville, it appears there was little or no coordination with public officials in the affected communities, nor do many of those officials believe that these actions will benefit manatees. See Attachments 1-4.

<sup>2</sup> Exhibit A to the Proposed Stipulated Order describes the current and proposed restrictions along an approximately 15 mile section of the Caloosahatchee River adjacent to Fort Myers. A basic calculation provides a rough demonstration of the impact of these restrictions: traveling 15 miles at 25 mph takes 36 minutes; traveling 15 miles at 6 mph takes 2 hours and 30 minutes. Thus, a round trip across the 15 mile stretch would take nearly 4 hours longer to complete. See Attachment 2, February 7, 2003, Lee County letter (proposed designation would add "over one hour" each way). While this calculation does not account for specific distances,

(continued...)

access to open water, diminishing Gulf access drastically diminishes property values. For developers in the process of building coastal communities, marina operators, local governments dependent on property taxes, and even homeowners, the immediate change in shoreline value would be devastating.

Faced with the threat of being held in contempt by this Court and constant pressure from Plaintiffs, Federal defendants have agreed to a stipulated order that is not merely illegal; it is bad. The *quid pro quo* is an agreement by Plaintiffs to support vacature of contempt proceedings. But the Proposed Stipulated Order does not remedy any alleged violation of the Settlement Agreement nor any alleged contempt.

This Court ruled that FWS violated the Settlement Agreement by "failing to designate a sufficient number of refuges and sanctuaries throughout peninsular Florida in the agreed upon time," July 9, 2002, Memorandum Order, page 13, and subsequently ordered FWS to publish a final rule in the Federal Register by November 1, 2002. August 1, 2002, Order, page 3. The final rule, which was submitted to the Federal Register on November 1 but not published until November 8, 2002, designated thirteen areas as permanent refuges or sanctuaries. There is no contention that these final rules, adopted on January 7, 2002, and November 8, 2002, fail to satisfy the substantive requirements of the original Settlement Agreement. Designating additional manatee protection areas in different parts of the state and imposing unnecessary new consultation processes will not remedy the violations found by the Court or mitigate the alleged contempt.

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seasonal variations in the proposed speed zones, or certain sections of the river that would not be reduced to 6 mph under the proposal, it provides a good illustration of the type of impact such restrictions would cause.

Finally, rather than achieve a final resolution of the issues before the Court, the Proposed Stipulated Order lays the groundwork for a whole new set of issues arising from new obligations and new deadlines extending into September 2003 and beyond. Thus, the Proposed Stipulated Order will draw the Court more and more deeply into the inner workings of FWS, but without the guideposts of an administrative record to define the scope of judicial oversight. This is dangerous territory.<sup>3</sup>

#### Standard of Review

In considering a proposed settlement order, the reviewing court must determine whether the terms fairly and reasonably resolve the controversy in a manner consistent with the public

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<sup>3</sup> The administrative record of the agency action (the information that was before the agency at the time of its decision) must be the focal point for judicial review of agency action. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The APA provides that a "court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Limiting judicial review of agency action to the administrative record reflects "a sensible reluctance to involve the judiciary too deeply in administrative decisionmaking, which reluctance permits agencies to function efficiently within their areas of expertise [and] prevent[s] courts from improperly substituting their own judgment and determination for that of the agency." *American Canoe Ass'n Inc. v. E.P.A.*, 46 F. Supp. 2d 473, 476 (E.D. Va. 1999) (citing *Overton Park*, 401 U.S. at 417). As the D.C. Circuit explained:

[J]udicial reliance on an agency's stated rationale and finding is central to a harmonious relationship between agency and court, one which recognizes that the agency and not the court is the principal decision-maker. Were courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President. The accepted deference of court to agency would be turned on its head; the so-called administrative state would be replaced with one run by judges lacking the expertise and resources necessary to discharge the function they had arrogated unto themselves.

*San Luis Obispo Mothers for Peace v. N.R.C.*, 751 F.2d 1287, 1325-26 (D.C. Cir. 1984); compare *Sierra Club v. Peterson*, 228 F.3d 559, 566 (5th Cir. 2000) (rejecting wholesale challenge to Forest Service program to "avoid encroaching on the other branches of government" and to "respect the expert judgment of agencies specifically created to deal with complex and technical issues").

interest. *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983). The Proposed Stipulated Order is not intended to resolve the controversies raised in the complaint – the matters raised in the complaint were addressed by the Settlement Agreement approved by the Court on January 5, 2001. The purpose of the Proposed Stipulated Order is to address controversies over delays related to FWS's manatee protection area rulemaking pursuant to paragraph 11 of the Settlement Agreement. Thus, this Court must determine whether the terms of the Proposed Stipulated Order *fairly and reasonably resolve* that controversy – namely, this Court's determination that (1) FWS failed to designate refuges and sanctuaries throughout peninsular Florida in the agreed upon time and that, (2) when FWS subsequently issued its rule designating refuges and sanctuaries throughout peninsular Florida, it failed to publish the rule in the Federal Register by November 1, 2002.<sup>4</sup>

Courts have broad equitable powers to enforce and effectuate their orders and judgments. *United States v. City of Detroit*, 476 F.Supp. 512, 520 (E.D. Mich. 1979). But the guiding principle is that the remedy should be related to the wrong. An appropriate remedy for civil contempt should be fashioned to “coerce the contumacious party into compliance, or to compensate the aggrieved party for loss, if any, or for both purposes.” *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F.Supp. 869, 882 (E.D. Pa. 1982) (citing *Larobe Steel Co. v. United Steelworkers of America, AFL-CIO*, 545 F.2d 1336, 1344 (3rd Cir. 1976)). Although the remedy for contempt is an exercise of judicial discretion, the remedy must have an equitable relationship to the degree and kind of wrong committed. *U.S. v. Huebner*, 752 F.2d 1235, 1244-45 (7th Cir. 1985) (district court held defendants in contempt of

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<sup>4</sup> Intervenor acknowledges that the Proposed Stipulated Order does properly address one  
(continued . . .)

consent decree for conducting farming in wetlands and ordered defendants to remove cranberry beds from 10 acres of wetlands; court of appeals reversed for abuse of discretion in light of high cost of removing cranberry beds relative to minor impact of cranberry beds on wetlands).

#### Argument

**I. The Agreement to Propose New Refuges in Areas Specifically Described in Paragraph 1 and Exhibit A is Not a Fair and Reasonable Resolution of the Controversy, is Contrary to Previous FWS Determinations on These Exact Locations, and Will Violate the APA Requirement that a Rulemaking Provide a Meaningful Opportunity for Public Notice and Comment.**

The Proposed Stipulated Order does not fairly and reasonably remedy the post-settlement rulemaking issues nor does it bear an equitable relationship to the degree of the alleged wrong. The agreement is contrary to the law governing rulemaking generally and manatee protection area designation specifically. The agreement injures the Intervenor and the public. The agreement violates regulations governing consultation procedures. The agreement imposes new, enforceable obligations on FWS and extends the life of this litigation and this Court's involvement in FWS's administration of the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) far beyond the end dates expressly agreed to in the original Settlement Agreement. While the Proposed Stipulated Order gives Plaintiffs what they desire and may allow Federal defendants to avoid contempt proceedings, the burdens of the agreement are borne by the public. Yet, neither Plaintiffs nor Federal defendants have shown that these onerous measures will produce any meaningful benefits for manatee conservation.

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pending post-settlement issue – the issue of Plaintiffs' request for attorneys' fees and expenses.

**A. FWS's Agreement to Publish a Rule Proposing Refuges Described in Exhibit A is Inconsistent with its Prior Position.**

Federal regulations provide that manatee protection areas may be established only where there is (1) "substantial evidence showing such establishment" is (2) "necessary" to prevent manatee take. 50 C.F.R. § 17.103. To avoid a contempt citation, FWS has caved in to the demands of Plaintiffs for sanctuary and refuge designations in four specific locations that FWS has repeatedly determined do not meet this legal threshold for designation. Paragraph 1 of the Proposed Stipulated Order specifically states that the proposed protection areas are areas that FWS has already "determined, based on current best available data, should be proposed as manatee refuges or sanctuaries." This position is in direct conflict with repeated, recent determinations by FWS.

FWS has described to this Court its exhaustive reviews of these four areas, including two reviews prior to its August 23, 2002, submission and another review completed just before filing that submission, and how these analyses, based on the best available scientific evidence, demonstrate that the four areas do not meet the criteria for designation. See "Report Submitted in Response to Court Order," August 23, 2002, p. 1-3:

The Service first evaluated 145 sites to determine if they warranted protection under the typical designation process for refuges and sanctuaries. See attachment 1. Following evaluation of the initial 145 sites, the Service found that 16 sites could potentially meet the criteria for typical designation and therefore qualified for further evaluation under the emergency standard. In evaluating whether these 16 sites met that standard, the Service used the best available science and best professional judgment of its field personnel. Sites were evaluated based on information on manatee use (i.e., telemetry and observational data), other data such as carcass recovery information, and the extent of current protection measures.

\* \* \*

In preparation for the January 2002 meeting [with Plaintiffs, Intervenor, and the state], the Service reevaluated 82 sites recommended by plaintiffs in their comments on the proposed rule and in subsequent discussions. All 82 sites had

previously been considered in the evaluations of the 145 potential sites. See attachment 3. As part of that analysis, the Service again looked at these 82 sites to determine if they warranted emergency designation. The Service did not identify any "imminent" threat of take at any of the 82 sites. ... In their August 9, 2002 correspondence to the Court, plaintiffs specifically mentioned the Caloosahatchee River, and Duval and Collier counties as sites where they suggest emergency designations may be appropriate to address manatee deaths resulting from boat collisions.

In its August 23, 2002, submission and in its September 5, 2002, "Report to the Court Regarding Meeting with Magistrate," FWS detailed its latest evaluations on both emergency and permanent designations of refuges and sanctuaries at the four sites demanded by Plaintiffs and now included in the Proposed Stipulated Order. With respect to the Caloosahatchee River in Lee County, an area now identified for designation, FWS stated:

We recognize that the Caloosahatchee River remains an area of concern. However, we found no evidence that designation as a refuge or sanctuary (including emergency designation) would provide more protection for manatees than current regulations. Thus the designation was not "necessary to prevent such a taking" as provided under the regulatory standard. The Service acknowledges that there is evidence of manatee use, and there is a history of take. However we did not find a continued potential for take because the existing speed zones and the signs were evaluated in the river and adjustments were made early this year. There has also been a recent increase in the law enforcement effort to ensure boater compliance in the river. During FY 02, the Service's Division of Law Enforcement conducted 6 enforcement task forces in Lee County. There has also been a decline in the number of manatee deaths in this area over the past few months as compared to late last year and earlier this year.

Federal Agency Defendants' "Report submitted in Response to Court Order," August 23, 2002, page 3. In 2001, 8 manatee carcasses found in the Caloosahatchee were deemed watercraft

mortalities.<sup>5</sup> That number dropped to 3 in the Caloosahatchee in 2002, and is zero for the past five months.<sup>6</sup> For the St. Johns River, FWS reported to this Court on August 23, 2002, that

The Service has been working to address manatee concerns in Duval County. We are scheduled to meet to [sic] with county and the State officials to further discuss the issue. The area suggested for designation is on the St. Johns River in downtown Jacksonville. There was only one watercraft related mortality recorded during 2001 in Duval County and that carcass was not recovered downtown. In 2002, only one carcass has been recovered downtown. The Service acknowledges that there is evidence of manatee use, and there may be the potential for take. However, the County has agreed to improve signs in some portions of the St. Johns River in association with the permitting of a public boat ramp and negotiations are ongoing with two permit applicants to improve signs in the downtown area. The Service has determined that designation of sites would not prevent take because the size of the area and the presence of the existing State speed zones. Instead, we believe this area should be closely monitored to determine the effectiveness of the current speed zones and the improved signage. If these zones are not sufficiently effective, then designation may be considered.

*Id.*, page 3. Finally, in their "Report to the Court Regarding Meeting with Magistrate," filed on September 5, 2002, Federal defendants addressed Plaintiffs' claims regarding the Halifax and Tomoka Rivers in Volusia County and stated:

As to the other sites raised by the Plaintiffs, their data on the Halifax River was from the historical time frame of 1974 through February 2002. In 2001 there were three watercraft-related mortalities in the Halifax River. In 2002, there have been no carcasses recovered from the Halifax River. For the Tomoka River, historically, there has been low mortality, although 3 manatee deaths were recorded in 2001. In 2002, there have been no manatee mortalities recorded. Nonetheless, the Service continues to monitor both areas and the County's progress in posting appropriate signs as well as enforcing speed zones.

"Report to the Court Regarding Meeting with Magistrate," filed on September 5, 2002, page 5.

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<sup>5</sup> See [http://www.floridamarine.org/manatees/search\\_individual.asp](http://www.floridamarine.org/manatees/search_individual.asp). Because a manatee may swim a significant distance or be moved by currents and tides after a fatal collision with a boat, the location of a manatee carcass does not necessarily indicate the location of the collision.

<sup>6</sup> See [http://www.floridamarine.org/manatees/search\\_individual.asp](http://www.floridamarine.org/manatees/search_individual.asp).

The Proposed Stipulated Order is impossible to square with the science, the facts, and FWS's repeated determinations. The only thing it squares with is that, in order to avoid contempt, FWS has agreed to give Plaintiffs what they want, notwithstanding the law, the facts, the science, and FWS's statutory obligations.

**B. Data and Information Compiled Since August 2002 Do Not Support These Designations.**

New data and information compiled after FWS's August 23, 2002, submission to this Court only further support FWS's previous determinations that the four areas do not meet the standard for designation. The Proposed Stipulated Order is simply a sop thrown to Plaintiffs in the hopes that it will buy some peace, or at least avoid contempt.

The Florida Fish and Wildlife Conservation Commission's ("FWC") Florida Marine Research Institute ("FMRI") completed its "Final Biological Status Review of the Florida Manatee" in December 2002. That peer-reviewed study concluded that the manatee population is increasing and recommended that FWC downlist the species from endangered to threatened under state law. See Attachment 5, Final Biological Status Review of the Florida Manatee, p. 6, 17-18, [http://www.floridamanatee.org/features/view\\_article.asp?id=19173](http://www.floridamanatee.org/features/view_article.asp?id=19173). The good news of an increasing manatee population and the positive progress toward recovery of the species is supported by recent aerial surveys conducted on January 21-22, 2003. During these surveys, the state counted 3,113 manatees, the second highest count of manatees since the surveys began in

1991 with a count of 1,465 manatees.<sup>7</sup> The 2001 and 2003 manatee counts are the highest on record.<sup>8</sup>

Post-August 2002 mortality data in the areas proposed for designation also demonstrate that protections recently put in place are working, and designation is not warranted. Since August 2002, no manatee carcasses have been recovered in the St. Johns River (Duval, Clay, St. Johns Counties).<sup>9</sup> In the Halifax and Tomoka Rivers in Volusia County, no manatee carcasses recovered since August 2002 have been deemed watercraft mortalities.<sup>10</sup> In the Caloosahatchee River there have been no manatee deaths attributed to watercraft related activities in over five months.<sup>11</sup> Many actions have been taken by state, local, and private interests with responsibilities in these areas (i.e., significant increases in law enforcement personnel, time on the water, and equipment, new state and local initiatives, and public and private educational programs). See Attachments 1-4.

Specific to the Caloosahatchee River, in November 2002, FWC, through the FMRI, issued its report "A Special Study of Manatees in Mullock Creek and the Caloosahatchee River Eastward to the Edison Bridge." See Attachment 6; [http://www.floridamarine.org/features/view\\_article.asp?id=18833](http://www.floridamarine.org/features/view_article.asp?id=18833). FWC agreed to conduct this study of the Caloosahatchee as part of

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<sup>7</sup> See [http://www.floridamarine.org/news/view\\_article.asp?id=19530](http://www.floridamarine.org/news/view_article.asp?id=19530).

<sup>8</sup> The last full count, in 2001, totaled 3,276 manatees. See Florida Marine Research Institute, Record Number of Manatees Counted in 2001, [http://www.floridamarine.org/features/view\\_article.asp?id=7902](http://www.floridamarine.org/features/view_article.asp?id=7902). The 2002 count was incomplete due to poor weather and poor visibility. See [http://www.floridamarine.org/features/view\\_article.asp?id=15263](http://www.floridamarine.org/features/view_article.asp?id=15263) ("Foul Weather Foils Annual Manatee Count").

<sup>9</sup> See [http://www.floridamarine.org/manatees/search\\_individual.asp](http://www.floridamarine.org/manatees/search_individual.asp).

<sup>10</sup> See [http://www.floridamarine.org/manatees/search\\_individual.asp](http://www.floridamarine.org/manatees/search_individual.asp).

<sup>11</sup> See [http://www.floridamarine.org/manatees/search\\_individual.asp](http://www.floridamarine.org/manatees/search_individual.asp).

its settlement agreement with the Save the Manatee Club and other plaintiffs in a parallel lawsuit against the state, *Save the Manatee Club v. Egbert*, Case No. 99-00-400CIV17-WS (N.D. Fla.).

Based on the results of the study and the recommendation of staff, FWC determined that no further management actions are warranted at this time on the Caloosahatchee.<sup>12</sup>

Indeed, a high number of manatees are found in the Caloosahatchee River. Plaintiffs have previously acknowledged that a record 435 manatees have been counted near the artificial warm water discharge from a power plant near the confluence of the Caloosahatchee and Orange Rivers. Manatee speed zones in the Caloosahatchee were recently and significantly expanded, however, and most of the signs posting the new speed zones were placed between mid-2001 and early 2002. The manatee speed zones in the area now include no entry zones near the power plant warm water discharge, place the intracoastal channel under an idle speed restriction during the winter months from November 15 to March 31 near the warm water discharge, place nearby inshore waters under an idle speed restriction all year, place the entire Orange River under an idle speed restriction all year, and place nearly all near shore waters of the entire Caloosahatchee under a slow speed restriction all year. At the same time that new zones have been posted, law enforcement task forces and boater education efforts have targeted the area. Thus, even with an

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<sup>12</sup> See November 20-22, 2002, Meeting Minutes of the Florida Fish and Wildlife Conservation Commission, p. 7; <http://floridaconservation.org/commission/2003/jan/Nov02.pdf>. As part of the settlement of the *Egbert* case, FWC also agreed to enhance law enforcement and education activities in the Caloosahatchee and conduct additional studies to evaluate the adequacy of the speed zones in Lee County and the St. Johns River in Duval County. See Exhibit D (State Settlement Agreement) to Plaintiffs' April 17, 2002, Expedited Motion to Enforce Court Ordered Settlement Agreement. Save the Manatee Club and other parties to that lawsuit agreed that FWC's additional evaluation of these speed zones would be reported in Fall 2003. Now, however, Plaintiffs are unwilling to wait for the results of the additional speed zone study. Instead, they demand that FWS designate manatee protection areas in the Caloosahatchee and St.

(continued ...)

increasing manatee population and high numbers of manatees artificially drawn to a warm water discharge, there have been no watercraft mortalities in the Caloosahatchee in the past five months, demonstrating that a new overlay of restrictions is not "necessary," as is required by law.

The population and mortality data, recent new restrictions and enforcement efforts, and the scientific analyses and reports generated or released subsequent to the FWS August 23, 2002, submission only further support FWS's repeated determinations that designation is not warranted. The Proposed Stipulated Order is on the wrong track.

**C. The Outcome of the Rulemaking is Predetermined in Violation of the Administrative Procedure Act.**

That FWS will designate the four specified locations is plain in the Proposed Stipulated Order. First, FWS has agreed to language that binds it to designate the four locations in the same manner that this Court held bound FWS to designate sanctuaries and refuges "throughout peninsular Florida" under the original Settlement Agreement. Second, by agreeing in advance that the "best available data" supports designation, FWS is flatly contradicting every previous representation it has made to this Court and the public. FWS's agreement to bargain away the science now means it is leaving itself no choice but to designate the four locations sought by Plaintiffs.

Paragraphs 1 and 2 of the Proposed Stipulated Order state:

1. In accordance with 50 C.F.R. §§ 17.100-17.107, the Service agrees to submit to the Federal Register for publication a proposed rule for the designation of additional manatee protection areas (i.e., refuges and/or sanctuaries as defined in 50 C.F.R. §17.102) in the Caloosahatchee River (Lee County, Florida), the St. Johns River (Duval, Clay and St. John's (sic) County, Florida), and the Halifax River/Tomoka River (Volusia County, Florida) on or before March 31, 2003.

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Johns right now -- before FWC completes its additional evaluation of the adequacy of the speed zones in the Caloosahatchee and St. Johns Rivers.

Exhibit A describes the areas that the Service has determined, based on the current best available data, should be proposed as manatee refuges or sanctuaries.

2. The Service agrees to submit to the Federal Register for publication its final decision on the proposed rule described in paragraph 1 on or before July 31, 2003. Plaintiffs and Federal Defendants agree that the Service retains its discretion consistent with the Administrative Procedure Act in reaching its final decision with respect to manatee protection areas identified in paragraph 1.

(Prop. Stip. Ord., page 3, emphasis added). This language is very similar to the language in paragraph 11 of the original Settlement Agreement, which provides in part

[i]n accordance with 50 C.F.R. §§ 17.100-17.107 and subject to ¶16, the Service agrees, by April 2, 2001, to submit to the Federal Register for publication a proposed rule for new manatee refuges and sanctuaries throughout peninsular Florida. Subject to ¶16, the Service agrees to submit to the Federal Register for publication, by September 28, 2001, a final rule for new manatee refuges and sanctuaries throughout peninsular Florida.<sup>13</sup>

(Settlement Agreement, ¶ 11, emphasis added).

Finding the language in paragraph 11 of the Settlement Agreement unambiguous, this Court interpreted the Settlement Agreement to require Federal defendants to issue, by a date certain, a final rule that designated refuges and sanctuaries "throughout peninsular Florida." July 9, 2002, Order, page 8. Likewise, the Proposed Stipulated Order binds FWS to publish in the Federal Register by July 31, 2003, its final decision on the "Caloosahatchee River (Lee County, Florida), the St. Johns River (Duval, Clay and St. John's (sic) County, Florida), and the Halifax River/Tomoka River (Volusia County, Florida)." A "rule" as used in the original Settlement Agreement is the same as a "decision" as used the Proposed Stipulated Order. See

<sup>13</sup> ¶16 of the Settlement Agreement provides "[t]he parties agree that this Agreement was negotiated in good faith and it constitutes a settlement of claims that were vigorously contested, denied, and disputed by the parties. By entering into this Agreement, plaintiffs, federal defendants, and intervenors do not waive any claim or defense on any grounds except as expressly provided by this Agreement."

Administrative Procedure Act, 5 U.S.C. § 551(4) ("rule" is the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"). A "decision" by FWS on designation of the four specified areas is by definition a "statement" by FWS of the "applicability" of manatee protection area restrictions to "implement" statutory take prohibitions in the four areas. Indeed, "rulemaking" is an agency's decisionmaking process on whether to issue, change, or even repeal a rule. *Id.* at § 551(5) ("rulemaking" "means agency process for formulating, amending, or repealing a rule"). A FWS "decision" under the Proposed Stipulated Order is the same as a "rule" under paragraph 11 of the original Settlement Agreement.

Thus, for the same reason that the original agreement was held to require designations "throughout peninsular Florida," the Proposed Stipulated Order must require FWS to designate the four refuges and sanctuaries proposed. Indeed, by predetermining that the "current best available data" supports designation, FWS has succumbed to a position that contradicts every prior representation to this Court and the public. Worse, FWS has bargained away the science by gratuitously agreeing to prejudge the "best available data" in a manner that (1) is inconsistent with the facts and FWS's own conclusions and (2) will bind FWS to take action conforming to its 180 degree shift in position on designation of the specified locations. Thus, FWS has gone much farther toward committing itself to a certain outcome than it did in the original Settlement Agreement. And, while the Proposed Stipulated Order states that FWS "retains its discretion under the Administrative Procedure Act," the original Settlement Agreement also reserved to FWS its discretion under the APA, but FWS was nonetheless held to be required to designate sanctuaries and refuges throughout peninsular Florida. See Settlement Agreement, ¶ 20 and 21.

The APA governs federal agency rulemaking. It requires that federal agencies issue rules only after providing notice to the public, giving "interested persons an opportunity to participate" and "consideration of the relevant matter presented." 5 U.S.C. § 553(c). Because the outcome of the rulemaking process is predetermined, the public notice and comment process provided for is a meaningless exercise. Thus, the Proposed Stipulated Order violates the APA. Indeed, no one at this point seriously questions that FWS will designate the sites as proposed rather than run the risk of being brought back to Court on further allegations of wrongdoing and contempt.

**II. The FWS's January 22, 2003, Memorandum Titled "Consultation Procedures to be Followed for All Watercraft-related Access Activities Occurring within Peninsular Florida" is Inconsistent with the Law, Affects Intervenor's Legal Rights, and is Not a Fair and Reasonable Resolution to the Controversy.**

Paragraph 5 of the Proposed Stipulated Order "acknowledge[s]" a January 22, 2003, memorandum in which FWS establishes new procedures for consultation with "action agencies" under the ESA on "watercraft-related access activities occurring within peninsular Florida." These new procedures abrogate existing "informal consultation" procedures established in existing applicable regulations, forcing even single family docks into formal consultation. Such a change in applicable regulations may only be made through notice and comment rulemaking. Without the required rulemaking, the new procedures violate the ESA regulations, and are thus unlawful.

Under existing ESA regulations, if an action agency (for example, the Corps in its evaluation of an application for a permit to construct a dock) determines that its action "may affect" a threatened or endangered species, the agency will initiate consultation with FWS (or for some species, the National Marine Fisheries Service) to ensure that in taking its action the action agency does not jeopardize the continued existence of the species. 50 C.F.R. § 402.14. During

consultation the action agency and FWS will consider how the particular project will affect species and what measures might be taken to minimize or mitigate any adverse impacts to the species. *Id.* At the end of consultation, FWS will issue a Biological Opinion indicating whether the project is likely to cause jeopardy and suggesting "reasonable and prudent measures" to minimize adverse impacts (in the case of a project that will not cause jeopardy) or "reasonable and prudent alternatives" (in the case of a project that would otherwise cause jeopardy). *Id.* If, despite these measures, the project has the potential to result in "incidental take" of the species, FWS will issue an "incidental take statement" effectively authorizing such inadvertent takes associated with otherwise lawful conduct. *Id.*<sup>14</sup>

If, however, during the course of consultation FWS and the action agency both conclude that the proposed project, as mitigated, is "not likely to adversely affect" the species of concern, and they exchange letters documenting the basis for those conclusions, then under the regulations the consultation is "terminated" and no Biological Opinion is required. 50 C.F.R. §§ 402.13(a), 402.14(b).

The Consultation Memo rewrites these regulations, deleting the Informal Consultation provisions that allow consultation to be terminated based on a "not likely to adversely affect" concurrence. This, by itself, is a violation of the regulations because the regulations can only be changed through notice and comment rulemaking with an opportunity for the affected public to be heard. Moreover, by dispensing with the case-by-case evaluation of projects that is

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<sup>14</sup> Because FWS has not issued incidental take regulations under the MMPA, however, if FWS were to conclude that a given project would cause take of manatees, it would not be able to issue incidental take authorization. In that case, the Biological Opinion would not include an incidental take statement, and, in accordance with ¶ 7(B) of the Settlement Agreement, the Corps would deny the permit application.

contemplated in the regulations and adopting an across-the-board requirement that all watercraft access projects must undergo full formal consultation, FWS is effectively concluding that no dock could ever meet the "not likely to adversely affect" standard. Such a conclusion is arbitrary on its face.

Not only is the new Consultation Memo legally infirm, but it will aggravate FWS's current violations of statutory deadlines. Under the ESA, Congress specifically set deadlines for completing the consultation process and issuance of the Biological Opinion. FWS has 90 days to complete the consultation process and 45 additional days to write the Biological Opinion. See 16 U.S.C. § 1536(b). According to Corps records, however, there are over 1,000 permit applications for water-related activities in Florida now pending before FWS. These are applications that have been transmitted by the Corps to FWS for completion of the consultation process required under the ESA. Some have been pending for years. In Lee County alone there are 650 applications delayed because FWS has failed to concur or issue a Biological Opinion in accordance with the procedures set forth in the original Settlement Agreement.

The result is a massive backlog of pending permit applications, delayed due to failure by FWS to complete the consultation process, both as envisioned in the Settlement Agreement and as required by fixed statutory and regulatory deadlines. FWS's failure to act has effectively placed a moratorium on permit actions, contrary to fixed statutory deadlines that FWS must meet. The Consultation Memo, which illegally abrogates the informal consultation process, adds yet another source of delays to further exacerbate the economic and other harms suffered by those awaiting action on their Corps permit applications.

### III. The Proposed Stipulated Order does Not Achieve this Court's Goal of "Finality."

This Court directed the parties to resolve the issues to achieve "finality." The Intervenor's want nothing more than to conclude this case by May 5, 2003, the date identified for the final decision on the MMPA rules and the date upon which FWS will have satisfied all terms of the original Settlement Agreement. The Proposed Stipulated Order expands the life of this case and does not achieve the much-desired finality. It creates new obligations and imposes new deadlines for FWS.<sup>15</sup> In paragraph 7, FWS agrees to meet with Plaintiffs and Intervenor's no later than March 10, 2003, to confer on "additional protection measures" and the form and substance of such measures. This agreement to confer serves no real purpose but to allow Plaintiffs an additional opportunity to influence the process and potentially extend the life of this case.

Because the Proposed Stipulated Order does not result in the finality sought by the Court, it is not a fair or reasonable resolution of the controversy.

#### Conclusion

Based on the above objections and in consideration of the letters filed by the Florida Fish and Wildlife Conservation Commission, Lee County, the City of Cape Coral, and the City of Jacksonville, this Court should find that the Proposed Stipulated Order is not a fair and reasonable resolution of the post-settlement issues, is illegal, and is not in the public interest.

Based on this the Court should deny the Motion for Entry of the Proposed Stipulated Order.

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<sup>15</sup> The Proposed Stipulated Order requires FWS (1) to provide to Plaintiffs and Intervenor's all comments received by FWS in response to the request for comment on additional measures to protect manatees; (2) to meet with Plaintiffs and Intervenor's to discuss "additional measures" to protect manatees described in the public comments; (3) to propose new refuges to include, but not limited to those specifically identified in Exhibit A; and (4) comply with new internal responsibilities for manatee protection as outlined in the three Memoranda referenced by the Proposed Stipulated Order.

Respectfully submitted,

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