

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SAVE THE MANATEE CLUB, et al.

Plaintiffs,

v.

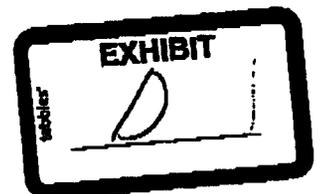
LT. GENERAL JOE N. BALLARD, et al.

Defendants.

Civ. No. 1:00CV-00076 (EGS/JMF)

**DECLARATION OF MARSHALL P. JONES
DEPUTY DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE
UNITED STATES DEPARTMENT OF THE INTERIOR**

1. I, Marshall P. Jones, hereby aver as follows: I am the Deputy Director of the United States Fish and Wildlife Service ("Service"), an agency within the U.S. Department of the Interior ("Interior"). I exercise authority delegated by the Congress, the Secretary of the Interior, and the Director of the Service. As Deputy Director, I supervise all of the Service's fish and wildlife conservation programs, including the endangered species program and the marine mammal program.
2. On August 1, 2002, the Court ordered all defendants to Show Cause why they should not be held in contempt of the Court's orders of January 5, 2001, and January 17, 2001, in which the Court approved and filed the parties' January 5, 2001, Settlement Agreement as an order of the Court.



3. The following declaration provides information on the manner in which federal defendants Gale Norton, Secretary of the U.S. Department of the Interior, and Steve Williams, Director of the U.S. Fish and Wildlife Service ("Interior defendants"), interpreted their responsibilities¹ and commitments under the Agreement and why the Interior defendants believed that they had complied with the terms of the Agreement. This declaration also provides information on actions taken by Interior defendants that demonstrate the Interior defendants' good faith efforts both to comply with all other terms of the Agreement and to apply their authorities for the conservation of manatees beyond those commitments made to the parties under the Agreement. The information is based on my personal knowledge and knowledge I have gained in my official capacity gathered in preparation of this declaration.

Actions related to designation of refuges and sanctuaries

4. The Interior defendants appreciate the opportunity to explain why, in good faith, they did not interpret their responsibilities under the Agreement with respect to the designation of manatee refuges and sanctuaries in the same manner as this Court interpreted those responsibilities in its Memorandum Opinion of July 9, 2002. The following explains how the Interior defendants interpreted their responsibilities to the parties under paragraph 11 of the Agreement in a manner they believed at the time was consistent with their responsibilities to federal, state, or tribal agencies; to potentially regulated parties; and to the interested public.

5. The Interior defendants believed that the rulemaking requirement of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, required them to publish a proposed rule in the *Federal*

¹Steve Williams began serving as Director of the U.S. Fish and Wildlife Service on February 6, 2002, which was after the final rule on manatee protection areas was published in the *Federal Register*.

Register, provide for an adequate period of public review and the opportunity for public comment, and consider all public comments received before they could make a final determination whether the designation of any additional manatee sanctuaries or refuges was warranted. The Interior defendants believed that paragraph 20 in the Agreement expressed their intent to both the parties to the Agreement and all persons reading the Agreement that no decision on the substantive content of any rule could be reached by the agency until it had complied with all procedures outlined in section 553 of the APA.

6. For the reasons described in paragraph 5 of this declaration, the Interior defendants believed when interpreting the terms of paragraph 11 of the Agreement that the Department had agreed to engage in a standard rule-making process consistent with the requirements of the APA, with no limitations on the agency's discretion other than the statutory requirements of the Endangered Species Act ("ESA") and the Marine Mammal Protection Act ("MMPA"); the regulatory standards under 50 C.F.R. sections 17.103 and 17.106; any other requirements under applicable law; and the deadlines by which they agreed in paragraph 11 that they would submit documents to the *Federal Register*. The Interior defendants believed that agreeing to any limitation to their rule-making discretion in paragraph 11, other than the deadlines under which they agreed to complete the rule-making process, would have introduced APA defects into the rule-making process.

7. Because the Interior defendants believed when interpreting paragraph 11 that the Department had agreed to a standard rule-making process under the APA and deadlines regarding that process, in interpreting the term "refuges and sanctuaries" in paragraph 11 of the Agreement the Interior defendants did not believe their discretion was limited during the rule-making process in

a manner that would require them to designate both refuges and sanctuaries. Rather, the Interior defendants interpreted this provision to mean that the agency would consider whether designation of manatee refuges, manatee sanctuaries, or both refuges and sanctuaries was warranted under 50 C.F.R. sections 17.103 and 17.106. The Interior defendants believed that the agency decision-making process under 50 C.F.R. sections 17.103 and 17.106 could also result in a determination that no areas merited manatee refuge or manatee sanctuary designation.

8. Because the Interior defendants believed when interpreting paragraph 11 that the Department had agreed to a standard rule-making process under the APA and deadlines regarding that process, in interpreting the term "throughout peninsular Florida" in paragraph 11 of the Agreement the Interior defendants did not believe their discretion was limited during the rule-making process in a manner that required them to designate manatee refuges or sanctuaries in a particular geographic area or any geographic distribution (i.e., evenly around the State). Rather, the Interior defendants interpreted this term to clarify that part of the manatee's range that all parties to the Agreement had focused upon in the negotiations and, specifically under paragraph 11 of the Agreement, the general geographic area where the agency would apply its decision-making process.

9. In March 2001 the Service briefed Department officials, recommending 16 sites as proposed manatee refuges or sanctuaries.

10. On or around this time period, Department and Service officials were contacted by State officials who raised concerns with the scope of the Service's recommendation. Following discussions with the State, Department and Service officials agreed that it was appropriate to consider parallel manatee protection actions by the State of Florida that could result in

comparable or more protective measures for manatees; that designation of such protective measures by the State would negate the need for overlapping federal protective measures; that duplicate federal and State protective measures would create confusion among the regulated public; that it would be an unnecessary use of the U.S. government's financial and personnel resources to designate areas under the federal system when State designations would provide comparable or more protection for manatees; that such State designations would provide the full enforcement resources of the State, which are larger than the resources of the Department; and that considering State actions regarding designation of State manatee protection sites during the federal decision-making process complied with the intent of the Agreement.

11. Service officials concluded that duplicate designation as a federal manatee protection area would not provide significant additional protection for manatees at sites also designated under the State system. The Service also concluded that the State's greater law enforcement resources for enforcing speed zones would provide greater protection for manatees than the Service's limited law enforcement resources alone. Therefore the Service agreed that the State should be given the opportunity to take the lead in designation of sites to protect manatees from watercraft. The Service believed that designating the areas in most immediate need of regulation complied with the intent of the Agreement.

12. Following consideration of the State's concerns, the advantages of avoiding duplication of State and federal efforts, and policy direction from Department officials, the Service revised its recommendation on sites to propose as manatee refuges or sanctuaries.

13. While the Department believed that only two sites warranted immediate designation, it believed that the other 14 sites presented by the Service might be considered for designation in

the future, depending on the outcome of actions to be taken by the State.

14. Because the Department believed there was a possibility that these sites would be considered within a relatively short period of time for a second round of rule making, it decided to include all 16 sites in one proposed rule. The goal of including all 16 sites in one proposed rule was to communicate to the parties and to the public that while only two sites were believed to warrant designation at that time, the agency was prepared to consider additional sites in a second round of rule making as necessary and appropriate to complement State action, and therefore was seeking public comments on all 16 sites at that time.

15. When the Department stated that it was "deferring" final rule making on 14 of the proposed sites in the *Federal Register* notices of August 10, 2001, and January 7, 2002, it thought that it was explaining that the agency would conduct separate, additional rule making through publication of a separate final rule for those sites if later information indicated that such action was warranted.

16. The Department was prepared to designate and enforce the other 14 sites as necessary to complement the State's enforcement efforts and thus to increase the total number of designated federal and State sites, and the total amount of available enforcement resources, in comparison to the more limited number of sites and available enforcement resources from Service action alone.

17. The Department believed that it was demonstrating its commitment to take appropriate actions when it included a deadline by which it voluntarily agreed to conduct any additional rule making on the other 14 sites.

18. The Department's goal in both the August 10, 2001, and the January 7, 2002, *Federal Register* documents was to explain its proposed course of action, which at the time it believed

was consistent with the requirements of the Agreement, the standards under 50 C.F.R. sections 17.103 and 17.106, and the requirements of the APA and other applicable law.

19. The Interior defendants believed that they had met their responsibilities to complete a rule-making process for "new manatee refuges and sanctuaries throughout peninsular Florida" under paragraph 11 of the Agreement and that they were complying with the APA and the Manatee Protection Area regulatory standards when they submitted a final rule to the *Federal Register* for two sites on December 31, 2001, finding that the other 14 sites were less urgently in need of regulation. The Interior defendants believed that any additional rule-making process for the other 14 sites was beyond what was required under the Agreement.

20. The Interior defendants also appreciate this opportunity to report progress regarding designation of manatee refuges and sanctuaries.

21. As announced in paragraph 6 of the Marshall Jones's declaration of August 7, 2002, as an action the Department was prepared to take in response to plaintiffs' August 2, 2002 proposed order, the Interior defendants hereby, and without further order by this Court, commit to apply the process set forth at 50 C.F.R. section 17.106 to the 14 sites that have been identified by the Department in the proposed rule as the highest priority sites. If, through this process, it is determined that any of these sites warrant emergency designation, the Department will move forward with emergency designation. A notice will be filed for publication with the Office of the Federal Register no later than September 16, 2002, that announces the Department's decision whether any of the sites warrant emergency designation, together with appropriate emergency designations for those warranted sites.

22. Regarding the process described in paragraph 21 above, as of the date of this declaration the

Jacksonville Field Office of the Service has prepared a draft *Federal Register* notice and draft newspaper notice (as required under 50 C.F.R. section 17.106(b)(1)) that would establish three manatee refuges on an emergency basis and four manatee sanctuaries on an emergency basis. These draft documents have been forwarded to the Service's Atlanta regional office for review. The Service has also completed sign plans and has filed permit applications to post these sites. The Service has initiated action to acquire signs and develop contracts for installation of the signs.

Actions under other terms of the Settlement Agreement

23. The Interior defendants request that the Court consider the actions described below that the Department has taken in the past 19 months under the Agreement to protect manatees.
24. Consistent with the terms of the Agreement regarding the MMPA incidental taking rule making, on March 12, 2001, the Department published an Advance Notice of Proposed Rulemaking in the *Federal Register*, 66 Fed. Reg. 14352, announcing its intent to pursue a rule-making process under section 101(a)(5) of the MMPA, 16 U.S.C. § 1371(a)(5), to cover the direct, indirect, and cumulative effects of watercraft-access activities on manatees in Florida. See attachment 1.
25. On March 6 and March 28, 2001, the Department sent letters to the Corps of Engineers ("Corps"), the Florida Fish and Wildlife Conservation Commission, the Florida Department of Environmental Protection, the National Park Service, the U.S. Coast Guard, the U.S. Forest Service, the Florida Department of Highway Safety, the Florida Inland Navigation District, the West Coast Inland Navigation District, the South Florida Water Management District, the St. John's River Water Management District, the Southwest Florida Water Management District,

and the Suwannee River Water Management District inviting these agencies, which conduct activities that the Department believes may influence factors relating to effects of watercraft on manatees, to participate in this rule-making process. See attachment 2. Copies of the *Federal Register* notice and all responses received from these entities were provided to counsel for the plaintiffs and intervenors on May 8, 2001. See attachment 3.

26. On June 2, 2001, the Department determined that compliance with the National Environmental Policy Act called for preparation of an Environmental Impact Statement that will analyze the effects of the proposed rule on the environment, as well as the environmental effects of alternatives to the proposed rule. Consistent with paragraph 4(A) of the Agreement, Interior defendants are therefore committed to submitting a proposed MMPA incidental taking regulation to the *Federal Register* no later than November 6, 2002, and, if the Department determines that the requirements of section 101(a)(5) of the MMPA can be satisfied, a final MMPA incidental taking regulation to the *Federal Register* no later than May 6, 2003. On June 7, 2001, in fulfillment of its commitment under paragraph 4(C) of the Agreement, the Department notified all of the parties to the Agreement of the agency's intent to prepare an Environmental Impact Statement. See attachment 4. In addition, on June 10, 2002, the Department published a notice in the *Federal Register*, 67 Fed. Reg. 39668, announcing its intent to prepare an Environmental Impact Statement and opening a 45-day public comment period. See attachment 5.

27. As of the date of this declaration, the Department has co-sponsored a Manatee Population Ecology and Management Workshop on April 2 - 4, 2002, which included participation from the Service, the Florida Fish and Wildlife Conservation Commission, the U.S. Geological Survey - Biological Resources Division, the Marine Mammal Commission, the Mote Marine Laboratory,

and stakeholder groups. Subsequent meetings were held with members of the workshop's expert panel, as well manatee experts from the U.S. Geological Survey - Biological Resources Division, to discuss the data presented at the workshop and how best to use this data in the MMPA rule-making process.

28. On April 23, 2002, the Department sent a letter to the agencies who agreed to participate in the MMPA rule-making process requesting information regarding their activities as they relate to the activities that the Department is considering for incidental take authorization pursuant to the MMPA.

29. Consistent with the terms of the Agreement regarding the interim ESA section 7 strategy, on March 14, 2001, the Department published a revised draft of the interim strategy in the *Federal Register*, 66 Fed. Reg. 14924, and opened a 60-day period for public comment.

30. On August 21, 2001, the Department published the final interim strategy for ESA section 7 consultations in the *Federal Register*, 66 Fed. Reg. 43885, which included the agency's responses to comments received during the public comment period.

31. As of the date of this declaration, the Department believes that the following actions that offer manatee protection have resulted because of the agency's ESA section 7 consultations under the interim strategy. Speed limit signs were installed in February 2002 in the Imperial River, Lee County, in an area where speed zones had existed but that had been designated by the Department as an "area of inadequate protection" because of the lack of appropriate signs. In March 2002 a permit applicant posted signs in a manatee aggregation area in the Faka Union Canal/Port of the Islands area to restrict access by vessels smaller than 33 feet. The applicant also agreed to conduct a one-year manatee speed zone compliance study.

32. In addition, the Department has worked closely with the Corps to assist the Corps in revising the document referenced in paragraph 5 of the Agreement as the "manatee key." The Department provided the Corps a revised manatee key and accompanying county maps on August 21, 2001, that are consistent with the final interim strategy.

33. Consistent with the terms of the Agreement regarding law enforcement for the benefit of manatees, on March 6, 2001, the Department sent to the parties to the Agreement a letter that described how the Department intended to deploy its increased law enforcement resources in Fiscal Year 2001. See attachment 6. Although not required under the terms of the Agreement, during a coordination meeting among the parties in January 2002, the parties were notified of the Department's allocation of law enforcement resources for Fiscal Year 2002.

34. Consistent with the terms of the Agreement regarding revision of the manatee recovery plan, on July 10, 2001, the Department published a notice in the *Federal Register*, 66 Fed. Reg. 35993, announcing the availability of the ESA draft manatee recovery plan for a second public review and opening a 30-day comment period.

35. On October 30, 2001, the Department held a press conference announcing the availability of the final recovery plan. In finalizing the plan, the Department considered all comments received during the public comment process.

36. As of the date of this declaration, the Department has convened the Habitat Working Group developed under the recovery plan. The Working Group has met three times and has focused its initial efforts on reviewing the plan's habitat criteria. The Warm Water Task Force has also met two times since October 2001. Task Force initiatives have included preparations for a warm water adaptive management plan, a warm water alternatives analysis, a review of proposed

regulations under the Clean Water Act, and other initiatives related to industrial warm-water refuges.

37. The Department also provided the plaintiffs and the intervenors status reports listing agreed-upon tasks accomplished under the Agreement on June 7, 2001; December 5, 2001; and June 21, 2002. See attachment 7.

38. For the Court's consideration, the Department has prepared attachment 8, which lists in more detail the specific actions the Department has taken in fulfilling its responsibilities under the Agreement.

39. The Interior defendants are fully committed to meeting all of their remaining responsibilities under the Agreement.

Actions beyond the terms of the Settlement Agreement

40. As announced in paragraph 6 of my declaration of August 7, 2002, as an action the Department was prepared to take in response to plaintiffs' August 2, 2002 proposed order, the Interior defendants hereby, and without further order by this Court, commit, within the limits imposed upon all federal agencies under the Anti-Deficiency Act, 31 U.S.C. § 1341, to continue to support a special agent dedicated primarily to manatee protection, as well as use task force operations coordinated with other federal and state agencies to assist enforcement of speed zones in high priority manatee areas. The Department will also continue to allocate funds, within the limits imposed upon all federal agencies under the Anti-Deficiency Act, 31 U.S.C. § 1341, to the Department's National Wildlife Refuge ("NWR") program to support refuge officers at Ten Thousand Islands NWR, Lake Woodruff NWR, Crystal River NWR, and Merritt Island NWR who, in part, conduct manatee enforcement measures and work with the Law Enforcement

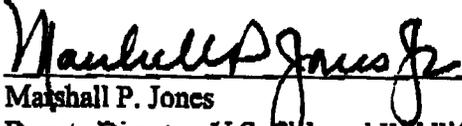
program on task force operations as described above. The Department will also continue to coordinate its manatee Law Enforcement program, including the enforcement of speed zones, with the Florida Fish and Wildlife Conservation Commission.

41. The Department is committed to closely monitoring manatee mortality and conservation needs, to closely consulting with the Florida Fish and Wildlife Conservation Commission and other agencies and organizations having knowledge and expertise in manatee conservation, and to promptly considering any additional measures that the agency has the resources to undertake and that will provide demonstrable benefits to manatee conservation.

42. In addition to the above actions, the Interior defendants request that the Court take into consideration all other actions that the Department has also taken outside of its obligations under the terms of the Agreement to protect and conserve manatees. For more detail on these actions, please see attachments 9 and 10.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 28th day of August, 2002.



Marshall P. Jones
Deputy Director, U.S. Fish and Wildlife Service
U.S. Department of the Interior