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DEPARTMENT OF THE INTERIOR
TASKING PROFILE

ACCN #: ESO-00006507 **Status:** Closed **Fiscal Year:** 2009
Document Date: 07/15/2009 **Received Date:** 07/22/2009 **Action Office:** FWS **Signature Level:** AA **Doc Source:** ENV

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Req. Surnames:

Mail Carrier:

Mail Track #:

Cross Ref:

Copies To: SIO-OES

Status Tracking:

Correspondence Specialist and Phone: SIO-OES Tim Feeney/202-208-6701

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U.S. FISH AND WILDLIFE SERVICE
JACKSONVILLE, FLORIDA

**Before the Department of the Interior
Fish and Wildlife Service**

Washington, D.C. 20240

In Re: Cumulative Impacts of “Swim-with” Interactions)
upon the Federally Endangered West Indian Manatee, Florida.)
Petition for Rulemaking Banning “Swim-with” Interactions.)

*To the Secretary of the Interior and
the Acting Director, Fish and Wildlife Service:*

Petition for Rulemaking

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July 15, 2009

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INTRODUCTION

Pursuant to the Right to Petition Government clause contained in the First Amendment of the U.S. Constitution¹, the Administrative Procedures Act², and the implementing regulations of the United States Fish and Wildlife Service (“USFWS”), Public Employees for Environmental Responsibility (“petitioner”) hereby files the following petition for your consideration.

Sections 4(d) and 11(f) of the Endangered Species Act (“ESA”) mandate that the Secretary of the Interior and the USFWS to promulgate special rules and regulations necessary for the conservation and rehabilitation of listed species. 16 U.S.C. § 1533(d), 16 U.S.C. § 1540(f). Furthermore, Section 4(b)(2) requires the Secretary of the Interior and the USFWS to designate critical habitat for federally endangered and threatened species. 16 U.S.C. § 1533(b)(2). In accordance with these provisions, PEER hereby petitions the USFWS to promulgate regulations pursuant these powers under the ESA governing “swim-with” interactions in Florida coastal waters that the West Indian manatee inhabits. Specifically, this petition seeks the following regulations:

- (a) A ban on the approval of USFWS Special Use Permits for commercial dive shops operating “swim-with” programs for manatees in Florida under Section 4(d) of the ESA;

¹ U.S. Const., amend. I. (“Congress shall make no law ... abridging ... the right of the people ... to petition Government for a redress of grievances.”). United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass’n, 389 U.S. 217, 222 (1967)(the right to petition for redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights). United States v. Cruikshank, 92 U.S. (2 Otto) 542, 552 (1875)(the Supreme Court has recognized that the right to petition is logically implicit in, and fundamental to, the very idea of a republican form of government).

² 5 USC 553(e) (2005) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”)

- (b) Promulgation of a special rule under Section 4(d) of the ESA prohibiting all “swim-with” interactions in all Florida waters and the development of regulations governing the implementation and enforcement of the special rule pursuant to Section 11(f).
- (c) Designation of Kings Bay, Three Sister Springs and Homosassa Springs as critical habitat for the West Indian manatee under Section 4(b)(2) of the ESA.

Such regulations are necessary to further the purpose of the ESA to

provide a means whereby the ecosystems upon which the endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a)

and to comply the policy set forth by Congress that

all Federal departments and agencies *shall* seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

16 U.S.C. § 1531(b)-(c)(1)(emphasis added).

There is long standing evidence that human interaction with manatees in their natural habitat alters the species’ normal behavioral patterns. According to a report issued in 2003, USFWS permitted “swim-with” programs have significantly contributed to the ongoing harassment of manatees, both directly and indirectly.³ Humans swimming with manatees can inadvertently separate mothers from calves or induce manatees to leave warm shallow water areas essential to their survival. Harassment also causes unnecessary stress on the animal, which can have disastrous effects on the vitality of future manatee populations.

³ Michael G. Sorice, C. Scott Shaffer, and Doug Scott, Managing Endangered Species within the Use/Preservation Paradox: Understanding and Defining Harassment of the West Indian Manatee. Texas A&M University, Department of Recreation, Park and Tourism Services (2003).

While the USFWS does recognize that the harassment of manatees from “swim-with” interactions is a serious and ongoing issue, as evidenced by its creation of the Manatee Protection Working Group, the effectiveness of the regulatory and enforcement initiatives in this area has repeatedly fallen short of actually protecting manatees from these harms. The USFWS has neglected its duty to prevent harassment which has potentially devastating effects on the endangered species.

The USFWS possesses the power to promulgate regulations governing activities which harass threatened and endangered species. 16 U.S.C. § 1540(f). The Secretary’s obligations under the Endangered Species Act place an affirmative responsibility on the USFWS to promulgate such regulations for “swim-with” interactions. The USFWS has failed to initiate the process for rulemaking to govern the harassment of manatees in Florida.

ARGUMENT IN SUPPORT OF PETITION

I. BACKGROUND -- “SWIM-WITH” PROGRAMS AND SPECIAL USE PERMITS IN CRYSTAL RIVER WILDLIFE REFUGE AND HOMOSASSA BLUE WATER SANCTUARY

Crystal River National Wildlife Refuge

The Crystal River Refuge was created in 1983 expressly to protect the endangered West Indian manatee. The refuge contains 80 acres including 46 acres of islands and water bottoms within Kings Bay, the headwaters of the Crystal River. This safe-haven provides warm water habitat critical to the survival of the Florida manatee. Accordingly, the manatees make use of many of the refuge’s warm tidal bays, creeks, and rivers- particularly during the winter months. Crystal River has the largest population of manatees between January and March, which coincides with the peak of manatee tourism activity.

At present, fifteen local dive shops operate commercial “swim-with” programs at Crystal River, all permitted under a USFWS Special Use Permit (SUP). Visitors to Crystal River NWR take advantage of these programs to observe and encounter manatees. According to the Marine Mammal Commission’s (“MMC”) Annual Report to Congress, the average number of visitors per year at Crystal River exceeds 100,000 visitors and is increasing. Many of these visitors touch the manatees or interact with them in some way when participating in the “swim-with” programs.⁴

Homosassa Blue Water Sanctuary

The USFWS established Homosassa Blue Water Sanctuary in 2002 to ensure manatee protection in the sanctuary’s waters during winter months.

⁴ See supra note 8.

Currently, five dive shops operate commercial “swim-with” activities at the Homosassa Blue Waters Sanctuary, also under USFWS Special Use Permits. The peak of manatee tourism activity is during the very winter months for which the sanctuary was designed to afford protection to manatees.

II. “SWIM-WITH” INTERACTIONS RESULT IN UNDUE HARASSMENT OF MANATEES

Manatees have a low reproductive rate, typically bearing one calf every two to three years with a gestation of 11 to 13 months. As a result, the survival of manatees as a species depends on a steady adult survival rate. Manatees already face significant threats from a rapidly decreasing habitat due to encroachment by developers, injury and death from watercraft collisions, and pollution. Harassment further diminishes the manatees’ chances of survival.

Disturbance resulting from non-consumptive uses of wildlife can result in changes in wildlife physiology, behavior, reproduction, population levels, and future community's species composition.⁵ Manatee-specific studies have shown that human interactions have changed manatees’ behavior in Florida, including disrupting the relationship between the females and their suckling calves and driving manatees away from warm water areas and into colder water where they may be more prone to diseases which cause death. One study found a correlation between the number of swimmers in an area and an increase in manatee use of sanctuaries which exclude humans, confirming that manatees do not welcome the human

⁵ William E. Hammitt and David N. Cole, Wildland Recreation: Ecology and Management. John Wiley & Sons, New York (1998).

interaction.⁶ The same study revealed that over half of human-manatee interactions constituted harassment.⁷ Although such actions are not intended to harm manatees, they do in fact constitute harassment as defined by the ESA and MMPA.

Moreover, the manatee tourism industry encourages and perpetuates manatee harassment.⁸ There are numerous citizen reports of tour groups “vigorously rubbing,” making excessive noise around manatees, chasing manatees, “pulling their tails,” and “disturbing them while they were sleeping.”⁹ One citizen reported a tour guide telling his group that the manatees enjoy human interaction.¹⁰ These examples only begin to capture the gravity of harassment in Florida.

Moreover, the USFWS itself has conducted surveys and its personnel have observed manatee harassment by participants of “swim-with” programs.¹¹ Yet the USFWS has not done anything to stop or prevent future infractions from occurring and potentially causing great harm to the endangered manatee.

⁶ King, J.M, and J.T. Heinen. An Assessment of the Behaviors of Overwintering Manatees as Influenced by Interactions with Tourists at Two Sites in Central Florida. *Biological Conservation* 117(3): 227-234 (2004)

⁷ Id.

⁸ Florida FWC Division of Law Enforcement, Operational Detail Report

⁹ Internal email between USFWS officers, February 1, 2008 (“While we were at the dive spot we noticed a number of people who were not following the rules: vigorously rubbing the manatees, using fins and making a lot of noise-splashing with the fins and scaring the manatees... chasing the manatees, pulling their tails, disturbing them while they’re sleeping”); Email from citizen to USFWS, October 3, 2007 (“passengers observed swimmers riding the manatee, elbowing people out of the way so that patrons could get up to the manatee and chasing the manatee when it tried to move away from them.”); Internal email between USFWS officers, November 6, 2007 (“The manatees are being chased out of the [Three Sister Springs] by swimmers starting at sun-up everyday... One swimmer immediately approached and touched one of the resting manatees, causing it to leave.”)

¹⁰ Email from citizen to USFWS January 4, 2008 (“Our tour guide even told the group that it was ok to touch manatees and that they enjoy human interaction.”)

¹¹ Internal email between USFWS officers, February 4, 2005 (Email discusses continuing infractions by swimmers, particularly a report by a USFWS personnel witnessing a man’s daughter standing on a manatee- the man said he had been cited before and told the USFWS volunteers to “buzz off”)

III. CONGRESS HAS PROHIBITED THE TAKING OF ENDANGERED MANATEES BY UNDUE HARASSMENT

Under both the Marine Mammal Protection Act of 1972 and the Endangered Species Act of 1973, the “taking” of a federally endangered species is prohibited.¹² Under these statutes, “take” is defined as “...to harass, hunt, capture, or kill.”¹³ Harass is further legally defined as “...an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” In addition, under the Florida Manatee Sanctuary Act, it is “unlawful for any person, at any time, by any means or in any manner, intentionally or negligently, to annoy, molest, harass, or disturb any manatee.”¹⁴

Numerous studies, many commissioned by the USFWS itself, indicate that the presence of swimmers and divers results in harassment to manatees and the denial of critical warm water sites to the species.¹⁵ These studies are supplemented by USFWS law enforcement cases involving harassment and entry into sanctuaries as well as volumes of reports and complaints by USFWS volunteers and the general public regarding ongoing harassment at both Crystal River and Homosassa Springs.¹⁶

The USFWS’s continued practice of issuing Special Use Permits to commercial dive shops for the purpose of allowing “swim-with” interactions constitutes an unauthorized take of the species by the federal government. The ESA prohibits not only acts that directly result in a

¹² 16 U.S.C. 1372 and 16 U.S.C 1536.

¹³ 16 U.S.C. 1362(13) and 16 U.S.C. 1532(19).

¹⁴ Fla. Stat. § 370.12 *et seq.*

¹⁵ See *supra* notes 8-10.

¹⁶ See *supra* notes 8-10.

taking, but also prohibits those acts of a third party that bring about the acts constituting a taking.¹⁷ In light of the overwhelming evidence that such interactions amount to perpetual harassment and are detrimental to both present and future manatee populations, the USFWS's authorization of these programs amounts to a take under both the ESA and the MMPA, and is therefore prohibited by law.

IV. CONGRESS HAS DELEGATED THE US FISH AND WILDLIFE SERVICE THE DUTY TO PROTECT THREATENED AND ENDANGERED SPECIES

In addition to the fact that the “swim-with” permits issued by the USFWS constitute the unauthorized take of the federally endangered manatee, federal law, administrative policy, and agency regulations place an affirmative duty on the USFWS to protect the endangered species from harm caused by human activities.

Section 4(d) of the ESA gives the Secretary the authority to determine in a special rule those measures and prohibitions that are necessary and advisable for the conservation of a particular endangered species. Moreover, Section 11(f) authorizes the Secretary to promulgate such regulations as may be appropriate to enforce the purpose and policy of the Act. Because the West Indian manatee was determined to be an endangered species under the ESA on March 11, 1967, the Secretary has a duty to determine those measures and prohibitions necessary and advisable for the conservation and protection the species.

¹⁷ See Strathan v. Cox, 127 F.3d 155 (1st Cir. 1997) (stating “a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA”). In Strahan, the state licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in taking of the Right Whale. The Circuit Court found that the causation, while indirect, is not so removed that it extended outside the realm of common law causation. 127 F.3d at 164. See also Loggerhead Turtle v. County Council of Volusia, 896 F. Supp. 1170, 1181 (recognizing that Volusia county assumes liability for takes of federally protected species by vehicles which it permits on its beaches).

In the past, the USFWS has addressed harassment problems by increasing law enforcement efforts and establishing manatee sanctuaries in Citrus County, Florida, under its authority in Section 4(b)(2) of the ESA, to provide areas for the manatees to retreat to when disturbance becomes intolerable. The increased law enforcement measures have been inadequate at addressing the continuing problem since local, state, and federal officers are still limited in numbers and unable to sufficiently monitor the interactions. In addition, the sanctuaries have done nothing to address the countless cases of harassment which occur through the “swim-with” programs outside of the sanctuaries. Moreover, the current sanctuary and wildlife refuge areas are not adequately sized or enforced to provide safe waters for the manatees.

The USFWS has also established “interaction guidelines” in an attempt to address the abundant complaints and reports of harassment, injury and nuisance occurring during “swim-with” interactions. These guidelines “encourage” swimmers, amongst other things, never to ride, poke, or chase manatees, never to separate a mother from a calf, to avoid excess splashing, not to feed manatees, and to observe manatees from the surface of the water. Yet, since the implementation of these guidelines, the USFWS has continued to receive reports from concerned citizens and law enforcement officers that violations of these exact guidelines are occurring on a regular basis and the USFWS has failed to act affirmatively to prevent such violations. The clear evidence that the USFWS’s guidelines have not been followed illustrates the dire need for rulemaking addressing manatee harassment resulting from “swim-with” interactions.

In March 2007, the Marine Mammal Commission wrote to the USFWS recommending the Service develop regulations prohibiting the touching of animals, requiring that divers not

approach animals closer than 10 feet, and back away from animals that approach them.¹⁸ The USFWS replied that it had recently updated its video and educational materials and that it believed its “recommended guidelines” for visitors would solve the problem. The Commission reviewed the updated educational materials sent by the Service but remained concerned that the advice presented was not sufficient to ensure that manatees would not be harassed. The Commission also stated that a tolerance for touching manatees and approaching them close enough to be touched placed the USFWS’s guidelines in conflict with National Marine Fisheries Service (NMFS) policies regarding human interactions with marine mammals, and that, as a general matter, such behavior by people viewing endangered species should not be tolerated or condoned.

V. THE US FISH AND WILDLIFE SERVICE MUST TAKE ACTION TO PROTECT ENDANGERED MANATEES FROM HARASSMENT RESULTING FROM “SWIM-WITH” INTERACTIONS

As a matter of law, the USFWS is required to promulgate regulations governing the conservation and protection of the federally endangered West Indian manatee. In order to comply with these duties and avoid being responsible for the “take” of endangered manatees the USFWS must publish regulations prohibiting “swim-with” interactions and designate additional critical habitat for the species in Florida. The USFWS has been complicit in allowing these activities and has taken only minimal, belated steps to address the symptoms but not the illness. Moreover, the enforcement mechanisms used for preventing harassment are widely ineffective.

¹⁸ Marine Mammal Commission, Annual Report to Congress (2007).

For the reasons given, PEER petitions that the USFWS promulgate special regulations governing the harassment of the West Indian manatee. Specifically, we petition the USFWS to:

1. Ban the approval of USFWS Special Use Permits for commercial dive shops operating “swim-with” programs in Florida pursuant to Section 4(d) of the ESA.
2. Promulgate a special rule under Section 4(d) of the ESA prohibiting all “swim-with” interactions in all Florida waters and develop regulations governing the implementation and enforcement of the special rule under Section 11(f).
3. Designate Kings Bay, the Three Sister Springs and Homosassa Springs as critical habitat for the West Indian manatee under Section 4(b)(2) of the ESA.

CONCLUSION

Federal law requires that the USFWS protect our wildlife resources, and provides particularly stringent standards with regard to species protected under the ESA and MMPA. Without USFWS intervention to ban "swim with" programs, the manatee harassment problem will continue and likely worsen. As a result, manatees, which already face a number of serious threats to their survival, may become extinct in the near future. The loss of the manatee will not only have far-reaching impacts on Florida ecosystems but also deprive future generations of enjoying and learning about this species.

PEER therefore petitions the USFWS to immediately address the manatee harassment problem by prohibiting human-manatee interactions in Florida waters where endangered manatees exist and maintain critical habitat.



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