



Public Employees for Environmental Responsibility

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March 9, 2015

Daniel Ashe, Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Cindy Dohner, FWS Southeast Region Director (Region 4)
1875 Century Blvd., Suite 400
Atlanta, GA 30345

By Certified Mail, Return Receipt Requested

RE: Notice of Intent to Sue the Fish and Wildlife Service Over Violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544.

Dear Director Ashe, Secretary Jewel, and Region 4 Director Dohner,

Public Employees for Environmental Responsibility (“PEER”) and Florida residents Lars Anderson, Susan Aungst, Brack Barker, Tracy Colson, and Steve Kingery (collectively “PEER et al.”) hereby provide 60-day notice of their intent to sue the U.S. Fish and Wildlife Service (“FWS” or “the Agency”) for violating the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544 in its treatment of the endangered Florida manatee (*Trichechus manatus latirostris*), a subspecies of the West Indian Manatee protected under both the ESA and the Marine Mammal Protection Act (“MMPA”).

PEER et al. contend that FWS is in violation of the ESA, the MMPA, the National Wildlife Refuge Administration Act, and the Administrative Procedure Act by actively facilitating significant physical harassment of manatees through issuing Special Use Permits (“SUPs”) to commercial dive shops for “swim with” programs within the Crystal River National Wildlife Refuge (“NWR”). Additionally, FWS has violated the law by failing to designate Kings



Bay, Three Sister Springs, and Homosassa Springs as critical habitat for the Florida manatee under Section 4(b)(2) of the ESA, and by failing to provide sufficient sanctuary and refuge protection areas as mandated by the ESA and MMPA. We submit this letter pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g).

PEER is a Washington, D.C. based 501(c)(3) non-profit organization. PEER maintains an office in Florida and is authorized to do business in Florida. PEER's organizational purposes include assuring the enforcement of federal and state laws aimed at protecting endangered species and their critical habitat. In Florida, PEER works for the benefit of the public to ensure the protection of the environment, including endangered species.

Lars Anderson is a nature writer and the owner of Adventure Outpost, a company that leads three to four kayak/canoe tours per week on Florida waterways, including one to two passive manatee watching tours per week on Crystal River, Weeki Wachee, Blue Springs, and Ichetucknee River. In 2014, he received the "Award of Excellence from the Florida Master Naturalists program. His customers frequently express disappointment and disgust at what they witness in crowded manatee areas, and FWS's mismanagement actively hurts his business. **Susan Aungst** is an adjunct professor, outreach educator for the Save the Manatee Club, and member of the Manatee Awareness Coalition. **Brack Barker** is a certified Florida Master Naturalist, amateur photographer, and owner of Wild Florida Adventures, an eco-tourism company that operates in Citrus County. Mr. Barker provides guided kayak and nature tours featuring a "hands off" observational approach, and regularly receives complaints from customers who are deeply disturbed by rampant manatee harassment. **Tracy Colson** is an amateur photographer and videographer and owner of Nature Coast Kayak Tours, a Citrus County eco-tourism company providing guided kayak tours, including "hands off" manatee tours during the winter. She is also a former Manatee Watch volunteer (2003-2005) and a recent recipient of the Save and Manatee Club's "Manatee Hero Award." Ms. Colson's company no longer conducts kayak tours on Kings Bay because of the overcrowded and unsafe conditions and the unpleasant experience that unchecked manatee harassment presents for her and her customers. **Steve Kingery** is a certified Florida Master Naturalist and retired scientist who has received the Save the Manatee Club's "Manatee Hero" award. From 2005-2008, he studied manatee-human interaction in Florida, particularly Crystal River, using animal counts, video recordings, and personal interviews with members of the public and with "swim with" operators and employees.

On July 15, 2009, PEER petitioned FWS to:

1. Ban the approval of FWS Special Use Permits for commercial dive shops operating "swim-with" programs in Florida.
2. Promulgate a special rule prohibiting all "swim-with" interactions in all Florida waters and develop regulations governing implementation and enforcement.

3. Designate Kings Bay, the Three Sister Springs, and Homosassa Springs as critical habitat for the Florida manatee.

On January 12, 2010, the FWS issued a finding acknowledging that the current habitat designations were insufficient to protect the endangered manatee population, but declined to undertake revising critical habitat due to preclusion “by higher priority listing-related actions and funding constraints.”

On March 29, 2010, PEER submitted a Notice of Intent to Sue the FWS under the Endangered Species Act. FWS responded by ordering a series of emergency measures, eventually leading to the recently finalized Environmental Assessment (“EA”) for Manatee Wildlife Viewing on Crystal River National Wildlife Refuge Three Sisters Springs and corresponding Finding of No Significant Impact. The narrow safeguards for manatees that FWS approved fail to meet the Agency’s responsibilities under the ESA and other relevant laws. Accordingly, PEER et al. now submit this expanded and updated Notice of Intent to Sue.

I. Legal background.

Endangered Species Act

Congress passed the ESA to conserve endangered and threatened species and their habitat. 16 U.S.C. § 1531(b). The Supreme Court’s review of the ESA’s “language, history, and structure” convinced the Court “beyond a doubt” that “Congress intended endangered species to be afforded the highest of priorities.”¹ As the Court found, “the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”²

Section 9 of the statute prohibits various activities including the “take” of endangered species. 16 U.S.C. § 1538(a). “Take” can be direct or indirect and includes engaging in or attempting to engage in a variety of deleterious actions including harassment, harm, and pursuit. *Id.* § 1532(19). Under 50 C.F.R. § 17.3, “harm” includes significant habitat modification or degradation that kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.³ “Harass” is 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. *Id.* Courts have recognized that, in addition to past and current threats of harm, the “likely” threat of future harm also constitutes “take” under the ESA.⁴

¹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).

² *Id.* at 184.

³ See also *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

⁴ *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir.1996); *Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Florida*, 92 F. Supp. 2d 1296, 1302 (M.D. Fla. 2000).

Section 7 requires all federal agencies to ensure that their actions neither “jeopardize the continued existence” of listed endangered species nor “result in the destruction or adverse modification” of its “critical habitat.” *Id.* § 1536(a)(2). Once a species is listed under the ESA, the Service must designate “critical habitat” for listed species, 16 U.S.C. § 1533(a)(3), and “develop and implement” recovery plans for listed species, *id.* § 1533(f). The ESA also authorizes the Service to acquire land for the protection of listed species, *id.* § 1534, and makes federal funds available to states to assist in their efforts to preserve and protect threatened and endangered species, *Id.* § 1535(d).

Marine Mammal Protection Act

The Marine Mammal Protection Act prohibits the “take” of all marine mammals, including the manatee. 16 U.S.C. § 1371(a). The MMPA defines “take” to include “harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13). “Harassment” includes any act of pursuit, torment, or annoyance, which has the potential to injure a marine mammal in the wild or disturb it by disrupting its behavioral patterns, including, migration, breathing, nursing, breeding, feeding, or sheltering.

In order to authorize any incidental taking of a marine mammal, the Secretary of Commerce or the Interior must first issue regulations specifically for the activity that would cause the taking, in accordance with the notice and comment requirements of the Administrative Procedures Act. See 16 U.S.C. § 1371(a)(5)(A). There are no such regulations in place for the endangered manatee under the MMPA, and thus no incidental taking is allowed.

National Wildlife Refuge Administration Act / Refuge Improvement Act

The National Wildlife Refuge System Administration Act of 1966 as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd et seq.) provides authority for the FWS to manage the CRNWR and its wildlife populations. Under the law, *compatible* wildlife-dependent public uses receive priority consideration in planning and management. Although wildlife observation is listed as one of six wildlife-dependent public uses, a compatibility determination is nonetheless necessary to ensure that the use is conducted in a way that is compatible with the purposes for which the specific refuge was established and does not violate other laws, such as the ESA. It is not clear whether the Refuge has a compatibility determination; when we inquired with the Refuge, we were informed that they could only find an unsigned copy of one. As swimming amongst manatees is patently incompatible with the refuge’s purpose of protecting manatees, any current or future compatibility determination that approves this use within the refuge would contravene the Refuge Administration Act.

Administrative Procedure Act

The Administrative Procedure Act requires a court reviewing an action by an administrative agency of the federal government to “compel agency action unlawfully withheld or unreasonably delayed” and to set asides actions, findings, and conclusions by the agency that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. FWS’ facilitation of manatee harassment, failure to revise critical habitat designations, and failure to provide sanctuary and refuge protection areas constitutes an agency action unlawfully withheld as well as an action that is arbitrary, an abuse of discretion, and otherwise not in accordance with various federal and state laws.

II. Factual background

A. Crystal River National Wildlife Refuge

Established in 1983, Crystal River National Wildlife Refuge exists *specifically for the protection of the endangered manatee*. The refuge manages 177 acres, including several islands and 40 acres of winter manatee sanctuaries within the spring-fed waters of Kings Bay, the headwaters of the Crystal River. Kings Bay includes over 70 natural springs that produce a constant flow of 72°F water. Manatees depend on the refuge’s warm tidal bays, creeks, and rivers, particularly during the winter months when waters in the Gulf of Mexico drop below 68°F. Crystal River has the largest population of manatees between November and March, which coincides with the peak of manatee tourism activity. Particularly popular among manatees is the Three Sisters Springs area, where “swim with” tourists drive manatees to crowd themselves into those portions of the area where swimmers are not allowed.

Visitation at the Refuge has increased dramatically in recent years, from 67,000 recorded visitors in 2010 to over 265,000 in-water visitors in 2014.⁵ At present, NWF has granted SUPs to 34 local dive shops (over double the number since PEER submitted its 2010 rulemaking petition) operating commercial “swim-with” programs at Crystal River, with tourists touching and otherwise harassing the manatees, as discussed below. Additionally, FWS has issued 10 SUPs for guided/rental non-motorized vessel outfitters. In its EA, FWS admits:

During the most critical months for manatees, November through March, commercial Special Use Permit holders reported an average visitation per day of 360 clients to the warm water springs located at Three Sisters Springs and Kings Spring. In March 2014, Commercial Special Use Permit holders reported the highest visitation recorded in one month with 17,046 visitors to the Refuge including Three Sisters Springs and Kings Spring. Over the last four years during

⁵ In 2014, dive shops reported 136,628 visitors, while an additional 128,550 visited the Refuge on their own. See FWS, “Annual Stewardship Report to the Florida Communities Trust and the City of Crystal River,” (January 2015).

the peak manatee season, guided visitation has increased from 275 visitors per day to 421 visitors per day to both Refuge springs.⁶

B. Homosassa Blue Water Sanctuary

FWS established Homosassa Blue Water Sanctuary in 2002 to ensure manatee protection in the sanctuary's waters during winter months.⁷ This sanctuary provides a non-refuge example of how the failure to properly control harassment and swim-with issues in Kings Bay is spreading to other parts of Florida. Commercial Dive operations at Homosassa Blue Water No Motor Boats Zone have continued to grow rapidly with numerous new operators using that warmwater aggregation area for commercial "swim-with" activities. The peak of manatee tourism activity is during the November through March – the very time period during which the sanctuary was designed to protect these endangered animal – yet FWS does not do enough to protect these manatees and other across Florida from harassment as required by the ESA.

C. The endangered manatee and its particular vulnerabilities.

For more than forty years, the federal government has recognized that the Florida Manatee is in danger of extinction. The West Indian Manatee (*Trichechus manatus*) was first listed under the Endangered Species Act of 1966. 32 Fed. Reg. 4001 (1967). Today, this designation includes both sub-species of the West Indian manatee, the Florida manatee (*Trichechus manatus latirostris*) and the Antillean (or Caribbean) manatee (*Trichechus manatus manatus*). 50 C.F.R. § 17.11; 35 Fed. Reg. 8491, 8498 (June 2, 1970). The species is also protected as a depleted stock under the MMPA (16 U.S.C. 1361-1407). The State of Florida lists the Florida subspecies as an endangered species pursuant to Rules 68A-27.003 and 68A-27.005 of the Florida Administrative Code (FWC 2011).

Florida manatees are large aquatic mammals native to Florida's coastal and inland waters that spend most of their time eating, resting, and must seek the shelter of warmer essential habitat during winters often forgoing feeding in order to stay warm.⁸ Manatees have low levels of body fat and a very slow metabolism, making them extremely vulnerable to cold and unable to survive long in water colder than 68°F.⁹ They strongly prefer shallow water between three to seven feet deep, and rarely venture into waters beyond 20 feet in depth.¹⁰ Thus, although the range of

⁶ FWS, *Draft EA: Manatee Wildlife Viewing on Crystal River National Wildlife Refuge Three Sisters Springs, Citrus County, Florida*, at 17 (December 2014).

⁷ See 50 C.F.R. § 17.108.

⁸ Keith Rizzardi, *Toothless? The Endangered Manatee and The Florida Manatee Sanctuary Act*, 24 FLA. ST. U. L. REV. 377, 382 (1997).

⁹ Patti Thompson et al. *Petition for a Rule to revise Critical Habitat for the Florida manatee*, Wildlife Advocacy Project, Save the Manatee Club, Center for Biological Diversity, and Defenders of Wildlife 8 (December 29, 2008), available at: www.biologicaldiversity.org/species/mammals/Florida_manatee/pdfs/ManateeCHPetition.pdf

¹⁰ Nancy Sadusky, *Journey North Manatee Migration FAQ*, available at:

Florida manatees in summer months can extend to deeper water basins and canals, the manatees overwhelmingly congregate in shallower, warm water shelters during the winter. Such shelters primarily constitute areas near natural warm springs, warm-water effluents created by power plant cooling pipe discharges, and sheltered deep-water basins.¹¹

The reproduction rate of manatees is very low. Female manatees mature sexually when they are around 3 years of age.¹² The gestation period for calves is about 13 months, and females usually only produce one calf per pregnancy, with intervals between births ranging from 2 to 5 years.¹³ Calves are dependent upon their mothers for up to two years.¹⁴ Furthermore, a calf and its mother will remain in a sheltered location for weeks before the calf is able to travel.¹⁵ These factors all contribute to the species' slow recovery rates as well as increased vulnerability for new calves and their mothers. Because manatees are not able to replenish quickly, it is critical that they maintain a high adult survival rate to continue surviving as a species.

The Florida Fish and Wildlife Research Institute's most recent synoptic survey in January 2014 counted 4,824 manatees, down from 5,077 in 2010.¹⁶ While watercraft collisions continue to be the most common cause of human-induced manatee deaths and injuries,¹⁷ manatees are also particularly vulnerable to severe cold spells such as the one that killed roughly 480 manatees in 2010 and red tides, a major cause of the record manatee death tolls in 2013.¹⁸

D. Manatee Habitat

The Florida manatee generally lives in fresh, brackish, and marine habitats and consumes submergent, emergent, and floating sea grasses and other vegetation. Manatees generally require warm water temperatures above 20 degrees Celsius (68 degrees Fahrenheit) to survive during periods of cold weather. During the winter months, most manatees rely on warm water from industrial discharges and natural springs and are therefore concentrated in peninsular Florida. In warmer months, they expand their range and occasionally are seen as far north as Rhode Island on the Atlantic Coast and as far west as Texas on the Gulf Coast.

www.learner.org/jnorth/search/ManateeNotes1.html#26

¹¹ Thompson, *supra* note 9, at 9.

¹² *Supra* note 9, at 14.

¹³ *Id.*

¹⁴ *Id.* at 14-15.

¹⁵ *Id.*, at 8.

¹⁶ *Manatee Synoptic Surveys*, Fish and Wildlife Research Institute, Florida Fish and Wildlife Conservation Commission. Available at: <http://myfwc.com/research/manatee/research/population-monitoring/synoptic-surveys/>.

¹⁷ *Supra* note 9, at 11.

¹⁸ <http://myfwc.com/research/manatee/rescue-mortality-response/mortality-statistics/>

Human activities impact Florida manatees' warm water shelters. For example, the consumptive pumping of aquifer water within spring basins – a practice associated with human population growth – can reduce spring flow.¹⁹ The loss of warm-water sanctuaries such as springs threatens manatees' survival, as many return to the same warm-water wintering areas annually. Site-fidelity patterns in manatees are likely transferred from generation to generation as calves learn to use particular refuges while accompanying their mothers.²⁰ Other human threats include expansion of port facilities and inlets, seagrass destruction due to coastal development, and water quality degradation and pollution.²¹ Pesticides, herbicides, and industrial chemicals contaminate water and vegetation ingested by manatees, and such toxins can accumulate in manatee tissue.²² FWS' most recent revised Recovery Plan for the manatee acknowledges, “[i]ncreases in direct human-caused mortality and habitat destruction are two of the consequences of the rapid growth in Florida’s human population,” and that “[a]s long as this trend continues, the long term survival of manatees in the U.S. is in serious jeopardy.”²³

For the Florida population of the West Indian manatee, Kings Bay with its complex of Springs, including Kings Spring and Three Sisters Springs is an especially important habitat because of its numerous natural springs that provide warm water on which manatees depend for winter survival. FWS's information sheet, including a map of the area, are attached to this notice for reference. The number of manatees that depended on Kings Bay Springs increased from approximately 100 manatees in the 1980s to approximately 800 manatees at present.²⁴ Indeed, as the Service acknowledged in its draft EA, the Kings Bay springs “are considered among the highest priority winter thermal retreats for the species throughout its range.”²⁵

¹⁹ Manatee – Habitat Protection. Florida Fish and Wildlife Conservation Commission, *available at*: http://myfwc.com/WILDLIFEHABITATS/Manatee_habitat.htm.

²⁰ David W. Laist, John E. Reynolds, III. *Influence of Power Plants and other Warm-Water Refuges on Florida Manatees*. MARINE MAMMAL SCIENCE, 21(4):739-764, 758 (October 2005).

²¹ *Id.*

²² Victoria Brook Van Meter, *The Florida Manatee*. Florida Power & Light Company, 24 (revised 2001), *available at* www.sirenian.org/FPLBooklet.pdf.

²³ Florida Manatee Recovery Plan at 4, *available at*: www.fws.gov/northflorida/Manatee/Documents/Recovery%20Plan/Manatee%20Recovery%20Plan.pdf.

²⁴ M. Lynne Corn, Eugene H. Buck. “Florida Manatee: Federal Protection.” Congressional Research Service Reports, National Library for the Environment (1994). *Available at*: www.cnire.org/nle/crsreports/biodiversity/biodv-29.cfm#1

²⁵ FWS, *Draft EA: Manatee Wildlife Viewing on Crystal River National Wildlife Refuge Three Sisters Springs, Citrus County, Florida*, at 15 (December 2014).

E. Manatees and Tourists

The strong attraction of manatees to the Crystal River NWR has made it attractive to skin and scuba divers and other tourists, with nearly 300,000 of them visiting annually.²⁶ Continued human presence in Kings Spring and particularly in the Three Sisters Spring area during the winter months is minimizing or preventing manatee use of this critical resource.

There is long standing evidence that human interaction with manatees in their natural habitat alters the species' normal behavioral patterns. Research has shown as far back as 1981 that manatees time their activities to avoid harassments by boats and divers.²⁷ The bubbling noise created by scuba divers disturbs manatees and causes them to flee. Splashing, chasing, following, restraining, or holding are all activities that disturb manatees. They are particularly disturbed by camera strobe and video lights.²⁸ Because manatee mothers and calves vocalize to maintain contact,²⁹ loud human activity can interfere with this process and cause the calves to be separated from their mothers. Longitudinal studies for similar marine mammals, such as dolphins show that tourist activity has a detrimental effect upon the targeted species.³⁰ Human activity that produces trash also has a harmful effect; plastic litter like bags and six-pack holders can become entangled in plants that manatees eat, causing them accidentally to ingest the plastics, which can choke them or block their intestines.³¹ Fishhooks can also puncture a manatee's intestinal lining, leading to infection and 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 interaction.³² The same study revealed that over half of human-manatee interactions constituted harassment.³³ Although tourists may not intend to harm manatees, their actions nonetheless constitute harassment as defined by the ESA and MMPA.

Studies have shown that human interactions can drive manatees away from warm water areas and into colder water, where they are extremely vulnerable. Water temperatures below 20°C (78°F) for extended periods initiate a cascade of clinical signs and chronic disease

²⁶ See FWS, "Annual Stewardship Report to the FL Communities Trust and the City of Crystal River," (Jan. 2015).

²⁷ Van Meter, *supra* note 22, at 16.

²⁸ Florida Scuba News, "Positive Encounters with Gentle Giants" (2010), *available at*: www.scubanews.com/node/359.

²⁹ Van Meter, *supra* note 22, at 18-19.

³⁰ Sorice, *supra* note 23. The study cited concerned dolphin species.

³¹ If You Love Us, Please Don't Feed Us: Tips for Protecting Manatees in the Wild, Save the Manatee Club, *available at*: www.savethemanatee.org/Don'tFeedUs.pdf.

³² 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)

³³ *Id.*

processes that have been loosely termed the “manatee cold stress syndrome” or CSS.³⁴ Manatee cold-stress syndrome, including emaciation, depletion of fat reserves, skin lesions, and heart tissue degeneration is a combination of clinical signs and chronic disease processes caused by extended exposure to cold temperatures.³⁵ Human harassment in natural warm-water refuges can drive manatees away from the refuge, forcing them to utilize less suitable habitat and increasing the probability of cold-related illnesses and death.³⁶ This means that cold water stress, while certainly occurring in nature, can also be a significant manmade source of manatee injury as well as mortality. Indeed, this conclusion is borne out by recent statistics, as the number of cold stress deaths in 2010 was slightly less than triple the average for the last five years.³⁷ Manatees exposed to long-term moderate levels of cold lose weight and become malnourished, raising mortality, while manatees exposed to extreme cold die from hypothermia or other cold-related illnesses.³⁸ Smaller manatees are less capable of raising their metabolic rates like larger manatees, and thus are particularly susceptible to hypothermia and death during cold snaps.³⁹ While manatees can survive short periods of time (*e.g.*, less than an hour) in water as cold as 13°C, prolonged exposure to temperatures of 15°C can be lethal.⁴⁰

The shallow narrow entrance to and exit from Three Sisters Springs is dangerous for all who use it. For example, on February 18, 2015, a paddle boarder navigating the narrow channel fell hard onto her board and into the water, narrowly missing striking her head on the adjacent rocks. The fall was so forceful that it also caused numerous manatees to become panicked and to rapidly exit the area into colder waters away from the springs.

The FWS itself recognizes these deleterious effects. According to a report issued in 2003, FWS permitted “swim-with” programs have significantly contributed to the ongoing harassment of manatees, both directly and indirectly.⁴¹ These “swim-with” programs involve human harassment, noise, and unwelcome interaction, threatening manatees that seek to utilize stable warm water shelters. The manatee tourism industry encourages and perpetuates manatee harassment.⁴² There are numerous citizen reports of tour groups “vigorously rubbing,” making excessive noise around manatees, chasing manatees, “pulling their tails,” and “disturbing them

³⁴ Bossart, G. *Manatees*, Marine Mammal Medicine, L. Dierauf & F. Gulland (eds.), CRC Press, Boca Raton, FL, 939-960 (2001).

³⁵ *Id.*

³⁶ Van Meter, *supra* note 22, at 25.

³⁷ See manatee mortality figures from the Florida Fish and Wildlife Conservation Commission, available at www.myfwc.com/media/2703511/preliminary.pdf.

³⁸ Van Meter, *supra* note 22, at 26.

³⁹ *Id.*

⁴⁰ Bossart, *supra* note 34.

⁴¹ Sorice, *supra* note 23.

⁴² Florida FWC Division of Law Enforcement, Operational Detail Report

while they were sleeping.”⁴³ One citizen reported a tour guide telling his group that the manatees enjoy human interaction.⁴⁴ These examples only begin to capture the gravity of harassment in Florida. Indeed, FWS itself has conducted surveys and its personnel have observed manatee harassment by participants of “swim-with” programs.⁴⁵

Yet the FWS has not stopped or prevented future infractions from occurring and potentially causing great harm to the endangered manatee. Instead, the FWS *actively facilitates* this harassment by issuing SUPs to dive shops that enable them to put hundreds of thousands of tourists into direct contact with these endangered animals. At present, 34 local dive shops operate commercial “swim-with” programs at Crystal River National Wildlife Refuge, all permitted under FWS SUPs, and visitors to Crystal River take advantage of these programs to encounter manatees. According to numerous reports and the recent Environmental Assessment announcement, the FWS permitted “swim-with” programs have significantly contributed to the ongoing harassment of manatees, both directly and indirectly. When confronted with this and other serious documentations of ongoing harassment, the FWS admitted in 2009 that not “all customers will follow the permit conditions,” yet maintained that SUPs are “a significant management tool which currently minimizes manatee harassment by swimmers.”⁴⁶

E. Insufficiency of current FWS efforts to protect the Florida manatee

Because the FWS’s current SUP holder requirements (including education regarding manatee interactions and informing customers about relevant regulations) have patently and consistently failed to limit tourist harassment and illegal interaction with manatees and in fact *facilitate* the programs that lead the harmful activity to continue, these SUPs actively enable manatee harassment.

As a result of budget cuts severely reducing staffing for the entire Chassahowitzka National Wildlife Refuge Complex (in which Crystal River is one of five refuges), there is

⁴³ Internal email between FWS 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 FWS, 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 FWS 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.”)

⁴⁴ Email from citizen to FWS January 4, 2008 (“Our tour guide even told the group that it was ok to touch manatees and that they enjoy human interaction.”)

⁴⁵ Internal email between FWS officers, February 4, 2005 (Email discusses continuing infractions by swimmers, particularly a report by a FWS personnel witnessing a man’s daughter standing on a manatee- the man said he had been cited before and told the FWS volunteers to “buzz off”)

⁴⁶ Letter in reply to FWS/R4/ES, Cynthia K. Dohner, Acting Regional Director, Fish and Wildlife Service (August 25, 2009), *available at*: www.peer.org/docs/fl/09_31_8_ltr_FWS_PEER_response_to_petition.pdf.

currently only one full-time law enforcement officer for all five refuges.⁴⁷ The sheer volume of tourists and the limited budget and official personnel numbers have created an enforcement vacuum, in which many complaints regarding manatee harassment are never followed up upon or investigated.⁴⁸ This has created an atmosphere of willful misconduct in which tourists blatantly and flagrantly flout rules due to the fact that they will not be punished. A recent study of manatees at Three Sisters Springs from December 2014 to January 2015 confirms these problems, as well as observes significantly different manatee behavior during time periods when humans are not present, including normal cow-calf interactions, active mating herd behavior, and normal resting and sleeping positions.⁴⁹ This study found that when boaters and swimmers are present, manatees seeking warm water during times of rising tides enter the area in fewer numbers and at a slower rate.⁵⁰ Additionally, the study included a survey of visitors who used the boardwalk and found that 81% of visitors felt that the number of people and boats in the water was excessive.⁵¹

Additionally, despite admitting in 2009 that manatees need critical habitat revisions, FWS failed to revise critical habitat due to preclusion “by higher priority listing-related actions and funding constraints.”⁵² It has now been *six years* since that rationale was proffered for avoiding undertaking an action that the Service conceded was legally justified and necessary to protect manatees and their habitat. It is inexcusable for the Service to continue to put off

⁴⁷ Help End Manatee Harassment in Citrus County, Florida, *available at*: www.savethemanatee.org/ta_harassment_bkgnd.html

⁴⁸ See, e.g., Florida FWC Division of Law Enforcement, Operational Detail Report; 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.”); 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.”); 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”).

⁴⁹ *Manatees, People, and Three Sisters Springs*, Rae Ellen Syverson and Carl Wolfe, Preliminary Report Power Point Presentation (available upon request). See also <http://www.chronicleonline.com/content/study-springs-sometimes-%E2%80%98chaotic%E2%80%99>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See FWS Press Release: “Federal Finding Means Florida Manatee Critical Habitat Designation Warrants Revision,” *available at*: www.fws.gov/northflorida/Releases-10/20100112_nr_FWS_announces_12-month_finding_on_Florida_manatee_critical_habitat.htm (January 12, 2009)

revising critical habitat, especially when the result is an ongoing unlawful take of manatees.⁵³ Furthermore, FWS has failed to establish additional manatee refuges and sanctuaries under its rulemaking authority as provided in 50 C.F.R. § 17.103.

Position of Marine Mammal Commission

In March 2007, the Marine Mammal Commission wrote to the FWS recommending the Service prohibit the touching of manatees, requiring that divers not approach animals closer than 10 feet, and back away from animals that approach them.⁵⁴ Subsequently, the FWS issued nonbinding “interaction guidelines” and an educational “Manatee Manners” video that have so far failed to make any substantial impact in the levels of manatee harassment by tourists.

Upon reviewing these updated educational materials, the Marine Mammal Commission warned that the tolerance for manatee touching and close approaching placed the FWS guidelines directly in conflict with National Marine Fisheries Service (“NMFS”) policies regarding human-marine mammal interactions.⁵⁵ Again in November 2014, after learning of a petition by concerned nonprofit groups in August 2014 asking FWS to seasonally close Three Sisters Spring to tourists and to prohibit tourists from touching manatees, the Marine Mammal Commission issued a strongly worded letter to the FWS, expressing in no uncertain terms that manatee harassment problems currently occurring are “clearly contrary to” the MMPA and “require immediate attention.”⁵⁶ The letter states, “We note that taking manatees is prohibited under both the Marine Mammal Protection Act and the Endangered Species Act and that touching manatees under most circumstances *already should be considered a form of taking*.”⁵⁷ The letter lambasts FWS for its vague and difficult-to-enforce rules that allow tourists to touch non-resting manatees, and emphasizes that they are inconsistent with the MMPA and undermine parallel efforts by the NMFS to protect these and other marine mammal species.⁵⁸

⁵³ 16 U.S.C. § 1536(a)(2) (“each federal agency shall ensure that any action authorized . . . is not likely to jeopardize the continued existence” of an endangered or threatened species “or result in the destruction or adverse modification” of designated critical habitat

⁵⁴ Marine Mammal Commission, Annual Report to Congress (2007).

⁵⁵ The MMPA does not provide for a permit or other authorization to view or interact with wild marine mammals, and NOAA Fisheries does not “support, condone, approve, or authorize activities that involve closely approaching, interacting, or attempting to interact with whales, dolphins, porpoises, seals, or sea lions in the wild. This includes attempting to swim with, pet, touch, or elicit a reaction from the animals.” See NOAA Fisheries Policy on Human Interactions With Wild Marine Mammals, available at: www.nmfs.noaa.gov/pr/education/viewing.htm.

⁵⁶ Letter from Marine Mammal Commission to FWS’ Chief of National Wildlife Refuges and Assistant Director for Endangered Species, November 3, 2014, at 1, available at: www.mmc.gov/letters/pdf/2014/FWS_petition_CrystalRiver_110314.pdf

⁵⁷ *Id.*, n. 1 (emphasis supplied).

⁵⁸ *Id.* at 2.

Current Environmental Assessment

FWS recently published its final Environmental Assessment (“EA”), “Manatee Wildlife Viewing on Crystal River National Wildlife Refuge, Three Sisters Springs, Citrus County, Florida,” which covers the remainder of the 2014-15 manatee season and is meant to serve as a tool to inform future decisions for manatee management in the upcoming Comprehensive Conservation Plan for the refuge.⁵⁹ In the EA, FWS proposes to create two lobes within Three Sisters Spring where swimmers will not be allowed. While conceding the gravity of the existing problem and purporting to reduce the likelihood of future take of manatees through harassment, the FWS’s plan is glaringly insufficient in its poor design and lack of rules and enforcement mechanisms:

- The plan concentrates obtrusive swimmers into a smaller space.
 - The EA proposes to bisect the narrow (8-15 foot wide) spring run, the manatees’ only “access road” to the spring. This is highly problematic because the concentration of humans swimming or – especially – walking will create a wall that blocks manatees and reduces water quality and visibility by disturbing sediment. Moreover, there can be no expectation that manatees will stay on their designated side. Any manatee attempting to enter or exit will face a gauntlet of people who will touch, chase, and harass them. In short, the EA proposes a course of action that will inevitably continue to promote harassment within the narrow run.
 - Once up the run, the entirety of the “middle lobe” is open to swimmers, leaving any manatee trying to get to either of the side springs, or back out of the run, at the mercy of potentially hundreds of eager swimmers.
- The boardwalk provides adequate wildlife observation opportunities that do not involve harassing an endangered species. The EA also fails to acknowledge this fact, as well as the fact that in-water activities impede wildlife observation from the boardwalk, as the swimmers’ bodies and the sand that they kick up makes it more difficult for observers to see manatees from above.
- The EA bans paddle crafts, while allowing “swim with” trips. Not only does this action in itself make little sense, but it will likely have the effect of increasing direct harassment, as tourists who would otherwise prefer to observe manatees from kayaks and paddle boards may be more likely to elect to swim with manatees.
- The EA poses no limits to the number of hourly or daily visitors, nor does it limit the number of tour operators in the refuge as a whole or at any one time. Furthermore,

⁵⁹ The February 2015 EA and accompanying Finding of No Significant Impact are available at: www.fws.gov/refuge/Crystal_River/Three_Sisters_Springs_Manatee_Information.html

passive observation is only a “guideline,” and touching of manatees is – incredibly, and despite the strong urging of the Marine Mammal Commission as noted above – *still not prohibited*. Swim-with tour guides and their customers have been openly flouting these guidelines for decades with no consequences. The proposal requires no further education or certification for guides or tour operators.

- The EA fails to provide any new Law Enforcement Officers, nor does it provide for regulations that ensure no one enters the springs outside of the posted times.

Furthermore, in a press conference announcing the EA, an agency representative stated that FWS would not implement vessel restrictions until the City Council gave its support.⁶⁰

III. The Fish and Wildlife Service’s Actions Constitute “Take” as Defined by the ESA and are Likely to Jeopardize the Continued Existence of the Florida Manatee.

By permitting the above-described tourist harassment within Three Sisters Springs, Kings Spring, and other springs and warm water habitats areas in Kings Bay, by failing to revise critical habitat designations, and by failing to establish additional manatee refuges and sanctuaries, the Fish and Wildlife Service is unlawfully allowing the continued taking of endangered manatees. The Endangered Species Act prohibits the “take” of listed endangered species, and both the Supreme Court and Congress have explicitly stated that the term “take” is to be interpreted as broadly as possible.⁶¹ The Fish and Wildlife Service’s continued allowance of human presence in Three Sisters Springs, Kings Spring, and other springs and warm water habitats areas in Kings Bay, has resulted in both habitat denial and manatee harassment, and is well within the range of activities prohibited by the ESA.

Federal courts have held that the ESA prohibits indirect takes authorized by federal agencies. The U.S. Supreme Court held in *Babbitt* that actions which indirectly result in the take

⁶⁰ Notably, the Plan does *not* find that manatee “take” within the meaning of the ESA and MMPA will not result from the conditions established, and SUPs issued, by the Service. Rather, the Plan asserts that protection of manatees will be “adequate,” Final EA at 3, 18, and indicates that the level of manatee safeguards deemed “adequate” was strongly influenced by the Service’s desire to allow extensive continued recreational use of the area. However, as discussed in the following section, the ESA and MMPA do not mandate an “adequate” level of protection for an endangered species. Rather, they strictly prohibit *any* take unless it has been authorized through one of the few legal mechanisms established by the Act for that purpose. Insofar as there can be no dispute that take has not been authorized through any of the prescribed legal mechanisms, the final Plan’s assertion of “adequate” manatee protection is not only factually inaccurate but, in effect, a tacit concession of legal vulnerability for the Service’s entire approach to this issue.

⁶¹ 16 U.S.C. § 1538(a)(1)(B); 5 C.F.R. 17.21(c); *see, e.g., Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698 (1995) (determining that “the broad purpose of the ESA supports” a correspondingly broad definition of “harm” from the Secretary of the Interior); S. Rep. No. 93-307, at 7 (1973) (“‘Take’ is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”).

of an endangered species are prohibited.⁶² There, the Court found that the ability of the Secretary to issue incidental take permits under the ESA strongly suggested that Congress intended section 9(a)(1)(B) of ESA to prohibit both direct and indirect takes of endangered species. Further, in *Strahan v. Cox*, the court specifically ruled that federal agency-authorized third party actions that result in illegal takes are prohibited under the ESA.⁶³

As noted above, there is ample scientific evidence that the mere presence of humans in warm-water manatee refuges, not to mention the type of harassment of manatees that frequently occurs within Three Sisters Springs, Kings Spring, and other important warm water springs in Kings Bay, causes manatees to leave the refuges, impairing their essential behavior patterns in a way that causes significant and permanent effects on the species, particularly during the winter months. Further, studies have shown that manatee use of protected areas goes up as the number of swimmers and boaters in unprotected nearby areas increase,⁶⁴ suggesting that the manatees are being crowded out. Studies suggest the vast majority of manatees avoid human contact.⁶⁵

By permitting harmful human presence in Three Sisters Springs, Kings Spring, and other important warm water springs in Kings Bay, FWS continues to authorize activities which result in illegal, third-party takes of endangered manatees on the Service's own property, in violation of the ESA. Accordingly, although the illegal takes of manatees at Three Sisters Springs, Kings Spring, and other springs and warm water habitats areas in Kings Bay, are being committed by third-party tourists, the FWS is legally responsible for authorizing such harmful activity, and the agency is duty-bound to protect the endangered manatees from impacts that the Service knows will result from the permits the agency issues.

The tourist interference with manatees falls squarely within the Service's own definition of illegal activity. FWS defines "take" as to "harass, harm, pursue . . . or attempt to engage in any such conduct."⁶⁶ The Service further defines "harass" as an "intentional or negligent act or omission which creates the likelihood of injury to wildlife *by annoying it to the extent as to significantly disrupt normal behavior* patterns which include, but are not limited to, breeding, feeding or *sheltering*" (emphasis added).⁶⁷

⁶² 515 U.S. at 712

⁶³ *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997); (Massachusetts' commercial fishing regulatory scheme likely exacted a taking in violation of the ESA); *See also Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991) (finding Forest Service's management of timber stands was an illegal taking of the red-cockaded woodpecker); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989) (enjoining federal agency from authorization of third-party activity which caused illegal take of endangered ferret).

⁶⁴ Sorice, *supra* note 23, at 324.

⁶⁵ Florida Scuba News, *supra* note 21 at A1. *See also* Cheryl Bucklingham et. al., *Manatee Response to Boating Activity in a Thermal Refuge*, WILDLIFE SOCIETY BULLETIN, Vol. 27, No. 2, 514-522 (Summer 1999).

⁶⁶ 16 U.S.C. § 1532(19) (2009).

⁶⁷ 50 C.F.R. 17.3 (emphasis added).

As stated above, there is substantial evidence that tourist harassment of manatees in warm water sanctuaries often causes manatees to flee these sanctuaries for areas of colder water, where they contract cold stress, cold-related illnesses or hypothermia and subsequently die. In Kings Bay, most manatees avoid human interaction by moving into the human-free manatee sanctuaries or swimming out into colder portions of the Bay.⁶⁸ Exposure to severe cold can cause rapid death due to acute hypothermia, whereas sustained exposure to somewhat higher temperatures can also bring about death more slowly. In an average cold year, adults inside a warm-water refuge usually do not have a danger of dying, and calves only have up to a 20% mortality rate. However, outside warm-water refuges, adults go from having a 1% chance of mortality to up to 75%, whereas calves go from 10% to 90-100%.⁶⁹ These mortality rates demonstrate the importance of having adequate warm-water shelter winter habitat during cold years for both manatee adults and calves, because cold stress mortality rates are so high. Furthermore, this means that a large percentage of cold water stress deaths, while seemingly ‘natural’ in origin, are directly attributable to manatees not having enough access to warm-water refuges where they will remain instead of fleeing from human harassment.

Furthermore, tourist harassment often causes separation of calves and mothers, causing significant harm. Manatee calves are especially susceptible to cold water.⁷⁰ After it is birthed, a calf and its mother will remain in a sheltered location for weeks before the calf is able to travel.⁷¹ Thus, there is increased vulnerability for new calves and their mothers. A ten-year study in Florida found that manatee groups with calves used a No Entry refuge, from which almost all human use is barred, to a greater extent than other groups.⁷² However, during the winter and spring (colder months), the overwhelming need for warm water led to groups with calves choosing similar habitat to groups without.⁷³ This evidence suggests that tourist harassment has an especially detrimental effect on manatee mother-calf pairs who are already not in human-free habitat, as such manatees prefer to avoid humans. Human harassment of mothers and calves threatens the calves’ survival, heightening mortality, whether from cold stress or separation from

⁶⁸ Cheryl Buckingham, *An evaluation of manatee distribution patterns in response to public use activities in Kings Bay, Crystal River, Florida*. Florida Cooperative Fish & Wildlife Research Unit, at the University of Florida 2 (1990). Available at: http://aquacomm.fcla.edu/982/1/Buckingham_eval_1990.pdf

⁶⁹ Michael C. Runge, *A Model for Assessing Incidental Take of Manatees Due to Watercraft-related Activities*. Marine Mammal Protection Act — Florida Manatees, Final EIS. Table 6, page I-35 (March 28, 2007). Available at: www.savethemanatee.org/Runge%20model.pdf.

⁷⁰ Rudy M. Ortiz, Graham A. J. Worthy. *Could Lower Body Fat Mass Contribute to Cold-Water Susceptibility in Calves of the West Indian Manatee (Trichechus Manatus)?* MARINE MAMMAL SCIENCE, 20(1): 176-183, 180 (January 2004).

⁷¹ *Id.*

⁷² Janet G. Gannon, et. al. *Habitat Selection by Manatees in Sarasota Bay, Florida*. MARINE MAMMAL SCIENCE 23(1): 133-143 (January 2007).

⁷³ *Id.*

the security of the mother. Suckling behavior has been known to decrease in the presence of human swimmers,⁷⁴ weakening calves.

Despite harassment actions such as grabbing, riding, and separating a mother from its calf being widely publicized as illegal, they occur with regularity and almost 40% of Kings Bay visitors report personally seeing such incidents.⁷⁵ Thus, tourist activities at Three Sisters Springs, Kings Spring, and other areas within Kings Bay certainly fall within the Service's own definition of harassment, and are illegal under the ESA. It is clear that the Service's SUPs for commercial dive shops foreseeably result in the continued harassment of manatees in Three Sisters Springs, Kings Spring, and other areas within Kings Bay in violation of the Endangered Species Act.

In addition to the prohibition on takings, Section 7 of the ESA requires that all federal agencies "shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes [of the ESA] by carrying out programs for the conservation of" listed species.⁷⁶ The ESA defines "conservation" to include "all methods and procedures which are necessary to bring any [listed] species ... to the point at which the measures provided [in the ESA] are no longer necessary."⁷⁷ Section 7 also requires that, "in consultation with and with the Assistance of the [Service]," each federal agency shall "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any" listed species.⁷⁸ In assessing the impact of an agency's actions on a species, the Service is required to "[e]valuate the effects of the action and cumulative effects on the listed species"⁷⁹ The effects to be considered include both the effects of the action itself, and of all other activities that "are interrelated or interdependent with that action"⁸⁰ It is clear that the cumulative impact of allowing human presence in Kings Spring during critical winter months has resulted in direct and indirect harm to the endangered Florida manatee. As such, the FWS has failed to utilize their authorities in furtherance of conservation of the Florida manatee and has failed to insure that any action it authorizes is not likely to jeopardize the continued existence of the species.

Moreover, under Section 7 and implementing regulations, the only way in which the Service could avoid formal Section 7 consultation – culminating in a Biological Opinion and

⁷⁴ *Trichechus manatus* (American Manatee, West Indian Manatee). The IUCN Red List of Threatened Species, 2010. Available at: www.iucnredlist.org/apps/redlist/details/22103/0.

⁷⁵ Buckingham, *supra* note 52 at 28.

⁷⁶ 16 U.S.C. § 1536(a)(1).

⁷⁷ *Id.* at § 1532(3).

⁷⁸ 16 U.S.C. § 1536(a)(2).

⁷⁹ 50 C.F.R. 402.14(g)(3)

⁸⁰ *Id.* at 402.02.

Incidental Take Statement – would be through a valid, biologically sound finding that the FWS’s issuance of SUP’s and other management activities may affect but are not likely to adversely affect manatees. Any such finding, to be sustainable, would have to be based on the “best available” science, the standard for all decision making under Section 7 of the Act. Here, the FWS’s refusal to engage in formal consultation, based on a “not likely to adversely affect” determination in connection with the recently adopted measures, cannot conceivably pass muster under that standard, since it is obvious that Service’s actions *will* continue to adversely affect manatees and their habitat, including by continuing to facilitate harmful human-manatee interactions.

Congress enacted the ESA expressly to provide both “a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] a program for the conservation of such endangered species and threatened species”⁸¹ The duties the Act imposes on the Secretary of the Interior have been delegated to the FWS Director, and such duties cannot and must not be taken lightly.⁸² Nor can they be avoided, as the Service appears to believe, based on the “Agreement” entered into by the FWS with the City of Crystal River. *See* Final EA at 8 (indicating that a more manatee-protective alternative was rejected from serious consideration because it “would violate the agreement.”) It is elementary that the FWS’s obligations under federal law – especially the ESA, which was designed to afford listed species the highest of priorities – must take precedence over any municipal interest in facilitating recreational use of an area that, the FWS concedes, is now of utmost importance to manatee survival and recovery. Consequently, the FWS’s concession that its approach to this issue and, in particular, its consideration of manatee protection measures under the ESA and MMPA, has been heavily influenced by a past agreement with the City only serves to underscore the extent to which the agency is in dereliction of its legal responsibilities under federal environmental law.

IV. FWS should act immediately to protect the Florida manatee

As demonstrated above, there is ample evidence by which to conclude that there is imminent danger of takes occurring at Three Sisters Springs, Kings Spring, and other areas of Kings Bay due to tourist harassment of manatees there, and that the establishment of a protection area there would prevent such takes from continuing. The Secretary should act immediately to establish the following critical protections:

- Protect manatees from harassment by banning “swim-with” programs and all other contacts that would put humans within 10 feet of a manatee, including ceasing the practice of issuing SUPs for commercial tourism shops operating these programs at Crystal Spring NWR and across the state.

⁸¹ 16 U.S.C. § 1531(b).

⁸² 50 C.F.R. 402.01(b).

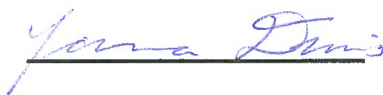
- Complete the revision of critical habitat, which the agency admitted was warranted many years ago, designating Kings Bay, the Three Sister Springs, and Homosassa Springs as critical habitat for the Florida manatee. The failure to complete this revision constitute unreasonable delay.
- Provide sufficient sanctuary and refuge protection areas as mandated by the ESA and MMPA, including expanding the manatee sanctuary areas in Crystal River NWR by making Three Sisters Springs a formal Winter Manatee Sanctuary, ensuring unimpeded access of manatees to Three Sisters Springs and preventing any non-essential human in-water entry into the area immediately adjacent to the entrance to the run as well from November 15-March 31.

CONCLUSION

If FWS fails to act within 60 days to correct the violations of law, PEER et al. will pursue litigation in federal court against the Agency. PEER et al. will seek declaratory and injunctive relief, as well as legal fees and costs regarding these violations. A lawsuit is easily avoidable. An appropriate remedy that would prevent litigation would be for the Service to adopt the steps suggested above to protect one of the most critical thermal wintering refuges for the endangered Florida manatee.

Please direct any response to this notice of intent to sue to PEER's representative, Laura Dumais, using the contact information below.

Sincerely,



Laura Dumais, Staff Counsel
Public Employees for Environmental Responsibility
2000 P Street NW, Ste 240
Washington, DC 20036
Tel: 202-265-7337
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photo: Maura L. Savando



photo: Kevin Remostich/USFWS



photo: Kevin Remostich/USFWS



photo: Joyce Kiecolt/USFWS

Crystal River National Wildlife Refuge

Established in 1983, Crystal River National Wildlife Refuge is the only refuge created specifically for the protection of the endangered Florida manatee. The refuge manages 177 acres, including several islands and 40 acres of winter manatee sanctuaries within the spring-fed waters of Kings Bay in Crystal River, Florida. Crystal River NWR is one of over 550 national wildlife refuges which have been established throughout the United States for the protection of wildlife and natural areas.

What are the manatees?

The Florida manatee, a subspecies of the West Indian manatee, is native to Florida. Their summer range extends along the Atlantic and Gulf coasts. Manatees are sensitive to cold water temperatures and, like humans, are susceptible to hypothermia in the winter months. Kings Bay, the headwaters of Crystal River, encompasses more than 70 natural springs which produce a constant flow of 72°F water. Combined with areas of shallow water, the abundance of natural springs provide a winter haven for hundreds of manatees once waters in the Gulf of Mexico drop below 68°F.

Manatees often return to the same wintering areas year after year. Therefore protecting warm-water wintering habitat, like that found in Kings Bay, is key to protecting and recovering this endangered species.

How are manatees protected in Kings Bay?

The U.S. Fish and Wildlife Service provides three levels of protection for manatees within Kings Bay.

A National Wildlife Refuge is created by an act of Congress and is part of a larger system of federally owned lands and waters set aside to conserve fish, wildlife, plants and their habitats for the benefit of the American public.

A Manatee Refuge is a special protected area created by an administrative act of the U.S. Fish and Wildlife Service. This is an area where some activities in the water may be restricted to prevent the taking (by harm or harassment) of one or more manatees. No federal land or water ownership results from establishing a manatee protected area.

A Manatee Sanctuary is a federally designated area which restricts all activities, including human entry, during the winter months. The sanctuaries in Kings Bay are in effect from November 15 through March 31. Seven of these sanctuaries are in place each year. Temporary no entry areas may be established at House, Jurassic or 3 Sisters spring at the discretion of the refuge manager (see map on reverse of tearsheet).

The State of Florida also provides protection for manatees by establishing and enforcing slow and idle speed zones in public waterways.

Manatee Viewing Guidelines and Prohibitions

The U.S. Fish and Wildlife Service encourages passive observation, which means not initiating contact with manatees and calmly observing from a distance and at the surface. Any contact should be initiated by the manatee, not the person.

The following activities are prohibited within all waters of Kings Bay, including Three Sisters Springs:

- Chasing or pursuing a manatee
- Disturbing or touching a resting* or feeding manatee
- Diving from the surface onto a resting or feeding manatee
- Cornering or surrounding a manatee
- Riding, holding, grabbing, pinching, poking, prodding, or stabbing a manatee with anything, including your hands and feet
- Standing on a manatee
- Separating a mother and calf or separating a group of manatees
- Giving manatee(s) anything to eat or drink
- Actively initiating contact with belted/lagged manatee(s)
- Interfering with rescue and research activities

*A resting manatee is mostly motionless, but rises from the water bottom, the water column, or the water's surface to breath and may make minor movements while resting in order to roll or compensate for drift.

Visiting Crystal River NWR

Except for the areas closed as winter manatee sanctuaries, Crystal River NWR is open to the public during daylight hours. The Kings Bay area is unique for its increasingly high abundance of wintering manatees. The refuge boasts the largest concentrations of manatees in the world within a natural winter habitat, with densities exceeding 550 manatees on extremely cold days.

People come from around the world to experience the Florida manatee at Crystal River NWR. The best times for viewing manatees are late November through early March, when manatees congregate around warm water springs. The refuge encourages visitors who wish to snorkel with manatees to plan ahead and make reservations with one of the many local dive shops or marinas.



U.S. Fish and Wildlife Service

How can you help?

There are many ways you can help the refuge protect the endangered Florida manatee:

- Follow the regulations in this tearsheet and practice passive observation
- Report manatee violations or injuries to the FWC Wildlife Alert Hotline (889/404 3822)
- Join the Friends of Crystal River NWR, Inc. via their website (<http://FriendsOfChass.org/>)
- Help improve the quality and quantity of spring water for manatees and other native Florida wildlife by conserving water and limiting the use of fertilizers.

The refuge headquarters is located on SE Kings Bay Drive, off of Hwy 19 in Crystal River. Office hours are from 8 am - 4 pm Monday through Friday.

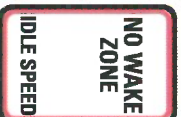
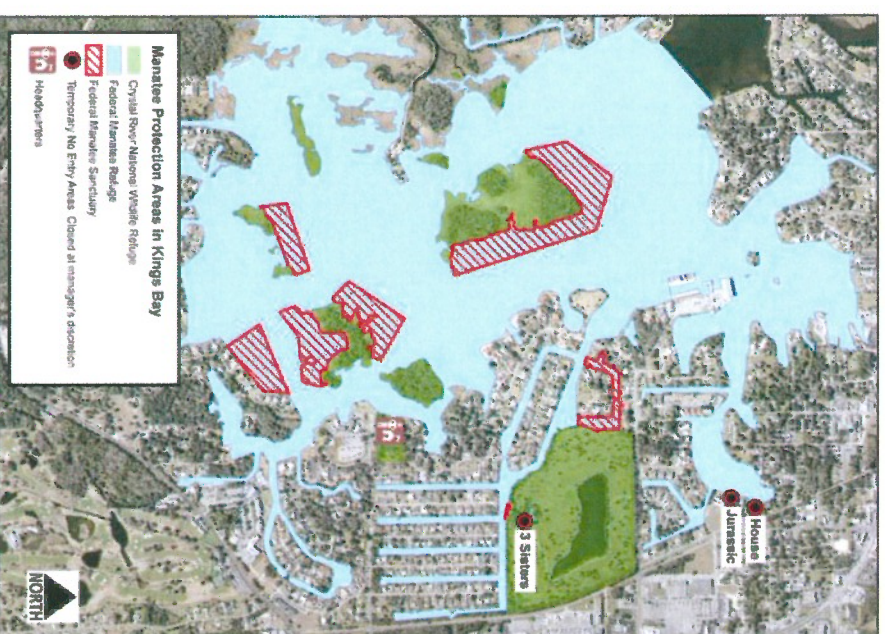
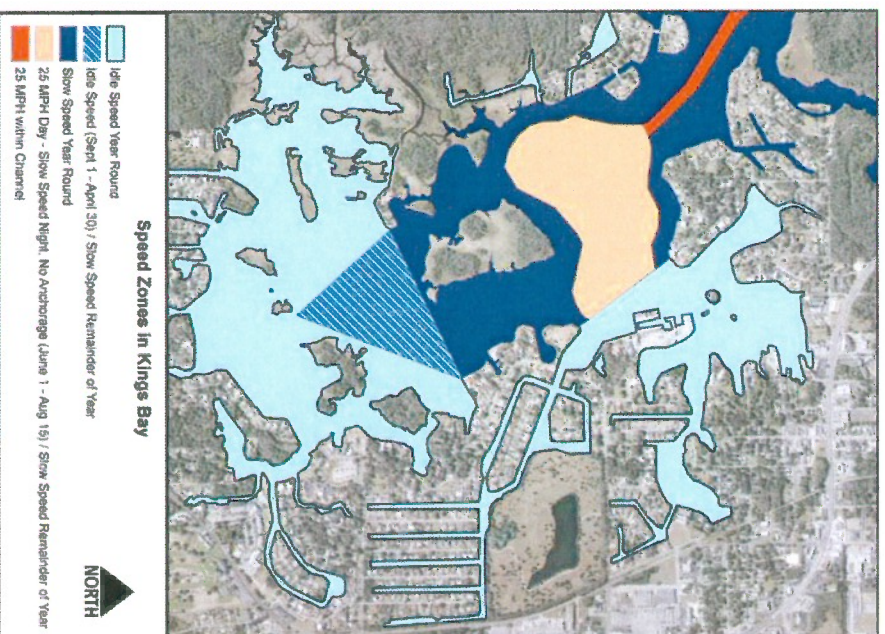
For more information about this refuge, the refuge system, or volunteer opportunities, please contact:

Refuge Manager
1502 SE Kings Bay Dr.
Crystal River, FL 34429
Phone: 352/663 2088
Fax: 352/795 7961
Email: CrystalRiver@fws.gov

Tune into AM1600 in Crystal River on your local radio

Visit us at www.fws.gov/crystalriver

Like us on facebook at www.facebook.com/CrystalRiverComplex



Idle speed: No wake. Minimum speed that will maintain the sterage of a motorboat.



These buoys mark manatee sanctuaries in Kings Bay. There is no fishing, boating, swimming, or public use allowed in these areas while sanctuaries are in effect.



Slow speed: The speed of a vessel at which it is completely off plane, is settled into the water, and is producing minimum wake. A motorboat operated with an elevated bow is not proceeding at slow speed. No specific speed is assigned to slow speed.



This sign marks the refuge boundary. Public access is limited to areas designated open for public use.

No lifeguard on duty at Crystal River NWR. Swim at your own risk.

King Springs: Parts of this cavern are potentially unstable. Falling rocks can cause death. Avoid small passages beneath fractured rocks.