Description of event	Optical alignment	Optical alignment indicator assessment (Note 1)	Zero calibration check	Clear path (off-stack) zero assessment (Note 3)	Upscale calibration check	Calibration error check	Fault status indicator check	Averaging peirod calculation and recording	7-day zero and upscale drift check (Note 2)	Recertify per PS–1	New MCOC per ASTM D 6216–98	Comments
(5) Replace or repair components which are Measurement Critical, but not involving optical or electro-optical components.	.....	.....	X	.....	X	X	X	X	.....	.....	.....	Includes change of components involving data acquisition and recording
(6) Rebuild or Substantially Refurbish the analyzer.	.....	.....	.....	.....	.....	.....	.....	.....	.....	XX	.....	See text description, sec. 10.5(4)
(7) Change to, or addition of, analyzer components which may affect MCOC-specified performance parameters.	.....	.....	.....	.....	.....	.....	.....	.....	.....	X	X	Significant changes which are not part of the MCOC-designated configuration

Notes: (1) Optical alignment indicator assessment requires the operator to verify during an off the stack clear path zero assessment that the beam is centered on the reflector/retro reflector when the alignment indicator indicates on-axis centered alignment. If not, the analyzer optical train must be adjusted until this condition is met.

(2) 7-day zero and upscale drift assessment. Opacity measurement data recorded prior to completion of the 7-day drift test will be considered as valid provided that the first 7-day drift test is successful, that it is completed within 14 days of completion of the repair, and that other QA requirements are met during this time period.

(3) Requires verification of the external zero jig response, or re-calibration of the same, after the off-stack clear path zero has been re-established.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 18

RIN 1018–AH86

Marine Mammals; Incidental Take During Specified Activities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; withdrawal. Availability of Record of Decision.

SUMMARY: We, the Fish and Wildlife Service (Service) have determined that we are unable to authorize the incidental, unintentional take of small numbers of Florida manatees (*Trichechus manatus latirostris*) resulting from governmental activities related to the authorization, regulation, or funding of watercraft and watercraft access facilities within certain regions of the species' range in Florida. Comments and new information received during the public comment period for our proposed rule to authorize such incidental take raised significant questions about the standards, information, and analytic methodologies appropriate for making the necessary findings. These significant questions preclude us from finding that incidental takings of Florida manatee resulting from these governmental activities will have a negligible impact on any of the four stocks in Florida. The Marine Mammal Protection Act (MMPA) does not allow us to authorize incidental take unless we are able to find that the total authorized incidental take will have no more than a negligible impact on the species or stock. Therefore, pursuant to 50 CFR 18.27(d)(4), we are making negative findings for all four stocks. Consistent with this determination we are withdrawing our November 2002 MMPA proposed rule to authorize the incidental take of Florida manatees.

We published a proposed regulation and announced the availability of a Draft Environmental Impact Statement (DEIS) in the **Federal Register** on November 14, 2002. We announced the availability of a Final Environmental Impact Statement (FEIS) for this decision on April 4, 2003. Responses to comments received during the public comment period for the proposed rule and DEIS are available in Appendix N of the FEIS. Through this notice, we are also announcing the availability of the Record of Decision related to the FEIS.

ADDRESSES: If you wish to review the FEIS and Record of Decision, obtain copies by any one of the following methods:

1. You may visit our Web site at *http://northflorida.fws.gov*.
2. You may request a copy by electronic mail (e-mail) to *manatee@fws.gov*.
3. You may write the Field Supervisor, Jacksonville Field Office, U.S. Fish and Wildlife Service, 6620 Southpoint Drive, South, Suite 310, Jacksonville, Florida 32216.
4. You may call the Jacksonville Field Office, 904/232–2580, during normal business hours from 8 a.m. to 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Pete Benjamin, at the above address (telephone 904/232–2580; or visit our Web site at *http://northflorida.fws.gov*).

SUPPLEMENTARY INFORMATION:

Background

On November 14, 2002, the Service published a proposed rule to authorize the incidental, unintentional take of small numbers of Florida manatees (*Trichechus manatus latirostris*) resulting from government activities that authorize and regulate watercraft and watercraft access facilities in Florida. Under the provisions of the MMPA of 1972 (16 U.S.C. 1361–1407), all take, including incidental take, is prohibited unless otherwise authorized. To date, there is no authorization for the incidental, unintentional death, injury, or harassment of Florida manatees caused by these otherwise legal activities. In the proposed rule, we examined the issue of take of Florida manatees to determine whether the incidental, unintentional take of manatees could be authorized.

The Secretary of the Interior may authorize the incidental taking of small numbers of marine mammals resulting from specified activities in a specified geographic area pursuant to 16 U.S.C.

1371(a)(5)(A) of the MMPA if the Secretary finds, based on the best scientific evidence available, that the total authorized taking for the authorized period will have no more than a negligible impact on the species or stock. Negligible impact is defined as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' (50 CFR 18.27(c)).

If a negligible impact finding is made, specific regulations must be established for the activities that describe permissible methods of taking; means of effecting the least practicable adverse impact on the species and its habitat; and requirements for monitoring and reporting. If the Secretary cannot find that the total taking will have a negligible impact on the species or stock, the Secretary must publish a negative finding in the **Federal Register** along with the basis for such a determination (50 CFR 18.27(d)(4)).

Manatee Lawsuit Settlement

In *Save the Manatee Club, et al.* v. *Ballard, et al.*, Civil No. 00–00076 EGS (D.D.C.), several organizations and individuals filed suit against the Service and the U.S. Army Corps of Engineers alleging violations of the MMPA, the Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531–1543), the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*), and the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*). Four groups representing development and boating interests intervened. Following extensive negotiations, a settlement agreement was approved by the court on January 5, 2001. Under the terms of the settlement, the Service agreed to take several actions, including pursuing a rulemaking proceeding to adopt incidental take regulations under the MMPA. According to the settlement agreement, draft and final products were due on November 5, 2002, and May 5, 2003, respectively. The agreement further specified that, if, during the rulemaking process, we determined that requirements of the MMPA could not be met, then we must submit a negative finding to the **Federal Register** by May 5, 2003.

Beginning in January 2001, the Service held a series of meetings with the affected agencies to discuss the scope of government activities and incidental take rulemaking. At the Manatee Population Ecology and Management Workshop in April 2002, the Service discussed the issue of incidental take rulemaking with scientists and managers involved in manatee research and conservation. On June 10, 2002, the Service published a notice in the **Federal Register** (67 FR 39668) announcing our intent to prepare an EIS to evaluate the effects on manatees of a rulemaking to authorize incidental take; public comments were solicited. On November 14, 2002, the Service published in the **Federal Register** (67 FR 69077) a proposed rule and notice of availability for the Draft EIS and announced six public hearings and the commencement of the public comment period. We published a notice on November 29, 2002, announcing a seventh public hearing (67 FR 71127). In December 2002, the Service conducted seven public hearings throughout Florida. On January 9, 2003, we extended the public comment period from its original closing date of January 13, 2003, to January 27, 2003 (68 FR 1175).

In response to these notices, meetings, and public hearings, over 8,000 written comments were received. The majority of these comments related to manatee population issues; NEPA, ESA, and MMPA concerns; recommendations regarding the proposed determination of negligible impact under the MMPA; identification of information needs believed necessary to adequately address issues of concern; and socioeconomic and public involvement concerns. The comments and our responses are provided in Appendix N of the FEIS. The Service refined the Incidental Take Model, an analytic tool; examined and fully considered all comments submitted by the public; and released a Final Environmental Impact Statement (FEIS) on March 26, 2003, with a notice of availability published in the **Federal Register** on April 4, 2003 (68 FR 16544).

We identified four distinct stocks of the Florida manatee, which we call the Upper St. Johns River, the Northwest, the Atlantic, and the Southwest stocks. In addition to the No Action Alternative, the FEIS evaluated a range of action alternatives that included findings of negligible impact for between one (Upper St. Johns River) to three stocks (Upper St. Johns River, Northwest, and Atlantic). The FEIS presented information, including new information, as well as a comparison of results from different methodologies for determining negligible impact. The FEIS also identified areas of uncertainty in various methodologies, stated pertinent information needs, and presented criticisms of each methodology and of our population benchmark criteria.

Proposed Rule

In the proposed rule, we made the following findings with respect to the effects of watercraft-related incidental take on each stock—(1) Current levels of watercraft-related incidental take were having a negligible impact on the Upper St. Johns River and Northwest stocks; (2) current incidental take levels were having a greater than negligible impact on the Atlantic stock, but incidental take could be reduced to the negligible level with implementation of additional mitigating measures; and (3) current levels of incidental take were having a greater than negligible impact on the Southwest stock, and mitigating measures were not available to reduce this take to a negligible level.

The rationale behind the negligible impact threshold presented in the proposed rule was: In terms of stocks that are depleted (*i.e.*, population levels below Optimum Sustainable Population (OSP)), it is generally accepted that the large majority of annual net productivity must be reserved for the recovery of the stock to its OSP level, and that only a small portion should be allocated for incidental take, so that human-related take does not significantly increase the time needed to reach OSP. Therefore, based on our interpretation of the MMPA, its implementing regulations, previous incidental take rulemakings, and our current understanding of manatee population dynamics, we concluded that, in order for us to determine that the allowable level of human-related incidental take would have a ''negligible impact,'' we must be reasonably certain that the take would not significantly increase the time needed to achieve OSP (67 FR 69086). Our negligible impact standard, based on the above rationale, was reasonable certainty that authorized incidental take will not significantly increase the time needed to reach OSP (67 FR 69086). OSP is defined in the MMPA as ''the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element'' (16 U.S.C. 1362).

We relied on criteria developed through the ESA recovery planning process to assess the status of the manatee stocks against the negligible impact standard. The proposed rule stated that, as concluded in the newly revised Florida Manatee Recovery Plan, the Florida manatee population could be considered to be ''healthy'' and able to sustain itself after the demographic benchmarks were met for all four stocks

based on at least a 20-year data set. Assuming that none of the stocks were severely depleted when data collection relative to the demographic benchmarks began (in the late 1970s and 1980s), 20 years of continued growth at the benchmark rates would in all likelihood result in stocks that are within or near the range of OSP. As such, we believed it was reasonable to assume that achievement of the demographic benchmarks would result in a population that is within or near the range of OSP, and that the negligible impact threshold would be that level of incidental take that does not significantly increase the time needed to achieve the demographic benchmarks (67 FR 69087).

Applying these standards to the best information available at the time of the proposed rule, we concluded that the Northwest and Upper St. Johns River stocks were currently meeting the demographic benchmarks and were progressing toward OSP at a biologically acceptable rate (*i.e.*, current incidental take was having a negligible impact). Regarding the Atlantic stock, we determined that it was close to the demographic benchmarks, and would meet the negligible impact standard provided additional mitigation measures were implemented to reduce take. The Southwest stock was not close to meeting the demographic benchmarks, so we proposed a negative finding with respect to that stock. We stated that it might be possible to refine this analysis for the final rule using a stochastic manatee population model (67 FR 69091), which will be referred to hereafter as the ''Incidental Take Model.'' The Incidental Take Model structure was described in the proposed rule and DEIS, but was not completed at the time the proposed rule was published. It was included in Appendix I of the FEIS.

Discussion and Findings

Standards and Assumptions

Some of the standards and assumptions that supported our proposed rule have been questioned. This includes criteria for quantifying negligible impact and assumptions about OSP and the status of each stock (including population growth rate).

We quantified the negligible impact standard as that which would not exceed a five percent probability of delaying a stock's time to reach its OSP by no more than 10 percent. The specific probability and delay values were selected based on standards used by other agencies for other types of regulations under the MMPA, and because the 95 percent probability is frequently used in statistical decision-making. We are currently considering whether this is an appropriate standard for incidental take caused by watercraft.

We also assumed that, if historical population levels were sufficiently high relative to carrying capacity, continued growth at the benchmark rates would result in population levels that are within or near OSP. This assumption played a role in our conclusions that current levels of watercraft-related take are either not currently delaying the time to reach OSP or are mitigable, depending on the stock.

Information developed during the rulemaking process, but not available until after the DEIS and proposed rule were published and made available, calls into question some of the assumptions upon which our analysis was based. One of the uncertainties raised by the new information is that all four stocks may be further from OSP, and growing at a slower rate than we originally thought. In short, new information challenges the verity of the assumptions that we built into our negligible impact criteria.

We are also reconsidering the use of the recruitment benchmark because we have no data that allow us to generate confidence intervals for the percent of females with first and second year calves, which undermines our current ability to evaluate the status of the stocks against this benchmark.

In summary, some of the assumptions relied upon in our negligible impact criteria and standards have been called into question. Key among these are:

- The assumption that achievement of demographic benchmarks developed through an ESA recovery plan will result in a population that is within or near the range of OSP;
- The recruitment benchmark, which is complicated by gaps in our understanding of the percent of females with first and second year calves;
- The biological implications of our assumptions about the linkage between (1) stock status, and (2) population benchmarks;
- The significance of various probabilities of delay in the time to reaching OSP; and
- The time it takes to reach OSP.

New Information

We gained significant information about manatee populations and trends after the proposed rule and DEIS were made available to the public. Some fundamental questions about our understanding occurred as a result of collecting the information necessary to refine the Incidental Take Model. The most important new information included new estimates of watercraft-related mortality, age-related survivorship, trends in carrying capacity, and demographic trends in the Atlantic Stock.

New information about carcass recovery suggests that rates vary significantly by stock, which challenges our estimates of watercraft-related mortality in all four stocks. Manatee carcass recovery rate is our leading indicator of the fraction of mortality due to watercraft. The carcass recovery rate (the fraction of dead manatees recovered by the carcass salvage program) plays a role in the calculation of negligible impact, because it serves as the link between the numbers of observed and actual watercraft-related mortalities. The fraction of mortality due to watercraft also can be used to calculate the survival rate in the absence of take, hence the degree to which take-reduction could improve the population growth rate. Both of these quantities have only recently been estimated from Florida Marine Research Institute data, and a peer review of the analysis has not been conducted. Further, only a point estimate for recovery rate in each region is available, which means that we do not yet have an expression for the uncertainty in that rate.

New information about carrying capacity suggests that it may decline over the next 3 to 60 years, which would affect density-dependent life history and management functions of the Florida manatee. The limiting factor for the carrying capacity of each stock is warm water refugia. Each stock of Florida manatees is variably dependent on natural and artificial warm water refugia, such as springs, sewerage outfalls, and power plant discharges. Preliminary information presented in the Incidental Take Model, but not yet peer reviewed, suggests that a reduction in total warm water carrying capacity is possible, if not likely, in the near future. This would suggest that OSP will change over time. Our implicit assumption of a stable OSP is challenged by this information. This, in turn, has implications for our interpretation of total population estimates, and our assumption that none of the stocks were severely depleted based on the demographic benchmarks.

We also are considering how information gaps may affect our ability to make a negligible impact determination for Florida manatee. The most important information gap is our limited understanding of density-dependent effects on manatees.

Methodologies

Questions have been raised about the analytic methods we proposed to use to determine negligible impacts. We stated that, to be negligible, authorized incidental take must be reasonably certain not to significantly delay the time to reach OSP. We also said that the final determination may be informed by an Incidental Take Model (which was presented in the DEIS, or a refined version, included in the FEIS as Appendix I). Comments received during the comment period included suggestions for two alternative methodologies, the Potential Biological Removal (PBR) level, and a method which we characterize as the Fraction of Excess Growth (FEG) method.

The PBR for each species or stock of marine mammal is calculated as part of the Stock Assessment required under section 117 of the MMPA, and is defined as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its OSP. PBR is typically used for determinations for the purpose of regulating commercial fishing activities under the MMPA, but is not used by the Department of the Interior for analyzing incidental take for activities other than commercial fishing.

The FEG method assumes that negligible impact includes both a delay in time to reach OSP and a percent of annual growth harvested through incidental take functions. As suggested, this method concludes that any incidental take that delays the time to reach OSP by 10 percent or more, or that harvests 10 percent or more of annual growth rate, exceeds negligible levels.

The Incidental Take Model is based on a model developed by USGS and presented at the April 2002 Manatee Population Ecology and Management Workshop. The model projects population trends for each of the four manatee stocks based on repeated simulations that incorporate environmental and demographic variability, as well as varying levels of human-related take. In the proposed rule, we stated that the initial model used the best available science, and that the Manatee Population Ecology and Management Workshop attendees believed that it was the most suitable model for use in the negligible impact determination. However, the Incidental Take Model currently projects population trends, including the negligible impact criteria, in 20-year increments, which exceeds the 5-year increments required in the MMPA. This approach is currently being assessed.

The qualitative assessment methodology used the initial results of the April 2002 version of the Incidental Take Model, and was described in detail in the proposed rule. This analytic methodology was applied to make the proposed findings.

Conclusion

After carefully considering the various analytic methodologies and relevant information generated during the public comment period, we conclude that the questions regarding standards and assumptions, new information, and analytic methodologies preclude us from finding that under the requirements set out in 50 CFR 18.27, incidental take resulting from government activities related to the authorization, regulation, or funding of watercraft and watercraft access facilities within certain regions of Florida will have a negligible impact on any of the four stocks of Florida manatee. Therefore, pursuant to 50 CFR 18.27(d)(4), we are withdrawing our November 2002 MMPA proposed rule to authorize the incidental take of Florida manatees and are publishing this notice as our findings.

Relationship Between MMPA Incidental Take Authorization and ESA Section 7 Consultation

We wish to clarify the relationship between an MMPA incidental take rulemaking and review of proposed watercraft access projects under section 7 of the ESA. The manatee is listed as an endangered species under the ESA and is also a marine mammal. As such, both the MMPA and the ESA prohibit the incidental take of Florida manatees in the course of conducting otherwise lawful activities, unless authorized. Through section 7 of the ESA, the Service can authorize the incidental take of listed species when take is reasonably certain to occur as a result of Federal actions as long as specific ESA requirements are met. However, if the listed species is also a marine mammal, incidental take authorization under the MMPA must be in place before incidental take under the ESA can be authorized. This rulemaking process analyzed whether incidental take could be authorized for any of the four stocks under the MMPA, which would have allowed the Service to authorize incidental take for these stocks under section 7 of the ESA.

Actions To Be Taken

The following describes additional efforts to improve manatee protection.

(1) We will continue to manage our consultation program to ensure that our responsibilities under section 7 of the ESA are fulfilled in accordance with our regulations and policies, and that these responsibilities are executed efficiently without imposing undue delays or burdens on the regulated public.

Over the past 2 years, we have made several alterations to our ESA section 7 procedures related to Corps of Engineers' authorization of new watercraft access facilities. Many members of the public apparently believed that these changes were precipitated by the MMPA incidental take proposed rule, which is not the case. Rather, these changes occurred during the same time period as development and publication of the proposed rule. Similarly, in accordance with the settlement agreement in *Save the Manatee Club, et al.* v. *Ballard, et al.*, the Service's Interim Strategy for review of watercraft access permits (*i.e.*, docks, boat ramps, and marinas) remained in effect through publication of the final MMPA incidental take determination.

With the publication of this final decision regarding MMPA incidental take regulations for manatee, the Service's Interim Strategy for review of watercraft access permits is no longer in effect. Therefore, the Service will conduct manatee consultations in accordance with section 7 of the ESA and its implementing regulations and policies.

Because no MMPA incidental take regulations have been promulgated the Service is precluded from authorizing incidental take of manatees in the ESA consultation process for any project that would be reasonably certain to result in take of manatees. In making its determinations, the Service will give consideration to State and/or local manatee protection measures, State-approved manatee protection plans and similar measures, and will use the best available scientific and commercial information, including information on law enforcement efforts and the adequacy of manatee speed zones and their signage.

(2) We have proposed additional protection measures in Duval, St. Johns, Clay, Volusia, and Lee counties (68 FR 16601, April 4, 2003).

(3) We will coordinate with the Florida Fish and Wildlife Conservation Commission to review and comment on county Manatee Protection Plans and will give consideration to approved plans and protection measures in our section 7 consultations.

(4) We will establish the Working Group on Watercraft-related Incidental

Take as a subcommittee of the Florida Manatee Recovery Team.

(5) We have initiated a status review of the Florida manatee pursuant to section 4(c)(2) of the ESA.

(6) We will be revising the Florida manatee stock assessment to reflect our determination that the four regional populations of Florida manatees are separate stocks, as defined by the MMPA. The stock assessment will build from and complement the status review to include a summary of the most recent data that provides the biological basis for separating the population into four stocks.

References Cited

A complete list of all references cited in this rule is available upon request from the Jacksonville Field Office (*see* **ADDRESSES** section).

Author

The primary author of this document is Pete Benjamin (*see* **ADDRESSES** section).

Dated: May 3, 2003.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

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