

March 29, 2010

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RE: 60 Day Notice of Intent to Sue the Fish and Wildlife Service Over Violations of Sections 2, 5 and 7 of the Endangered Species Act Relating to the Taking of Florida Manatees and Failure to Establish Additional Sanctuaries for the Conservation and Preservation of the Species.

This letter serves as a sixty-day notice on behalf of Public Employees for Environmental Responsibility (“PEER”) on its intent to sue the Fish and Wildlife Service (“FWS” or “Service”) over violations of Sections 2, 5, and 7 of the Endangered Species Act (“ESA”). The Florida population of the West Indian manatee (*Trichechus manatus latirostris*) is listed as an endangered species under the Endangered Species Act (“ESA”) and protected under the Marine Mammal Protection Act (“MMPA”). On July 15, 2009, PEER petitioned the Service to, among other things, designate the Kings Spring area 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.” The FWS has failed to utilize available statutes, regulations, and resources to conserve and protect the manatee from further harm due to human waterborne activities. As such, this letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA. See 16 U.S.C. § 1540(g).

I. Background

A. The Florida manatee

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).

Florida manatees are large aquatic mammals native to Florida's coastal and inland waters that spend most of their time eating, resting, and migrating to warmer regions.¹ They are one of the most endangered marine mammals in coastal waters of the United States. 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.² They strongly prefer shallow water between three to seven feet deep, and rarely venture into waters beyond 20 feet in depth.³ Thus, although the range of 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.⁴

Watercraft collisions and canal locks/flood control structures are the most common human-induced causes of manatee deaths.⁵ The reproduction rate of manatees is very low. Female manatees mature sexually when they are around 3 years of age, but are not usually successful at raising calves until they are about 6 to 10 years old.⁶ 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.⁷ Calves are dependent upon their mothers for up to two years, and calf mortality rates are not only high, but are rising for unclear reasons.⁸ Furthermore, a calf and its mother will remain in a sheltered location for weeks before the calf is able to travel.⁹ 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.

¹ Keith Rizzardi, *Toothless? The Endangered Manatee and The Florida Manatee Sanctuary Act*, 24 FLA. ST. U. L. REV. 377, 382 (1997)

² 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:

http://www.biologicaldiversity.org/species/mammals/Florida_manatee/pdfs/ManateeCHPetition.pdf.

³ Nancy Sadusky, *Journey North Manatee Migration FAQ*, available at:

<http://www.learner.org/jnorth/search/ManateeNotes1.html#26>.

⁴ Thompson, *supra* note 2, at 9.

⁵ *Supra* note 2, at 11.

⁶ *Supra* note 8, at 14.

⁷ *Id.*

⁸ *Id.* at 14-15.

⁹ Thompson, *supra* note 2, at 8.

B. Habitat

The Florida manatee generally lives in fresh, brackish and marine habitats. Its preferred food is submergent, emergent, and floating sea grasses and other vegetation.

Because the species is cold-intolerant, it requires warm water temperatures generally 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 for warmth 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.

The Florida manatee's warm water shelters are threatened by a variety of factors, most of which are related to human activity. For example, the closing of power plants creates a subsequent loss of warm-water effluents associated with those plants. Another example is the consumptive pumping of aquifer water within spring basins associated with human population growth, which can reduce spring flow.¹⁰ For the ensured survival of manatees, the erasure of warm-water sanctuaries presents a serious challenge as many Florida manatees exhibit strong consistency in migration patterns and return to the same warm-water wintering areas annually, including the aforementioned springs and effluents. Site-fidelity patterns in manatees are likely transferred from generation to generation as calves learn to use particular refuges while accompanying their mothers.¹¹ Other threats include expansion of port facilities and inlets and seagrass destruction due to coastal development, as well as general water quality degradation and pollution.¹² Pesticides, herbicides, and industrial chemicals contaminate water and vegetation ingested by manatees, and such toxins can accumulate in manatee tissue.¹³ Stable warm water shelters such as Kings Spring are being threatened by swim-with programs and the associated human harassment, noise, and unwelcome interaction.

The Florida Fish and Wildlife Research Institute's most recent synoptic survey in January of 2010 counted 5,076 manatees.¹⁴ The record cold weather in the winter of 2010 has killed an astounding 280 manatees via cold stress-related illnesses, about 5% of the estimated total.¹⁵ As of March 24, 2010, 431 manatees have died this year, already surpassing in three months the record for manatee deaths for any full calendar year on record.¹⁶ Most disturbingly, many more of this year's manatee deaths were adults (53%

¹⁰ Manatee – Habitat Protection. Florida Fish and Wildlife Conservation Commission, available at: http://myfwc.com/WILDLIFEHABITATs/Manatee_habitat.htm.

¹¹ 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).

¹² *Id.*

¹³ Victoria Brook Van Meter, *The Florida Manatee*. Florida Power & Light Company, 24 (revised 2001). Available at: www.sirenian.org/FPLBooklet.pdf

¹⁴ *Manatee Synoptic Surveys*, Fish and Wildlife Research Institute, Florida Fish and Wildlife Conservation Commission. Available at: http://research.myfwc.com/features/view_article.asp?id=15246.

¹⁵ Tristan Smith, *Cold temps further endanger Florida's manatees*, CNN, February 22, 2010 at A1. Available at: <http://www.cnn.com/2010/US/02/12/manatee.cold.weather/index.html?hpt=Sbin>.

¹⁶ <http://www.reuters.com/article/idUSTRE62M5GT20100323>.

compared to 17% last year), and the evidence shows that they are dying of acute cold shock resulting in immediate fatality, as opposed to secondary infections or complications associated with cold stress (which may take longer to cause mortality).¹⁷ This evidence points to these cold-related deaths having a simpler, more preventable cause—a lack of sufficient warm water habitat.

C. Human presence in Kings Spring threatens survival of the Florida manatee

The area surrounding Kings Spring is an especially important manatee habitat because it is the largest natural spring that provides warm water on which manatees depend for winter survival. The number of manatees that depended on Kings Spring increased from approximately 100 manatees in the 1980s to approximately 800 manatees in the 1990s.¹⁸ The spring is a primary source for the warm water that manatees need to survive. The strong attraction of manatees to this area has made it attractive to scuba divers and other tourists, with nearly 100,000 of them visiting annually.¹⁹ Continued human presence in Kings Spring during the winter months is minimizing or preventing manatee use of this critical resource.

The most recent revised Recovery Plan for the manatee, issued by the FWS, has indeed confirmed that “[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.”²⁰

In fact, research has shown as far back as 1981 that manatees time their activities to avoid harassments by boats and divers.²¹ The bubbling noise created by scuba diver masks disturbs manatees and causes them to flee. Splashing and other water disturbances, chasing, following, restraining, or holding are all activities that disturb manatees. They are particularly disturbed by camera strobe and video lights.²² Because manatee mothers and calves vocalize to maintain contact,²³ 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 (none so far exist for manatees), show that

¹⁷ Kevin Lollar, *Huge number of manatees gather in Lee County*, The News-Press, (February 21, 2010) at A1, available at: <http://www.news-press.com/article/20100221/GREEN/100221028/Huge-number-of-manatees-gather-in-Lee-County>.

¹⁸ M. Lynne Corn, Eugene H. Buck. “Florida Manatee: Federal Protection.” Congressional Research Service Reports, National Library for the Environment (1994). Available at: <http://www.cnie.org/nle/crsreports/biodiversity/biodv-29.cfm#1>

¹⁹ Michael G. Sorice, et al. *Managing Endangered Species within the Use/Preservation Paradox: Understanding and Defining Harassment of the West Indian Manatee (Trichechus manatus)*. COASTAL MANAGEMENT, 31:319–338, 320 (2003).

²⁰ Florida Manatee Recovery Plan at 4, available at <http://www.fws.gov/northflorida/Manatee/Documents/Recovery%20Plan/Manatee%20Recovery%20Plan.pdf>.

²¹ Van Meter, *supra* note 8, at 16.

²² Florida Scuba News, “Positive Encounters with Gentle Giants,” available at: <http://www.scubanews.com/node/359> (2010).

²³ Van Meter, *supra* note 8, at 18-19.

tourist activity has a detrimental effect upon the targeted species.²⁴ Human activity such as trash also has a harmful effect; plastic litter like bags and six-pack holders can get entangled in plants that manatees eat, causing them to accidentally ingest the plastics, which can choke them or block their intestines.²⁵ Fishhooks can also puncture a manatee's intestinal lining, leading to infection and death.

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.²⁶ 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.²⁷ This means that cold water stress, while certainly occurring in nature, can also be a significant manmade source of manatee mortality. Indeed, this conclusion is borne out by recent statistics, as the number of cold stress deaths in 2009 was double the average for the last five years.²⁸ 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.²⁹ 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.³⁰ 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.³¹

At present, fifteen local dive shops operate commercial “swim-with” programs at Crystal River National Wildlife Refuge, all permitted under FWS Special Use Permits (“SUPs”), and visitors to Crystal River take advantage of these programs to encounter manatees. According to a 2003 report, FWS permitted “swim-with” programs have significantly contributed to the ongoing harassment of manatees, both directly and indirectly.³² 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”, but still staunchly maintains that SUPs are “a significant management tool which currently minimizes manatee harassment by swimmers.”³³

²⁴ Sorice, *supra* note 19, at 325. The study cited concerned dolphin species.

²⁵ If You Love Us, Please Don't Feed Us: Tips for Protecting Manatees in the Wild, Save the Manatee Club, available at: <http://www.savethemanatee.org/Don'tFeedUs.pdf>.

²⁶ Laist, *supra* note 11, at 743.

²⁷ Van Meter, *supra* note 8, at 25.

²⁸ Curtis Morgan, *Manatee death rate hit record high in '09*, Miami Herald at A1 (January 7, 2010).

Available at: <http://www.miamiherald.com/2010/01/07/1413078/manatee-death-rate-hit-record.html>.

²⁹ Van Meter, *supra* note 8, at 26.

³⁰ *Id.*

³¹ Laist, *supra* note 11, at 743.

³² Michael G. Sorice, C. Scott Shaffer, and Doug Scott, *Managing Endangered Species within the Use/Preservation Paradox: Understanding and Defining Harassment of the West Indian Manatee*. Texas A&M University, Department of Recreation, Park and Tourism Services (2003).

³³ Letter in reply to FWS/R4/ES, Cynthia K. Dohner, Acting Regional Director, Fish and Wildlife Service (August 25, 2009). Available at:

http://www.peer.org/docs/fl/09_31_8_ltr_FWS_PEER_response_to_petition.pdf.

D. Current FWS measures are insufficient to adequately protect the Florida manatee

Because the SUP holder requirements instituted by the FWS (including education regarding manatee interactions and informing customers about relevant regulations) have failed to limit tourist harassment and illegal interaction with manatees and in fact allow the programs that lead to the harmful activity to continue, these SUPs actively enable manatee harassment. The sheer volume of 100,000 annual area tourists and the limited budget and official personnel numbers have created a vacuum of enforcement, in which many complaints regarding manatee harassment are never followed up or investigated.³⁴ 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 currently only one full-time law enforcement officer for all five refuges.³⁵ 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.

In March 2007, the Marine Mammal Commission wrote to the FWS recommending the Service develop regulations prohibiting the touching of animals, requiring that divers not approach animals closer than 10 feet, and back away from animals that approach them.³⁶ Subsequently, FWS issued nonbinding “interaction guidelines” and an educational “Manatee Manners” video that have so far failed to make any impact in the levels of tourist harassment at Kings Spring. Upon reviewing these updated educational materials, the Marine Mammal Commission emphasized 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.³⁷

³⁴ 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”).

³⁵ Help End Manatee Harassment in Citrus County, Florida, *available at*: http://www.savethemanatee.org/ta_harassment_bkgnd.html

³⁶ Marine Mammal Commission, Annual Report to Congress (2007).

³⁷ 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.”

Even if the ongoing and blatant physical harassment by humans were to decrease or stop, continued human presence alone in Kings Spring would probably cause manatees to depart from the area, rendering the spring just as unsuitable for manatee habitat. One study found a correlation between the number of swimmers in an area and an increase in manatee use of sanctuaries that wholly exclude humans, confirming that manatees do not welcome any human presence.³⁸ The same study revealed that over half of human-manatee interactions constituted harassment.³⁹

FWS has admitted that the current sanctuaries are insufficient to protect the endangered manatee population and the need to establish additional refuges under 50 C.F.R. 17.103.⁴⁰ However, FWS has failed to revise critical habitat due to preclusion “by higher priority listing-related actions and funding constraints.”⁴¹ However, an economic rationale to continue enabling illegal takes of manatees under the ESA cannot withstand scrutiny.⁴²

II. The Fish and Wildlife Service’s Allowance of Tourist Activity at Kings Spring Constitutes a Taking as Defined by the ESA and is Likely to Jeopardize the Continued Existence of the Florida Manatee.

By permitting the above-described tourist activity to continue at Kings Spring, 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.⁴³ The Fish and Wildlife Service’s continued allowance of human presence in Kings Spring has resulted in both habitat denial and manatee harassment, and is well within the range of activities prohibited by the ESA.

Federal courts have consistently applied the ESA broadly to prohibit certain federal agency-authorized activities. For example, in *Palila v Hawaii Dept. of Land and Natural Resources*, the Ninth Circuit found that an agency program that resulted in significant

See NOAA Fisheries Policy on Human Interactions With Wild Marine Mammals, available at: <http://www.nmfs.noaa.gov/pr/education/viewing.htm>.

³⁸ 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).

³⁹ *Id.*

⁴⁰ See FWS Press Release: “Federal Finding Means Florida Manatee Critical Habitat Designation Warrants Revision,” available at: http://www.fws.gov/northflorida/Releases-10/20100112_nr_FWS_announces_12-month_finding_on_Florida_manatee_critical_habitat.htm (January 12, 2010)

⁴¹ *Id.*

⁴² 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 species.”)

⁴³ 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.”).

habitat denial to an endangered species constituted a taking and was therefore unlawful under the ESA.⁴⁴ The court reasoned that “impairment of essential behavior patterns via habitat modification that can have significant and permanent effects on the species constitutes [a] harm,” which is an illegal take under the ESA.⁴⁵ 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 in Kings Spring, 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 an area increase,⁴⁶ suggesting that the manatees are being crowded out. In addition, studies suggest the vast majority of manatees avoid human contact, with only about ten percent of animals seeking any human interaction.⁴⁷

By allowing human presence in Kings Spring, the FWS continues to authorize activities which result in illegal, third-party takes of endangered manatees on the Service’s own property, and amounts to a violation of the ESA. Several courts have held that the ESA prohibits indirect takes authorized by federal agencies. The Supreme Court held in *Babbitt* that actions which indirectly result in the take of an endangered species are prohibited.⁴⁸ 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. Coxe*, the court specifically ruled that federal agency-authorized third party actions that result in illegal takes are prohibited under the ESA.⁴⁹ Accordingly, although the illegal takes of manatees at Kings Spring are being committed by third-party tourists, the FWS can be held responsible for preventing such harmful activity and are responsible for protecting the endangered manatees there.

The tourist interference with manatees falls squarely within the Service’s own definition of illegal activity. The Fish and Wildlife Service defines “take” as to “harass, harm, pursue . . . or attempt to engage in any such conduct.”⁵⁰ 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).⁵¹

⁴⁴ *Palila v Hawaii Dept. of Land and Natural Resources* 852 F.2d 1106 (9th Cir. 1988).

⁴⁵ *Id.* At 1108; 16 U.S.C. § 1532(19) (2009).

⁴⁶ Sorice, *supra* note 19, at 324.

⁴⁷ Florida Scuba News, *supra* note 21 at A1. See also Cheryl Buckingham et. al., *Manatee Response to Boating Activity in a Thermal Refuge*, WILDLIFE SOCIETY BULLETIN, Vol. 27, No. 2, 514-522 (Summer 1999).

⁴⁸ 515 U.S. at 712

⁴⁹ *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); see also *Defenders of Wildlife v. Envtl. Protection Agency*, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (enjoining federal agency from authorization of third-party activity which caused illegal take of endangered ferret).

⁵⁰ 16 U.S.C. § 1532(19) (2009).

⁵¹ 50 C.F.R. 17.3 (emphasis added).

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.⁵² 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%.⁵³ 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.⁵⁴ After it is birthed, a calf and its mother will remain in a sheltered location for weeks before the calf is able to travel.⁵⁵ 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.⁵⁶ 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.⁵⁷ This evidence suggests that tourist harassment has an especially detrimental 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 the security of the mother. Suckling behavior has been known to decrease in the presence of human swimmers,⁵⁸ weakening calves. This in turn directly impacts the already slow gestation rate, resulting in decreased population recovery.

⁵² 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

⁵³ 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: <http://www.savethemanatee.org/Runge%20model.pdf>.

⁵⁴ 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).

⁵⁵ *Id.*

⁵⁶ Janet G. Gannon, et. al. *Habitat Selection by Manatees in Sarasota Bay, Florida*. MARINE MAMMAL SCIENCE 23(1): 133-143 (January 2007).

⁵⁷ *Id.*

⁵⁸ *Trichechus manatus* (American Manatee, West Indian Manatee). The IUCN Red List of Threatened Species, 2010. Available at: <http://www.iucnredlist.org/apps/redlist/details/22103/0>.

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.⁵⁹ Thus, tourist activities at Kings Spring certainly fall within the Service's own definition of harassment, and is therefore illegal under the ESA. It is clear that the Service tolerates and, in many cases, permits, through the issuance of SUPs to commercial dive shops, the continued harassment of manatees in Kings Spring in violation of the Endangered Species Act and furthermore shows no signs of taking steps to stop such harassment.

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.⁶⁰ 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."⁶¹ 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.⁶² 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"⁶³ 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"⁶⁴ 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.

Congress enacted the ESA with the express purpose of providing 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"⁶⁵ The duties the Act imposes on the Secretary of the Interior have been delegated to the FWS Director, and such duties cannot and should not be taken lightly.⁶⁶

III. The Fish and Wildlife Service should Act Immediately to Establish a Manatee Sanctuary at Kings Spring.

⁵⁹ Buckingham, *supra* note 52 at 28.

⁶⁰ 16 U.S.C. § 1536(a)(1).

⁶¹ *Id.* at § 1532(3).

⁶² 16 U.S.C. § 1536(a)(2).

⁶³ 50 C.F.R. 402.14(g)(3)

⁶⁴ *Id.* at 402.02.

⁶⁵ 16 U.S.C. § 1531(b).

⁶⁶ 50 C.F.R. 402.01(b).

A. The Secretary should establish an additional manatee sanctuary at Kings Spring

As outlined above, the Secretary has a legal obligation to ensure that no takes of manatees occur on FWS property. Although the service has taken some measures, including requiring tourists to watch an informational video on appropriate levels of human-manatee interactions, these measures have proved to be wholly inadequate to prevent takes of manatees in Kings Spring. Given the importance of Kings Spring as a shelter for large numbers of manatees, it is clear that the Service must take stronger action to protect manatees there from harmful human interactions.

Because there is ample evidence that the mere presence of humans in warm water refuges causes many manatees to flee those refuges, the Secretary should, at a minimum, designate Kings Spring as a manatee sanctuary in which swimming and snorkeling activities are prohibited. The Secretary may “establish manatee protection areas whenever there is substantial evidence showing such establishment is necessary to prevent the taking of one or more manatees.”⁶⁷ Such protection areas include manatee sanctuaries and manatee refuges. A manatee sanctuary is an area in which no waterborne activity whatsoever is permitted.⁶⁸ A number of manatee sanctuaries have already been established in the Crystal River National Wildlife Refuge in the vicinity of Kings Spring,⁶⁹ and the Secretary should act immediately to extend these critical protections to Kings Spring in order to prevent further takes of endangered manatees seeking shelter there.

B. The Secretary should enact an Emergency Rule to establish an additional manatee sanctuary at Kings Spring

The Secretary should act immediately to establish these critical protections by promulgating an emergency rule. 50 CFR 17.106 provides that the Secretary may establish protection areas “at any time he determines there is substantial evidence that there is imminent danger of a taking of one or more manatees, and that such establishment is necessary to prevent such a taking.” As demonstrated above, there is ample evidence by which to conclude that there is imminent danger of takes occurring at Kings Spring due to tourist harassment of manatees there, and that the establishment of a protection area there would prevent such takes from continuing. Such a designation would provide short-term relief for manatees seeking refuge in Kings Spring while the Service establishes a long-term protection area under 50 CFR 17.103.

If the Secretary fails to determine that such actions are necessary, it is likely that a court would require him to establish such protection areas through an injunctive order. When seeking an injunction, court weighs: the likelihood of success on the merits, the potential for irreparable harm if the injunction is denied, the hardship to movant if relief denied

⁶⁷ 50 C.F.R. 17.103.

⁶⁸ 50 C.F.R. 17.102.

⁶⁹ See map available at: <http://www.fws.gov/northflorida/Manatee/Maps/crystal-river-NWR-sanctuaries.pdf>.

relative to the hardship to nonmovant if injunction granted, and the injunction's potential effect on public interest. As outlined above, because of the continued taking of manatees in Kings Spring and the Service's obligation to take measures to prevent such takes, there is a high likelihood that an action for injunctive relief would succeed on the merits. Similarly, there is substantial evidence that if such an injunction is not granted and the Secretary fails to establish manatee protection areas at Kings Spring, takes of manatees will continue there, causing irreparable harm to the species. The hardship to the nonmovant, the Fish and Wildlife Service, if the injunction is granted would be minimal, as the Service would merely be required to perform its congressionally mandated duty in that case. Finally, Congress has determined that in cases involving endangered species, the "balance of hardships and the public interest tips heavily in favor of protected species."⁷⁰

CONCLUSION

If the Fish and Wildlife Service fails to act within 60 days to correct the violations of the ESA, Public Employees for Environmental Responsibility will pursue litigation in Federal Court against the Service. PEER 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 an emergency rule establishing an additional manatee sanctuary at Kings Spring, and the subsequent establishment of a permanent sanctuary at Kings Spring, one of the most critical thermal wintering refuges for the endangered Florida manatee.

Sincerely,

/s/ Christine Erickson
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⁷⁰ *National Wildlife Fed'n v. Burlington Northern R.R.*, 23 F.3d 1508, 1510 (9th Cir. 1994).