

Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome. Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define "Reasonable and prudent alternatives" at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,

- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

- Are economically and technologically feasible, and

- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinstate consultation on previously reviewed actions in instances where we have

listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

#### References Cited

A complete list of all references cited in this document is available, upon request, from the Western Colorado Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Author

The primary authors of this notice are the staff members of the Western Colorado Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: September 16, 2009.

#### Thomas L. Strickland

*Assistant Secretary for Fish and Wildlife and Parks*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R4-ES-2009-0066]  
[92210-1117-0000-B4]

#### Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to Revise Critical Habitat for the Florida Manatee (*Trichechus manatus latirostris*)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding and initiation of critical habitat review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce a 90-day finding on a petition to revise the critical habitat designation for the Florida subspecies (*Trichechus manatus latirostris*) of the endangered West Indian manatee (*Trichechus manatus*) under the Endangered Species Act of

1973, as amended. Based on our review, we find that the petition, in conjunction with information readily available in our files, presents substantial scientific or commercial information indicating that a revision of the critical habitat designation for the Florida manatee may be warranted. Therefore, with the publication of this notice, we are initiating a review of the current critical habitat designation for the subspecies to determine how we intend to proceed with the revision. To ensure a comprehensive review, we seek information pertaining to the Florida manatee's essential habitat needs from any interested party.

**DATES:** To allow us adequate time to conduct this review, we request that you send us information on or before October 29, 2009.

**ADDRESSES:** You may submit information by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Search for docket FWS-R4-ES-2009-0066 and then follow the instructions for submitting comments.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R4-ES-2009-0066; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all information received on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Information Solicited** section below for more details).

#### FOR FURTHER INFORMATION CONTACT:

Dave Hankla, Field Supervisor, Jacksonville, Florida Ecological Services Office, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256, by telephone (904-731-3336), or by facsimile (904-731-3045). If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Information Solicited

When we make a finding that a petition presents substantial information indicating that a revision of a critical habitat designation may be warranted, we initiate a review of that critical habitat to determine how we intend to proceed with the requested revision of the designation. To ensure that the review is complete and incorporates the best available scientific and commercial information, we seek information regarding the revision of critical habitat for the Florida manatee.

We request information from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We are seeking information regarding:

(1) The historical and current status and distribution of Florida manatee, its biology and ecology, and ongoing conservation measures for the species and its habitat;

(2) Physical and biological features essential to the conservation of the species;

(3) Information on threats to the species and its habitat; and

(4) Data on the increase in growth of Florida's human population since we designated manatee critical habitat in 1976, and examples of related increased threats to the species and subsequent changes to manatee habitat.

In 2007, the Service conducted an extensive review of all available information on the Florida manatee while preparing a 5-year status review of the species (Service 2007). We are particularly seeking information about manatee habitat or manatee use of habitat that has been made available since publication of the review.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(2) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*) directs that "the Secretary shall designate critical habitat, and make revisions thereto, ...on the basis of the best scientific data available." Based on our critical habitat review, we will publish a 12-month notice of our intentions concerning the petition, as provided in section 4(b)(3)(D)(ii) of the Act.

You may submit your information concerning this review by one of the methods listed in the **ADDRESSES** section. If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>. Please include sufficient information with your submission (such as full references) to allow us to verify any scientific or commercial information you include.

Information and materials we receive, as well as supporting documentation we used in preparing this finding, will be available for public inspection on <http://www.regulations.gov>, or by appointment during normal business hours, at the U.S. Fish and Wildlife Service, Jacksonville, Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

### Background

Section 4(b)(3)(D) of the Act requires that we make a finding as to whether a petition to revise critical habitat presents substantial scientific information indicating that the revision may be warranted. The standard for substantial scientific or commercial information set forth in our implementing regulations with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). In determining whether substantial information exists, we take into account several factors, including information submitted with, and referenced in, the petition and all other information readily available in our files. To the maximum extent practicable, we are to make this finding within 90 days of the receipt of the petition, and we are to publish the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If we find that a petition presents substantial information indicating that the revision may be warranted, we are required to determine how we intend to proceed with the requested revision within 12 months after receiving the petition and promptly publish notice of such intention in the **Federal Register**.

Critical habitat is defined under section 3(5)(A) of the Act as:

(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(I) essential to the conservation of the species and

(II) which may require special management considerations or protection; and

(ii) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a

determination that such areas are essential for the conservation of the species.

Our implementing regulations at 50 CFR 424.12 describe our criteria for designating critical habitat. We are to consider essential physical and biological features essential to the conservation of the species. Those features include, but are not limited to: (1) space for individual and population growth, and normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, or rearing of offspring; and (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species. Essential physical and biological features may include, but are not limited to: "nesting grounds, feeding sites, water quality, tide, and geological formations." Our implementing regulations at 50 CFR 424.02 define "special management considerations or protection" as any methods or procedures useful in protecting physical and biological features of the environment for the conservation of the species.

Section 4(b)(2) of the Act requires us to designate and make revisions to critical habitat for listed species on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any particular area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

### Petition History

On December 19, 2008, we received a petition from Wildlife Advocacy Project, Save the Manatee Club, Center for Biological Diversity, and Defenders of Wildlife, requesting that we revise critical habitat for the Florida manatee (*Trichechus manatus latirostris*) pursuant to the Act and the Administrative Procedure Act (5 U.S.C. Subchapter II). The petition clearly identified itself and included the requisite identification information for the petitioners, as required in 50 CFR 424.14(a). In a January 17, 2009, letter to the petitioners, we responded that we received the petition and would make a finding, to the maximum extent practicable within 90 days, as to

whether or not the petition presents substantial information. We also stated that if the initial finding concludes that the petition presents substantial information indicating that a revision may be warranted, then we have one year from the date we received the petition to determine how we intend to proceed with the requested revision and we will promptly publish in the **Federal Register** a notice of our intentions at the end of this period.

#### *Previous Federal Actions*

We originally listed the Florida manatee (*Trichechus manatus latirostris*), a subspecies of the West Indian manatee (*Trichechus manatus*), as endangered in 1967 (32 FR 4001, March 11, 1967) under the Endangered Species Preservation Act of 1966 (Pub. L. 89-669; 80 Stat. 926). In 1970, we amended Appendix A to 50 CFR part 17 to include additional names to the list of foreign endangered species (35 FR 18319, December 2, 1970). This listing incorporated West Indian manatees into the list under the Endangered Species Conservation Act of 1969 (Pub. L. 91-135; 83 Stat. 275) and encompassed the species' range in the Caribbean and northern South America, thus including both Antillean (*T. m. manatus*) and Florida manatees in the listing. The West Indian manatee is currently listed as an endangered species under the Act, and the population is further protected as a depleted stock under the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*). We designated critical habitat for the Florida manatee (listed in that regulation as *Trichechus manatus*) on September 24, 1976 (41 FR 41914) in Citrus, Hillsborough, Manatee, Sarasota, Charlotte, De Soto, Lee, Collier, Monroe, Dade, Palm Beach, Martin, West Palm Beach, Volusia, Brevard, Nassau and Duval Counties, Florida. That critical habitat designation appears in our regulations at 50 CFR 17.95(a).

#### *Species Information*

For current information on the biology, status, and habitat needs of the Florida manatee, refer to the Service's 5-Year Review of the West Indian Manatee (Service 2007) and the Service's Florida Manatee Recovery Plan (Service 2001), available on the Internet at <http://www.regulations.gov> and at <http://www.fws.gov/northflorida/Manatee/manatees.htm>.

#### **Evaluation of the Petition**

In making this 90-day finding, we evaluated whether information regarding the revision of the critical habitat for Florida manatee, as presented in the petition and other

information available in our files is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

The petitioners seek to revise the critical habitat designation through proposed revisions of each geographic area or management unit and the inclusion of "notable constituent elements." The petitioners claim that although the currently designated critical habitat is large, because of flaws in the listing, it provides inadequate protection of manatees. The petitioners include the four topics listed below as "major deficiencies" in the currently designated critical habitat for the Florida manatee.

#### *(1) Petitioners Claim that Constituent Elements Required by Law are Absent.*

The petitioners state that we designated manatee critical habitat in 1976, 2 years before the requirement for constituent elements was included in the 1978 amendments to the ESA in which the term "critical habitat" was clearly defined, and included the physical and biological factors (p. 15). The petitioners also state that, because extensive information concerning the manatee's current and projected habitat needs and utilization is now available, it is possible to describe the constituent elements, and we should remedy the lack of such elements in the critical habitat designation (p. 15).

We agree that we did not address constituent elements, or more appropriately, the physical and biological features essential to the conservation of the manatee, in the original 1976 designation of critical habitat, and more information is now available on the habitat needs of the manatee. Therefore, we find that the petitioners have presented substantial information that a revision to the critical habitat for the manatee may be warranted to more adequately address the features essential to the species' conservation.

#### *(2) Petitioners Claim that Changes in Use by the Species Necessitate Revision.*

The petitioners include statistics on the increase in growth of Florida's human population since we designated manatee critical habitat and include examples of related increased threats to the species and subsequent changes to habitats now available to manatees (pp. 15-16). They state that a 171 percent increase in the human population of Florida since critical habitat was designated in 1976, through 2005, has increased recreational use of coastal areas and has diminished water quality

and the availability of natural warm water for manatees.

We agree that the increase in urban development, particularly on Florida's coasts, has changed the landscape since we designated critical habitat for the manatee. In response to the increase in human growth, and consequent increase in the number of recreational vessels on Florida's waterways, we have published a number of rules to establish manatee protection areas in the State (50 CFR 17.100 through 17.108). This information can be found on the Internet at <http://www.fws.gov/northflorida/Manatee/manatees.htm>. We find that the information provided by the petitioners, along with information in our files, is substantial, indicating that a revision to critical habitat may be warranted to address changes in habitat use by manatees in Florida since the original designation of critical habitat.

#### *(3) Petitioners Claim that Advancements in Science Provide New Information About the Needs of the Species.*

The petitioners claim that aerial surveys, radio and satellite telemetry studies, a carcass retrieval database, and the U.S. Geological Survey-Sirenia Project photo-identification database, which were developed after the initial designation of manatee critical habitat, have revolutionized our knowledge of manatee distribution and use of habitat. The petitioners also cite the Florida Manatee Recovery Plan's actions regarding manatee habitat, stating that we are compiling information and sponsoring research to identify and protect important manatee habitats with a longer term goal to conserve a network of manatee migratory corridors, and feeding, calving, and nursing areas (p. 16).

We agree that scientific information regarding manatee conservation has dramatically increased since the original critical habitat designation. On the basis of this information, it is apparent that there has been a change in habitat use by the manatee due to an increasing manatee population and changing habitats. However, the most substantial information otherwise readily available to the Service is not that of the petitioners, but the analysis of threats for the Florida manatee in the Service's 5-year review (Service 2007), which incorporates updates in manatee science and includes both biological information and habitat use. The Service must designate and make revisions to critical habitat on the basis of the best scientific information available. The Service's 5-year review is the most recent analysis of threats to the

species based on those updates in scientific information. Therefore, based on information submitted by the petitioners and information in Service files, we find the information concerning advancements in science and new information concerning the needs of the species to be substantial information. We now know more specifically where habitat exists for manatees that is critical to their survival and recovery. As a consequence, we have determined that a revision to critical habitat for the manatee may be warranted to address new information concerning habitat usage and needs.

*(4) Petitioners Claim that The U.S. Fish and Wildlife Service Recognizes the Need for Revision.*

The petitioners cite passages from Service consultation documents and the current Florida Manatee Recovery Plan (Recovery Plan) as evidence that we have stated the need to assess and revise critical habitat for the Florida manatee (p. 17). Specifically, the petitioners cite a biological opinion regarding U.S. Army Corps of Engineers Application (No. 4-1-97-F-602): “The action area is within designated critical habitat for the manatee; however, no specific primary or secondary constituent elements were included in the critical habitat designation, making it difficult to determine when an action adversely modifies critical habitat.” The petitioners state that the Service’s Recovery Plan acknowledges the need to revise critical habitat and cite Recovery Action 3.5 from the Recovery Plan: “Much has been learned about manatee distribution in the decades since manatee critical habitat was originally defined. The FWS should assess the need to revise critical habitat for the Florida manatee.”

The Service disagrees with the petitioner’s statement that the Recovery Plan acknowledges the need to revise critical habitat; however, we do acknowledge that the 2001 Florida Manatee Recovery Plan contains a recovery action, including the recommendation as stated above, to assess the need to revise critical habitat. Although the Service believes “assessing the need” is not the same as “recognizing the need” for revision, we find that the information submitted by the petitioner in this category to be substantial information indicating that a revision to critical habitat for the manatee may be warranted.

*Petitioners’ Proposed Revisions to Critical Habitat*

In addition to identifying the deficiencies noted above with the

current Florida manatee critical habitat designation, the petitioners dedicate an entire section of the petition to specific proposed revisions to manatee critical habitat in Florida. These proposed revisions include a description of geographic boundaries within each regional management unit that would alter the currently designated critical habitat, as well as recommended physical and biological features essential to the conservation of the manatee that would require protection and special attention either throughout all or portions of the petition’s proposed geographical boundary revisions.

Within each geographic management unit (Northwest Region, Southwest Region, Atlantic Region, and Upper St. Johns River Region), the petitioners provide a list of the currently designated critical habitat areas followed by their proposed revisions to those areas. In most cases, the petitioners list additional areas that they believe should be included in a revision to the currently designated critical habitat boundaries. They cite available scientific data to support their proposal.

The list of essential features recommended by the petitioners for each of these geographic areas includes warm water (natural springs, passive thermal basins, and power plant thermal discharges); various food sources (seagrasses and freshwater vegetation); travel corridors; shelter (for calving and from disturbances); fresh water; and other habitat features (water depth, water quality and salinity).

The Service recognizes the importance of warm water habitat to manatees; however, we have not evaluated potential physical and biological features essential to the conservation of the manatee. The Service makes no statement at this time on the specific proposals by the petitioners for the constituent elements or for the areas presented as revised critical habitat geographic boundaries. We do believe that any revision to critical habitat should reflect the current understanding of the conservation needs of the species.

**Finding**

Our process for making this 90-day finding under section 4(b)(3)(D) of the Act is limited to a determination of whether the information in the petition presents “substantial scientific information,” which is interpreted in our regulations as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted” (50 CFR 424.14(b)).

Based on this review and evaluation, in addition to the information readily available in our files, we find that the petition has presented substantial scientific information indicating that revision of the critical habitat designation for the Florida manatee may be warranted. Therefore, we are initiating a review to determine how we intend to proceed with the request to revise the critical habitat designation under the Act for the Florida manatee.

**References Cited**

A complete list of all references cited in this rule is available on the Internet at <http://www.regulations.gov> upon request from the Field Supervisor, Jacksonville, Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

**Author(s)**

The primary authors of this notice are the staff members of the Jacksonville, Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

**Authority**

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: September 16, 2009.

**Thomas L. Strickland**

*Assistant Secretary for Fish and Wildlife and Parks*

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 660**

[Docket No. 0909111273–91274–01]

**RIN 0648–XR09**

**Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule.

**SUMMARY:** NMFS proposes a regulation to implement the annual harvest guideline (HG) for Pacific mackerel in the U.S. exclusive economic zone (EEZ) off the Pacific coast. This HG is proposed according to the regulations implementing the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP) and establishes allowable harvest