

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