

### 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