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Public Comments Processing
Attn: Docket # FWS-R4-ES-2015-0178
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RE: Docket # FWS-R4-ES-2015-0178

Dear Director Ashe:

The Committee on Animal Law of the New York City Bar Association respectfully submits this response to the request for comments issued by the U.S. Fish and Wildlife Service (“USFWS”) in 81 Federal Register No. 5/Proposed Rules, pp. 1000-1026 (January 8, 2016) regarding a proposed rule to downlist the West Indian manatee from endangered to threatened under the Endangered Species Act of 1973 as amended (the “Act”).¹

The New York City Bar Association is an independent non-governmental organization of more than 24,000 lawyers, law professors and government officials, predominantly from New York City and also from throughout the United States and fifty other countries. The Animal Law Committee is the first committee of its kind in the country and has a history of supporting federal, state, and local anti-cruelty legislation. Our Committee has taken positions on various issues of concern involving the Endangered Species Act of 1973.²

BACKGROUND

The West Indian manatee (*Trichechus manatus*) is currently listed as “endangered” under the Act. In May 2014, an organization called Save Crystal River, Inc. (“Crystal River”) sued the Department of the Interior, the USFWS, and others (the “Defendants”) in Federal Court in the Middle District of Florida. In this action, Crystal River sought a declaratory judgment and injunctive relief based on allegations that Defendants had failed to make a 90-day

¹ 16 U.S.C. §1531-§1544.

² See January 28, 2013 Letter to the U.S. Fish and Wildlife Service urging listing the African lion as endangered under the Endangered Species Act of 1973, as amended, <http://www2.nycbar.org/pdf/report/uploads/20072384-CommentsreAfricanLionasEndangeredSpecies.pdf>; January 27, 2015 Letter to the U.S. Fish and Wildlife Service regarding petition to list the African lion as threatened under the Endangered Species Act of 1973, as amended, <http://www2.nycbar.org/pdf/report/uploads/AfricanLionEndangeredSpeciesActAnimalReport.pdf> (all citations listed herein last visited March 23, 2016).

finding on Crystal River’s petition to downlist the West Indian Manatee from endangered to threatened.³ Crystal River describes itself as a “nonpolitical organization of citizens from Crystal River, Citrus County, Florida, who wish to protect their individual property rights and enhance the quality of life for citizens of Crystal River and the surrounding area.”⁴ The parties settled the case and, on July 2, 2014, the USFWS published its 90-day finding on Crystal River’s petition to downlist the West Indian manatee, whereby the USFWS initiated a review of the status of the West Indian manatee to determine if downlisting was warranted.⁵ In January 2016, USFWS issued its proposal to downlist the species from “endangered” to “threatened” based on its conclusion that the West Indian manatee no longer meets the Act’s definition of endangered. The USFWS has requested public comments on this proposal.

Under the Act, “endangered species,” means any species which is in danger of extinction throughout all or a significant portion of its range.⁶ The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.⁷ A species may be determined to be endangered or threatened for any of these factors: the present or threatened destruction, modification or curtailment of its habitat or range; overutilization for commercial, recreational, scientific or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence.⁸

RECOMMENDATION

The Committee does not support the reclassification of the West Indian manatee from “endangered” to “threatened.” We believe that a designation of “endangered,” and not merely “threatened,” is warranted for this subspecies; and that downlisting the West Indian manatee at this time is premature. Accordingly, we recommend that the Secretary of the Interior maintain the “endangered” status of the West Indian manatee because the subspecies “is in danger of extinction throughout all or a significant portion of its range.”⁹

The Committee bases its recommendation on its analysis of the work done by established organizations regarding the conditions in which the West Indian manatee exists, as

³ See *Save Crystal River, Inc. v. Jewel, et al.*, No. 5:14CV00253, 2014 WL 1816048, (M.D. Fla. May 1, 2014).

⁴ *Id.* ¶ 11; see also *Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Downlist the West Indian Manatee*, 81 Fed. Reg. 1000, 1001-02 (January 8, 2016); CBS Miami, *Manatees May Soon Lose Endangered Status*, August 29, 2014, <http://miami.cbslocal.com/2014/08/29/manatees-may-soon-lose-endangered-status/> (noting that Save Crystal River, the organization advocating the downlisting of the West Indian Manatee, represents the interests of recreational boaters, tour operators, dive shops and hotels).

⁵ 79 Fed. Reg. 37706-01 (July 2, 2014).

⁶ 16 U.S.C. §1532(6), (16).

⁷ *Id.* §1532(20).

⁸ *Id.* §1533(a)(1)(A)-(E).

⁹ *Id.* §1532(6), (16).

applied to the relevant law, and also statements by the USFWS, which demonstrate that the West Indian manatee satisfies the criteria for continued protection as “endangered” under the Act. In particular, we note that in recent years the West Indian manatee has suffered serious losses to its population in Florida due to environmental factors such as red tide and a statewide cold snap.¹⁰ In addition, annual deaths of West Indian manatees by watercraft show no signs of decreasing despite efforts to protect the species through boat speed limits and refuge boundaries.¹¹ The USFWS has always taken the view that the focus of recovery for the species should not be on how many individual manatees are counted but, rather, on “implementing, monitoring and addressing the effectiveness of conservation measures to reduce or remove threats which will lead to a healthy and self-sustaining population.”¹²

Furthermore, and in addition to the specific justifications, *infra*, for maintaining the “endangered” status of the West Indian manatee, the Committee does not agree with the USFWS's public statements that downlisting the West Indian manatee to “threatened” status “will not affect existing protections.”¹³ Section 4(d) of the Act allows the USFWS to establish special regulations for threatened (not endangered) species. These “4(d) rules” take the place of the normal protections of the Act and may decrease those protections. One use of 4(d) rules is to relax the normal Act restrictions to reduce conflicts between people and the protections the Act provides to the threatened species.¹⁴ Given that one of the leading causes of death of the West Indian manatee is interaction with people and watercraft (as discussed *infra*), the Committee is concerned that downlisting the species may result in fewer protections under the Act, in particular with regard to enforcing no-wake zones and boat speeds, and maintaining species refuges. Furthermore, logic dictates that were it indeed true that downlisting the West Indian manatee to “threatened” status will not affect existing protections, there would be no purpose to downlisting the species.

The Committee also questions the USFWS's reliance on synoptic and aerial surveys

¹⁰ See Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Downlist the West Indian Manatee, *supra* note 4, 1005 (stating that the proposed rule to downlist the West Indian manatee does not take into account recent severe cold events or red tide die offs); see also Save the Manatee Action Alert, http://www.savethemanatee.org/aa_fws_downlisting_1-16_alert.html (stating that the USFWS proposal ignores recent massive die-offs of manatees).

¹¹ See *id.* at 1020.

¹² Florida Manatee Recovery Plan, Third Revision, U.S. Fish and Wildlife Service, Southeast Region, 41 (October 30, 2001), http://www.fws.gov/northflorida/Manatee/Recovery%20Plan/2001_FWS_Florida_Manatee_Recovery_Plan.pdf.

¹³ Transcript of Manatee Reclassification Press Conference, January 7, 2016, at 6, <http://www.fws.gov/southeast/wildlife/mammal/manatee/pdf/manatee-reclassification-press-conference-transcript-2015-01-07.pdf>; see also Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Downlist the West Indian Manatee, *supra* note 4, at 1006 (“[T]his reclassification would not change the protection afforded to this species under the Act.”).

¹⁴ See, e.g., U.S. Fish and Wildlife, Midwest Region, *What Is the Difference Between Endangered and Threatened?*, <http://www.fws.gov/midwest/wolf/esastatus/e-vs-t.htm>; see also *Def's. of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156, 1173 (D. Or. 2005) (“Downlisting the wolf allowed FWS to implement 4(d) rules that permit “takes” under certain circumstances.”).

given the unreliability of such population assessment methods; the USFWS has itself expressed skepticism about aerial surveys.¹⁵ The Florida Fish and Wildlife Conservation Commission does not consider synoptic surveys “suitable for assessing long-term population trends.”¹⁶ In addition, the USFWS admits that aerial surveys “are not considered to be reliable indicators of population trends, given the concerns about detection probabilities.”¹⁷ In light of the unreliability of such surveys, the Committee feels that downlisting is premature and recommends that the USFWS revisit downlisting the West Indian manatee when more reliable population surveys are available.

JUSTIFICATION

A. The West Indian manatee should continue to be listed as “endangered” under the Act due to present destruction and modification of its habitat and range.

The Act provides that a species may be determined to be “endangered” due to “the present or threatened destruction, modification or curtailment of its habitat or range.”¹⁸ The West Indian manatee’s habitat faces ongoing modification and destruction and should therefore continue to be listed as “endangered” under the Act. The West Indian manatee is an herbivore, feeding on a large variety of submerged, emergent, and floating plants. Seagrass beds and freshwater submerged aquatic vegetation are important feeding sites for the West Indian manatee. West Indian manatees can eat 10 - 15% of their body weight in vegetation daily.¹⁹ The West Indian manatee travels along the waterward edges of plant beds and in and near channels. Significantly, the West Indian manatee must seek out sources of fresh drinking water to survive.²⁰

West Indian manatees are at the northern limit of their range in the southeastern United States. Prolonged exposure to cold water temperatures results in debilitation and/or death due to cold water syndrome.²¹ For this reason, during colder weather the West Indian manatee

¹⁵ A “synoptic” survey attempts to present a general view of the whole. The current synoptic survey is a count of manatees over a broad area; it provides a method of determining the minimum number of manatees but does not provide a population estimate. See Florida Fish and Wildlife Conservation Commission, *Manatee Synoptic Surveys*, <http://myfwc.com/research/manatee/research/population-monitoring/synoptic-surveys/>

¹⁶ *Id.*

¹⁷ Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Downlist the West Indian Manatee, *supra* note 4, at 1025.

¹⁸ 16 U.S.C. §1533(a)(1)(A).

¹⁹ See Save the Manatee, *Manatee FAQ: Food and Water*, <http://www.savethemanatee.org/faqfood.htm>.

²⁰ See Save the Manatee, *When It Rains, the Manatees Drink*, http://www.savethemanatee.org/faq_fresh_water.html.

²¹ See Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Downlist the West Indian Manatee, *supra* note 4, at 1003.

gathers near warm water springs on the east and west coasts of Florida, or near warm water effluents of power plants. In fact, the winter range of the West Indian manatee has probably been extended by the existence of power plants.²²

As the USFWS has recognized, in Florida “warm-water natural spring areas essential for the manatee’s survival are threatened by numerous factors including diminishing spring flows, deteriorating water quality, and increasing human activities in and around spring areas.”²³ According to the studies relied on by the USFWS, “Florida’s springs have seen drastic declines in flows and water quality and many springs have been altered (dammed, silted in, and otherwise obstructed) to the point that they are no longer accessible to manatees.”²⁴ Manatees have also become dependent on human industry, wintering in warm waters created by power plants.²⁵ The USFWS does not know with certainty whether these power plants will continue to exist, but it has acknowledged the likelihood that the power plants will close.²⁶ Furthermore, the USFWS does not know how the West Indian manatee will respond to the closing of the power plants.²⁷

Loss of seagrass habitat presents an additional threat to the West Indian manatee population. Human population growth in coastal Florida over the past half century has resulted in drastic losses of coastal wetland habitats. Seagrass distribution and abundance in many estuaries have declined as the result of direct human impacts (e.g., dredge-and-fill activities, propeller scarring) and indirect effects of development (declining water quality and nutrient loading).²⁸ As recently as December 2015, a seagrass die-off affected 40,000 acres in Florida Bay.²⁹ Seagrass beds are threatened in other parts of Florida where West Indian manatees live.³⁰

²² See Save the Manatee, *Migrating Manatees*, http://www.savethemanatee.org/info_manatee_migration.html.

²³ Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Downlist the West Indian Manatee, *supra* note 4, at 1004.

²⁴ *Id.* at 1016.

²⁵ Stephan Lovgren, *Manatees Seek Power Plants, Warm Springs as Safe Havens*, NATIONAL GEOGRAPHIC NEWS, October 20, 2006, <http://news.nationalgeographic.com/news/2006/10/061020-manatees.html>.

²⁶ Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Downlist the West Indian Manatee, *supra* note 4, at 1016.

²⁷ *Id.*

²⁸ See Florida Fish and Wildlife Conservation Commission, *Florida Manatee Management Plan 2007*, at 11, http://myfwc.com/media/214332/manatee_mgmt_plan.pdf.

²⁹ See Dr. Katie Tripp, *Manatees’ Future Far From Certain*, SUN SENTINEL, January 15, 2016, <http://www.sun-sentinel.com/opinion/commentary/fl-viewpoint-manatees-20160115-story.html>.

³⁰ See Dr. Katie Tripp, *Manatees and the Changing Climate*, Save the Manatee Club, http://www.savethemanatee.org/news_feature_global_warming.html; Florida Keys National Marine Sanctuary, *Human Activities Such as Dredging and Careless Boating Are Threatening South Florida’s Mangroves and Seagrass*, National Oceanic & Atmosphere Administration, <http://floridakeys.noaa.gov/>.

Given the USFWS’s acknowledgment of threats to the habitat and range of the West Indian manatee, downlisting the subspecies from “endangered” to “threatened” is premature.

B. The West Indian manatee should continue to be listed as “endangered” under the Act due to overutilization of the species for commercial, recreational and scientific purposes.

The Act provides that a species may be determined to be “endangered” due to “overutilization for commercial, recreational, scientific or educational purposes.”³¹ Manatee-related tourism is an overutilization for recreational/commercial purposes. In some instances, the current situation regarding manatee-related tourism has been described as unsustainable, and is also causing behavioral changes in manatees attempting to utilize the habitat.³²

In its 2001 Recovery Plan, the USFWS identified minimizing the causes of manatee disturbance, harassment, injury, and mortality as one of its key objectives.³³ One of the ways in which the USFWS sought to accomplish this objective was to identify and manage human activities that result in the harassment of manatees, including fishing, swimming, snorkeling, scuba diving, manatee observation, and provisioning.³⁴ Given that the situation regarding the commercial exploitation of the West Indian manatee has gotten worse rather than better since the USFWS first identified this objective, the downlisting of the West Indian manatee is premature.

C. The West Indian manatee should continue to be listed as “endangered” under the Act due to disease or predation.

The Act provides that a species may be determined to be “endangered” due to “disease or predation.”³⁵ The West Indian manatee suffers from disease and predation and therefore should be listed as “endangered” under the Act. In particular, disease threatens the West Indian manatee population. Specifically, *kerenia brevis*, or Florida red tide, kills hundreds of West Indian manatees in and around Florida waters each year.³⁶ Red tide was linked to one of the

plants/msthreats.html.

³¹ 16 U.S.C. 1533(a)(1)(B).

³² See *supra* note 28.

³³ U.S. Fish and Wildlife Service, Southeast Region, *Florida Manatee Recovery Plan, Third Revision*, October 30, 2001, at 54, http://www.fws.gov/northflorida/Manatee/Recovery%20Plan/2001_FWS_Florida_Manatee_Recovery_Plan.pdf.

³⁴ *Id.* at 66-67.

³⁵ 16 U.S.C. 1533(a)(1)(C).

³⁶ See Florida Fish and Wildlife Conservation Commission, *Effects of Florida’s Red Tide on Marine Animals*, <http://myfwc.com/research/redtide/general/marine-animals/>. Red tide, a harmful algal bloom, causes toxins to accumulate in filter feeding organisms that attach to sea grass, which is then eaten by manatees. *Id.* The toxins paralyze manatees so they cannot breathe and they suffocate. Mel White, *Record 829 Manatee Deaths in 2013 Puzzle Scientists*, NATIONAL GEOGRAPHIC NEWS, January 23, 2014,

largest annual die-offs in recent history.³⁷ In 2013, extensive red-tide blooms killed 276 manatees.³⁸

Yet despite the obvious risk red tide poses to the West Indian manatee, the population count relied by the USFWS in reaching its decision to downlist the West Indian manatee did not take in account the 2013 red tide die-off or the “anticipated continued increase in the frequency of severe red-tide mortality.”³⁹ Until the causes of red tide and effective means of eliminating this threat are identified, or a reliable scientific study is conducted showing that red tide does not adversely affect the West Indian manatee population, the Committee recommends against downlisting the West Indian manatee to “threatened” status.

D. The West Indian manatee should be listed as “endangered” under the Act due to inadequacy of existing regulatory mechanisms.

The Act provides that a species may be determined to be “endangered” due to “the inadequacy of existing regulatory mechanisms.”⁴⁰ The USFWS acknowledges “watercraft-related mortality remains the single largest threat in Florida to the West Indian manatee.”⁴¹ Indeed, “removal of [watercraft-related mortality] would reduce the risk of extinction to near negligible levels.”⁴²

Despite existing laws and restrictions designed to decrease the frequency of West Indian manatee deaths caused by watercraft, the number of such fatalities has not decreased.⁴³ Moreover, notwithstanding this threat to the West Indian manatee population, the USFWS does not recommend specific increased restrictions on watercraft to protect the West Indian manatee from this ongoing cause of mortality. Rather, downlisting the West Indian manatee from “endangered” to “threatened” may contribute to increased mortality due to the use of 4(d) rules, which can be used to relax current watercraft restrictions. Local law enforcement

<http://news.nationalgeographic.com/news/2014/01/140122-manatee-deaths-florida-red-tide-threats-endangered-species/>

³⁷ See Record 803 Manatee Deaths; Red Tide Blamed, NBC NEWS, December 20, 2013, <http://www.nbcnews.com/science/science-news/florida-sees-record-803-manatee-deaths-red-tide-blamed-f2D11785545>.

³⁸ See Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Downlist the West Indian Manatee, *supra* note 4, at 1021.

³⁹ *Id.*

⁴⁰ 16 U.S.C. 1533(a)(1)(D).

⁴¹ See Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Downlist the West Indian Manatee, *supra* note 4, at 1020.

⁴² *Id.*

⁴³ See Florida Fish and Wildlife Conservation Commission, Yearly Mortality Summaries, <http://myfwc.com/research/manatee/rescue-mortality-response/mortality-statistics/yearly/> (containing annual manatee mortality statistics by cause).

of existing watercraft restrictions may become less stringent if the status of the West Indian manatee is downlisted to “threatened.” Law enforcement agencies may perceive the downlisting of the species to mean that there is less risk to the West Indian manatee population, despite the USFWS’s acknowledgment of the serious and on-going threat that watercraft pose.

E. The West Indian manatee should be listed as “endangered” under the Act due to other natural or manmade factors affecting the species’ continued existence.

The Act provides that a species may be determined to be “endangered” due to “other natural or manmade factors affecting its continued existence.”⁴⁴ In addition to loss of habitat, disease, algal blooms, and watercraft fatalities, the West Indian manatee is also affected by land development activities, including, without limitation, the construction of artificial canal systems, dredging and filling, elimination of aquatic vegetation, construction of structures that can trap or crush manatees, and the placement of bulkheads below the ordinary high waterline.⁴⁵ Moreover, fishing gear and contaminants present ongoing, yet in some cases, “poorly understood” risks to the West Indian manatee population.⁴⁶ Until a plan is developed to protect the West Indian manatee from effects of land development and other risks to the West Indian manatee are more fully understood, the Committee recommends maintaining the current endangered status of the species.

CONCLUSION

For the foregoing reasons, we urge the Secretary to continue to recognize that the West Indian manatee meets statutory criteria as an “endangered species” and not to downlist the West Indian manatee as “threatened” under the Act.

Respectfully,



Lori Barrett
Chair, Committee on Animal Law

Sen. Charles Schumer (NY)
Sen. Kirsten Gillibrand (NY)
Rep. Carolyn Maloney (NY)
Rep. Louise Slaughter (NY)
Rep. Debbie Wasserman Schultz (FL)
Rep. Paul Tonko (NY)

⁴⁴ 16 U.S.C. 1533(a)(1)(E).

⁴⁵ See, e.g., Citrus County Department of Services, *Citrus County Comprehensive Plan 1995-2020 - Manatee Protection Element*, at 13-21, http://myfwc.com/media/415124/Manatee_CitrusMPP97.pdf.

⁴⁶ See Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Downlist the West Indian Manatee, *supra* note 4, at 1021 (stating that contaminants from mining, agriculture, oil and gas production, and other sources are found in tissues of manatees but the effect on the species is not fully understood).