National Headquarters
1130 17th Street, N.W. | Washington, D.C. 20036-4604 | tel 202.682.9400 | fax 202.682.1331
www.defenders.org

Daniel M. Ashe, Director
U.S. Fish and Wildlife Service
c/o Public Comments Processing
Docket No. FWS-R4-ES-2015-0178
Submitted via www.regulations.gov

April 7, 2016

Re: Comments on 12-Month Finding on a Petition to Downlist the West Indian Manatee, and Proposed Rule to Reclassify the West Indian Manatee as Threatened

Dear Mr. Ashe:

On behalf of our more than 1.2 million members and supporters, over 80,000 of whom live in Florida, Defenders of Wildlife ("Defenders") submits these comments on the U.S. Fish and Wildlife Service's ("Service") 12-month finding on a petition to downlist the West Indian manatee and proposed rule to reclassify the species as threatened. 81 Fed. Reg. 1000 (Jan. 8, 2016).

The West Indian manatee (*Trichechus manatus*) is protected under both the Endangered Species Act and the Marine Mammal Protection Act. Although the West Indian manatee is taxonomically described as consisting of two recognized subspecies, the Florida manatee (*T.m. latirostris*) and the Antillean manatee (*T.m. manatus*), 81 Fed. Reg. at 1003, legally, it is listed on the species level as endangered range-wide.[1] 50 C.F.R. § 17.11(h) (list of endangered and threatened wildlife). The Service's draft regulation proposes to reclassify the species from endangered to threatened range-wide. This finding also constitutes the Service's "warranted" 12-month finding on the petition submitted by the Pacific Legal Foundation on behalf of Save Crystal River, Inc., to downlist the West Indian manatee.

The West Indian manatee is an iconic species, one that has been protected under the ESA and its predecessor statutes for almost fifty years. The West Indian manatee is a priority key species for Defenders because of the vital role the nationally beloved manatee plays not only as a gentle ambassador representing the value of protecting imperiled wildlife under the ESA but also as a keystone species and an integral component and bellwether of the health of the freshwater and marine ecosystems on which it depends. Defenders' members in Florida, the Southeast, and

[1] Given the recognized taxonomic differentiation between the Florida and Antillean subspecies, it may be appropriate for the Service to consider whether to propose reclassification of the West Indian manatee into two subspecies. As part of that analysis, the Service should further consider whether it should propose designating any distinct population segments for the Antillean manatee. As the Service has not included a reclassification proposal in the current proposed rulemaking, however, we do not comment further on the issue.

throughout the United States cherish the manatee and are passionately committed to its protection and full recovery.

Defenders recognizes the remarkable strides that have been made towards the species' recovery in Florida. We applaud the tremendous efforts the Service has devoted to managing and protecting the manatees under its jurisdiction in both Florida and Puerto Rico. Defenders has worked closely with the Service and other federal and state agencies to promote manatee conservation for many years. We have worked hard at the national, state, and local levels to advocate for the necessary resources and protective measures to ensure the species' continued survival and recovery. Defenders will continue to advocate for and support the Service in its efforts to ensure the manatee's recovery to the point where the species no longer requires the full protections of the ESA, and we welcome all signs of progress toward that ultimate goal.

Defenders cannot support the Service making a final determination to downlist the West Indian manatee based on the current 12-month finding and proposed rule. The Service has not adequately demonstrated that a downlisting of the West Indian manatee is warranted under the statutory standards of Section 4 of the Endangered Species Act (ESA), 16 U.S.C. § 1533. In particular, Defenders believes that the Service has not based its proposed rule on the best available scientific and commercial data on the manatee, as required by Section 4(b)(1) of the ESA, 16 U.S.C. § 1533(b)(1). Where known conflicting data exist, the Service has failed to explain why it has determined the data it relies on is "best." Further, the Service has violated the ESA by invoking its "significant portion of range" policy and relying on its range-wide threatened determination to avoid any analysis of whether the West Indian manatee is endangered in any significant portion of its range, contrary to the plain language of ESA Section 3(6), 16 U.S.C. § 1532(6). Finally, the Service does not demonstrate rational connections between the facts it cites and the conclusions it reaches with respect to the listing standards of Section 4(a)(1), 16 U.S.C. § 1533(a)(1).

As detailed below, Defenders asserts that there are substantial disagreements regarding the "sufficiency or accuracy of the available data." In particular, we identify significant gaps where the Service has failed to obtain or analyze the best available scientific data on both Florida and Antillean manatees. Therefore, we request that the Service extend the deadline for its final determination by an additional six months as per 16 U.S.C. § 1533(b)(6)(B)(i) to ensure the sufficiency and accuracy of the data on which the final determination must rest.

The six-month extension is also vital to protect the public's legal right to informed participation in the rulemaking process and to ensure the Service has the benefit of independent peer review as per its policy. For example, the Service's analysis of Florida manatees relies heavily on the projections of the Runge *et al.* (2015) Core Biological Model, which is based on mortality data only through 2009. We understand that a new version of this CBM has updated the model based on mortality data through 2013. To comply with its mandate to base its final determination on the best available scientific data, the Service must revise its proposed rule to address the updated CBM as well as other available data that the Service has not sufficiently or accurately considered. Thereafter, the Service should publish a revised proposed rule to notify the public and to solicit public comment and independent peer review.

Legal Framework

The Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44, was enacted to halt the trend towards the irreversible loss of species. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). In the ESA, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *Id.* at 194.

The ESA states that the determination of whether a species is endangered or threatened must based on an analysis of five factors:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
> (C) disease or predation;
> (D) the inadequacy of existing regulatory mechanisms; or
> (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1)(A)–(E). The Service must consider these same factors in determining whether a listed species warrants reclassification from endangered to threatened (or vice-versa) or delisting altogether. *Id.* § 1533(c); 1533(c)(2)(B); 50 C.F.R. § 424.11(c).

In analyzing the five listing factors to determine whether to list, reclassify, or delist a species, the Service must make its determinations

> solely on the basis of the best available scientific and commercial data available to [it] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species . . . .

16 U.S.C. § 1533(b)(1)(A); *see also* 50 C.F.R. § 424.11(b).

Courts have interpreted the "best available data" standard broadly. The Service may not ignore available biological information, *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988), and must address all such available data in its decision making, *San Luis v. Badgley*, 136 F. Supp. 2d 1136, 1147 (E.D. Cal. 2000). In any final rule promulgated to implement a change in a species' status under the ESA, the Service has a duty under 16 U.S.C. § 1533(b)(8) to summarize the data on which the rule is based and demonstrate the relationship between the data relied on and the conclusion reached. *See San Luis*, 136 F. Supp. 2d at 1149. Credible anecdotal evidence may constitute the best available scientific data and the Service cannot ignore it, even if a full-scale study might be preferable. *Ctr. for Native Ecosystems v. U.S. Fish and Wildlife Serv.*, 795 F. Supp. 2d 1199, 1208 (D. Colo. 2011) (citing *Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1147 (9th Cir. 2007)).

Where data are available but have not yet been analyzed, the Service may not lawfully fail to analyze whether that data constitutes best available data and thereafter develop appropriate projections based on such data. *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1149–50 (W.D. Wash. 2000).

The Service may not rely on existing models and population abundance estimates based on past population data without acknowledging and analyzing more recently available population data. *Natural Resources Defense Council v. Kempthorne*, 506 F. Supp. 2d 322, 362–66 (E.D. Cal. 2007).

In analyzing the five listing factors based on the best available data, the Service may not simply consider each factor individually but "must consider each of the listing factors singularly and in combination with the other factors." *Carlton v. Babbitt*, 900 F. Supp. 526, 530 (D.D.C. 1995); *see also WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 102 (D.D.C. 2010) (Service's failure to consider the cumulative effects of the listing factors rendered its decision not to reclassify the Utah prairie dog as endangered arbitrary and capricious). Any single factor or combination of factors may warrant listing; conversely, to warrant downlisting from endangered to threatened, no single factor or combination of factors can continue to threaten the species with the danger of extinction.

Moreover, although the Service will receive deference from a reviewing court with respect to decisions made based on its technical expertise, such deference is not unlimited: "the presumption of agency expertise may be rebutted if its decisions, even though based on scientific expertise, are not reasoned." *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997). The Service is always obligated to articulate a rational connection between the facts it finds and the conclusions it reaches in making any listing determination under the ESA.

The fundamental objective of the ESA is to recover listed species to the point that they no longer require the statute's protections. The ESA's primary tool for achieving this goal is the recovery planning provision, 16 U.S.C. § 1533(f). Recovery plans are to incorporate

> (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
> (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
> (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

16 U.S.C. § 1533(f)(1)(b).

Once a species is listed, the Service is required "*at least* once every five years" to conduct a status review of that species to determine whether it should be reclassified or delisted. 16 U.S.C. § 1533(c)(1)(A) (emphasis added); 50 C.F.R. § 424.21.

The ESA envisions recovery plans being the central organizing tool for guiding a species' recovery process. A central statutory mandate is that each recovery plan contain "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list." 16 U.S.C. § 1433(f)(1)(B)(ii). The ESA also establishes explicit mechanisms for ensuring that the Service regularly and systematically obtains and evaluates the best available scientific data on a listed species' current status and the success (or failure) of ongoing conservation efforts, in order to ensure that the Service's subsequent decisions on that species' status are likewise justified by the best available scientific data. *Cf. Bennett v. Spear*, 520 U.S. 154, 176 (1997) (best available scientific data

requirement "ensure[s] that the ESA [will] not be implemented haphazardly, on the basis of speculation or surmise").

Specific Comments on the Proposed Rule

In Defenders' September 2, 2014, comment letter on the Service's positive 90-day finding on the petition to reclassify the West Indian manatee, we emphasized strongly the importance of the Service completing a new five-year status review and updating the 2001 Recovery Plan for the Florida manatee to help ensure that the 12-month finding would be based on the best available scientific data and updated demographic recovery criteria. Unfortunately, despite the 15-month gap between our comment letter and the publication of the proposed downlisting rule, the Service accomplished neither of these tasks. The Service has also failed to timely comply with the ESA's recovery planning objectives for the Antillean manatee in Puerto Rico, the recovery plan for which dates back thirty years to 1986.

The proposed rule demonstrates clearly that the Service's failure to update the ESA-mandated recovery plans and status review has significantly contributed to the agency's proposing a rule based on outdated data and outmoded demographic recovery criteria rather than on the best available scientific data that the law requires.

Defenders has identified significant shortcomings in the proposed rule as follows:

1) The Service's Failure to Address and Analyze the Best Available Scientific Data

There are a number of areas in which the Service's proposed rule to downlist the West Indian manatee fails to analyze or address the full range of the best available scientific data. The discussion that follows draws heavily on the scientific review of the Service's proposed rule performed by Dr. John E. Reynolds, III, Senior Scientist, Mote Marine Laboratory ("Reynolds Report" or "Reynolds"). Dr. Reynolds' analysis identifies a number of significant deficiencies in the data on which the proposed rule is based. We attach a copy of Dr. Reynolds' report for your consideration.

a) The Service Inappropriately Relied on the Runge *et al.* Core Biological Model to Conclude the Florida Manatee Population is Stable or Increasing Without Analyzing Recent and Relevant Data

The proposed rule does not demonstrate that the Service has evaluated all of the best available scientific data to justify its conclusion that the West Indian manatee should be reclassified as threatened based in part on the status of the Florida manatee. The centerpiece of the proposed rule's analysis with respect to the Florida manatee, *T.m. latirostris*, is the "updated" Core Biological Model (CBM) (Runge *et al.* (2015)). The Service relies on the survival rate estimates and estimated growth rates generated by this CBM for its conclusion that the Florida manatee population is "stable or increasing" and that therefore "Florida manatees are not likely to become extinct in the foreseeable future." 81 Fed. Reg. at 1023–24. There are a number of problems with the Service's reliance on the CBM for this conclusion.

As the Runge *et al.* (2015) paper itself candidly acknowledges, the CBM was completed in 2012 and was conducted on mortality data available only through 2009. It therefore does not analyze significant manatee mortality events that have occurred since that time. Runge *et al.* (2015) at p. 2.

Since 2010, manatee mortality in Florida has exceeded 3200 animals due to severe cold events, severe red tide events, and substantial loss of seagrass habitat. Reynolds, pp. 5–6, 9–10; *see also* Runge *et al.* (2015) at p.1. Despite the availability of scientific data, the Service itself did not address these mortality events in any depth in the proposed rule. It did not attempt to draw any conclusions as to the implications of these significant mortality events for the continued predictive reliability of the updated Runge CBM and the validity of its various assumptions. Nor did the Service itself undertake to make any revised population projections based on these significant mortality events. The Service's treatment of these documented manatee mortality events in the proposed rule is extremely sketchy, amounting to no more than a few conclusory sentences, *see, e.g.*, 81 Fed. Reg. at 1006, 1021–22.

In addition, Service has not analyzed whether its reliance on the CBM to make population projections for the Florida manatee should be qualified in light of available data that call into question some of that model's assumptions. For example, based on mortality data from 2001–09, the CBM estimated fractions for manatee mortality due to five major threats: collisions with watercraft, impingement in water control structures, entanglement in marine debris, effects of cold (i.e. loss of warm-water habitat), and effects of red tide. Runge *et al.* (2015) at p. 3. The CBM's status quo model, on which the Service premises its projections of future population trends, assumes that the five major threats modeled would remain at current levels (i.e., current as of 2009) indefinitely, without increasing. *Id.* at p. 5. The CBM does not model changes (either increases or decreases) in magnitude in these five existing threats, nor does it model the impacts of additional, emerging threats such as climate change-related effects.

The Service's proposed rule uncritically relies on the CBM's projections about the continued persistence of the manatee under baseline conditions through 2009 (i.e. the five-threat analysis). Indeed, the Runge paper itself notes many of the caveats that must qualify any conclusions to be drawn from the CBM based on the assumptions it made and the limited time series of data it analyzed. Runge *et al.* (2015) at pp. 20–21. Notwithstanding that Runge and colleagues had not finalized the "next steps" identified at p. 21 of the paper (including analysis of recent years' mortality events) prior to publication of the proposed rule, this does not relieve the Service of its fundamental statutory obligation to review and analyze the best available scientific data and to make informed population projections thereon. *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d at 1149–50 (W.D. Wash. 2000); *Natural Resources Defense Council v. Kempthorne*, 506 F. Supp. 2d at 362–66.

The Service failed to undertake any analysis of whether available data cast doubt on the reliability of these projections due to limitations in the model, and did not use its best professional judgment to make population projections based on available data not considered in the CBM. For example, the Service failed to determine whether existing data demonstrates that modeled threat levels might increase above current baseline levels (e.g., whether projected human population increases in Florida might cause a corresponding increase in watercraft collisions). Similarly, the Service failed to analyze available data or make projections for manatee populations based on the synergistic interactions of threats (e.g., the likelihood of increasing nutrient pollution causing more frequent or more severe red tide or brown tide events).

The Service also failed to analyze available data or make any population projections based on existing, documented threats to manatee habitat and survival that were not analyzed in the CBM at all. Reynolds Report at 9–10. The Service ignored available data on the effects of repeated brown tide events that have significantly affected seagrass density and distribution. *Id.* One important

example of this is the extensive manatee forage habitat loss caused by massive seagrass die-offs in Indian River Lagoon in Brevard County, in perhaps the most important West Indian manatee habitat in the world; 47,000 acres were lost in this area in 2011-2012, and although the seagrass has yet to recover, a new brown tide event is now underway. Approximately 1/3 of Florida manatees rely on these waters for foraging habitat. *Id.* At least one unusual mortality event has occurred in the Indian River Lagoon since the seagrass die-offs. Runge *et al.* (2015) at 2.

In sum, the Service's overreliance on the Runge CBM to project continued stable or positive population growth and its corresponding failure to analyze in any meaningful way the best available data on Florida manatees from 2010 to the present, including significant mortality events and data on threats not considered in the CBM, demonstrate that the Service has not based the proposed rule on the best available scientific data.

b) The Service Inappropriately Relied on the Castelblanco-Martinez *et al.* PVA For Antillean Manatee Population Estimates and Trends Without Analyzing or Addressing Conflicting Data

The centerpiece of the proposed rule with respect to the Antillean manatee (*T.m. manatus*) is a population viability analysis (PVA) published by Castelblanco-Martinez *et al.* (2012). The Service relies on this model for its conclusion that the Antillean manatee is a metapopulation with positive growth. 81 Fed. Reg. at 1005, 1023, 1024. This conclusion is not based on the best available data, nor does the Service explain why the Castelblanco-Martinez PVA generates population trends and estimates that are superior to other, conflicting scientific data. *See* Reynolds Report at 7–8.

The proposed rule acknowledges that trends and estimates for manatee populations outside the U.S. "are, in large part, based on the personal opinions of local experts and are not based on quantitative analyses of trends in country population counts or demographics. Such data from these countries are limited or absent, making most of these assessments conjectural." 81 Fed. Reg. at 1003 (Table 1, fn. 1). Yet the Service does not attempt to reconcile its own conclusions on the total number of Antillean manatees in current populations or those of the Castelblanco-Martinez PVA (i.e., that there are currently 6700 Antillean manatees and that the population is experiencing positive growth) with the conflicting conclusions of other expert analyses. Reynolds Report at pp. 7–8 (citing (Deutsch *et al.* (2008) [IUCN Red List review] and UNEP (2010) [regional management plan for the West Indian Manatee]). Although the Service cites these studies, it does not explain why it did not select a lower, more conservative population estimate or at least cite a range of possible population estimates.

For example, the Service cites Deutsch *et al.* (2008) as estimating fewer than 10,000 mature individuals throughout the species' range but dismisses this estimate without further discussion with the statement that "[O]ur estimate of the total West Indian manatee population currently is 13,142 (Table 1)." 81 Fed. Reg. at 1005. The Service gives no rational reason why it dismisses the findings of Deutsch *et al.* (2008), which estimated a range of population estimates for the Antillean manatee between 2600 (minimum) and 5600 (optimistic) with a likely average falling at approximately 4100 manatees. Even within the proposed rule itself, the Service states that "total estimates for manatees outside the southeastern United States and Puerto Rico alone range between approximately 3,000 and 6,700 individuals," 81 Fed. Reg. 1004, but fails to explain why its choice of the highest number in this range is credible. In the light of these conflicting studies, the Service has failed to explain why

the Castelblanco-Martinez PVA it relies upon for its optimistic outlook on the Antillean manatee constitutes the best available scientific data.

Further, as noted by Reynolds, the assumption "that Antillean manatees throughout the wider Caribbean represent a metapopulation, defined as a group of spatially separated populations of the same species which interact at some level" is highly problematic: "Given the highly fragmented nature of manatee habitat and distribution, as well as genetic evidence to date, I find that assumption untenable." Reynolds at p. 7. As discussed below, the Service should have examined whether any of these spatially separated populations constitute a significant portion of range in which manatees are endangered.

Cited data in the Service's proposed rule contradicts the PVA's conclusion that the Antillean manatee is experiencing positive population growth. The Service cites a number of sources of expert and local opinion to state that, for Antillean manatees, "population trends are declining or unknown in 84 percent of the countries where manatees are found." 81 Fed. Reg. at 1005. The Service's compilation of data indicates that Antillean manatee populations are stable or increasing in only three countries out of nineteen: the U.S. (Puerto Rico) (stable at 532 estimated manatees), Honduras (stable at 100 estimated manatees), and French Guiana (stable at 100 estimated manatees). 81 Fed. Reg. at 1002–03 (Table 1). For the other sixteen countries, accounting for some 6050 estimated manatees out of the Service's estimate 6782 estimated manatees (a full 89%), populations are unknown or declining. The Service does not explain how, if at all, it reconciles these cited data with the conclusions of the Castelblanco-Martinez PVA that Antillean manatees are overall experiencing positive growth as a metapopulation. *See* Reynolds Report at pp. 7–8.

c) The Service Did Not Adequately Analyze the Best Available Data Relevant to the Statutory Listing Factors Either Individually or Cumulatively

The West Indian manatee's listing under the ESA nearly fifty years ago was not based on its low population numbers but on threats to its continued existence such as habitat loss and watercraft-related mortality. Although significant steps have been taken to ameliorate these threats, particularly in Florida, these threats and many others continue to the present day. For the Service to make a clear and convincing case, based on the best available scientific data, that past, present, and future threats have been addressed to the extent that downlisting is warranted, it must do so based on a detailed, data-driven analysis of these threats (and the adequacy of existing regulatory mechanisms that address these threats) both individually and cumulatively.

The Service has not made this clear and convincing case. In addition to an overreliance on the projections of the CBM and the PVA to conclude that both Florida and Antillean manatee populations are experiencing and will continue to experience stable or positive population growth, the proposed rule also demonstrates that the Service had not engaged in a comprehensive and cumulative analysis of the threats relevant to the species' status under the four most salient Section 4(a)(1) listing factors (A, B, D, and E).

Review of the proposed rule is extremely challenging. The Service's analysis and rationale for its conclusion is difficult to fully discern without repeatedly flipping back and forth between separate sections. For example, the proposed rule lumps the discussion of the listing factors for Florida and Antillean manatees together while simultaneously splitting discussion of relevant information applicable to each listing factor into different sections under "Recovery Actions" and "Summary of

Factors Affecting the Species." Moreover, it is not at all clear why the Service subdivides its discussion of the (outdated) Florida and Puerto Rico recovery plans into different sections with repeated identical headings. As a result, the "Recovery Actions" section as a whole, 80 Fed. Reg. 1006–14, obscures rather than illuminates the Service's reasoning on whether and how the Florida and Puerto Rico manatee populations have actually made substantial enough progress toward valid, objective measures of recovery to warrant the conclusions the Service reaches under the listing factor discussion, *id.* at 1014–24.

Read as a whole, however, the proposed rule contains no comprehensive analysis of the data on the cumulative effects of threats under each individual listing factor to justify its ultimate conclusion that each aggregated set of threats under that factor yields only a moderate total threat to the species range-wide. Rather, the Service's discussion under each factor consists of examples of threats and counter-examples of measures taken to ameliorate such threats. These laundry lists do not meet the Service's burden of drawing a rational connection between the facts it mentions and its ultimate conclusion under each listing factor that the cumulative sum of threats under that factor poses only a moderate total threat to the species range-wide.

Similarly, in the proposed rule's brief conclusion, the Service does not undertake any meaningful analysis to support the conclusion that the sum of cumulative effects of moderate threat levels under each of four listing factors it deems relevant yields a total of moderate threat demonstrating that the West Indian manatee is no longer in danger of extinction throughout its entire range. 80 Fed. Reg. at 1023–24. Again, the Service lists off some positive and negative trends and anecdotes relevant to some of the four listing factors, but makes no effort to evaluate whether the cumulative effects of moderate threats across multiple listing factors might add up to a continued danger of extinction in all or any significant portion of the West Indian manatee's range. Tellingly, the Service's conclusion relies on its citations to the Runge CBM and the Castelblanco-Martinez PVA for population estimates and stable or increasing population growth trends. The overall lack of any cumulative analysis with respect to any or all of the relevant listing factors demonstrates that the Service has not articulated a rational explanation to justify downlisting. *Carlton v. Babbitt*, 900 F. Supp. at 530; *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d at 102.

Antillean manatee

The Service repeatedly determines that individual threats or the sum of threats under each listing factor pose only a moderate threat to the Antillean subspecies outside the U.S. (Puerto Rico), but frequently and frankly acknowledges that it lacks credible data on which to base these judgments. In addition to the substantial uncertainty as to what Antillean manatee population estimates and trends are in each range state other than the U.S., *e.g.*, 81 Fed. Reg. at 1002–03 (Table 1, fn. 1), *id.* at 1005, 1006 (identifying "general lack of information about [Antillean] manatees in most range countries"), the Service lacks data on threats categorized under two out of three threat-related listing factors. *Id.* at 1014 ("some countries have been able to document manatee habitat loss effects, while other countries do not have site-specific information available to quantify the severity and/or frequency of this threat on manatees); 1020–23 (none of the "other threats" analysis contains data for most of the Antillean manatee range states).

The overall dearth of data notwithstanding, the Service still concludes that habitat loss and "other factors" each pose only a moderate threat to the Antillean subspecies. *Id.* at 1016, 1023. This does not demonstrate a rational connection between the data the Service has and its conclusions. Where

the Service has actual and uncontroverted data that overutilization via poaching poses "a serious threat" to manatee populations in thirteen out nineteen range states, *id.* at 1016–17, 1018, it nevertheless makes the unsupported conclusion that poaching poses only a moderate threat. The Service further acknowledges significant data deficits on the adequacy of existing regulations in many of the Antillean subspecies' range states. *Id.* at 1007 (conservation efforts vary significantly from country to country); 1017–18 (adequacy of existing regulatory mechanisms varies widely from country to country).

For example, under listing factor B, the Service concludes that the West Indian manatee is not in danger of extinction from overutilization, notwithstanding that threats have "varying frequencies of occurrence from absent to common throughout the species' range" because "measures and efforts are in place to address concerns and are proving effective *in a good portion of the West Indian manatee's range*." 80 Fed. Reg. at 1017 (emphasis added); *see also id.* at 1023 ("Efforts to address poaching outside the United States vary in effectiveness, with successful efforts noted in areas with a significant enforcement presence"); 1007 ("We are encouraged by the progress that is being made in *several portions* of the Antillean manatee's range in protecting this mammal") (emphasis added).

This conclusion is flatly contradicted by the Service's own cited data. "Manatees are particularly susceptible to overexploitation because of their low reproductive rates . . . . [P]oaching poses a serious threat to some manatee populations, especially in those areas where few manatees remain. . . . Marsh (2011, p. 269) identifies poaching as a major threat to manatees in Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, French Guiana, Guatemala, Honduras, Mexico, Suriname, Trinidad and Tobago, and Venezuela." *Id.* at 1017. The Service also identifies that poaching still occurs in northern Nicaragua. *Id.*

In other words, the best available data show that poaching remains a major threat to Antillean manatee populations in thirteen out of nineteen range states, potentially affecting 4850 out of 6782 estimated Antillean manatees (71.5%). Breaking this down by the three major geographic regions into which the Service divides the Antillean manatee population estimates, poaching remains a serious threat to:

- The Greater Antilles population in two out of five countries, potentially affecting 700 of 1382 estimated animals (51%);

- The Mexico and Central America population in five out of seven countries, potentially affecting 2450 of 3600 estimated animals (68%); and

- The South American population in **six out of seven** countries, potentially affecting **1700 of 1800 estimated animals (94%)**.

The Service's cited data also demonstrate that "[d]espite all of the existing regulations for manatees, illegal poaching and destruction of habitat continue." *Id.* at 1018.

In every instance, the Service construes missing or even available but negative data as positive in its assertion that downlisting is warranted for the Antillean manatee. The Service has taken an inappropriately risk-prone and data-deficient approach to evaluating the listing factors vis-à-vis the Antillean manatee and has given the benefit of the doubt to downlisting, not to the Antillean

manatee. The lack of available data demonstrating that the Antillean manatee is secure against all threats under the listing factors, and, conversely, the best available data demonstrating that poaching continues to be a severe threat that is not effectively addressed by adequately enforced existing regulatory mechanisms, support a continued endangered listing.

Florida manatee

We discuss above our significant concerns with the Service's overreliance on the Runge *et al.* (2015) CBM and the agency's failure to consider that model in the larger context of the best available data on the status of and threats to the Florida manatee. We provide additional detail here on particular issues of concern under the listing factors.

i) Listing Factor A

The Service's analysis of habitat threats facing Florida manatees is at 80 Fed. Reg. 1014–16. As the Reynolds Report points out, the Runge CBM is based on an assumption that the five modeled threats will remain static (i.e. at 2009) baseline levels; therefore, the model does not analyze the potential increases in any of these threats caused by the extraordinary human population increases projected to occur over the next couple of decades. Reynolds at p. 9. With nearly 20 million residents, Florida recently surpassed New York as the third most populous state in the country; development is accelerating and placing greater pressure on manatees and their habitat. As the economy continues to recover and more boaters take to the water, boat strikes are likely to increase as well.

It is clear that the manatee's habitat in Florida remains far from secure. *See* Reynolds at pp. 9–10. Acute and recurring problems in Lake Okeechobee and the Caloosahatchee and St. Lucie Rivers, their estuaries, and downstream coastal waters, Indian River Lagoon, Southwest Florida, Florida Bay, Kings Bay, natural warm-water springs and other important areas underscore the need to improve protection of manatee habitat. Electric power plants, on which 60% of the Florida manatee population (and 90% of the Atlantic management unit) relies for winter warm-water refugia will not be reliable sources of warm water in the future. Reduction of warm-water refugia, diminished water quality, increases in water pollution and loss of seagrass and other food sources, including at least 47,000 acres of seagrass lost in the Indian River Lagoon, much of which has yet to recover and where algal blooms persist, underscore the need to protect manatee habitat.

Florida faces serious and increasing threats to the quality and quantity of its water supply. Without concerted efforts to address threats to Florida's waterways, manatee habitat will continue to become increasingly fragmented and degraded. While many initiatives have been put in place by the Service and its state partners during the years that manatees have been listed as an endangered species, the agencies have not managed to safeguard the manatees' habitat, as evidenced by seagrass losses, storm-water runoff issues, other point and nonpoint source pollution, and coastal development. Additional natural and anthropogenic threats include large-scale mortality events from cold stress, red tide and other harmful algal bloom-related events.

Manatee survival in Florida will depend on protecting natural spring flows and maintaining the integrity of ecosystems and habitat sufficient to support a viable manatee population. In the face of

all these continuing and potentially increasing habitat threats to Florida manatees, we disagree with the Service's conclusion that habitat threats are only moderate. 80 Fed. Reg. at 1016.

ii) Listing Factor B

The Service's analysis of overutilization threats facing Florida manatees is at 80 Fed. Reg. 1016–17. Manatees continue to be disturbed and harassed at various viewing locations around the state and most notably at Three Sisters Springs. Over the years we have provided comments to the Service about the need to increase protection for manatees at Three Sisters Springs and in other areas of Kings Bay. For years, tourism has run rampant with hundreds of unregulated swimmers and boaters often harassing the manatees, disrupting their feeding and resting times and sending them back into colder waters, thus placing them in danger.

The last two winters, the Service implemented interim measures to improve manatee protection at Three Sisters Springs. The interim measures allowed the Service to:

- implement temporary full closures to prohibit visitation inside the warm water springs located at Three Sisters Springs during extreme cold weather events,
- enforce violations of twelve prohibitions,
- allow management the flexibility to prohibit vessels and large inflatable floats within the spring heads as well as the spring run in order to prevent manatee disturbance,
- guide the public to use the western half of the spring run extending into the warm water spring heads located at Three Sisters Springs to maintain an open channel for manatee ingress and egress,
- create two expanded no-public entry areas within the spring heads by closing the eastern and western lobes known as Pretty Sister and Little Sister located on Three Sisters Springs,
- implement an expedited communication plan to actively inform visitors and stakeholders of the proposed actions.

Although pleased with recent forward movement by the Service, Defenders has continued to push for more stringent protections. In December, 2014 Defenders provided comments outlining where the proposed measures were overly permissive in allowing manatees to be harassed and blocked from their warm water refuge. During that comment period we also resubmitted 76,757 petition signatures from online activists requesting that the Service institute a strict no-touch policy and designate Three Sisters Springs a full winter sanctuary that prohibits in-water manatee viewing. While the measures the Service actually implemented the last two winters marked an improvement from previous winters, they still fell short of providing enough distance between resting manatees and human observers.

One of the positive outcomes of the interim measures was that refuge managers were much more hands-on and able to monitor the effectiveness of these measures. As a result, the Service incorporated a number of recommendations resulting from its monitoring work to improve the situation this winter. It issued a draft Environmental Assessment for new, long-term management measures to improve the in-water manatee viewing situation at Three Sisters Springs. In September 2015, we strongly encouraged the Service to adopt the most restrictive recommendation, "Viewing from Land Only," without further delay.

After reviewing more than 2,600 public comments, most of which called for closing Three Sisters Springs to in-water viewing, on November 10, 2015, just five days before the start of the winter manatee season when manatees start to seek shelter from the cold, the Service released a revised draft Environmental Assessment for public comment that includes a modified alternative that provides for more restrictive in-water viewing than the previous assessment. We again provided comments strongly encouraging the Service to select "Viewing from Land Only," as this option would offer the greatest protection for manatees while promoting appropriate, non-intrusive, responsible wildlife viewing that should be expected at a national wildlife refuge. In the meantime, instead of new long-term protections measures, the interim measures implemented last winter were utilized at the refuge again this season.

Given the ongoing human harassment that the Florida manatee faces, particularly and most dangerously during the winter, combined with the threat of insufficient warm-water refugia discussed above, Defenders disagrees with the Service's conclusion that the threat of overutilization has been sufficiently ameliorated for the Florida manatee.

iii) Listing Factor C

The Service concludes that neither disease nor predation poses a significant threat to the West Indian manataee. 80 Fed. Reg. at 1017. Within this section, the Service cites a paper by Marsh *et al.* "speculating that the Florida subspecies appears to have a robust immune system." *Id.* The Service fails to cite or analyze available data relevant to whether manatees may be subject to sublethal effects from stressors such as cold, with negative consequences for immune function. *See* Reynolds Report at pp. 4–5 (and two studies cited therein). The Service should acknowledge the potential for disease to spread when many manatees, numbering over 1,000 at some locations, are closely packed into warm-water outfalls at electric power plants and other industrial sites. During prolonged periods of cold weather, manatees would be particularly vulnerable when they are susceptible to cold stress and may not be able to feed for extended periods of time.

iv) Listing Factor D

The Service's discussion of the adequacy of regulatory mechanisms applicable to the Florida manatee is at 80 Fed. Reg. 1017–19. We believe the Service's analysis is incomplete.

As Defenders mentioned in our comments on the 90-day finding, a number of changes to regulatory measures could have implications for manatee conservation. In 2011, the Florida legislature dissolved the Department of Community Affairs, the state's growth management agency. Moreover, the Florida Department of Environmental Protection (DEP) has been revising its rules in response to the governor's executive order requiring all agencies to review their regulations and streamline them to relieve businesses of "burdensome permitting requirements." DEP has scaled back its science, regulatory and enforcement staff. Further, the budgets of the five regional water management districts have been vastly reduced. And despite the fact that Florida's waters face serious threats including drought, over pumping, saltwater intrusion, and pollution caused by runoff from development and agriculture, within sensitive watersheds, the state fought off stricter water quality standards that had been promulgated by the U.S. Environmental Protection Agency.

A massive water policy bill passed during the 2016 legislative session and signed into law by the governor has positive and negative aspects. On the positive side, the law provides for the following to help to protect springs:

- Designates Florida's largest springs as "Outstanding Florida Springs" and establishes new water pollution restrictions in areas that feed into designated Outstanding Florida Springs
- Requires the DEP to adopt emergency rules to ensure that springs receive sufficient flow, if the Water Management Districts fail to do so by July 1, 2017 (2026 for Northwest Florida),
- Sets deadlines for the adoption of "basin management action plans" for any springs that do not already have such a plan and requires revisions of existing plans to include the new requirements established, and requires a BMAP to include a septic remediation plan if septic tanks contribute 20 percent or more of nitrogen pollution to the spring, and requires local governments to adopt an ordinance to control urban fertilizer use in springsheds by July 1, 2017 if they have not already done so.

On the negative side:

- The law makes "basin management action plans" (BMAPs) the primary pollution control tool for Lake Okeechobee, but these BMAPs only go into effect after a water body is already polluted.
- The law relies heavily on voluntary "best management practices" (BMPs) that historically have not been the most effective or prompt way to reduce water pollution, though they are intended to reduce the amount of fertilizers, pesticides, animal waste, and other pollutants entering the waterways.
- Rather than expediting Lake Okeechobee cleanup, the law delays it by eliminating the 2015 deadline for reducing phosphorus pollution into the Lake (from 400 tons annually to 105 tons, which was not met) rather than creating a new deadline.
- This law focuses more on expanding the development of "alternative" water supplies. It fails to establish water conservation as a priority, even though it is a more cost effective and sustainable alternative to developing new water supplies.

Many of these changes at the state level decrease the protections that the State of Florida provides manatees, implicating not only listing factor (D) on the inadequacy of existing regulatory mechanisms but also the requirements of 16 U.S.C. § 1533(b)(1)(A) to take a state's protective efforts into account in any reclassification determination.

More blatant efforts aimed specifically at rolling back protections for the Florida manatee, such as weakening speed zones, reducing enforcement and scaling back funding, have accelerated ever since the Service announced its 90-day finding on the petition to downlist the West Indian manatee. During the last two legislative sessions, efforts to strip Florida's Manatee Sanctuary Act of key protective provisions were defeated. The Manatee Sanctuary Act authorizes FWC to adopt manatee protection rules by restricting the speed and operation of vessels where necessary to safeguard manatees from harmful collisions with vessels and to shield manatees from harassment. In areas that are especially important to manatees, the rules can prohibit or limit entry into an area as well as restrict what activities can be performed in the area. If this rule were to be weakened, it would restrict the ability of FWC to establish state speed zones and it could impact all the hard work and progress that has been made to reduce injury and death caused by boat strikes, a leading threat to

manatee survival. It is also of concern that the FWC lacks constitutional authority over manatees and other marine protected species.

On January 12, 2016, the Brevard County Board of County Commissioners adopted a resolution intended to undermine key provisions of the Florida Manatee Sanctuary Act and FWC's role and authority in establishing and reviewing state manatee protection speed zones. While the county itself lacks authority to establish, review or remove state zones, to this day they continue to apply pressure on FWC to evaluate state zones in the county and press for removal of zones. In fact, the county has formally petitioned FWC to re-evaluate and modify as necessary, rule making procedures pertaining to manatee speed zones throughout the county, and to update the Brevard Manatee Protection Plan.

During the most recent state legislative session (January 12 - March 11, 2016), once the most egregious provisions had been eliminated, two Pinellas County legislators, Representative Ahern and Senator Brandes filed bills, in response to new speed zones proposed for western Pinellas County, that failed to move forward. The bills would have required FWC to contract for a manatee speed zone effectiveness study and to submit a report detailing the findings to the Governor and Legislature.

The Service recognizes that many serious threats to the Florida manatee remain. Service personnel have made public statements promising that the agency does not intend to reduce or remove existing federal legal protections as part of the downlisting. As recent history demonstrates, however, even the possibility of a downlisting has encouraged anti-speed zone political forces to initiate rollbacks of vital state and local manatee protection measures. Although Defenders is pleased that the Service has so far committed to maintaining existing federal protections, we are very concerned that state and local regulatory mechanisms are at risk of being dismantled. The Service lacks the authority to ensure that state and local regulatory mechanisms will continue unchanged after a downlisting. Therefore, it has no basis for its claim that "[i]f this downlisting rule is finalized, all regulatory mechanisms will remain in place and will continue to provide legal protections to the species throughout its range." 80 Fed. Reg. at 1019–20.[2]

Continued funding for regulatory protections is also a serious concern. As the Service acknowledges, "as long as funding remains available, recovery actions would continue to be implemented." However, we have seen efforts at the county level and in the Florida legislature to redirect funding from manatee recovery actions already, so this is great cause for concern.

v) Listing Factor E

The Service's analysis of listing factor E (other natural or manmade factors) is at 80 Fed. Reg. 1020–23 and covers a wide range of threats including watercraft strikes, fishing gear, water control structures, contaminants, algal blooms, cold weather, genetics, tropical storms, and climate change/sea-level rise. This section best exemplifies the Service's failure to engage in meaningful analysis of these threats either individually or cumulatively, as we stated above. The Service's

[2] Although we focus on the Florida manatee in this section of our comments, we note that the Service has absolutely zero basis for making this claim with respect to the eighteen sovereign nations outside U.S. jurisdiction that make up the Antillean manatee range.

conclusory statement that the threats under this listing factor present only a moderate threat is lacking a sufficiently credible explanation. Its conclusion is further undermined by its weak assertion that the Castelblanco-Martinez PVA and Runge CBM "project increasing populations under these threats as they currently exist," *id.* at 1023, particularly in light of the issues with the Service's overreliance on these models as detailed above and in light of the fact that these PVAs simply did not model all of these threats and how they might increasingly affect manatees over time.

Defenders believes one of the most significant threats to Florida manatees addressed under this factor is watercraft collisions. Watercraft-related mortality is recognized as the single largest threat in Florida to the West Indian manatee. Runge *et al.* (2015) observed that watercraft-related mortality constitutes the largest contribution to the risk of extinction out of the five threats analyzed and that full removal of this single threat from the five analyzed would reduce the risk of extinction to near negligible levels. The primary conservation action to reduce the risk of manatee injury and death is a limitation on watercraft speed through a network of federal, state and local speed zones in 26 counties in Florida. The Service recognizes that the threats associated with increasing numbers of watercraft will require ongoing maintenance and enforcement of manatee protection areas and the adoption of additional areas.

Under its analysis for listing factor D, the Service states: "If this downlisting rule is finalized, all regulatory mechanisms will remain in place and will continue to provide legal protections to the species throughout its range." 80 Fed. Reg. at 1019–20. As we previously noted, the Service cannot make this claim for the Florida manatee, given ongoing state and local efforts to roll back speed zones and other protections, let alone for the Antillean subspecies.

The Service also recognizes that harmful algal blooms and cold weather will continue to be major threats to the Florida manatee. The Florida manatee experienced record mortality events in 2010-11 when a prolonged period of cold weather killed more than 650 manatees (in 2010 a total of 766 manatee deaths from all causes were documented), and in 2013, the combined effects of red tide in southwest Florida and harmful algal blooms in Brevard County, contributed to the deaths of nearly 400 manatees; a new record of 830 manatee deaths was set in 2013. Overall, the death toll in Florida over the last six years has been 3217 manatees, Reynolds Report at p.5.

Despite these unprecedented and poorly understood mortality events, Runge *et al.*'s (2015) analysis has not included the effects of the 2010/2011 cold mortality event or the 2013 red tide event, and the Service did not evaluate these events in its downlisting assessment. The wide swings in mortality numbers from year to year are a clear indication that the Service needs to act with "institutionalized caution" and better understand the continued and potentially increasing level of threats under listing factor E to Florida manatees before downlisting the species.

The Service acknowledges that sea level rise as a result of climate change is likely to exacerbate the greatest long-term threat to manatees in Florida: loss of warm-water habitat. While some of the effects remain uncertain, sea level rise is expected to eliminate most of the industrial warm-water sites and could reduce or eliminate (via inundation and saltwater intrusion) the viability of natural springs used by wintering manatees. 80 Fed. Reg. at 1023. It is unacceptable that the Service does not factor potential sea-level rise effects on warm water refugia into its analysis under listing factor A. 80 Fed. Reg. at 1015–16. Notwithstanding the "high level of uncertainty regarding the overall effects of climate change on the species and its habitat," *id.*, the Service must nonetheless analyze the

best available data (however uncertain) and factor its analysis into its analysis of the degree of habitat threat the Florida manatee faces.

2) The Service's Failure to Determine Whether the Manatee is Endangered in a Significant Portion of Its Range

The Service's proposed rule concludes that the West Indian manatee is threatened throughout its range. Therefore, in reliance on its Significant Portion of Its Range (SPR) Policy, 79 Fed. Reg. 37,578 (Jul. 1, 2014), the Service failed to consider whether the West Indian manatee is endangered in any significant portion of its range. This failure is neither factually justified nor legally permissible.

The ESA requires listing a species if it is endangered or threatened "throughout all *or a significant portion of its range*." 16 U.S.C. § 1532(6), (20) (emphasis added). Under this language, "[w]here a species or subspecies is unlikely to survive in a sizeable portion of its current habitat, the agency must provide some explanation as to why this portion is not 'a significant portion of its range[.]" *Colo. River Cutthroat Trout v. Salazar*, 898 F. Supp. 2d 191, 203–04 (D.D.C. 2012) (citation omitted). The Service cannot justify its complete failure to analyze whether either of the geographically-separated ranges of the Florida and Antillean subspecies, or any of the geographically-separated ranges of the Antillean manatee's subpopulations themselves, constitutes a) one or more significant portions of range b) in which manatees are endangered.

The Service explicitly recognizes that the Florida and Antillean manatees are distinct subspecies with discrete ranges. 80 Fed. Reg. 1003. And as the Service's cited data explicitly recognize, 81 Fed. Reg. at 1002–03 (Table 1), the Antillean subspecies is found in a large and spatially separated geographical range from as far north as Puerto Rico to as far south as Brazil. 81 Fed. Reg. at 1002 (outside the U.S., "the West Indian manatee has an extensive but fragmented distribution" and manatees are found in the Greater Antilles, "discontinuously along the Gulf coast of Mexico, the Caribbean coast of Central and South America, and along the Atlantic coast of South America as far south as Bahia, Brazil"). The Service's description of these data categorize known populations of Antillean manatees into three distinct geographic areas: the Greater Antilles (estimated population 1,382 individuals), Mexico and Central America (3,600 individuals) and South America (1,800 individuals). *Id.* at 1002–03 (Table 1), 1004. In the Castelblanco-Martinez PVA, upon which the Service so heavily relies, the authors "divided the metapopulation into six subpopulations identified by geographic features, local genetic structure, ranging behavior, and habitat use." 81 Fed. Reg. at 1005. The Service's cited data strongly suggests that one or more portions of the Antillean subspecies' range merits analysis for significance.

The Service's cited data as to the differing estimated population status of Antillean manatees, where in sixteen of the nineteen range states the population trend is currently described as unknown or declining, also warrants a full SPR analysis. In twelve out of nineteen range states, the population estimate is only between 50 and 200 individuals. In five out of nineteen range states, the population estimate is between 500 and 700 animals. In only two of the nineteen range states do the population estimates reach or exceed 1000 animals (1500 in Mexico and 1000 in Belize). The Service's cited data regarding the myriad threats these animals still face, as well as the highly variable extent and effectiveness of existing regulatory mechanisms to ameliorate such threats, strongly suggests that the Service should have analyzed these by geographic region (i.e. significant portion of range) to determine whether manatees in that region or regions warranted listing as endangered.

As one example, as detailed above, the best available data on poaching, combined with the lack of any data that effective regulatory mechanisms exist and are enforced in each of the range countries where poaching remains a serious threat, contradicts the Service's conclusion that overutilization is not a serious threat to the Antillean manatee. Based on the available data on this listing factor alone, the Service should have conducted a detailed significant portion of range analysis to determine whether poaching continues to endanger West Indian manatees in any significant portion of the species' range.

The Service cannot justify its failure to conduct an analysis of whether the manatee is endangered in a significant portion of its range in reliance on its SPR Policy. That policy defines "significant" as follows:

> A portion of the range of a species is 'significant' if the species *is not currently endangered or threatened throughout all of its range*, but the portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range.

79 Fed. Reg. at 37,579 (emphasis added). Based on this definition, the Service stated that a species will only ever have one legal status assigned to it: "if a species is endangered or threatened throughout its range, no portions of its range can qualify as 'significant.'" *Id.*; *see also id.* at 37,599 ("Therefore, as this policy is applied, there will be no circumstance in which a species is threatened throughout all of its range and endangered throughout an SPR").

This interpretation and application of the SPR policy—to exclude even consideration of whether a species that may be at a minimum threatened in all of its range may also be endangered in a significant portion of its range—demonstrates that the Service has, in fact, read an operative portion out of the statute: specifically, the requirement to determine whether a species is endangered in a significant portion of its range. The Service may not lawfully forego any analysis whatsoever of whether a species is endangered in a significant portion of its range simply because it has determined that the species overall warrants a minimum threatened listing. Even after the threshold question of whether a species warrants at least threatened listing throughout its range has been answered in the affirmative, the Service must still analyze whether that species' status may be even worse—to the point of qualifying as endangered—in any significant portion of that range, such that without the members in that range, the rest of the currently-threatened members outside that range would themselves be placed in danger of extinction.

In short, the SPR Policy is an unreasonable interpretation of the statute because it irrationally directs the Service to ignore concentrated threats that place a portion of the range in immediate danger of extinction merely because there are lesser threats throughout the range that make the species at least threatened with extinction in all of its range. The plain text of the ESA requires the Service to consider whether a species should be listed as endangered based either on its status throughout all of its range or its status in a significant portion of its range, and to consider whether it warrants listing as either endangered (first) or threatened (second). 16 U.S.C. §§ 1532(6); 1533(a)(1). Because a determination of endangered status triggers mandatory statutory protections against take for the species, 16 U.S.C. § 1538, an interpretation that precludes an evaluation of endangerment in a significant portion of the range based on a finding of threatened status throughout the range

circumvents congressional intent to confer those protections.[3] Thus, the SPR Policy unreasonably short-circuits the statute by allowing the presence of lesser threats throughout the range to preclude consideration of whether more dire threats in even a vast portion of the range place that portion of the range in immediate danger of extinction, and therefore entitle the species to receive the mandatory protection Congress required to address such immediate danger, and to ensure the species' survival and recovery.

Conclusion

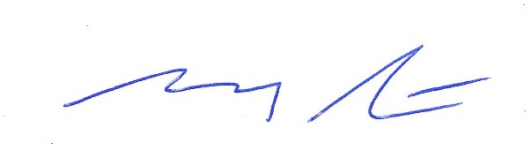
Although Defenders welcomes all encouraging signs that the West Indian manatee may be increasing in certain parts of its range, we believe there is still much work to be done before the species is secure enough to warrant downlisting. The Service must maintain the West Indian manatee as endangered until such time as one of two scenarios occurs: (1) a fully developed, scientifically supported, and peer-reviewed analysis of the statutory listing factors demonstrates that the species is no longer in danger of extinction throughout all or any significant portion of its range; or (2) the listing of the West Indian manatee is eventually updated to reclassify the species into subspecies and/or distinct population segments, which would then enable the Service to evaluate the listing status of such subspecies or distinct population segments independently.

For the reasons detailed above, we cannot support the Service finalizing the proposed rule as written. We urge the Service to exercise its discretion to extend the statutory deadline for its final listing determination by six months as per 16 U.S.C. § 1533(b)(6)(B)(i) in order to ensure the sufficiency and accuracy of the available data and its analysis thereof. We also urge the Service to publish a revised proposed rule for public comment and for expert peer review before making its final determination.

On behalf of Defenders of Wildlife, thank you for considering our comments. Please do not hesitate to contact Jane P. Davenport, senior staff attorney, at jdavenport@defenders.org or (202) 772-3274 if you have any questions about these comments.

[3] Furthermore, the Service's current interpretation of "in danger of extinction throughout . . . a significant portion of its range is" is impermissible because, under that interpretation, there are no circumstances where a species would be listed as endangered based on its status in only a portion of the range. In any circumstances where the individuals in only a portion of the range will meet the SPR Policy's standard of making a "contribution to the viability of the species . . . so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range," 79 Fed. Reg. at 37,578–79, the present endangerment of those individuals, per the Service's "on the brink" definition of "in danger," will always lead the Service to conclude that the species as a whole is at least threatened throughout all of its range before the Service ever reaches the question of whether the species should be listed as endangered based on being in danger of extinction in a significant portion of its range. Consequently, the Service's interpretation gives no operation at all to the statutory term "in danger of extinction throughout . . . a significant portion of its range."

Sincerely,



Michael Senatore, Vice President, Conservation Law

Encl.