

Hattenbach



United States Department of the Interior

OFFICE OF THE SOLICITOR

Southeast Regional Office
Richard B. Russell Federal Building
75 Spring Street, S.W.
Atlanta, Georgia 30303

IN REPLY REFER TO

June 19, 2001

VIA FACSIMILE AND U.S. MAIL

Eric R. Glitzenstein
Meyer & Glitzenstein
Suite 700
1601 Connecticut Ave., N.W.
Washington, D.C. 20009-1035

Robert L. Gulley
Hunton & Williams
1900 K Street N.W.
Washington, D.C. 20006-1109

Re: Designation of Refuges and Sanctuaries

Dear Eric and Robert:

This letter confirms our telephone conversation of June 13, 2001 in which we agreed to revise the schedule for the U.S. Fish and Wildlife Service to submit to the Federal Register for publication a proposed rule for new manatee refuges and sanctuaries throughout peninsular Florida.

On January 5, 2001 the United States entered into a settlement agreement with your clients in the case entitled Save the Manatee v. Ballard, Civil No. 00-00076 EGS (D.D.C.). Under the terms of the settlement the Service agreed to submit to the Federal Register for publication, by April 2, 2001, a proposed rule for new manatee refuges and sanctuaries throughout peninsular Florida. See Settlement Agreement, ¶ 11. Subsequent to our settlement agreement the parties in the pending lawsuit Save the Manatee v. Egbert, Case No.: 99-00-400CIV17-WS (N.D.Fla.), announced that a settlement was imminent. Based upon published accounts of the possible settlement we agreed that the date for publishing the proposed rule should be revised to May 2, 2001. On April 25, 2001 we extended the May 2, 2001 date to May 9, 2001. On April 26, we agreed that the May 9, 2001 date should be extended to July 2, 2001.

On June 8, 2001, the parties met in Jacksonville to discuss the Egbert lawsuit, the content of the manatee protection conversations between the State of Florida and the Service and possible revisions to the settlement agreement. After our meeting we met with our clients and agreed on June 13, 2001 to another extension, this time to August 3, 2001. Prior to this date we will meet again to determine if any further revisions to the settlement agreement are appropriate.

EXHIBIT
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Sincerely yours,

Kahlman R. Fallon

Kahlman R. Fallon
Deputy Regional Solicitor

cc: **Wayne Hettenbach**
Delores Young
Holly Wheeler
David Smith
Sam Hamilton
Gary Frazier
Cathleen Short
Virginia S. Albrecht

KAHLMAN R. FALLON
Deputy Regional Solicitor

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Date: November 30, 2001

To: Holly Wheeler Fax/Telephone Nos. 202-208-3877/202-208-5233

Subject: Save the Manatee Club v. Bullard

Enclosed is July 9, 2001 letter that Delores asked me to fix.

Kal

Number of pages transmitted including the cover sheet: 4

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EXHIBIT

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July 9, 2001

*Admitted in PA only

By Fax and Mail

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Re: Save the Manatee Club et al v. Ballard et al, Civ. No. 00-00076 EGS (D.D.C.)

Dear Kai and Delores:

I am writing to confirm the phone message I left for Kai on Friday, to the effect that plaintiffs cannot agree to any further extensions of the timetable for the Service to propose new federal refuges and sanctuaries, as required by paragraph 11. I will briefly set forth our reasons below.

To begin with, in our view, the FWS has had more than sufficient time and opportunity to "coordinate" with the Commission, which was the ostensible rationale for the Service's need for additional time to comply with its duties under paragraph 11. Indeed, in a demonstration of good faith, plaintiffs have agreed to no fewer than four extensions of the April 2, 2001 deadline for the FWS's proposal to be published in the Federal Register. Those extensions followed on the heels of the government's representation, when we were negotiating the settlement, that it did not "foresee the need to seek a further extension of" the time frames for proposing and adopting federal refuges and sanctuaries. See January 4, 2001 Letter of Mathew A. Love (Attachment



A).¹

Moreover, as plaintiffs have made clear following the June 8 meeting, there are obviously ways in which the federal government could advance the conservation and recovery of the manatee without replicating what the Commission may do in carrying out the Settlement Agreement into which it has entered. Indeed, at the Service's request, we have highlighted high priority areas which cry out for immediate action and which clearly fall within the Service's regulatory definition of federal refuges and sanctuaries, but which are not specifically addressed in the Settlement with the Commission.

For example, the area in downtown Jacksonville, from Radio Point to Fuller Warren Bridge, which the FWS agrees is a high watercraft mortality area, as well as an important travel corridor for manatees, is a location where manatee protection has recently been lessened. Plainly, plaintiffs cannot count on the Commission to address that problem area any time soon, either under the Settlement the Commission has entered into, or in any other fashion, and hence it would appear to be the quintessential example of an area as to which the FWS should "supplement" the state effort. Yet the Service evidently has no intention of addressing that area of high watercraft mortality or, for that matter, any of the other important areas plaintiffs have identified -- in response to the Service's request that we do so -- but which are not specifically addressed in the Settlement with the Commission.

Nor does it appear that the Service is willing to use its refuge and sanctuary designation authority to complement the Commission's activities in other obvious ways. For example, especially in light of the recent killing of yet another manatee in the Barge Canal in Brevard County, the Service should use its rulemaking authority to designate an emergency sanctuary or refuge -- which the agency may do whenever "there is substantial evidence that there is imminent danger or a taking of one or more manatees, and that such establishment is necessary to prevent such a taking." 50 C.F.R. § 17.106. It is difficult to imagine a situation that fits the regulatory definition and purpose for emergency sanctuary designation better than this one, especially since such a designation (which may last up to 120 days) could be in place during the time that it takes the state administrative review process to be completed. In short, an emergency designation in the Barge Canal/Sykes Creek area is tailor-made for precisely the kind of "complementary" and "supplementary" role that the FWS claims it wants to play. Regrettably, the agency's failure to take that obvious step makes clear that its claim is rhetorical rather than substantive.

Indeed, the Service's current attitude and approach appears to be well encapsulated in a recent quote in the Naples Daily News from FWS "spokesman" Chuck Underwood, who stated that the latest delay in the schedule for federal refuges and sanctuaries is justified because "[t]hese critters are not in dire straits so we thought we could give (the state) more time." See

¹ This representation was made to us specifically because the government sought, at the eleventh hour, to postpone the schedule from the one it had previously agreed to during mediation, under which refuges and sanctuaries were to be proposed by February 1, 2001 and adopted by June 29, 2001.

Attachment B. At a time when manatees continue to be killed and lacerated by boats in huge numbers — and where such deaths and lacerations continue to be the greatest immediate impediment to the species' ability to survive and recover — we are dismayed and outraged by the Service's public sentiment that there is no "dire" situation which needs to be addressed. Indeed, that is precisely the kind of nonchalant attitude and approach to this grave problem which prompted us to file a lawsuit in the first instance, and which we thought we were ending when we reached our comprehensive court-ordered settlement with the FWS and the Corps.

In any event, it has now become abundantly clear to us that, in the FWS's lexicon, "coordination" actually means capitulation and a desire to avoid its obligations under § 11 entirely. Given that unfortunate reality, and especially in view of the Service's outrageous public announcement that the ongoing killing and maiming of manatees is no longer a "dire" situation that needs to be addressed promptly, we cannot consent to any additional extensions of the long-delayed, Court-ordered timetable for the Service to propose federal refuges and sanctuaries.¹

Sincerely,



Eric R. Glitzenswein

cc: Robert Gulley (by fax)
Wayne Hettenbach (by fax)
Dave Hankla/Pete Benjamin (by fax)
Sam Hamilton (by mail)
David Smith (by mail)

¹ In light of the prior extensions for proposing federal refuges and sanctuaries, we are willing to agree to some extension in the settlement date for the federal government to adopt final rules. The settlement currently provides for the Service to adopt final rules by September 30, 2001. We are willing to extend that date to December 31, 2001, which should give the Service more than sufficient time to consider and solicit public comment and adopt a final rule.