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Public Comments Processing
Att'n: Docket No. FWS-R\$-ES-2015-0178
U.S. Fish and Wildlife Service Headquarters, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3804

Re: Comments on Proposed Rule to Reclassify the West Indian Manatee as Threatened

On behalf of Save the Manatee Club (“SMC”) – the nation’s preeminent conservation organization dedicated to protecting the manatee – I am submitting these comments on the U.S. Fish and Wildlife Service’s (“FWS” or “Service”) proposed rule to reclassify the endangered West Indian manatee as threatened. *See* 81 Fed. Reg. 1000 (Jan. 8, 2016). These comments focus on legal deficiencies in the proposal reclassification, and complement the additional comments on the proposal that are being submitted directly by SMC.

As explained below, the proposed reclassification suffers from a number of legal flaws. These flaws preclude the Service from proceeding with the reclassification or, at minimum, require extensive further analysis, and an extension of the opportunity for public comment, before the Service is in a position to act on the proposal.

1. **While proposing to reclassify the manatee to endangered status, the proposed reclassification clearly and admittedly fails even to apply the statutory definition of an endangered species.** An endangered species is defined in the Endangered Species Act (“ESA” or “Act”) as “any species which is in danger of extinction throughout all *or a significant portion of its range*” 16 U.S.C. § 1532(6) (emphasis added). The proposed reclassification, however, expressly *refuses* even to analyze whether the manatee is endangered in a “significant portion of its range” (“SPR”) but, rather, is based exclusively on a finding that the manatee “is no longer in danger of extinction throughout *all* of its range” 81 Fed. Reg. at 1023 (emphasis added). The entirety of the Service’s rationale for refusing to address whether the manatee is endangered in an SPR – which would require that the endangered listing be maintained throughout the species’ range, *see* 79 Fed. Reg. 37578, 37609 (July 1, 2014) – is the following:

[b]ecause we have concluded that the West Indian manatee is a threatened species throughout all of its range, no portion of its range can be ‘significant’ for purposes of the definitions of ‘endangered species’ and ‘threatened species.’ See the



Service's Significant Portion of its Range (SPR) Policy (79 FR 37578, July 1, 2014)).

81 Fed. Reg. at 1024.

Thus, the Service's refusal to address whether the manatee is endangered in a significant portions of its range is based entirely on the Service's general SPR Policy, rather than any species-specific analysis. In any event, this refusal to make an SPR determination is flatly illegal. There is nothing in the Act that excuses the Service from making a finding as to whether a SPOR of the manatee qualifies as endangered merely because the Service has concluded that the manatee qualifies as threatened throughout the entirety of range. To the contrary, the ESA provides that the FWS must "determine whether any species is an endangered species or threatened species because of any" of five listing factors, 16 U.S.C. § 1533(a)(1); in turn, the definition of an endangered species, once again, explicitly encompasses species that are "in danger of extinction throughout all *or* a significant portion of its range" *Id.* § 1532(6) (emphasis added).

Hence, it would violate the plain language of the ESA for the FWS to downlist the manatee from endangered to threatened status without making any SPR determination. Indeed, if anything, the violation of the Act would be even more blatant in the context of a downlisting determination than it would be in the context of an initial listing decision. When the Service is making an initial listing decision, a threatened determination at least affords the species more ESA protection than it previously received (i.e., none). But where, as here, the Service is downlisting a species, the Service's illegal refusal to make an SPR determination means that the species will be receiving *less* legal and practical protection than was previously the case. *See Defenders of Wildlife v. Kempthorne*, Civ. No. 04-1230 (GK), 2006 WL 2844232, at * 11 (D.D.C. Sept. 29, 2006) (explaining that there are "important differences in the status of, and legal protections accorded to, endangered and threatened species," including with regard to the protection of critical habitat and the application of the ESA's "take" prohibition). Certainly, nothing in the ESA's language, structure, or overriding purpose allows the Service to *weaken* a species protection without making the SPR determination that is mandated by the explicit definition of an endangered species.¹

Although SMC disagrees with the FWS's finding that the manatee is no longer endangered throughout all of its range, even the Service's own proposed downlisting rule refers to portions of the manatee's range in which the species faces grave threats and that could qualify as significant portions of the species' range.² In sum, until and unless the FWS engages in an

¹ In addition to this substantive violation of the ESA, downlisting the manatee without making an SPR determination would also violate section 4(h) of the Act, which provides that the public must have an opportunity to "submit written comments on[] any guideline" that is used by the agency in making listing decisions. 16 U.S.C. § 1533(h). The portion of the SPR Policy that provided that the Service would not make an endangered SPR finding whenever the Service finds that a species is threatened throughout the entirety of its range was never made available for advance public notice and comment. That violation of section 4(h) is compounded by the Service's application of the SPR Policy to avoid making an SPR determination.

² *See, e.g.*, 81 Fed. Reg. at 1005 (explaining that, according to the International Union for the Conservation of Nature, "each of the subspecies (*Antillean and Florida*) by themselves was considered to be endangered and

appropriate SPR analysis – and subjects that analysis to public comment – the agency has no possible legal basis for moving forward with any downlisting proposal. *Cf. In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 794 F.Supp. 2d 65, 90 n.29 (D.D.C. 2011) (noting that because the FWS had “reasonably concluded that the polar was not in danger in *any* portion of its range at the time of listing,” the Court had no need to address whether particular areas “constitute a ‘significant portion’ of the polar bear range”).

2. The downlisting proposal is admittedly not based on the best available science. Downlisting decisions, like all listing-related decisions under section 4 of the ESA must be based on the “best scientific and commercial data available” to the Service. 16 U.S.C. § 1533(b)(1). The downlisting proposal here, however, is explicitly *not* based on the best available science. For example, in the downlisting proposal, the Service acknowledges that the population model on which it is heavily relying to make predictions as to the fate of the Florida manatee “do not capture recent severe cold events of 2009-2010 and 2010-2011, the 2012-present Indian River Lagoon (IRL) die-off event; or the 2013 red tide event.” 81 Fed. Reg. at 1005; *see also id.* at 1021 (“Runge *et al.*’s (2015, p. 1) analysis did not address the effect of the 2013 red tide event [which killed 267 manatees] in its assessment.”).³ Those events must be incorporated into the Service’s analysis – and subjected to additional public comment – before the Service could

declining due to a variety of threats identified in the IUCN classification criteria) (emphasis added); *id.* (“Based on expert and local opinion, population trends are declining or unknown in 84 percent of the countries where manatees are found.”); *id.* (“there were several thousand manatees in Guyana in 1963, but recent estimates suggest that there may be as few as 100 manatees remaining.”); *id.* (“Castelblanco-Martinez *et al.* (2012, pp. 141-42) state that no quantitative information exists for manatees outside the southeastern United States and that ‘experts and local people throughout the region agree that the number of manatees sighted per year has decreased over time.’”); *id.* at 1007 (“Efforts to conserve manatees outside the United States vary significantly from country to country.”); *id.* (“Watercraft collision is now considered the greatest threat to manatees in Puerto Rican waters.”); *id.* at 1010 (conceding that the “if the severe red tide frequency increases, the growth rates [in the southwest U.S.] could stabilize or begin to decline”); *id.* at 1012 (explaining that the “average estimate of 532 for the manatee population in Puerto Rico . . . is just within the numbers of a viable population”); *id.* at 1014 (“manatee habitat degradation and loss remains a threat in most countries”); *id.* at 1015 (“In Puerto Rico and the southeastern United States, threats to manatee habitat are well documented.”); *id.* (“All of these threats [to manatees in Puerto Rico] still remain, in varying degrees and immediacy.”); *id.* (“Within the southeastern United States, the potential loss of warm water at power plants and natural, warm-water springs used by wintering manatees is identified as a significant threat.”); *id.* at 1016 (“Poaching remains a major threat to the manatee population outside of the southeastern United States . . . and has been responsible for past declining numbers throughout much of the Antillean subspecies’ range.”); *id.* at 1017 (“poaching poses a serious threat to some manatee populations, especially in those areas where few manatees remain”); *id.* (poaching is a “major threat to manatees in Brazil, Columbia, Costa Rica, Cuba, Dominican Republic, French Guiana, Guatemala, Honduras, Mexico, Suriname, Trinidad and Tobago, and Venezuela”); *id.* at 1020 (“[w]atercraft that kill or injure manatees are a threat in some range countries outside the United States”).

³ *See also* USGS, *Status and Threats Analysis for the Florida Manatee, 2012* (Open File Report 2015-1083), at 1 (“the version of the Core Biological Model used in 2012 makes a number of assumptions that are under investigation”); *id.* at 2 (“Florida manatee population have experienced a number of unusual events since the last 5-year status review (FWS, 2007) that are not yet reflected in the analysis in this report: severe cold in the winters of 2009-10 and 2010-11, extensive loss of seagrass habitat in Indian River Lagoon in Brevard County, Fla., in 2011 and 2012, a severe red tide in the Southwest region in 2013; and an unusual mortality even of unknown cause in Brevard County in 2013. The potential effects of these particular events is being explored in 2015.”); *id.* at 20 (“One of the most important questions that has not yet been incorporated into the CBM concerns the implications of the severe cold winters of 2009-10 and 2010-11 . . . [I]f these winters are harbingers of a changing winter climate and such winters are expected to occur more frequently, then this might well raise the estimates of quasi-extinction risk.”).

conceivably rely on the model as the best available science. *See, e.g., Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981) (agencies may rely on models in rulemakings when they have satisfied the “requirement of public exposure of the assumptions and data incorporated into the analysis and the acceptance and consideration of public comment”).

The model is also predicated on assumptions that the Service has made no effort to defend, and that appear indefensible. *See Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998) (EPA’s reliance on a model was arbitrary and capricious when the agency knew that underlying key assumptions were wrong yet failed to provide a “full analytical defense” of the model). For example, the “various scenarios” in the Runge model were “considered as an ‘all or nothing’: either a particular threat was present at its current level (and remained at that level indefinitely), or it was removed completely.” 81 Fed. Reg. at 1011. In other words, the Service did not consider any “scenarios” in which existing threats become even *worse* over the course of time, although the “best available” science points to many scenarios in Florida alone under which threats such as cold events, red tides, *increasing* habitat destruction and degradation due to ever-increasing development in Florida, *increasing* manatee mortalities and injuries due to an ever-increasing number of boats plying Florida’s water ways, render future conditions for the manatee much *worse* than the present situation.

Indeed, the downlisting proposal concedes that *downlisting* itself will likely make the situation much worse because, under Florida law, funding available to enforce the Florida Manatee Sanctuary Act may be *reduced* should downlisting occur. *See* 81 Fed. Reg. at 1019. Since enforcement of manatee protections is already woefully inadequate throughout much of Florida – resulting in an average of “more than 80 manatees hav[ing] died from watercraft-related incidents each year” for the last five years, *id.* at 1020 – the failure of the model to address scenarios under which, e.g., watercraft-related mortalities significantly *increase* above even the presently intolerable levels renders the model a patently inadequate basis on which to base a downlisting determination. Reliance on the model under such circumstances violates elementary principles of administrative law, *see American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1005 (D.C. Cir. 1997) (an agency’s reliance on a model is arbitrary and capricious if “the model bears no rational relationship to the reality it purports to represent”), and also contravenes the “institutionalized caution” that must guide all of the Service’s decisions in implementing the Act. *TVA v. Hill*, 437 U.S. 153, 194 (1978).

3. The downlisting proposal violates the recovery criteria in the Manatee Recovery Plan. The ESA requires that the FWS “shall develop and implement” recovery plans that must include, among other elements, “objective, measurable recovery 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” of endangered or threatened species. 16 U.S.C. § 1533(f)(1). Thus, the statute plainly contemplates that recovery plans would establish the presumptive criteria by which downlisting and delisting decisions must be made. Here, however, the Service has made little if any effort to establish that the agency’s formal downlisting criteria – as set forth in the Service’s 2001 Florida Manatee Recovery Plan – have been satisfied. To begin with, the downlisting proposal makes no effort to establish that all of the specific downlisting “population benchmarks in each of the four [Florida] regions over the most recent 10 year period of time,” Recovery Plan at v, have been satisfied. *Id.* (providing that the following criteria “must

be met prior to reclassification”: “statistical confidence that the average annual rate of adult survival is 90% or greater”; “statistical confidence that the average annual percentage of adult female manatees accompanied by first or second year calves in winter is at least 40%”; and “statistical confidence that the average annual rate of population growth is equal to or greater than zero”). Rather, the proposal suggests that these criteria have been abandoned, *see* 81 Fed. Reg. at 1012, although the Service never amended the 2001 Recovery Plan pursuant to notice and comment proceedings, as required by the ESA for any revision, *see* 16 U.S.C. § 1533(f)(4), and even though the Service’s proposal does not point to any specific scientific evidence demonstrating that the demographic criteria – which *were* adopted following notice and comment proceedings – no longer remain valid or appropriate.⁴

As for the remaining downlisting criteria in the Recovery Plan, the Service also concedes, in effect, that they have not been satisfied. For example, as for the first criterion – “identifying minimum spring flows,” Recovery Plan at v, the downlisting proposal asserts that “[m]inimum spring discharge rates . . . have been identified for *some springs* used by manatees,” but that the “status of efforts to establish minimum flows for eight remaining springs are *unknown*.” 81 Fed. Reg. at 1012 (emphasis added). Likewise, although the Florida Manatee Recovery Plan established, as a *prerequisite* to downlisting, the establishment of a comprehensive network of protected warm-water refuge sites and accompanying feeding habitat sites, as well as a comprehensive “network of migratory corridors, feeding areas, calving and nursing areas,” Recovery Plan at v, 42, the downlisting proposal makes no finding that the network contemplated by the Recovery Plan has in fact been put in place. To the contrary, the proposal simply asserts that “research . . . has *identified* many of the foraging sites associated with the Florida manatee’s warm-water network, as well as migratory corridors, resting areas, and calving and nursery areas,” and that “[i]n *many* of these areas, manatee protection area measures are in place to protect manatees from watercraft collisions.” 81 Fed. Reg. at 1013 (emphasis added). The proposal further concedes that “[a]ddressing the pending loss of warm water habitat from power plant discharges *remains a priority activity needed to achieve recovery*,” *id.* at 1014 (emphasis added) – which is tantamount to an admission that the downlisting criterion pertaining to warm-water sites has not, in fact, been met. *See also id.* at 1016 (“For West Indian manatees in the continental United States, ensuring the continued availability of warm-water refugia sites is a critical need related to this listing factor [the present or threatened destruction, modification, or curtailment of the species’ habitat or range]”).

Such a dramatic – and largely unexplained – departure from the agency’s own formal recovery/downlisting criteria precludes the agency from finalizing the proposed downlisting. Indeed, in another recent instance in which the Service determined that the intent of its own recovery/downlisting criteria had not been met and that essentially the same threats that faced the species at the time of its endangered listing were still present, the Service withdrew the proposed downlisting. *See* 80 Fed. Reg. 79805, 79806 (Dec. 23, 2015) (declining to reclassify the

⁴ The proposal refers to a “2004 review of the demographic criteria” as raising questions regarding them, 81 Fed. Reg. at 1012. If the Service is suggesting that this “review” somehow amended the recovery criteria without a formal public notice and comment process, then the agency is conceding a violation of section 4(f)(4) of the ESA, 16 U.S.C. § 1533(f)(4).

endangered Arroyo toad as threatened). That is the same conclusion that the Service should reach here.⁵

4. The downlisting proposal concedes the inadequacy, or potential inadequacy, of regulatory mechanisms throughout the manatee's range.

The FWS's proposed downlisting recognizes that a "species may be determined to be an endangered or threatened species due one or more of the five factors described in section 4(a)(1)" of the ESA. 81 Fed. Reg. at 1014. Accordingly, it is indisputable that continuing to list the manatee as endangered may be warranted based on listing factor (D) – the "inadequacy of existing regulatory mechanisms," 16 U.S.C. § 1533(a)(1)(D), in conjunction with other present and future threats facing the species. The downlisting proposal, however, does not remotely establish that, even with an endangered listing driving efforts at manatee protection, regulatory mechanisms are in fact adequate to protect the species from ongoing habitat loss and degradation, boat strikes, and other dire threats. Worse, the proposal itself suggests that regulatory mechanisms may become weaker than at present should downlisting occur.

First, the proposal flatly admits that outside the southeastern U.S., regulatory mechanisms are demonstrably *inadequate* to protect manatees against the broad range of threats facing the species.⁶ This alone precludes a finding that listing factor (D) has been sufficiently addressed to warrant removing the species from the endangered classification.

Even as to manatees in the Southeastern U.S., the proposed downlisting does not remotely establish – or even seriously attempt to demonstrate – that non-ESA regulatory mechanisms are now sufficient to warrant a major change in the species' ESA status. For example, the downlisting proposal refers to Florida county Manatee Protection Plans ("MPPs"), 81 Fed. Reg. at 1009, but makes no finding as to whether, and the extent to which, these plans are actually being successful in reducing manatee mortalities from boat strikes and/or in reducing cumulative effects from habitat degradation and other impacts from an ever-increasing number of projects that have direct and indirect effects on manatees.

⁵ In contrast, in other situations in which the Service has downlisted species, it has generally found that its own recovery criteria have been satisfied, *e.g.*, 71 Fed. Reg. 40657, 40658 (July 18, 2006) (reclassification of the Gila trout from endangered to threatened); 72 Fed. Reg. 13027, 13035 (Mar. 20, 2007) (reclassification of the American crocodile distinct population in Florida from endangered to threatened) or, at minimum, provided a convincing explanation of why a particular criterion no longer needed to be satisfied. *E.g.*, 75 Fed. Reg. 21179, 21181 (April 23, 2010) (reclassification of Oregon chub from endangered to threatened).

⁶ *See, e.g.*, 81 Fed. Reg. at 1008 (admitting that the Puerto Rico presently "does not have a specific manatee area regulation . . . which allows for management and enforcement of boat speed restrictions and operations in areas where manatees are concentrated."); *id.* (admitting that the "effectiveness of . . . [Puerto Rico] manatee speed regulatory buoys have not been appropriately assessed, and enforcement is limited."); *id.* at 1019 (the "current speed regulatory buoys are ineffective [in Puerto Rico], in part because regulations do not identify the perimeter or area that each buoy regulates"); *id.* at 1018 ("Although manatees outside of the southeastern United States are legally protected by these and other mechanisms, full implementation of these international and local laws is lacking, especially given limited funding and understaffed law enforcement agencies"); *id.* (conceding that, outside the southeastern U.S., "enforcement remains a critical issue," that "mechanisms are needed to allow existing West Indian manatee protection laws to work as intended," and that "illegal poaching and destruction of habitat continue").

The proposal also refers to the Service’s “effect determination key with the U.S. Army Corps of Engineers and State of Florida,” *id.*, but other than generically asserting that “these procedures constitute appropriate and responsible steps to avoid and minimize adverse effects to the species and contribute to recovery of the species,” *id.*, the proposal sets forth no empirical data establishing that the key has *in fact* been successful in reducing manatee mortalities and injuries from boat impacts and/or in addressing ongoing habitat destruction and degradation. Likewise, the proposal asserts that the “Clean Water Act insures that discharges into waterways used by manatees are not detrimental to grass beds and other habitat features used by manatees,” 81 Fed. Reg. at 1013, with no supporting documentation that CWA permitting reviews by the Corps of Engineers and/or Florida Department of Environmental Protection have in fact been successful in stemming ongoing destruction and degradation of sea grass beds and other critical habitat features, let alone “insur[ing] that detrimental effects do not occur. Indeed, since neither of the agencies engages in any kind of meaningful cumulative effects analysis, their reviews of individual discharge permits obviously do not constitute “adequate” existing regulatory mechanisms to ensure that essential manatee habitat does not continue to be destroyed, degraded, and fragmented.

The proposal not only fails to establish the actual efficacy of any of the protective measures on which it summarily relies – let alone demonstrates that they will be effective upon reclassification from endangered to threatened – but, even more fatal to any downlisting, the proposal in effect concedes that regulatory mechanisms in Florida are *not* adequate to address the severe, imminent threats facing the species. Thus, with respect to the huge numbers of manatees that continue to be killed and injured each year, the proposal concedes that manatee protection regulations are only as good as their level of enforcement and that the maintenance of markers in manatee protection zones “require significant, continuing funding to ensure the presence of enforceable protection areas.” 81 Fed. Reg. at 1009. The proposal also acknowledges that while “[i]t is difficult to ascertain the adequacy of enforcement efforts,” it is clear that *many water ways have low compliance rates*, including “compliance rates . . . *as little as 14 percent.*” *Id.* at 1010 (emphasis added). Because “[a]n enforcement presence generally ensures a higher compliance rate,” *id.*, such low compliance rates undeniably reflect a total paucity of enforcement presence in much of manatee habitat in Florida. Since the Service also concedes that the watercraft-related manatee mortality continues to pose a grave threat to the species, the admitted inadequacy of enforcement of speed zones throughout much of manatee habitat overwhelmingly supports the maintenance of an endangered listing at least until vastly improved enforcement, and the resources necessary to maintain it, are empirically in place.

Indeed, remarkably, the proposed downlisting admits that the enforcement situation could become much worse upon downlisting, explaining that State funding to enforce the Florida Manatee Sanctuary Act would be placed at risk as a result of downlisting. *See* 81 Fed. Reg. at 1019 (“However, Florida statutes state that, [w]hen the federal and state governments remove the manatee from status as an endangered or threatened species, the annual allocation may be reduced,’ suggesting that *adequate funding could be problematic if downlisting occurs*”) (emphasis added). Since the “recent status review and threats analysis shows that watercraft-related mortality remains the single largest threat in Florida to the West Indian manatee,” *id.* at 1020, and “makes the largest contribution to the risk of extinction,” *id.*, the prospect that Florida’s enforcement of protections may be *reduced* is alone a sufficient basis to maintain the

species' endangered status. Indeed, at the same time that the proposal concedes that manatee protections may *weaken* as a direct consequence of downlisting, the proposal also states that the “threats associated with increasing numbers of watercraft will require continued maintenance and enforcement of manatee protection areas, and the adoption of additional areas both inside and outside the United States” devoted to manatee conservation. 81 Fed. Reg. at 1023. Simply put, with respect to the devastating toll that watercraft have and will continue to take on the species, the Service’s own proposal renders it impossible for the agency to make the legal and factual findings necessary to support downlisting on the current record.

Likewise, while conceding the crucial importance of maintaining a network of warm water sites, *e.g.*, 81 Fed. Reg. at 1011, the Service cannot point to *any* adequate existing regulatory mechanisms that even purportedly address this crucial problem. To the contrary, the proposal concedes that “[w]ithin the southeastern United States, the potential loss of warm water at power plants and natural, warm-water springs used by wintering manatees *is identified as a significant threat,*” and “that ensuring the continued availability of warm-water refugia sites *is a critical need . . .*” 81 Fed. Reg. at 1015, 1016 (emphasis added). Yet, other than vague admonitions that additional efforts are needed to comprehensively preserve such warm-water sites, the proposal does not even purport to claim that this issue is being adequately addressed.

5. The manatee continues to qualify for listing as endangered. Even apart from the fact that the Service has admittedly failed even to consider whether the manatee is endangered in a significant portion of its range, the Service’s proposal is devoid of any valid legal justification for listing the manatee as threatened instead of endangered. The proposal does not demonstrate, or even purport to demonstrate that the Service’s own formal recovery/downlisting criteria have been satisfied. Nor does the proposal demonstrate that the very same factors that resulted in the manatee’s initial placement on the endangered list have been ameliorated or will be ameliorated in the foreseeable future. To the contrary, the proposal itself concedes that the manatee continues to confront the same major threats that the species has faced since its endangered listing – *i.e.*, collisions with an ever-increasing number of watercraft throughout its range, as well as escalating habitat loss and degradation from ever-increasing human development pressures throughout its range – and that the species *also* faces *additional* severe threats such as loss of warm-water sites, red tide events, cold weather spells, and more. These are not the conditions under which the Service should – or, legally, may – downlist the species. *See generally In re Polar Bear*, 794 F. Supp. 2d at 83 (explaining that the “legislative history of the ESA indicates that Congress did not intend to make any single factor controlling when drawing the distinction between an endangered and a threatened species, *nor did it seek to limit the applicability of the endangered category to only those species facing imminent extinction*”) (emphasis added); *see also id.* at 83 (explaining that, according to the FWS itself, endangered status “does not necessarily mean that extinction is certain or inevitable,” but, rather, “depends on the life history and ecology of the species, the nature of the threats, and the species’ response to those threats”) (internal citation omitted).⁷

⁷ In the case of the polar bear, for example, a species that previously received no protection under the ESA, while stressing that “there is no single metric for determining if a species is ‘in danger of extinction,’” and thus warrants listing as endangered, the Service found that a threatened listing was appropriate where the principal threat facing the polar bear – global warming contributing to loss of sea ice – will play out over many years. *In Re Polar Bear*

6. At minimum, the Service should extend its decision-making for six months and reopen the public comment period. Although the Service has more than sufficient basis for simply withdrawing the proposed downlisting, at bare minimum the Service should, as the ESA provides, “extend the one-year period” by which a decision must ordinarily be made following a listing-related proposal for an additional “six months for purposes of soliciting additional data” and providing for a new public comment period on that data. 16 U.S.C. § 1533(b)(6)(B)(i). The Service is authorized to take this course when “there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned.” *Id.*

Especially if the Service intends, as proposed, to rely heavily on the USGS model as a basis for stripping the manatee of endangered status, there are certainly serious questions “regarding the sufficiency or accuracy” of that model as a basis for making a downlisting decision, as suggested by the Service’s own proposal and the model itself. Likewise, as discussed, the downlisting proposal itself raises grave unanswered questions about what will happen to non-federal manatee protections in the event that the manatee is downlisted, e.g., whether and to what extent Florida and/or Florida county protections will be weakened, either as a legal or practical matter, should downlisting occur. Accordingly, if the Service is not convinced by public comments to simply withdraw the proposal – as it should be – at minimum, the agency should invoke section 4’s six-month extension clause and reopen public comment after the USGS model has been updated in light of the best available science.

Sincerely,

/s/ Eric R. Glitzenstein

Eric R. Glitzenstein

On Behalf of Save the Manatee Club

Listing, 794 F. Supp. 2d at 83. In contrast, the severe threats facing the manatee are ongoing and imminent, as well as long-term in nature.