

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

SAVE THE MANATEE CLUB, et al.

Plaintiffs,

v.

BALLARD, et al.

Defendants.

Civil No. 1:00CV00076 EGS/JMF

SETTLEMENT AGREEMENT

WHEREAS, on January 13, 2000, plaintiffs, eighteen environmental organizations and three individuals, filed suit against the U.S. Army Corps of Engineers ("Corps") and the U.S. Fish and Wildlife Service ("Service") (the Corps and the Service are collectively referred to as "federal defendants"), alleging violations of several federal statutes, including the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, with regard to the Florida Manatee;

WHEREAS, by Order dated March 13, 2000, this Court granted the motion of the Association of Florida Community Developers, Inc. ("AFCD") to intervene as defendants in this case;

WHEREAS, on April 28, 2000, this Court granted the motion of the National Marine Manufacturers Association, the Marina Operators Association of America, and the Marine Industries Association of Florida, Inc. (collectively referred to as "NMMA") to intervene as defendants (AFCD and NMMA are collectively referred to as "intervenors");

WHEREAS, subsequent to the filing of the Complaint, plaintiffs, federal defendants and

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intervenors entered into extensive settlement discussions;

WHEREAS, plaintiffs, federal defendants, and intervenors, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to plaintiffs' claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the dispute;

WHEREAS, all parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them; and

WHEREAS, all parties agree that the commitments made within this settlement agreement are made to facilitate settlement of this action only;

THE PARTIES THEREFORE AGREE AS FOLLOWS:

MMPA RULES

1. Federal defendants will pursue a rulemaking proceeding to adopt MMPA incidental take regulations. Through the rulemaking process, the Service will determine if any anticipated incidental take meets the requirements set forth in § 101(a)(5) of the MMPA, 16 U.S.C. § 1371(a)(5). Federal defendants agree that the rulemaking proceeding will, at a minimum, consider all Corps permitting activities and Service activities potentially relating to watercraft impacts on manatees, including the Corps' issuance of permits, pursuant to section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, and section 10 of the Rivers and Harbors Act ("RHA"), 33 U.S.C. § 403, for watercraft access developments in Florida manatee habitat. Watercraft access developments are defined to include, but are not necessarily limited to, marinas, ramps, launches, slips, lifts, docks, dry storage facilities associated with proposed water access, and commercial moorings. The parties agree that this MMPA incidental take rulemaking proceeding will result in a proposed regulation and, if the requirements set forth in section 101(a)(5) of the MMPA are deemed by the Service to be satisfied, a final MMPA incidental take regulation; appropriate NEPA documentation; and a consultation pursuant to section 7 of the ESA, 16 U.S.C § 1536. The parties agree that the Service's NEPA evaluation will, at a minimum, include the direct, indirect, and cumulative effects of the overall MMPA regulation. Detailed assessments of agency programs, including cumulative effects on manatees and their

- habitat, will occur for any activities proposed to be covered under the regulation.
2. To implement the process agreed to in ¶ 1, within sixty (60) days of entry of an Order by the Court ratifying this Settlement Agreement (“Agreement”), the Service will submit to the Federal Register for publication an advance notice of proposed rulemaking for incidental take of the manatee under the MMPA. Also within sixty (60) days of the Court’s ratification of the Agreement, by separate letter, the Service will invite the Corps and other entities that conduct activities which may influence factors relating to effects of watercraft on manatees, to participate in the MMPA rulemaking process. Copies of the Federal Register notice and the Service’s letter, as well as any responses the Service receives from any other entities invited to participate in the MMPA rulemaking process, will be provided promptly to the below-signed counsel for plaintiffs and intervenors, subject to applicable laws governing disclosure of federal records and documents. In the event that the Service withholds responses from any entities invited to participate based upon applicable laws governing disclosure, the Service will provide the plaintiffs and intervenors with an index of responses withheld.
 3. Defendant U.S. Army Corps of Engineers (“Corps”) agrees to cooperate in the MMPA incidental take regulation adoption process referred to in ¶ 1 and will encourage other federal, state, and local agencies to participate. Within thirty (30) days of receiving a letter inviting the Corps to participate in the MMPA incidental take regulation adoption process, the Corps agrees to respond in writing to the Service indicating its willingness to participate and cooperate in the MMPA incidental take regulation adoption process and to apply for a Letter of Authorization. In agreeing to participate in this process, the Corps specifically maintains that its participation in the MMPA incidental take regulation adoption process is as a matter of comity and not an admission that its regulatory activities subject it to “take liability” under either the ESA or MMPA. By entering into this Agreement, intervenors do not admit that Corps’ regulatory activities subject the Corps or its permittees to “take liability” under either the ESA or MMPA.
 4. Subject to ¶ 18, the Service agrees to the following time frames for issuance of the proposed and final MMPA incidental take regulations referred to in ¶ 1:

- A. If the Service decides to prepare an Environmental Impact Statement (“EIS”) in connection with its issuance of MMPA rules, the Service will submit proposed regulations to the Federal Register for publication within twenty-two (22) months of entry of an Order by the Court ratifying this Agreement and, if the Service determines that the requirements of section 101(a)(5) of the MMPA can be satisfied, it will submit final regulations to the Federal Register for publication within 28 months of entry of an order by the Court ratifying this Agreement. If the Service determines that the requirements of section 101 (a)(5) cannot be satisfied with issuance of final regulations, it will so notify below-signed counsel for plaintiffs and intervenors as soon as practicable and, within twenty-eight (28) months of entry of an order by the Court ratifying this Agreement, it shall take steps consistent with 50 C.F.R. § 18.27(d)(4).
- B. If the Service decides to prepare an Environmental Assessment (“EA”) in connection with its issuance of MMPA rules, the Service will submit proposed regulations to the Federal Register for publication within sixteen (16) months of entry of an order by the Court ratifying this Agreement, and if the Service determines that the requirements of section 101(a)(5) of the MMPA can be satisfied, it will submit final regulations to the Federal Register for publication within twenty (20) months of entry of an order by the Court ratifying this Agreement. If the Service determines that the requirements of section 101(a)(5) cannot be satisfied with issuance of final regulations, it will so notify below-signed counsel for plaintiffs and intervenors as soon as practicable, and, within 20 months of entry of an order by the Court ratifying this Agreement, it shall take steps consistent with 50 C.F.R. § 18.27(d)(4).
- C. Within six (6) months from the Court’s ratification of this Agreement, the Service will notify, in writing, below-signed counsel for plaintiffs and intervenors as to whether the Service intends to prepare an EA or an EIS. If the Service intends to prepare an EA and accompanying Finding of No Significant Impact (“FONSI”), it agrees to take steps consistent with 40 C.F.R. § 1501.4.

INTERIM MEASURES

5. Pending completion of the MMPA incidental take regulation proceeding referred to in ¶ 1, the Corps will complete a revision of its 1997 document known as the 1997 manatee “key” which is used by the Corps as guidance in evaluating permit applications under section 404 of the CWA and section 10 of the RHA to determine which proposed activities “may affect” manatees, thereby triggering the requirement for consultation with the Service under section 7 of the ESA. The parties recognize that, under the revised key, all Corps-permitted activities that are likely to materially increase boat access in certain counties that contain manatee habitat would trigger a “may affect” determination. The Corps will provide an opportunity for at least thirty days of public comment on the revised manatee key and will, within ninety (90) days of entry of an order by the Court ratifying this Agreement, issue a final version of the revised key, after taking into account public comment, subject to the process set forth in ¶ 18. The parties agree that failure to adequately respond to written comments received during the public comment period on the key shall not be considered a material breach of this Agreement. The parties recognize that, pending completion of the notice and comment process on the revised manatee key, the Corps will use the version of the newly revised key which is set forth as Attachment A to this Agreement to determine whether a proposed activity “may affect” the manatee and hence require consultation with the Service pursuant to section 7 of the ESA and the Service’s implementing regulations for that statute. The parties recognize that the Corps intends to make decisions regarding permit applications for those activities which the Corps determines do not require ESA consultation under the revised manatee key. For those activities for which a “may affect” determination is made by the Corps based upon the revised manatee key, the Corps will initiate formal consultation with the Service unless the Corps obtains from the Service a written concurrence that the project is not likely to adversely affect the manatee or its designated critical habitat.
6. Pending completion of the MMPA incidental take regulation adoption process referred to in ¶ 1, the Service will develop a new guidance document for use in ESA section 7 consultations concerning Corps permitting actions pursuant to section 404 of the CWA

and section 10 of the RHA for watercraft access facilities, which have the potential to affect manatees and/or manatee habitat. The principal purpose of this interim guidance is to provide assistance in determining appropriate measures for eliminating any project-related adverse effects to manatees, and to guide the Service in evaluating the Corps' requests for letters of concurrence, requests for initiation of consultation, and during formal consultation to identify measures which eliminate the risk of take of manatees.

- A. The Service agrees, by no later than sixty (60) days following the Court's ratification of this Agreement, to provide an opportunity for at least thirty days of public comment on the revised draft guidance document and, within ninety (90) days following the close of the public comment period on the draft guidance document, to submit a final version of the revised guidance draft document to the Federal Register for publication along with the Service's responses to written comments received during the public comment period, subject to the process set forth in ¶ 18.
- B. In the event that the plaintiffs or intervenors dispute whether the Service adequately responded to a specific written comment submitted by the plaintiffs or intervenors during the public comment period for the draft guidance document, the parties agree to refer this matter to Magistrate Judge John M. Facciola or another Magistrate Judge should Magistrate Judge John M. Facciola ("Magistrate Judge") become unavailable. If the Magistrate Judge advises the parties that in his view the Service did not adequately respond to a specific written comment submitted by the plaintiffs or intervenors during a public comment period, the Service will provide plaintiffs and intervenors with an adequate written response to that specific written comment within thirty (30) days. If the Magistrate Judge advises the parties that in his view the Service did adequately respond to a specific written comment submitted by the plaintiffs or intervenors during the public comment period on the draft guidance, the plaintiffs and intervenors will accept that decision as final and not pursue an additional response from the Service. Invocation of this subsection will constitute plaintiffs' and intervenors' exclusive remedy for the Service's

alleged failure to respond adequately to plaintiffs' or intervenors' comments on the draft guidance document.

7. The parties recognize that, pending completion of the MMPA incidental take regulation proceeding (including the time period prior to the Service's publication of the guidance document in the Federal Register following public notice and comment), the Service will rely on the version of the guidance document which is set forth in Exhibit B to this Agreement, or as subsequently modified by the Service in light of public comments, during consultations with the Corps.
 - A. Pending completion of the MMPA incidental take regulation proceeding, the parties recognize that, for those proposed activities for which the Corps makes a not likely to adversely affect manatees determination within the meaning of 50 C.F.R. § 402.14(b), the Corps will request a written concurrence from the Service that the proposed activity is not likely to adversely affect the manatee or its designated critical habitat and that, in the absence of such written concurrence, the parties will pursue formal consultation regarding the proposed activities. The Service will provide written concurrence[s] when it determines that the effects on the listed species are expected to be discountable, or insignificant, or completely beneficial, as these terms are defined in the Service's March 1998 Endangered Species Consultation Handbook. Plaintiffs and intervenors specifically do not waive any right to challenge the Service's concurrence determinations regarding any individual project, to the extent authorized by applicable law. In recognizing this non-waiver, the Federal Defendants do not concede that plaintiffs or intervenors have any right to challenge concurrence determinations under applicable law.
 - B. Pending completion of the MMPA incidental take regulation adoption proceeding, for permit applications as to which formal consultation is pursued by the Corps, the Service will, as required by the ESA, prepare Biological Opinions assessing whether the proposed action is likely to jeopardize the continued existence of the manatee or result in destruction or adverse modification of critical habitat. During

the interim period, for such projects which the Service determines will not result in jeopardy or adverse modification of critical habitat, yet in the Service's opinion could result in the direct and/or indirect take of manatees, the Service intends to exercise its authority under the ESA to issue biological opinions that include the following statement in lieu of an incidental take statement:

The Service is not including an incidental take statement for manatees at this time because the incidental take of manatees has not been authorized under section 101(a)(5) of the Marine Mammal Protection Act and/or its 1994 Amendments and thus incidental take is unlawful. If such Special Regulations or authorizations are subsequently issued, the Service may amend this biological opinion to include an incidental take statement for manatees, as appropriate.

Based on such a biological opinion, the Corps generally intends to exercise its authority by denying such a permit application. However, the Corps is not, in entering into this Agreement, relinquishing its ultimate legal authority and discretion to make final permitting decisions in each particular instance in accordance with applicable law. The parties recognize that permits for projects that are "not likely to adversely affect" manatees and are issued under these interim measures will not necessarily be affected by final MMPA rulemaking.

8. The parties agree that the revised manatee key and new section 7 guidance document, as described in ¶¶ 5, 6, and 7 are only interim measures pending completion of the MMPA incidental take regulation adoption process referred to in ¶ 1. Plaintiffs and intervenors agree not to challenge either the revised manatee key or the new section 7 guidance document in any proceeding as being contrary to law or arbitrary and capricious on their face unless these documents are materially changed in a manner which is detrimental to the interest[s] of plaintiffs or intervenors following the public notice and comment processes described in ¶¶ 5,6, or at some subsequent time. If the parties disagree as to whether there has been a "material" change to the revised manatee key or section 7 guidance, the parties agree to refer the matter to the Magistrate Judge for informal resolution. If the Magistrate Judge advises the parties that in his view the document change is "material" then the

plaintiffs or intervenors shall have the right to challenge the new manatee key and/or section 7 guidance as being contrary to law or arbitrary and capricious on their face. If the Magistrate Judge advises the parties that in his view the document change is not "material," then the plaintiffs or intervenors agree not to challenge the new manatee key and/or section 7 guidance as being contrary to law or arbitrary and capricious on their face. In recognizing the dispute resolution provisions within this paragraph, the Federal Defendants do not concede that the plaintiffs or the intervenors have any right to challenge the said actions under applicable law. In agreeing to these dispute resolution provisions, plaintiffs and intervenors do not concede that any particular aspect of the guidance or key is valid under applicable law or is consistent with sound scientific principles.

9. Upon approval of this Agreement by the Court, plaintiffs' complaint shall be dismissed without prejudice, except with regard to plaintiffs' claim for attorneys' fees and costs, which remains pending. If plaintiffs and defendants are unable to resolve plaintiffs' claim for attorneys' fees and costs within thirty days following the Court's approval of this Agreement, plaintiffs will file an appropriate application with the Court. Notwithstanding the dismissal of plaintiffs' complaint, the parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve any motions to modify such terms.
 - A. Until this Agreement is terminated pursuant to ¶ 24, plaintiffs agree not to seek to set aside or enjoin on the specific grounds set forth in their complaint any Corps permitting decision under Section 404 of the CWA or Section 10 of the RHA, or any biological opinion or concurrence by the Service for any "may affect, not likely to adversely affect" determination by the Corps pertaining to such a permit decision, where the permit was issued (signed by the Corps) before the date of execution of this Agreement by the parties. This provision does not affect in any fashion any ability plaintiffs may have to seek to set aside or enjoin any specific agency action or decision relating to any specific permit decision issued following the execution of this Agreement by the parties. This provision has no applicability to any non-manatee related agency decision or action.

- B. Between the date of execution of this Agreement and the completion of the MMPA incidental take regulation adoption process referred to in ¶ 1, the plaintiffs and the intervenors do not waive, and specifically reserve, the right to challenge any Corps' permit decision, Corps' no effect determination, or biological opinion or concurrence by the Service for any "may affect not likely to adversely affect" decision by the Corps, on the basis that the decision including the application of the Key and/or Guidance as applied in that permit decision, no effect determination, biological opinion, or concurrence decision, was arbitrary or capricious, an abuse of discretion, or otherwise contrary to law; provided however, that until this Agreement is terminated pursuant to ¶ 24, the plaintiffs agree:
- i. not to seek to set aside or enjoin, on any of the specific grounds stated within the complaint, the permitting or consultation programs or general processes established to implement Section 404 of the CWA, Section 10 of the RHA, and Section 7 of the ESA with regard to the Florida manatee; and
 - ii. to limit relief sought to that particular agency action being challenged.
- C. The plaintiffs further do not waive any rights they may have to pursue any relief against any state permitting agency concerning state permitting of any project, including any project which received a Corps permit prior to the filing of the Agreement in this case.
- D. Until this Agreement is terminated pursuant to ¶ 24, intervenors agree not to seek to set aside or enjoin the permitting or consultation programs or processes established to implement section 404 of the CWA, section 10 of the RHA, and section 7 of the ESA, with regard to the Florida manatee, and to limit relief sought to the particular permit decision, no effect determination, biological opinion, or concurrence decision being challenged.
- E. In recognizing the non-waivers in this paragraph, the Federal Defendants do not concede that the plaintiffs or intervenors have any right to challenge the said

actions under applicable law.

10. Nothing in this Agreement precludes the federal defendants from further revising the revised manatee key or new Section 7 guidance document in light of new information, including any such information which is brought to the federal defendants' attention by the plaintiffs, the intervenors, or any other member of the public. If the federal defendants decide to consider revising the key or guidance document in light of any such information, they will notify below-signed counsel for plaintiffs and intervenors as soon as practicable.

DESIGNATION OF SANCTUARIES AND REFUGES

11. In accordance with 50 C.F.R. ¶¶ 17.100-17.107 and subject to ¶16, the Service agrees, by April 2, 2001, to submit to the Federal Register for publication a proposed rule for new manatee refuges and sanctuaries throughout peninsular Florida. Subject to ¶ 16, the Service agrees to submit to the Federal Register for publication, by September 28, 2001, a final rule for new manatee refuges and sanctuaries throughout peninsular Florida. The parties recognize that, in evaluating the need for refuges and sanctuaries the Service anticipates considering the needs of the manatee at an ecosystem level in order to ensure that adequate protected areas are available throughout peninsular Florida to satisfy the biological requirements of the species, with a view towards the manatee's recovery within the meaning of section 4 of the ESA. The parties recognize that the Service anticipates holding a preliminary scoping meeting with representatives from the other federal and state agencies responsible for designating and enforcing speed zones. The parties also recognize that, the Service has published an Advanced Notice of Proposed Rulemaking in the Federal Register, in order to solicit early public input on the new manatee refuges and sanctuaries. Additionally, the Service will evaluate the propriety of invocation of its emergency sanctuary/refuge designation authority with regard to any specific areas. The parties also recognize that the Service anticipates holding one or more workshops involving interested parties identified through responses to the Federal Register notice. The parties recognize that the Service may exercise its authority, as it deems appropriate, in accordance with 50 C.F.R. ¶ 17.100 - 17.107 and in consideration of input it receives from plaintiffs, intervenors, and other members of the public, to publish emergency

sanctuary and/or refuge designations at the same time that it proposes standard designations for these new areas in order to provide immediate protection as it deems appropriate.

EFFORTS BY SERVICE AND OTHER AGENCIES

12. The parties recognize that the Service anticipates that its law enforcement effort for FY-2001 will increase over that of FY-2000 in terms of staff hours spent enforcing manatee speed zones. In recognizing this fact, the parties in no way intend to diminish the critical role of the Florida Fish and Wildlife Conservation Commission and other state and federal agencies in curtailing manatee mortalities and injuries. While the parties recognize that the Service has discretion to use its appropriated enforcement funds as it sees fit, the Service agrees that, within sixty (60) days following the Court's ratification of this Agreement, the Service will furnish plaintiffs and intervenors with a letter generally describing how the Service intends to deploy its increased enforcement resources in FY-2001.
13. The parties also recognize that a lawsuit concerning manatees is pending in the United States District Court for the Northern District of Florida, which alleges violations of the Endangered Species Act by the Florida Fish and Wildlife Conservation Commission. The sanctuaries and refuges established by the Service pursuant to ¶ 11 of this Agreement are intended by the Service to address manatee habitat needs consistent with the Florida Manatee Recovery Plan (1996) and the purposes of 50 C.F.R. 17.100, and, consistent with ¶ 22, are not intended to affect in any fashion the pending claims in the litigation in the Northern District of Florida. The parties also agree to encourage efforts to achieve more accurate and comprehensive manatee population estimates and improve technologies to aid in manatee conservation.

REVISION OF THE MANATEE RECOVERY PLAN

14. Subject to ¶ 18, by December 1, 2000, the Service agrees to make a draft revised Recovery Plan for the Florida Manatee available for public review and comment, and to circulate its final revised Recovery Plan for signature not later than February 28, 2001.

The parties recognize that the Service anticipates that this revised Recovery Plan will include objective and measurable criteria for determining when the manatee may be reclassified from endangered to threatened. Plaintiffs and intervenors are not waiving or limiting in any fashion any right which plaintiffs or intervenors may otherwise have to seek judicial review of the content or adequacy of the Final Revised Recovery Plan. In recognizing this non-waiver, the Federal Defendants do not concede that plaintiffs or intervenors have any right to challenge the Final Revised Recovery Plan under applicable law.

NOTICE PROVISIONS:

15. Following the Court's ratification of this Agreement and pending completion of the rulemaking proceeding described in ¶ 1, the Service and Corps agree to the following procedures for providing plaintiffs and intervenors with notification of the status of specific projects potentially affecting the Florida manatee. Upon the Court's ratification of this Agreement, these notice requirements will replace those set forth in the parties' existing stipulation regarding plaintiffs' motion for a preliminary injunction, except where otherwise expressly provided.
 - A. Whenever the Corps sends a letter to the Service which makes a "may affect" determination or request for formal consultation with regard to a particular project, it shall concurrently make a copy of that letter available to plaintiffs and intervenors. The Corps may satisfy this obligation either by establishing a web-based system which any member of the public may access, or by transmitting a copy of the letter by U.S. mail or electronically to contact persons for plaintiffs and intervenors to be subsequently designated by plaintiffs and intervenors;
 - B. Whenever the Service sends a letter to the Corps in response to the Corps' determination that a project "may affect" the manatee or "may affect but is not likely to adversely affect" the manatee, it shall concurrently make a copy of the correspondence available to the plaintiffs and intervenors. The Service may satisfy this obligation either by establishing a web-based system which any member of the public may access, or by transmitting a copy of the letter by U.S. mail or

electronically to contact persons for plaintiffs and intervenors to be subsequently designated by plaintiffs and intervenors; and

- C. Whenever the Service issues a final Biological Opinion regarding the effect of a particular project on manatees or manatee critical habitat, it shall concurrently make a copy of that opinion available to plaintiffs and intervenors. The Service may satisfy this obligation either by establishing a web-based system which any member of the public may access, or by transmitting a copy of the opinion by U.S. mail or electronically to contact persons for plaintiffs and intervenors to be subsequently designated by plaintiffs and intervenors.
- D. In accordance with 40 C.F.R. §§ 1506.6(b), (b)(1), the Corps agrees that, where plaintiffs have requested in writing notice of availability of the Environmental Assessment and Finding of No Significant Impact, and/or an Environmental Impact Statement concerning a specific proposed permit decision potentially affecting the Florida manatee, the Corps will make the document available to plaintiffs immediately following its issuance, by faxing or mailing it, or making it available electronically, to contact persons for plaintiffs and intervenors to be subsequently designated by plaintiffs and intervenors.
- E. The Federal Defendants agree to furnish plaintiffs and intervenors with status reports every six (6) months following the Court's ratification of this Agreement until completion of the MMPA rulemaking proceeding referred to in ¶ 1. The sole purpose of these status reports is to indicate whether or not the Federal Defendants anticipate accomplishing the tasks agreed to within this Agreement within the time frames set forth in this Agreement.

DISPUTE RESOLUTION AND MISCELLANEOUS PROVISIONS

- 16. The parties agree that this Agreement was negotiated in good faith and it constitutes a settlement of claims that were vigorously contested, denied, and disputed by the parties. By entering into this Agreement, plaintiffs, federal defendants, and intervenors do not waive any claim or defense on any grounds except as expressly provided by this Agreement.

17. The parties stipulate to the following dispute resolution procedure for disputes other than those governed by ¶¶ 6(B), 8, and 18:
- A. In the event that any dispute or potential dispute arises between the parties with respect to the terms or conditions of this Agreement, the party asserting such dispute shall invoke the provisions of this paragraph prior to seeking resolution of the dispute by other means, including seeking relief from the Court.
 - B. In the event of any dispute or claim (“controversy”) arising out of or relating to this Agreement or an alleged breach thereof, the parties shall use their best efforts to settle the controversy. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to all parties. Any party asserting a controversy shall notify all other parties hereto, in writing, stating the nature of the matter to be resolved and the position of the party asserting the controversy (the “notice of controversy”). The party receiving the notice of controversy shall respond in writing within ten (10) working days, stating its position regarding the controversy. The parties shall thereafter attempt to resolve the controversy, using the assistance of the Court or the Magistrate Judge. For purposes of this paragraph, notice shall be deemed provided when the written notice of controversy is actually received by Matthew A. Love, Trial Attorney, or the Section Chief of the Wildlife and Marine Resources Section of the U.S. Department of Justice, Environment and Natural Resources Division, on behalf of the defendants; Eric Glitzenstein on behalf of the plaintiffs; and Virginia S. Albrecht or Robert L. Gulley on behalf of the intervenors.
 - C. If the parties do not resolve the controversy to their mutual satisfaction within ten (10) working days from the date on which the response to the notice of controversy is delivered, the aggrieved party may file a motion for relief to be adjudicated by the Court.
18. The parties recognize that the time frames which the federal defendants have committed to in ¶ 4 are based upon the assumption that the only parties participating in the MMPA

regulation adoption process referred to in ¶ 1 are the Corps and the Service. The schedules set forth in this Agreement may be revised for good cause. Should a federal defendant determine that good cause exists to delay any of the schedules set forth in this Agreement, federal defendants shall provide notice to that effect, as soon as practicable, to plaintiffs' and intervenors' counsel. Should plaintiffs or intervenors dispute federal defendants' determination that good cause exists to delay any of the schedules set forth in this Agreement, that party may invoke the dispute resolution procedures in ¶ 17(A) and (B) within thirty (30) days from the date of Federal Defendants' notice revising schedule. If the parties do not resolve the controversy to their mutual satisfaction within ten (10) working days from the date on which the response to the notice of controversy is delivered as outlined in ¶ 17(B), the aggrieved party may seek an opinion from the Magistrate Judge as to whether the federal defendants' determination that good cause exists to delay the schedules set forth in this Agreement is a material breach of this Agreement, if not cured immediately, and what would be an appropriate remedy. The parties herein are not bound by the Magistrate Judge's determination as to material breach and appropriate remedy, if any. Within thirty (30) days following receipt of the Magistrate Judge's opinion, the plaintiffs may file a motion with the District Court to terminate this Agreement and reinstate their claims, or for other appropriate relief.

19. Nothing in this Agreement shall be interpreted or construed as a commitment or requirement that federal defendants or any other federal agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation.
20. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that federal defendants take actions in contravention of the ESA, CWA, MMPA, APA, or any other law or regulation, either substantive or procedural.
21. Except as expressly provided herein, nothing in this Agreement shall be construed to limit or modify the Service's or the Corps' discretion under any applicable law, including but not limited to the ESA, MMPA, CWA or general principles of administrative law. Except as expressly provided herein, nothing in this Agreement shall be construed to limit or

modify plaintiffs' or intervenors' ability to seek judicial review of any federal agency action.

22. Neither this Agreement nor its contents shall be offered as evidence by any party nor be used as precedent in any administrative or judicial proceeding, except that it may be used as a basis for enforcement of the Agreement's own terms.
23. This Agreement may be modified by written agreement of the parties.
24. This Agreement shall terminate upon the completion of the MMPA incidental take regulation adoption process referred to in ¶ 1, unless the parties agree to terminate the Agreement at an earlier time, or upon the Court terminating the Agreement upon motion of a party.
25. The terms of this Agreement shall become effective upon entry of an order by the Court ratifying this Agreement.

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the National Marine Manufacturers
Association, the Marina Operators
Association of America, and the
Marine Industries Association of Florida, Inc.

Dated:

ORDER

IT IS SO ORDERED.

Date:

U.S. DISTRICT JUDGE EMMET G. SULLIVAN