

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 633 Manatee Recovery
SPONSOR(S): Harrington
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1676

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Natural Resources</u>	_____	<u>Camechis</u>	<u>Lotspeich</u>
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

This bill creates a presumption that existing state manatee protection rules are adequate and additional rules unnecessary in a region where measurable biological goals established by the Florida Fish and Wildlife Conservation Commission (FWC) are being achieved; however, the presumption does not prevent the FWC from amending existing rules or adopting new rules to address issues that are “unique” to a particular region. The bill does not provide a definition of the term “unique” that will be applied by the FWC in determining whether the presumption prevents rule amendment or development.

Florida is divided into the following four regions for purposes of analyzing the status and trends of manatee populations:

1. Northwest Region, which includes the rivers along the Big Bend coast;
2. Upper St. Johns River Region, which covers upstream, south of Palatka and includes the Blue Spring warm-water refuge;
3. Atlantic Coast Region, which includes the lower St. Johns River, the east coast, and the Florida Keys;
4. Southwest Region, which covers Tampa Bay southward to Whitewater Bay.

The measurable biological goals established by the FWC are as follows:

- Statistical confidence that the average annual rate of adult manatee survival is 90 percent or greater;
- Statistical confidence that the average annual percentage of adult female manatees accompanied by first or second year calves in winter is 40 percent or greater; and
- Statistical confidence that the average annual rate of population growth is equal to or greater than zero.

This bill does not appear to have a direct fiscal impact on state government, local government, or private entities.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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DATE: March 31, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

CURRENT SITUATION

Florida Manatee (West Indian Manatee species)

The manatees found throughout Florida's rivers, estuaries, and bays are members of the West Indian manatee species and are native to Florida's coastal and riverine waters. Adult manatees typically average 8-10 feet in length and weigh an average of 1,000-1,200 pounds while the largest manatees may reach 13 feet in length and weigh over 3,500 pounds. Manatees eat a variety of aquatic plants, as much as 200 pounds per day, and are often seen near natural or artificial fresh water sources. Gestation lasts approximately 13 months and typically results in the birth of a single calf measuring 3-5 feet in length weighing approximately 65 pounds. Calves remain with their mothers for up to two years. Manatees are warm-blooded and seek refuge from cold temperatures in natural springs or congregate in manmade sources of warm water such as power plants and other industrial facilities with thermal plumes. Results of aerial surveys conducted by the FWCC are summarized as follows:

Year	Total Florida Manatee Population
1991	1,465
1999	2,353
2000	2,223
2001	3,276
2002	1,796
January 21-22, 2003	3,113

The manatee is listed by both the U.S. Fish and Wildlife Service (USFWS) and the Florida Fish and Wildlife Conservation Commission (FWC) as an endangered species, and has been protected in Florida since 1892. Manatees are killed or injured by a variety of human-related causes including collisions with watercraft, being crushed in water control gates and boat locks, and becoming entangled in fishing gear. Manatees also die as a result of exposure to harmful algal blooms such as red tide, the effects of cold water, and disease. Manatee habitat loss or degradation is also of concern, including future changes in artificial warm water refugia upon which many manatees have become dependent.

The number of manatee deaths from water-related incidents, such as collisions with boats and other watercraft, is documented by the FWCC as follows:

Year¹	Total Manatee Mortalities	Total Manatee Mortalities Due to Watercraft Incidents
1998	231	66
1999	269	82
2000	272	78
2001	325	81
2002	305	95
2003	380	73

Today, state manatee rules apply to approximately 298,817 acres of Florida waters with other areas being considered for protection.² Additionally, approximately 10,058 acres are designated as federal manatee refuges or sanctuaries. Florida has significantly increased law enforcement in manatee protection areas, has developed measurable biological goals to assist in defining recovery of the manatee population, and has instituted additional public education programs to enhance manatee protections.³

Florida is divided into the following four regions for purposes of analyzing the status and trends of manatee populations:

1. Northwest Region, which includes the rivers along the Big Bend coast;
2. Upper St. Johns River Region, which covers upstream, south of Palatka and includes the Blue Spring warm-water refuge;
3. Atlantic Coast Region, which includes the lower St. Johns River, the east coast, and the Florida Keys;
4. Southwest Region, which covers Tampa Bay southward to Whitewater Bay.

Florida Manatee Sanctuary Act

The Florida Manatee Sanctuary Act (Act), found in s. 370.12(2), F.S., was initially adopted in 1978 and is designed to protect the manatee from injury or harassment and to provide protection from the operation and speed of motorboats. The Act declares that the entire State is a refuge and sanctuary for manatees, and that the protections extended to and authorized by the Act are independent of, and not contingent upon, the manatee status as a state or federal listed species.

In areas of the State specified by the Act, the FWC must adopt rules under Chapter 120, F.S., known as the Administrative Procedure Act (APA), regulating the operation and speed of motorboat traffic only where manatee sightings are frequent and the best available scientific information, as well as other available, relevant, and reliable information, which may include but is not limited to, manatee surveys, observations, available studies of food sources, and water depths, supports the conclusions that manatees inhabit these areas on a regular basis.

The FWC may designate, by rule adopted pursuant to the APA, other portions of state waters where manatees are frequently sighted and the best available scientific information, as well as other available,

¹ Statistics provided in this table were obtained from the FFWC Marine Mammal Pathobiology Laboratory, <http://floridaconservation.org/manatee/>

² FWCC Position on Proposed Stipulated Order in Save the Manatee Club, Inc. v. Ballard, USDC, 1:00CV00076

³ FWCC Position on Proposed Stipulated Order in Save the Manatee Club, Inc. v. Ballard, USDC, 1:00CV00076

relevant, and reliable information, which may include but is not limited to, manatee surveys, observations, available studies of food sources, and water depths, supports the conclusion that manatees inhabit such waters periodically. Upon designation of such waters, the FWC must adopt rules pursuant to the APA to regulate motorboat speed and operation which are necessary to protect manatees from harmful collisions with motorboats and from harassment. The FWC may also adopt rules pursuant to the APA to protect manatee habitat, such as seagrass beds, within such waters from destruction by boats or other human activity.

Except for emergency rules adopted under s. 120.54, F.S., all proposed rules of the FWC for which a notice of intended agency action is filed proposing to govern the speed and operation of motorboats for purposes of manatee protection must be submitted to the counties in which the proposed rules will take effect for review by local rule review committees.

Measurable Biological Goals

In 2002, the Legislature amended s. 372.072, F.S., to require the FWC to work in conjunction with the USFWS to develop, by February 15, 2003, measurable biological goals to define manatee recovery. The measurable biological goals must be used by the FWC in its development of management plans or work plans and, "in addition to other criteria," must be used by the FWC when evaluating existing and proposed protection rules, and in determining progress in achieving manatee recovery.

In 2001, the USFWS issued its "Florida Manatee Recovery Plan, 3rd Revision" (Revision). In this Revision to the manatee recovery plan, the USFWS recognized that significant progress has been made towards recovery and that the species may warrant reclassification to threatened status if recovery criteria are met and threats are reduced or removed. Additionally, the USFWS noted that great care was taken in the Revision to provide what the USFWS believes are "objective measurable criteria" which, when met, would result in a determination that the species be removed from the list of threatened and endangered species. These criteria set benchmarks for standard population demographics such as survival and growth rate, that are a means to evaluate the success of conservation measures to reduce or remove existing and long-term threats to recovery.⁴ However, the USFWS noted that the focus should not be on how many manatees there are, but on whether threats to the species' existence are being reduced. Even under the best circumstances, the USFWS concluded that complete recovery of this species is difficult to predict, and resolving long-term threats may take many years.⁵

The population benchmarks established by the USFWS in the Revision are as follows:

- Statistical confidence that the average annual rate of adult manatee survival is 90 percent or greater;
- Statistical confidence that the average annual percentage of adult female manatees accompanied by first or second year calves in winter is 40 percent or greater; and
- Statistical confidence that the average annual rate of population growth is equal to or greater than zero.

The population benchmarks should be achieved within a 95 percent level of statistical confidence in each of the four regions for a 10-year period of time before the manatee can be reclassified to threatened status at the federal level.

In January 2003, the FWC endorsed the population benchmarks established by the USFWS as the "measurable biological goals" required by s. 370.12 (2), F.S. The FWC required that the measurable biological goals be reviewed within one year from adoption. The FWC noted in the *Save the Manatee Trust Fund 2002-2003 Annual Report*, that the statute required the establishment of measurable biological goals, but that there are many other goals and objectives in the Recovery Plan that are

⁴ Florida Manatee Recovery Plan, Third Revision, USFWS FAQ, Oct. 30, 2001, p. 2

⁵ Florida Manatee Recovery Plan, Third Revision, USFWS FAQ, Oct. 30, 2001, p. 2

critical to the long-term survival of the species. In particular, the provision of viable habitat components, such as warm water springs, is of major importance.⁶

Marine Mammal Protection Act of 1972 (Federal)

The Marine Mammal Protection Act (MMPA), enacted in 1972 and reauthorized in 1994, designates manatees as a marine mammal in danger of extinction or depletion due to human activities. The primary purpose of the MMPA is to prohibit the taking of marine mammals except under certain conditions such as conducting scientific research or enhancing the recovery or survival of a species. Portions of the MMPA authorize the "incidental taking" of marine mammals but only upon the condition that such a taking will have a negligible impact upon the species. This "incidental taking" by industries such as development or commercial fishing cannot be intentional.

In circumstances where persons possessing "incidental take" permits are found to have violated the "incidental take" permit, or failed to comply with provisions of the MMPA, the Secretary of the Interior is authorized to withdraw or suspend "incidental take" permits, thereby effectively stopping construction of marinas, docks, boating facilities, or any other structure, including single-family homes, where destruction of manatee habitat may result in an "incidental take" of the species.

Endangered Species Act of 1973 (Federal)

The Endangered Species Act (ESA), enacted in 1973 and amended in 1996, designates that species of fish (including marine mammals), wildlife and plants which are so depleted they are in danger of or threatened with extinction must be conserved. Section 9 of the ESA provides that it is illegal for persons to "take" any species, or violate any regulation protecting any species that are designated as threatened or endangered. Section 10 of the ESA provides for "incidental take" permits in the same manner as the MMPA, and Section 17 of the ESA provides that no provision of the ESA, may take precedence over provisions of the MMPA.

EFFECT OF PROPOSED CHANGES

This bill amends s. 370.12 (2), F.S., to create a presumption that existing state manatee protection rules are adequate and additional rules unnecessary in a region where measurable biological goals established pursuant to s. 372.072 (6), F.S., are being achieved; however, the presumption does not prevent the FWC from amending existing rules or adopting new rules to address issues that are "unique" to a particular region. The bill does not provide a definition of the term "unique" that will be applied by the FWC in determining whether the presumption prevents rule amendment or development.

C. SECTION DIRECTORY:

- Section 1. Amends s. 370.12(2), F.S., regarding measurable biological goals.
- Section 2. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

- 1. Revenues: None.
- 2. Expenditures: None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

- 1. Revenues: None.
- 2. Expenditures: None.

⁶ *Save the Manatee Trust Fund 2002-2003 Annual Report*, p. 13.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other: None.

B. RULE-MAKING AUTHORITY: The bill appears to restrict the FWC's rulemaking authority by establishing a presumption that FWC rules are adequate and that additional rules are unnecessary in a region where measurable biological goals adopted by the FWC are being achieved. However, the FWC may address issues that are "unique" to a region. The bill does not provide a definition of the term "unique", therefore, the types of issues that would be considered "unique" to a region are not apparent.

Section 20.331(6)(c), F.S., requires the Commission to follow the provisions of the APA when adopting rules in the performance of its statutory duties or responsibilities. The statutory duties listed in that provision include "research and management responsibilities for marine species listed as endangered, threatened, or of special concern, including...manatees." In 2003, the Florida Supreme Court upheld this provision concluding that it does not usurp the constitutional authority of the FWC to regulate marine life. Caribbean Conservation Corporation, Inc., v. FWCC, 838 So.2d 492 (Fla. 2003).

In January 2003, the Commission voted to "adopt" measurable biological goals at a meeting of the Commission held in Ft. Myers, Florida. However, it appears that the FWC has not adopted a rule pursuant to the APA to formally establish those measurable biological goals as applicable throughout the State.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The FWC provided the following comments regarding this bill:

Existing law (§372.072(6), FS) requires that the FWC use the measurable biological goals "*in its development of management plans or work plans. In addition to other criteria, these measurable biological goals shall be used by the commission when evaluating existing and proposed protection rules, and in determining progress in achieving manatee recovery.*" Further, §372.072(6), FS, requires that other criteria (in addition to the measurable biological goals) also be considered when evaluating existing or proposed manatee protection rules. This is a critical difference from the proposed language because it recognizes that assessing just the status of a sub-population does not address all of the reasons for protecting manatees. Existing law provides that manatee protection rules may be established for the intent of reducing injuries and harassment, as well as protecting habitat, §370.12(2)(n). Other paragraphs of the statute direct the FWC to adopt rules "*to protect manatees from harmful collisions with motorboats and from harassment*" and "*to protect manatee habitat, such as seagrass beds, within such waters from destruction by boats or other human activity.*"

Watercraft-related deaths is a component of total manatee mortality, which in turn affects all three measurable biological goals. If an area is experiencing increased watercraft injury or mortality, it can take some time for this increased mortality to be detected in adult survival and reproductive rates, because of the methods by which these rates are estimated (photo identification during winter months) and the long gestation time (13 months) for manatees. A region that currently meets or exceeds the measurable biological goals may still need further speed zone regulation for other purposes that appear in Florida Statute. The proposed bill could unintentionally create a conflict within Florida Statutes regarding the other statutory and biological reasons to create manatee protection zones. An amendment in the proposed bill language that addresses this issue is suggested at the end of this analysis.

It appears that the last sentence in the proposed language contemplates providing the commission with the ability to address unique circumstances. However, the language as written identifies issues unique to a particular region. While it may be difficult to demonstrate that the circumstances in one region are unique as compared to the other three regions, there may be cases where unique issues or risks could be identified for a specific area or water body within a region. The suggested amendment addresses this issue as well.

* * *

The proposed legislation will change how the FWC will assess the need for additional manatee protection rules. If it is determined that additional rules are needed to protect manatees in a region that is meeting the measurable biological goals, the FWC will need to demonstrate the unique issues associated with that area to warrant additional rules.

As proposed, it is not clear how this change will affect the state's overall ability to address manatee concerns. If it is perceived as hampering the states effectiveness, the possibility of federal intervention from the U.S. Fish and Wildlife Service could increase. Increased federal involvement in establishing manatee protection zones could have impacts on counties, municipalities, private riparian interests, and industry. The suggested language below addresses this issue without changing the intent of the bill.

The FWC proposed the following substitute revision to s. 372.12(2), F.S.:

The commission in evaluating existing and proposed manatee protection rules shall use the measurable biological goals for manatee recovery adopted pursuant to s. 372.072(6). Existing manatee protection rules shall be presumed to be adequate and additional rules unnecessary in a region when the measurable biological goals are being achieved in that region. However, such presumption shall not prevent the commission from amending existing rules or adopting new rules to protect manatees in order to address unique risks or circumstances in a particular area or water body.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A