

My name is Jim Mensay, and I'm the President of the Houston Underwater Photographic Society (HUPS). I will be making comments for HUPS on the Flower Garden Banks National Marine Sanctuary (FGBNMS) Draft Management Plan (DMP) and the Federal Register / Vol. 75, No. 204 / Friday, October 22, 2010 / Proposed Rules for the FGBNMS.

I am aware that, in general, the dive community supports the DMP and Proposed Rules, with the exception of the Ray and Whale Shark proposal. We agree with the dive community that this part of the Proposed Rules needs massive rework. I am also aware that Texas Gulf Coast Council of Diving Clubs (TGCC) has made verbal and written comments about the DMP and Proposed Rules. Their thoughts on the following issues are consistent with ours and therefore we have reduced our comment detail about the following 11 issues.

HUPS agrees with TGCC and recommends to the FGBNMS:

1. Flying both the Alpha and Diver Down flags.
2. Boundary expansion is a good thing – as long the Ray and Whale Shark proposed rules are realistic and promote safe interaction with these creatures.
3. We support the expansion of the buoy mooring system. We support diving and boating safety.
4. The costs for this plan are larger than we expected. A smaller budget is better.
5. The “fishing and diving” impact studies – HUPS agrees with a wait and see approach, since we believe that for many years both activities have been properly managed at the FGBNMS.
6. The “user information system” is a good thing that should provide visitor, trip and sighting information critical for sanctuary management and planning.
7. Long term “Research and Monitoring” should be continued. Budget concern should dictate how and when this is expanded to any additional banks that become added to the FGBNMS.
8. Increased protection is important for the sanctuary because of its planned expansion and greater public awareness. However, by protection we are not saying that additional or more restrictive rules need to be developed. What we are saying is that Law Enforcement needs to be present and obvious to all sanctuary visitors to insure that intentional damage to sanctuary equipment (buoys, etc.), to the coral bottom (illegal anchoring, intentional destruction, etc.) or the removal of bio-mass by illegal fishing is prevented. These require no new rules, just an increased enforcement presence.
9. We support the asymmetrical, minimum boundary concept if and when additional banks are added to the sanctuary.
10. We understand that there is some flexibility with the rules for the new banks. If spearfishing is currently an ongoing activity on a new bank or at a platform in the new sanctuary boundary, we can understand it being allowed.
11. We agree with TGCC's point that the FGBNMS is a “resource ...entrusted to them by the local community (recreational divers, recreational fishermen, researchers, Oil & Gas industry and boaters)”. It was given to be managed –

to provide a guiding hand balancing the needs of its users, the resource and the general public. Properly managed, it should stay a “Marine Sanctuary”, not go in the direction of becoming a “No Human Activity” zone as the Ray and Whale Shark Proposed Rule would lead one to conclude.

Before I continue with comments on the topic that concerns HUPS the most (Ray and Whale Shark) I would like to further introduce HUPS and its level of experience with this sanctuary and the issues it faces. HUPS did its first club dive of the Flower Gardens in August of 1988. HUPS has previously supported the FGBNMS efforts during its founding, its expansion to include Stetson Bank and by providing comments during the “scoping process” for this DMP. As a group, similar to other diving clubs, we have traveled to the FGBNMS on either the MV Fling or MV Spree and enjoyed diving and photographing the marine life found in the sanctuary. As individuals, many of our present and past members (from a President of “GREAT”, to numerous Sanctuary Advisory Council members, to writers and photographers) have contributed to the FGBNMS experiment and helped put it on the map.

The focus of HUPS is underwater photography, therefore the issue most pertinent to our members is the opportunity to interact with and photograph large marine creatures. Frankly, that’s probably why most people go to the FGBNMS. That issue is at the heart of the “Ray and Whale Shark” proposed rules.

When we first became aware of an intent to include this topic in the DMP, we believed that the historic practices from sanctuary designation time were simply being documented (no riding, no intentional touching, no harassing or intentional disturbing). As our focus is underwater photography, we always assumed that the animals shouldn’t be killed or injured.

Because the proposed rule goes way past being a summary of current practices, it should have reasons specific to the FGBNMS where it will apply. For example, maybe there’s an excessive amount of touching, or riding, or chasing going on that the general public is unaware of. We know of none.

Let me try and bullet the issues HUPS has with this “Ray and Whale Shark” proposed rules:

1. No justification specific to the FGBNMS for a rule that has an “intent ...to prevent human interaction”. Rather than a local justification, this has more of the feel of a Federal ideal, applied to the wrong sanctuary and taken way too far.
2. A stated intent to “prevent human interaction” is more consistent with a human no activity zone rather than what we would expect from a National Marine Sanctuary – a place that promotes and encourages safe visitor/nature interactions so that its visitors develop a positive personal appreciation for nature. I know that “prevent human interaction” has additional clarifying

wording like “potential to disrupt”, but that just comes back to “prevent human interaction”.

3. The scope of this regulation is not supported by the document itself. “Ray” is a general term that covers numerous species, which have many different behavior patterns. Most of the information in the proposal covers only Manta rays. Their behavior is not typical of every ray’s behavior. This regulation should be clarified to accept proper interaction behavior, common sense and knowledge about each species of animal covered by it. For example, there needs to be a distinction between what is allowable when approaching a manta ray, verses what is appropriate when swimming near a sting ray that is buried and hidden in the sand. It may also be that Whale Shark should not be combined with the Ray. For example, if there is a local problem with touching for one but not the other, then that animal should have stronger rules than the other. It may also be that one species of animal initiates touching and rubbing with divers, boats, and oil & gas platforms while other species of animals do not.
4. It is apparent that no consideration is given to the intelligence of these animals or to actions initiated by them. In a sanctuary where managing a proper interaction between man and nature is part of the plan, this would be important.
5. Communication between these animals and man is incorrectly portrayed in this regulatory proposal. Many of the animal movements quoted as “disturbing” are more often associated with curiosity, friendliness, identifying a comfort zone or are typical behavioral patterns these animals display with every other animals in their environment.
6. There is also a generalization of scientific findings in the Proposed Rules from high human impact areas that allows diver/animal behavior that does not exist at the FGBNMS. It is questionable that conclusions drawn from them should be used to support for rule changes for a low human impact area like the FGBNMS.
7. Although all activities (diving, fishing, boating, swimming, oil & gas, etc.) have the “potential to” affect these animals in a negative manner, it is probable that only a minimal number actually do. Only those that do need to be targeted by this rule. For example, so far the only activity we have been able to identify that significantly disturbs and slightly injures rays is the manta ray tagging procedure. We understand that this is done for research and tracking purposes.
8. The statement “or conduct any other activity that ... has the potential to disrupt” in the proposed Ray and Whale Shark regulations is a “catch all” phrase that should not be at part of this rule. Everything has the potential to disrupt! The problem is how far do we hold people responsible under these rules! For example we all know that even the act of a diver entering the water may attract a manta ray – both a change of direction and “potential to disrupt” violation. Under these rules, the diver entering the water is at fault, the boat captain should have known that he was allowing a diver to enter that had a “potential to disrupt”, and the dive shop that arranged passage for the diver

should have known better than to allow a “potential to disrupt” to go to the FGBNMS.

9. The regulations should acknowledge that many of the situations that they list as violations are animal initiated encounters. They should not be violations if the action was not human initiated and the diver or boater successfully withdrew from the encounter. The rules need to provide guidance and acceptable ways of removing oneself from those situations.
10. As we understand these rules, they would apply to everyone (divers, fisherman, boaters, swimmers, oil platforms, etc.). Without the application of knowledge and common sense (which this rule replaces) a boater or oil platform is in violation if a whale shark intentionally rubs up against it. A fisherman who accidentally catches and releases a ray is in violation. We are concerned about how these rules will be enforced and interpreted by everyone.

It is apparent that there are very serious shortcomings in the Ray and Whale Shark proposed rules. Let me conclude by responding to the following statement from page 65260 of the Proposed Rules. “NOAA believes that divers’ experience of the sanctuary marine environment would not be diminished by this prohibition ... NOAA anticipates no decreased demand for the services the affected small entities provide. Therefore, significant adverse economic impacts to small businesses are not expected to result from this proposed regulatory action.” I don’t believe this to be the case. If enforced in the manner that they are written, our club will not have another group trip to the FGBNMS. We will also advise our members to go elsewhere to experience nature, up close and personal.

Thank you for the opportunity to comment on the DMP and Proposed Rules for the FGBNMS. We support the DMP but believe the Proposed Rules for rays and whale sharks needs to be reworked and proposed again.

Jim Mensay
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