

Divergence of the Clean Water Act (CWA) and Endangered Species Act (ESA)

Lessons from a Florida Manatee Case | Kara Hempy-Mayer, Associate Environmental Scientist | May 2026



Case: 2025 Bear Warriors United (BWU) vs. Alexis Lambert (Florida Department of Environmental Protection [FDEP])

Allegations: The FDEP caused the unintentional take of manatees in the North Indian River Lagoon (NIRL) in Florida, thereby violating the ESA.



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West Indian Florida Manatee



Stephen Fink Collection, Alamy

Habitat: Marine, estuarine, and freshwater coastal environments in the southern United States through the Caribbean Islands, Central America, and northern South America. Occur at ~5 – 20-foot depths in the littoral (light) zone.

Food: Seagrass and other aquatic (vascular) plants

Protection: Listed as threatened under the ESA.

Threats: In its 2001 Manatee Recover Plan, the U.S. Fish and Wildlife Service (FWS) identified nutrient loading in groundwater and surface water as a threat to manatees by causing seagrass decline.

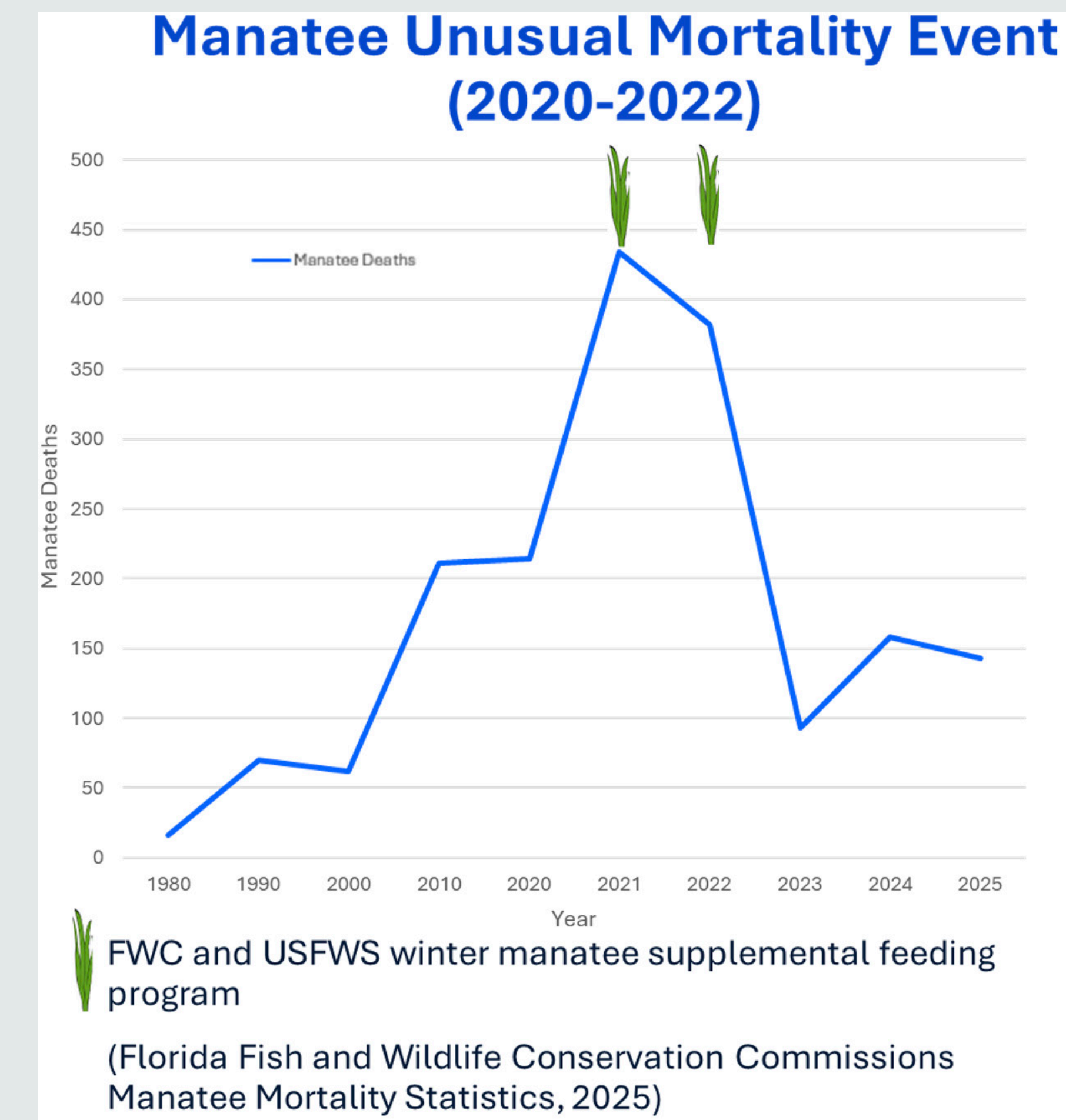
NIRL



Brevard Indian River Lagoon Coalition

The 156-mile-long Indian River Lagoon (IRL) = 40% of Florida's eastern coast. A designated use of the northern portion of the IRL (NIRL) is for providing balanced fish and wildlife populations under Florida's Water Quality Standards. The NIRL is on Florida's 303(d) list of impaired waterbodies because of nutrient impairment from nitrogen and phosphorus, which has caused an imbalance in flora and fauna, including decreased seagrass.

Manatee Unusual Mortality Event



NIRL eutrophication is driven by high nutrient loads from septic systems, wastewater treatment plants, and stormwater runoff, which are regulated by the FDEP. A severe 2020 algal bloom caused a 30% reduction in the IRL's seagrass, which has remained at less than 10% of its historic average. This algal bloom is associated with the deaths of hundreds of manatees between 2020 and 2022.



Florida Atlantic University

Q1 How Does the ESA Protect Manatees?

The FDEP checked all the boxes in developing state water quality regulations and was compliant with the CWA.

FDEP Responsibilities under the ESA ESA Sections 4 and 9: Prohibited Take

- Prohibits any "Person" (defined to include States) to take any listed species, where "take" is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.
- Also prohibits any "Person" to cause take to be committed.
- "Harm" = an act that actually kills or injures wildlife, which may include significant habitat modification or degradation (50 CFR 17.3).



Brian Skerry

The state may be liable when a proximate cause can be proved that led to individuals "taking" a listed species while carrying out activities permitted or regulated by the state agency.

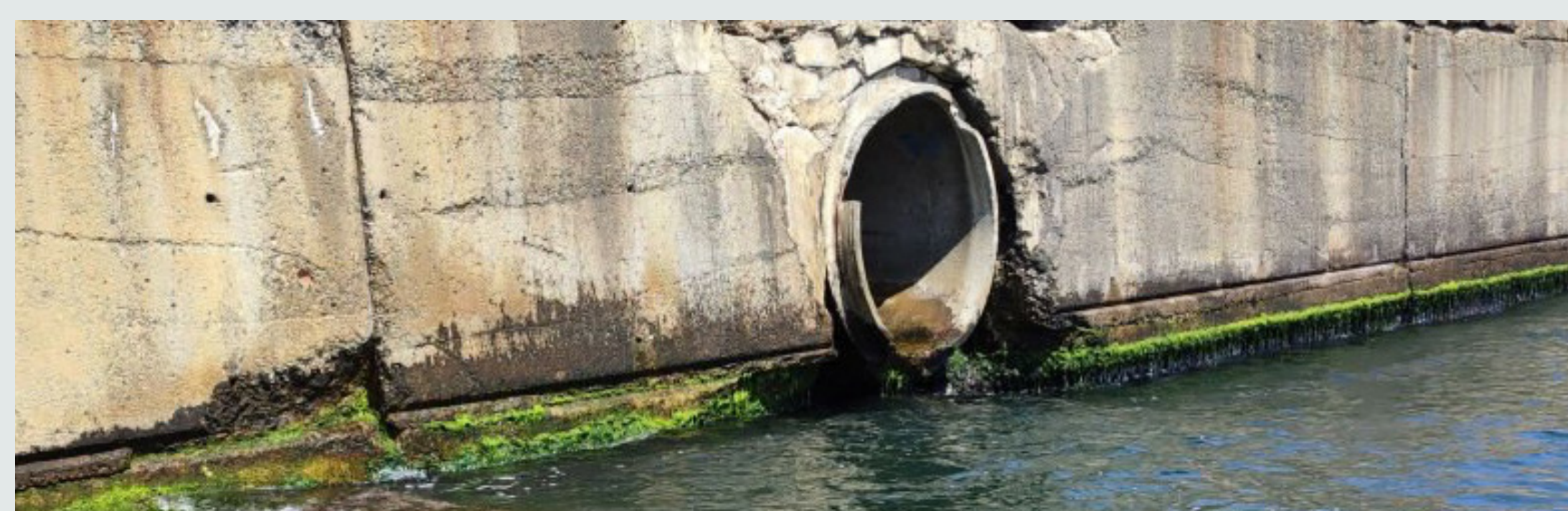
Q2 How Does the CWA Affect Manatees?

FDEP Responsibilities Under the CWA

Under the CWA, states can't implement wastewater laws or issue permits that conflict with its provisions based on a review by the Environmental Protection Agency (EPA). Key provisions relevant to the water quality of manatee habitat include:

- ✓ **Section 301 (Effluent Limitations):** Prohibits the release of any pollutant (inc. sewage) by any "Person" (inc. "States") past a certain limit established or approved by the EPA.
- ✓ **Section 302 (Water-quality-related effluent limitations):** Water-quality-related effluent limitations establish protection of designated uses of waterbodies by requiring effluent limitations, ensuring the protection of public health, public water supplies, agricultural and industrial uses, balanced fish and wildlife populations, and recreational activities.
- ✓ **Section 303 (Water Quality Standards & Implementation Plans):** This section establishes Water Quality Standards and requires states to identify impaired waterbodies that do not meet these standards. For these waters, states must develop Total Maximum Daily Loads (TMDLs) for each pollutant causing the impairment, which must be approved by the EPA, and create implementation plans to restore the waterbody.

The FDEP checked all the boxes in developing state water quality regulations and was compliant with the CWA



Domingo

The Case | Plaintiff and Defendants Positions and Court Findings



BWU (Plaintiff)

- The FDEP's past regulations concerning wastewater discharges led to manatee mortality, including (but not limited to) the Unusual Mortality Event.
- The FDEP's updated regulations and plans will allow a ratcheting down of wastewater discharges over the next 5–15 years, which will likely continue to lead to manatee mortality.

Proximate Cause: Wastewater has been the primary cause of nitrogen and phosphorous levels in the NIRL that led to eutrophication, seagrass decline, and manatee starvation.

Inadequate state regulations: Individuals caused manatee take by polluting the NIRL through wastewater discharges regulated and permitted by the FDEQ, which was arguably too slow in adequately adjusting its water quality standards once habitat began deteriorating despite the CWA:

- Direct sewage outfalls into the NIRL prior to 1990s
- N&P TMDLs not established for the NIRL until 2009
- 2013 BMAP only reduced stormwater N&P TMDLs (not wastewater N&P TMDLs).

Florida State law has no language specifying that discharge permit holders would comply with the ESA, which may have in part relieved the FDEP of its liability.

Extenuating circumstances: Other substantial sources of nitrogen and phosphorus, hurricane storm surges, or other potential cause of high nutrient loads are not present.



FDEP (Defendant)

- Bear Warriors United did not have standing
- They were compliant with the CWA.
- There is NOT a direct causal link between the FDEP's regulatory action and manatee deaths (the link is lengthy, convoluted, and speculative).
- There ARE extenuating circumstances, including damaged sewage systems caused by hurricanes and stormwater runoff.

U.S. District Court, Middle District of Florida, Orlando Division

Conclusion: The Court found that, despite being in compliance with the CWA and enacting regulations to remediate the NIRL, wastewater discharged pursuant to FDEP's regulations caused and will likely continue to cause manatee take until water quality is sufficiently improved.

Regulatory Consequence: The court granted "injunctive relief" by ordering the FDEP to stop permitting new septic systems in the NIRL basin until they obtain an incidental take permit (ITP) for likely future take.

"To hold otherwise... would violate the accepted notion that both a person whose actions adversely affect a protected species and a governmental body that authorizes that person's actions can violate the ESA's "take" prohibition."

There are approximately **470** aquatic, semi-aquatic, and marine species protected under the **ESA**.

How might an ITP make a difference?

While implementing measures to improve water quality, the NIRL Basin Management Plan and Indian River Lagoon Protection Program, central to recovering the NIRL, include no measures to minimize and mitigate manatee mortality. In contrast, the Habitat Conservation Plan associated with an ITP would likely establish actions the FDEP must take to minimize and mitigate manatee mortality while habitat quality is being restored.

Case is Under Appeal

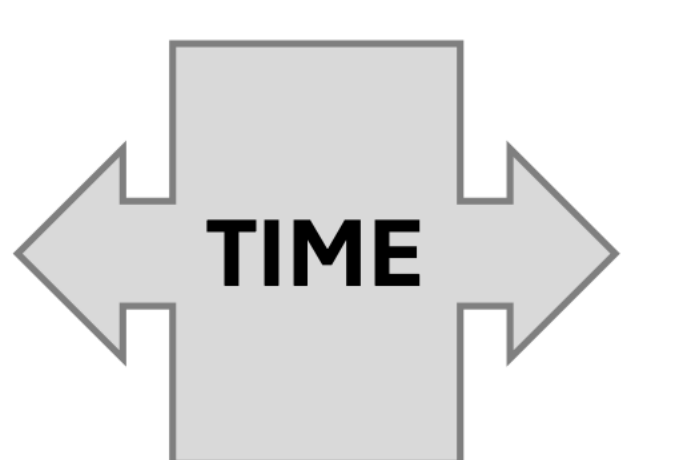
The FDEP is appealing the case with the 11th U.S. Circuit Court of Appeals. They argue the Florida Fish and Wildlife Conservation Commission, not the FDEP, is responsible for ESA compliance.

In addition, an Amicus Brief by the Save Crystal River and Pacific Legal Foundation argues that the FWS has proposed rescinding the definition of "harm," in which case habitat impacts may no longer be considered take.

Key Takeaways

- State and local water regulatory agencies should coordinate with sister wildlife agencies and the FWS in developing permit regulations.
- Look at current regulations and potential "proximate causal links" that could result in adverse impacts to a protected species.
- Consider ITPs

The CWA and ESA Divergence



CWA may be too slow in recognizing and correcting water quality standards that do not sufficiently protect wildlife

while...

Delays in implementing adequate water quality standards can cause (and continue to cause) take under the ESA.