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10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 THE OTTER PROJECT;)
14 ENVIRONMENTAL DEFENSE CENTER,)
15)
16 Plaintiffs,)

17 vs.)

18 KEN SALAZAR, Secretary of the Interior;)
19 SAM HAMILTON, Director, U.S. Fish and)
20 Wildlife Service; UNITED STATES)
21 DEPARTMENT OF THE INTERIOR; and)
22 U.S. FISH AND WILDLIFE SERVICE,)
23)
24 Defendants.)

25 Case No: C-09-4610 JW

26 **FIRST AMENDED COMPLAINT FOR
27 DECLARATORY AND INJUNCTIVE
28 RELIEF**

29 **INTRODUCTION**

30 1. On September 30, 2009, plaintiffs The Otter Project and Environmental Defense
31 Center filed their original Complaint in this action, regarding defendant U.S. Fish and Wildlife
32 Service’s (“FWS”) management of the southern sea otter (*Enhydra lutris nereis*), a threatened
33 species under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.* Pursuant to
34 Federal Rule of Civil Procedure 15(a) (as amended 2009), plaintiffs now submit this First
35 Amended Complaint as of right in order to clarify the agency inaction being challenged, and to
36 more fully and better explain the remedy being sought.
37
38

1 2. This case challenges defendant FWS' unreasonable delay in making a final
2 determination as to whether a 22-year old effort to establish a new, "experimental" population
3 of southern sea otters by translocation has failed, as required by its own regulations. Although
4 FWS has made numerous draft findings since as early as 1992 declaring the translocation effort
5 a failure, a determination overwhelmingly supported by the available evidence, the agency has
6 failed to make a final determination. By filing this action, plaintiffs do not ask this Court to
7 dictate the final substance of the agency's ultimate decision. Rather, plaintiffs simply ask this
8 Court to compel FWS to make a final decision within a reasonable and enforceable time frame.
9 Additionally, in the event that FWS *does* conclude that the translocation has failed, plaintiffs
10 also respectfully request that this Court further order FWS, as required by its regulations, to
11 initiate a rulemaking process to terminate the experimental population designation and to
12 conclude that process within a reasonable and enforceable time frame.

13 3. In 1987, FWS promulgated a rule authorizing the agency to reintroduce, via
14 translocation, individual southern sea otters to San Nicolas Island, located off the southern
15 California coast, from the species' sole remaining population located along the central coast of
16 California. *See Final Rule Establishing an Experimental Population of Southern Sea Otters*,
17 52 Fed. Reg. 29,754 (Aug. 11, 1987), *codified at* 50 C.F.R. § 17.84(d) ("1987 rule"). Although
18 the southern sea otter historically ranged throughout the California coastline, it was intensively
19 hunted for its luxurious fur throughout the 1700s and 1800s, and by the early 20th century had
20 been reduced to a handful of animals along the Big Sur Coast. The translocation was intended
21 to protect against the possibility of an oil spill, or other catastrophic human-caused or natural
22 event, driving the species extinct by establishing a new population of the species distant from
23 its existing population along California's central coast. Although the southern sea otter was
24 expected to naturally expand its range into southern California waters within 10 to 20 years
25 without an active translocation program, FWS and other species experts believed that more
26 urgent action was necessary to establish a second population.

27 4. The proposed translocation was opposed by the oil and gas industry, as well as
28 the shellfish industry, whose members believed that the reintroduced sea otters would deplete

1 harvests of abalone and urchin, and thus threaten their economic livelihood. In order to address
2 these concerns, the 1987 rule also designated *all* southern California waters and islands outside
3 of the San Nicolas Island translocation area as a “no otter zone,” and directed that all otters
4 found within that zone would be captured and moved back to waters north of Point Conception.

5 5. Despite the fact that southern sea otters had historically ranged throughout the
6 Southern California Bight, FWS agreed to the creation of this enormous no otter zone as a
7 compromise measure with the fishing industry *based on the assumption that a healthy and*
8 *thriving population of sea otters would become established on San Nicolas Island*, and that the
9 parent population of otters along the central coast would continue to grow steadily. Both of
10 these assumptions have proven false.

11 6. From its beginning in August 1987, the translocation effort was plagued with
12 difficulty, and after the fourth year of translocation only 10 percent of the 140 translocated
13 otters remained at San Nicolas Island. The remaining 90 percent died during translocation,
14 attempted to swim back north of Point Conception, or moved into the no otter zone and were
15 removed. In 1991, FWS stopped translocating otters to the island, due to its concerns that the
16 effort was resulting in unacceptable levels of mortality.

17 7. The 1987 rule requires FWS to conduct an evaluation of the translocation effort
18 as measured by five “failure criteria.” 50 C.F.R. § 17.84(d)(8)(i)-(vii). The application of
19 these criteria is described by FWS as “critical to [determining] whether or not the experimental
20 population will achieve its intended purposes or have to be terminated.” 1987 Rule, 52 Fed.
21 Reg. at 29,764. The rule directs FWS to consider three of these criteria at specified times
22 during the translocation effort. The latest of these criteria was to be applied two years
23 following completion of translocation efforts in 1991.

24 8. If “any one of these criteria” is met and FWS determines that the translocation
25 has failed to produce a viable population, the agency is required to amend the 1987 rule to
26 terminate the experimental population designation. 50 C.F.R. § 17.84(d)(8)(vi). The
27 termination of the designation must be achieved through a transparent notice and comment
28 rulemaking process, published in the *Federal Register*. *Id.* § 17.84(d)(8)(vii).

1 9. In spite of its clear regulatory mandate, the obvious failure of the translocation
2 effort, and consistent draft findings by FWS itself over the course of 20 years acknowledging
3 this failure, the agency to this date has failed to make a final failure determination. Indeed, as
4 early as 1990, FWS monitoring reports concluded that the translocation was failing. FWS
5 prepared its first draft determination of failure in 1992, and prepared subsequent draft failure
6 determinations in 1993, 1995, and 2005. The agency now has delayed its required final
7 determination as to whether the translocation effort has failed for *more than 17 years* since it
8 made its first draft determination.

9 10. Compounding FWS' failure to prepare a final failure determination as required
10 by its regulations, substantial new information and circumstances regarding the population
11 status, behavior, and ecology of sea otters has arisen. In 2000, FWS reinitiated consultation
12 with itself under section 7 of the ESA, 16 U.S.C. § 1536(a), to reanalyze the impacts of sea
13 otter containment within the management zone based on five categories of new information or
14 circumstances: (1) the natural migration of large groups of male sea otters into southern
15 California waters; (2) evidence that southern sea otters are being exposed to increasing levels
16 of environmental contaminants and diseases; (3) range-wide population declines of southern
17 sea otters; (4) evidence that translocated southern sea otters at San Nicolas Island may not be
18 protected from the effects of a single, large oil spill affecting the original central coast
19 population; and (5) the adverse effects of capture and release of southern sea otters. As a result
20 of this consultation FWS issued a Biological Opinion in 2000 concluding that continuation of
21 sea otter containment within the management zone jeopardizes the continued existence of the
22 species in substantive violation of section 7.

23 11. FWS also subsequently revised its Southern Sea Otter Recovery Plan in 2003 to
24 identify the termination of the translocation rule, abolishment of the no otter zone, and
25 continued natural expansion of sea otters south of Point Conception as primary actions
26 necessary to ensure the species' recovery. *See Revised Recovery Plan at 28* ("It is in the best
27 interest of sea otters to declare San Nicolas Island a failure and to discontinue the maintenance
28 of the otter-free zone in southern California."). Nonetheless, not only do southern sea otters

1 remain officially prohibited from southern California waters outside of San Nicolas Island, but
2 FWS has yet to even finalize its failure determination.

3 12. As detailed in this First Amended Complaint, defendants' failure to finalize the
4 failure determination long after such action was required by its regulations constitutes agency
5 action "unreasonably delayed" in violation of the Administrative Procedure Act ("APA"), 5
6 U.S.C. § 706(1).

7 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

8 13. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
9 question).

10 14. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because
11 plaintiff The Otter Project resides in this District, and a substantial part of the events or
12 omissions at issue herein occurred in this District. This case is properly assigned to the San
13 Jose Division of this Court pursuant to Civil Local Rule 3-2 (c)-(e) because plaintiff The Otter
14 Project is located in Monterey, and a substantial part of the events or omissions at issue herein
15 occurred within Monterey and Santa Cruz counties.

16 **PARTIES**

17 15. Plaintiff THE OTTER PROJECT is a non-profit organization based in Monterey
18 and incorporated under the laws of California. The Otter Project has more than 3,000
19 members. The Otter Project's mission is to promote the rapid recovery of the southern, or
20 California, sea otter, a near shore indicator and keystone species, through the communication of
21 research and science-based policy and advocacy. The Otter Project, as an organization and on
22 behalf of itself and its members, has long been involved in seeking to promote the protection
23 and recovery of sea otters, including continued involvement in advocating to end the no otter
24 zone, protecting sea otter habitat through ecosystem-based management of otters and habitat,
25 monitoring otter population status, keeping large vessel traffic out of key sea otter habitat,
26 preventing high oil-spill risk activities, and sponsoring important research projects that benefit
27 otter recovery.
28

1 16. Plaintiff ENVIRONMENTAL DEFENSE CENTER (“EDC”) is a California
2 public benefit, non-profit corporation headquartered in Santa Barbara, California. The EDC
3 has approximately 3,000 members and protects and enhances the local environment through
4 education, advocacy, and legal action. EDC represents itself and other organizations in
5 protecting coast and ocean resources, open spaces and wildlife, and human and environmental
6 health. EDC has long been involved in sea otter conservation issues, including advocating for
7 many years to terminate the no otter zone.

8 17. Plaintiff organizations both have long-standing interests in the preservation and
9 recovery of sea otters, and The Otter Project, as its name implies, was specifically formed to
10 advocate for sea otter conservation. Plaintiffs’ members place great value on this “keystone”
11 species, meaning that the presence of sea otters is essential to the healthy functioning of the
12 California marine ecosystem in which they evolved. Plaintiffs have actively sought to conserve
13 and recover the species through a broad diversity of efforts including public education,
14 outreach to residents and elected officials, scientific analysis and advocacy, and legal efforts.
15 Both plaintiff organizations have devoted extensive resources to the unfinished failure
16 determination process, including submitting extensive comments on the August 2005 Draft
17 Supplement Environmental Impact Statement regarding Translocation of Southern Sea Otters,
18 which was prepared for the express purpose of evaluating the success or failure of the southern
19 sea otter translocation effort under the regulatory failure criteria and evaluating alternatives to
20 the translocation and management rule. These interests are directly harmed by defendants’
21 failure to finalize the failure determination, and that harm would be remedied by an Order of
22 this Court compelling such action.

23 18. Plaintiffs’ members use sea otter habitat in both central and southern California
24 for a variety of pursuits. For example, plaintiffs’ members have recreational interests in sea
25 kayaking, sailing, SCUBA diving and other activities, during which they seek to view otters in
26 their native and unspoiled natural habitats. Plaintiffs’ members utilize sea otter habitat for
27 scientific, educational, and professional purposes, and many of the groups’ members, as well as
28 their organizational professional staff and volunteers, have been involved in, and personally

1 invested in, sea otter conservation and recovery efforts. Plaintiffs' members seek to view sea
2 otters in waters north and south of Point Conception, and defendants' challenged action has
3 reduced their opportunities to do so. Although defendants are not currently capturing or
4 moving sea otters from southern California waters, sea otters within those waters are
5 considered an "experimental population" not afforded the full protections of the ESA, including
6 section 9 prohibitions on "take" and section 7 requirements that federal agencies authorizing,
7 carrying out, or funding actions that may affect southern sea otters in southern California
8 consult with FWS in order to ensure that those actions are not likely to jeopardize the continued
9 existence of the species. The legal violations alleged in this complaint cause direct injury to the
10 aesthetic, economic, conservation, recreational, scientific, educational, and wildlife
11 preservation and conservation interests of plaintiffs' members.

12 19. The above-described aesthetic, economic, conservation, recreational, scientific,
13 educational, wildlife preservation and conservation, and other interests of plaintiffs and their
14 members have been, are being, and will continue to be irreparably harmed by defendants'
15 violation of law. The harm to these interests would be remedied by an Order of this Court
16 compelling required agency action make a final determination as to whether the translocation
17 effort has failed, and if so, further ordering FWS to initiate a rulemaking process to terminate
18 the experimental population designation. Plaintiffs have no adequate remedy at law, and thus
19 the requested relief is appropriate under the APA. Defendants' failure to act has also resulted
20 in informational, procedural, and organizational harm to plaintiffs.

21 20. Defendant KEN SALAZAR is Secretary of the Department of the Interior
22 ("DOI"). In that capacity, Secretary Salazar has statutory and supervisory responsibility over
23 FWS. Defendant Salazar is sued in his professional capacity.

24 21. Defendant SAM HAMILTON is the Director of the U.S. Fish and Wildlife
25 Service. Director Hamilton is sued in his professional capacity.

26 22. Defendant U.S. DEPARTMENT OF THE INTERIOR ("DOI") is a cabinet-
27 level agency responsible for managing and administering various provisions of the ESA.

28

1 27. Once a species is listed, the ESA provides several procedural and substantive
2 mechanisms intended to halt and reverse population declines, with the ultimate goal of
3 recovering the species to the point where the protections of the Act are no longer necessary.
4 The Secretary of the Interior, through FWS, is responsible for administering many of these
5 provisions, including the designation of critical habitat, *id.* § 1533(a)(3)(A); the development
6 and implementation of recovery plans, *id.* § 1533(f); acquisition of lands to conserve fish,
7 wildlife, and plants, *id.* § 1534; review and oversight of agency efforts to further the purposes
8 of the ESA and consultation on the effects of their actions on listed species, *id.* § 1536(a); and
9 the assessment of civil penalties and prosecution of criminal violations of the ESA. *Id.* §
10 1540(a)-(b).

11 28. Section 4(f) of the ESA mandates that FWS “develop and implement” recovery
12 plans for the “conservation and survival” of all listed species. *Id.* § 1533(f)(1). Each recovery
13 plan must include a description of management actions needed to ensure the species’ survival
14 and ultimate recovery, objective and measurable criteria to determine such recovery, and
15 estimates of time and cost needed to achieve recovery. *Id.* § 1533(f)(1)(B)(i)-(iii).

16 29. Section 7 of the ESA imposes certain obligations on federal agencies. Under
17 section 7(a)(2), 16 U.S.C. § 1536(a)(2), federal agencies must “insure” in consultation with
18 FWS that “any action authorized, funded, or carried” out by the agency “is not likely to
19 jeopardize the continued existence of any endangered species or threatened species or result in
20 the destruction or adverse modification of” designated critical habitat.

21 30. At the conclusion of a section 7(a)(2) consultation, FWS issues a “biological
22 opinion” that “set[s] forth [FWS’] opinion, and a summary of the information on which the
23 opinion is based, detailing how the agency action affects the species or its critical habitat.” *Id.*
24 § 1536(b)(3)(A). Under FWS regulations, if “jeopardy ... is found, [FWS] shall suggest those
25 reasonable and prudent alternatives which [FWS] believes would not violate subsection (a)(2)
26 of this section and can be taken by the Federal agency or applicant in implementing the agency
27 action.” *Id.* § 1536(b)(3)(A). The reasonable and prudent alternatives must be actions that
28

1 “can be implemented consistent with the scope of the Federal agency’s legal authority and
2 jurisdiction.” 50 C.F.R. § 402.02.

3 31. Section 10(j) of the ESA permits FWS to “authorize the release (and related
4 transportation) of any population . . . of an endangered species or threatened species outside the
5 current range of such species if the Secretary determines that such release will further the
6 conservation of the species.” *Id.* § 1539(j)(2)(A). These reintroduced populations are defined
7 as “experimental populations” under the Act. *Id.* § 1539(j)(1).

8 32. Section 10(j) was amended to the ESA to address FWS’ “frustration over
9 political opposition to reintroduction efforts perceived to conflict with human activity.”
10 *Wyoming Farm Bureau v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000). Accordingly,
11 “Congress purposefully designed section 10(j) to provide [FWS] flexibility and discretion in
12 managing the reintroduction of an endangered species.” *Id.* at 1233. Most notably, the ESA
13 provides that experimental populations are largely exempt from the Act’s section 7 consultation
14 and section 4 critical habitat designation requirements.

15 33. The ESA provides that designations of experimental populations are authorized
16 “only when, and at such times as, the population is wholly separate geographically from
17 nonexperimental populations of the same species.” *Id.* § 1539(j)(1).

18 34. Protective regulations for experimental populations must always “provide for
19 the conservation of the species.” 16 U.S.C. § 1533(d). FWS must thus ensure that its actions
20 always provide sufficient protection to ensure continued progress towards removal of the
21 species as a whole from the list of threatened and endangered species. *Sierra Club v. Clark*,
22 755 F.2d 608, 612 (8th Cir. 1985).

23 **B. The Marine Mammal Protection Act**

24 35. Recognizing that “certain species and population stocks of marine mammals are,
25 or may be, in danger of extinction or depletion as a result of man’s activities,” Congress passed
26 the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1361 *et al.*, in 1972 to ensure their
27 protection. *See* 16 U.S.C. § 1361(1) (Congressional finding that “certain species and
28

1 population stocks of marine mammals are, or may be, in danger of extinction or depletion as a
2 result of man's activities.”).

3 36. The main thrust of the MMPA is that “such species and population stocks
4 should not be permitted to diminish beyond the point at which they cease to be a significant
5 functioning element in the ecosystem of which they are a part, and, consistent with this major
6 objective, they should not be permitted to diminish below their optimum sustainable
7 population.” *Id.* § 1361(2). FWS, through the Secretary of the Interior, administers the MMPA
8 with respect to sea otters, walruses, polar bears, and manatees. *Id.* § 1362(12)(A)(i).

9 37. The MMPA's primary mechanism for protecting marine mammals is through its
10 prohibition on the “take” of such species. *Id.* § 1371(a). Under the MMPA, take is defined
11 broadly to mean “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any
12 marine mammal.” *Id.* § 1362(13).

13 38. Under the MMPA, FWS may only authorize the “incidental take” of marine
14 mammals from activities such as fishing when it finds that the taking will have a negligible
15 impact on the species. *Id.* § 1371(a)(5). However, the MMPA authorizes the Department of
16 Defense, after consultation with the Secretary of the Interior, to exempt any activity from the
17 MMPA for two years upon determining that the activity is necessary for national defense. *Id.* §
18 1371(f).

19 **C. Public Law 99-625**

20 39. Enacted in 1987, P.L. 99-625 authorized, but did not require, FWS to develop a
21 sea otter translocation and management plan. In the event FWS chose to utilize this authority,
22 Congress directed that it address the details of the translocation, including the number, age, and
23 sex of sea otters proposed to be translocated; the manner in which sea otters would be captured,
24 translocated, released, monitored, and protected; and specification of the translocation zone to
25 which the experimental population of otters would be released. Section 1(b)(1)-(2).

26 40. In the event FWS chose to utilize its authority under P.L. 99-625, Congress also
27 required the agency to designate a “management,” or no otter zone. The no otter zone was to
28 “surround” the translocation zone, but could not “include the existing range of the parent

1 population or adjacent range where expansion is necessary for the recovery of the species.”

2 Section 1(b)(4)(A)-(B). Within the no otter zone, FWS was directed to “use all feasible non-
3 lethal means and measures to capture any sea otter ... and return it to either the translocation
4 zone or to the range of the parent population.” Section 1(b)(4)(B).

5 **D. The Administrative Procedure Act**

6 41. The APA provides for review of “final agency action for which there is no other
7 adequate remedy.” 5 U.S.C. § 704. Agency action is defined to “include[] the whole or a part
8 of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure*
9 *to act.*” *Id.* § 551(13) (emphasis added).

10 42. The APA expressly directs that courts, in judicially reviewing a challenge to an
11 agency’s failure to act, “shall compel agency action unlawfully withheld or unreasonably
12 delayed.” *Id.* § 706(1).

13 **FACTUAL BACKGROUND**

14 **A. The Near Extinction of the Southern Sea Otter and Its Consequent Listing Under**
15 **the Endangered Species Act**

16 43. Southern sea otters are the smallest marine mammal in North America,
17 averaging about four feet in length, with males weighing approximately 65 pounds and females
18 weighing approximately 45 pounds. Intelligent and charismatic, sea otters are noted for their
19 ability to use tools, including rocks, shellfish, and human-made objects, to access their prey
20 sources, which consist of a large variety of marine invertebrates including clams, mussels,
21 urchins, snails, crabs, and abalone. Unlike other marine mammals, sea otters rely upon dense
22 fur, rather than blubber, for insulation.

23 44. Despite their relatively small size, sea otters are a classic example of a
24 “keystone” species within the nearshore marine kelp forest habitats they inhabit. While
25 definitions vary, the essence of a keystone species is that it plays an essential role in shaping its
26 respective ecosystem, such that the ecosystem will experience significant changes in the
27 species’ absence. One of the main reasons sea otters fulfill the keystone role within kelp forests
28 is because one of their primary prey is sea urchins. The elimination of sea otters throughout

1 much of their historic range has resulted in an explosion of sea urchin populations in many
2 areas, which have in turn devoured and decimated the kelp forest ecosystems, negatively
3 affecting the many other species that rely on those ecosystems.

4 45. Sea otters historically numbered between half million and one million
5 individuals, ranging throughout the north Pacific basin. They were found off the coast of
6 Japan, along the Aleutian chain of islands off the coast of Alaska, and down the Pacific
7 coastline, including the entire California coastline, to the central portion of Baja California in
8 the Republic of Mexico.

9 46. Sea otters were intensively hunted throughout the 18th and 19th centuries for
10 their luxurious pelts. By the early 1900s, the global population of sea otters dwindled to less
11 than 2,000 animals. In 1911, sea otters were provided belated protection through the
12 International Fur Seal Treaty.

13 47. The southern sea otter subspecies, also called the California sea otter,
14 historically numbered between 16,000 and 18,000 individuals off the California coast. Like all
15 sea otters, the southern sea otter was decimated by the fur trade, and indeed, was believed to be
16 extinct by the early 1900s. In 1938, however, a small population of fewer than 50 southern sea
17 otters was discovered near the mouth of Bixby Creek along the Big Sur coast. Following this
18 re-discovery, the subspecies has slowly expanded its range and numbers.

19 48. Despite this expansion, the southern sea otter continued to be highly imperiled,
20 and in 1977 was listed as a threatened species under the ESA due to its small population size,
21 limited distribution, and continuing vulnerability to habitat disturbance and destruction by oil
22 spills and other activities. 42 Fed. Reg. 2965 (Jan. 14, 1977). The listing of the sea otter was
23 overwhelmingly supported by the public, with 289 of 291 comments received supporting
24 listing. *Id.* at 2966.

25 **B. Origins of the Sea Otter Translocation Effort**

26 49. Subsequent to the listing of the southern sea otter as a threatened species, the
27 Marine Mammal Commission began to strongly advocate for the establishment of new
28 populations of sea otters through translocation as means of ensuring the survival and recovery

1 of the species. The Marine Mammal Commission is an independent federal agency created
2 under the MMPA to be the federal government's primary, scientifically-based adviser on
3 marine mammal conservation issues, and consists of three members appointed by the President
4 and subject to Senate consent. 16 U.S.C. § 1401(b)(1). Each member must be "knowledgeable
5 in the fields of marine ecology and resource management ... [and] not in a position to profit
6 from the taking of marine mammals." *Id.*

7 50. Under section 202 of the MMPA, the Marine Mammal Commission is directed
8 to make recommendations to FWS and other agencies, including "such steps as it deems
9 necessary or desirable for the protection and conservation of marine mammals." *Id.* § 1402 (4).
10 In accordance with this mandate, the Commission addressed sea otters in its October 3-4, 1980
11 meeting, concluding that "a transplant of sea otters to an area substantially removed from the
12 present California range seems to offer the only practical means for reducing the threat posed
13 by potential oil spills . . . a transplant should be undertaken as soon as possible." *See Summary*
14 *Minutes, Meeting of the Commission (Oct. 3-4, 1980).*

15 51. In the original Recovery Plan prepared for the southern sea otter pursuant to
16 section 4(f) of the ESA in 1982, FWS adopted the Marine Mammal Commission's
17 recommendation, identifying the need to establish, through translocation, one or more sea otter
18 populations as a primary management action necessary to ensure recovery.

19 52. In 1984, FWS published a report identifying four areas which the agency
20 believed had the best potential for successful translocation: San Nicolas Island, off the coast of
21 southern California; the coast of northern California; the coast of southern Oregon; and the
22 coast of northern Washington. *See Record of Decision for Translocation of Sea Otters to*
23 *Establish an Experimental Population*, 52 Fed. Reg. 29,784 (Aug. 11, 1987) ("NEPA ROD").

24 **C. Origins of "Zonal Management" and Designation of Southern California Waters**
25 **As a "No Otter" Zone**

26 53. On June 27, 1984 FWS published a public notice announcing its intention to
27 conduct rulemaking, and to prepare an Environmental Impact Statement under the National
28 Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, on its proposal to translocate

1 southern sea otters to an area within the species' historic range. 49 Fed. Reg. 26,313 (June 27,
2 1984). In that notice, FWS identified San Nicolas Island off the coast of southern California as
3 its preferred translocation site. *Id.*

4 54. FWS' proposal to translocate southern sea otters to San Nicolas Island was
5 strongly opposed by some fishing interests, which believed that the otters would adversely
6 affect urchin and other shellfish fisheries.

7 55. FWS released its Draft Environmental Impact Statement ("DEIS") on the
8 translocation proposal on August 15, 1986. Under FWS' preferred alternative, San Nicolas
9 Island continued to be identified as the proposed translocation site.

10 56. FWS provided several rationales for choosing San Nicolas Island as its preferred
11 translocation site, including: 1) the fact that it is within the historic range of the southern sea
12 otter; 2) it contains excellent sea otter habitat and food sources; 3) it is relatively remote and
13 inaccessible to the public, as it is 62 miles offshore and under the control of the U.S. Navy; 4) it
14 provides good opportunities for study and research of the translocated population; 5) FWS
15 believed its isolated location would increase the likelihood that otters would remain on the
16 island; and 6) FWS believed that it would be an area where the translocation population and the
17 existing central coast population could not be affected by the same oil spill. *See* NEPA ROD,
18 52 Fed. Reg. 29,784, at 29,786.

19 57. In response to fishing interest opposition, however, FWS included an additional
20 facet of the proposal in the DEIS—to also establish a "management," or "otter-free" zone. *Id.*
21 at 29,787. Under the proposal, any sea otter found within this area "would be captured and
22 removed using non-lethal means." *Id.*

23 58. FWS' preferred alternative defined the otter-free zone expansively, to "include[]
24 *all U.S. waters south of Point Conception*, including those along the mainland as well as the
25 offshore islands except the San Nicolas Island translocation zone." *Id.* (Emphasis added).

26 **D. Enactment of Public Law 99-625**

27 59. Despite the major concessions made by FWS in its DEIS, fishing interests
28 continued to oppose translocation, arguing that the MMPA "may be too restrictive to allow for

1 long-term containment and management of an experimental population of sea otters.” *Id.* at
2 29,785.

3 60. The proposed sea otter translocation was considered during the 1985
4 Congressional hearings on the reauthorization of the ESA, before the House Committee on
5 Merchant Marine and Fisheries and the Senate Committee on Environment and Public Works.
6 Subsequently, members of the House Committee on Merchant Marine and Fisheries proposed
7 an amendment to an unrelated bill, H.R. 4531, addressing sea otter management. This
8 amendment was adopted, and the larger bill enacted as Public Law 99-625 on November 7,
9 1986.

10 61. P.L. 99-625 authorized, but did not require, FWS to develop a sea otter
11 translocation plan. In the event FWS chose to utilize this authority, Congress directed that
12 FWS address the details of the translocation, including the number, age, and sex of sea otters
13 proposed to be translocated; the manner in which sea otters would be captured, translocated,
14 released, monitored, and protected; and specification of the translocation zone to which the
15 experimental population of otters would be released. This provision of P.L. 99-625 thus helped
16 to fulfill the recommendations of the Marine Mammal Commission and the requirements of the
17 Recovery Plan that a new sea otter population be established, while also addressing concerns
18 that such translocation was prohibited under the MMPA.

19 62. Congress, however, also directed FWS, in the event it chose to exercise its
20 authority to develop a translocation plan, to designate an otter-free management zone
21 surrounding the translocation zone on San Nicolas Island, essentially mirroring the no otter
22 zone which had been proposed in the DEIS earlier that year. Within this no otter zone,
23 encompassing the entire southern California coastline aside from San Nicolas Island, FWS was
24 to “use all feasible non-lethal means and measures to capture any sea otter ... and return it to
25 either the translocation zone or to the range of the parent population.”

26 63. The concept of the no otter management zone is unrelated to FWS’ duty to
27 recover sea otters, was not required by the Southern Sea Otter Recovery Plan, and was not part
28 of the original proposal to translocate otters to San Nicolas Island.

1 64. In enacting P.L. 99-625, Congress made clear that any translocation and
2 management plan prepared pursuant to its authority was not intended to address long-term
3 management of California sea otters, but to instead be “primarily a planning mechanism for the
4 translocation itself.” 1987 Rule, 52 Fed. Reg. 29,754, at 29,756. As stated in the legislative
5 history, “[t]he translocation itself . . . is not intended to replace the Recovery Plan as the
6 primary long-term management document.” *Id.*

7 **E. The 1987 Final Translocation and Management Rule**

8 65. Utilizing its existing authority under section 10(j) of the ESA, 16 U.S.C. §
9 1539(j), as well as the authority provided by P.L. 99-625, FWS on August 11, 1987 finalized its
10 rulemaking and associated NEPA process designating the waters around San Nicolas Island as
11 the translocation zone, with all other California waters and islands south of Point Conception
12 designated as the no otter management zone. *See* 52 Fed. Reg. 29,754 (final 1987 rule),
13 *codified at* 50 C.F.R. § 17.84(d); 52 Fed. Reg. 29,784 (NEPA Record of Decision).

14 66. Under the 1987 rule, all southern sea otters found within the translocation or no
15 otter management zones are defined as an “experimental population.” 50 C.F.R. § 17.84(d)(2).
16 As an experimental population, sea otters within southern California waters are not provided
17 the full protections of the ESA. For example, under the 1987 rule, the “incidental” taking of
18 sea otters from fishing and other activities within southern California is authorized. *Id.* §
19 17.84(d)(5)(B). Under section 10(j) of the ESA, experimental populations are also exempt
20 from ESA section 7 consultation protections and the requirement that critical habitat be
21 designated. 16 U.S.C. § 1539(j)(C)(i)-(ii).

22 67. In finalizing the rulemaking process, FWS expressed optimism that the
23 translocation effort would succeed within a fairly short time frame. For example, in its
24 response to comments on the draft rule, the agency stated that the “available information on
25 habitat quality and carrying capacity at San Nicolas Island, combined with the numbers and sex
26 composition of the animals to be translocated (primarily females) strongly suggests that the
27 recruitment of at least 20 young into the experimental population for 3 to 5 years should be
28 readily achieved, possibly by the end of the first 5 years.” 1987 Rule, 52 Fed. Reg. 29,754 at

1 29,762; *id.* at 29,778 (“There is a strong likelihood that an experimental population of southern
2 sea otters released at San Nicolas Island will become established within 10 years after
3 translocation is begun, and possibly in as few as 5 years.”). These projections would never
4 come close to being realized.

5 68. The final rule established specific and quantitative criteria for measuring the
6 anticipated success of the translocation. Under the rule, an “established experimental
7 population of southern sea otters” is defined as an “estimated combined minimum of 150
8 healthy male and female sea otters residing within the translocation zone, little or no
9 emigration into the management zone occurring, and a minimum annual recruitment to the
10 experimental population in the translocation zone of 20 sea otters for at least 3 years of the
11 latest 5-year period, or replacement yield sufficient to maintain the experimental population at
12 or near carrying capacity during the post-establishment and growth phase or carrying capacity
13 phase of the experimental population.” 50 C.F.R. § 17.84(d)(1)(vi).

14 69. The final rule also, as proposed, established a no otter management zone
15 encompassing all southern California waters outside of the San Nicolas Island translocation
16 zone. *Id.* § 17.84(d)(1)(ii); *id.* § 17.84(d)(5)(i) (“There is established a management zone for
17 southern sea otters comprised of all waters, islands, islets, and land areas seaward of mean high
18 tide subject to the jurisdiction of the United States located south of Point Conception, except
19 for any area within the translocation zone.”).

20 70. The establishment of the no otter zone was specifically intended to mitigate the
21 anticipated economic effect of a *successful* translocation effort and establishment of a new sea
22 otter colony at San Nicolas Island on the shellfish industry. As stated by FWS, “[m]aintenance
23 of this management zone free of otters is the principal mitigation feature of the proposal for
24 fisheries and other environmental and socioeconomic impacts.” NEPA ROD, 52 Fed. Reg.
25 29,784, at 29,787. (emphasis added).

26 71. The assumption of a successful translocation effort was also the basis for FWS’
27 concluding, in its original ESA section 7 consultation with itself on the proposal, that the effort
28 would not jeopardize the continued existence of the species.

1
2 Although a short-term reduction in the size of the parent population of
3 southern sea otters will result as a consequence of translocation, any
4 adverse effects of removal of no more than 70 mostly immature otters the
5 first year and only supplemental removals in subsequent years if needed
6 should be temporary and diminished by natural growth and expansion of
7 the parent population, *and will be outweighed by the achievement of a
8 primary recovery criterion that can result from a successful
9 translocation.*"

6 (emphasis added).

7 **F. The Failure Criteria**

8 72. FWS' optimism was not shared by all stakeholders, and during the rulemaking
9 process, some questioned the suitability of San Nicolas Island as a translocation site. *See* 1987
10 Final Rule, 52 Fed. Reg. at 29,759 (comment expressing concern that San Nicolas is very close
11 to existing offshore oil and gas operations, and thus may be vulnerable to oil spills); *id.* at
12 29,760 (comment stating that "[c]arrying capacity of San Nicolas Island is too small to achieve
13 the desired recovery and research purposes [and] could result in another genetic bottleneck.").

14 73. This concern was great enough that commenters requested that criteria to judge
15 whether the translocation has failed be specifically included as part of the rule's final language,
16 and thus codified as enforceable regulation. FWS agreed with this comment, stating that these
17 failure criteria "are critical to whether or not the experimental population will achieve its
18 intended purposes *or have to be terminated*, which would involve [FWS] evaluation and
19 informal rulemaking procedures." *Id.* at 29,764 (emphasis added); *see also* Draft Evaluation of
20 the Southern Sea Otter Translocation Program 1987-2004, at 22 ("Draft Evaluation") ("When
21 we developed the translocation plan and implementing regulations for the program, we
22 received public comment asking us to define what constituted failure of the program and what
23 actions we would take if the program failed. We responded by delineating specific failure
24 criteria in the 1987 Translocation Plan.").

25 74. Specifically, FWS included five "Criteria for a Failed Translocation" (hereafter
26 referred to as "failure criteria") in the final regulation. *Id.* The final 1987 rule directs that if
27 *any one* of the five criteria is met, then "[t]he translocation would generally be considered to
28 have failed." 50 C.F.R. §17.84(d)(8).

1 75. Failure criteria #1 is met “[i]f, after the first year following initial transplant or
2 any subsequent year, no translocated otters remain within the translocation and the reasons for
3 emigration or mortality cannot be identified and/or remedied.” *Id.* § 17.84(d)(8)(i).

4 76. Failure criteria #2 is met “[i]f, within three years from the initial transplant,
5 fewer than 25 otters remain in the translocation zone and the reason for emigration or mortality
6 cannot be identified and/or remedied.” *Id.* § 17.84(d)(8)(ii).

7 77. Failure criteria #3 is met “[i]f, after two years following the completion of the
8 transplant phase, the experimental population is declining at a significant rate and the
9 translocated otters are not showing signs of successful reproduction (i.e. no pupping is
10 observed.)” *Id.* § 17.84(d)(8)(iii).

11 78. Failure criteria #4 is met if FWS “determines, in consultation with [California]
12 and Marine Mammal Commission, that otters are dispersing from the translocation zone and
13 becoming established within the management zone in sufficient numbers to demonstrate that
14 containment cannot be successfully accomplished.” *Id.* § 17.84(d)(8)(iv).

15 79. Lastly, failure criteria #5 is met “[i]f the health and well-being of the
16 experimental population should become threatened to the point that the colony’s continued
17 survival is unlikely, despite the protections given to it by [FWS], State, and applicable laws and
18 regulations.” *Id.* § 17.84(d)(8)(v).

19 80. If FWS concludes, after consultation with the state of California and the Marine
20 Mammal Commission, that any of these criteria have been met, the translocation and
21 management rule “*will* be amended to terminate the experimental population.” *Id.* §
22 17.84(d)(8)(vi) (emphasis added). Prior to this action, however, FWS must conduct “a full
23 evaluation ... into the probable causes of the failure,” with “the results of the evaluation [to] be
24 published in the Federal Register with a proposed rulemaking to terminate the experimental
25 population.” *Id.* § 17.84(d)(8)(vii).

26 81. The final rule also provides that “termination of the project under [the criteria]
27 may be delayed if reproduction is occurring and the degree of dispersal into the management
28

1 zone is small enough that the efforts to continue to remove otters from the management zone
2 are acceptable to [FWS] and California Department of Fish and Game.” *Id.*

3 82. If the translocation is declared a failure, FWS is generally directed to capture all
4 remaining otters within the translocation zone (but not the broader no otter zone) and place
5 them back in the range of the parent population. *Id.* § 17.84(d)(8)(vi). However, the rule also
6 provides that “consideration will be given to maintaining the translocated population,” if the
7 causes for the failure can be identified, and “legal and reasonable remedial measures [are]
8 identified and implemented.” *Id.* § 17.84(d)(8)(vii).

9 **G. The Failure of the Translocation and Management Rule: FWS Draft Failure**
10 **Determinations in the 1990s**

11 83. In accordance with its final 1987 rule, FWS began translocating sea otters to San
12 Nicolas Island in 1987, releasing 140 individuals between August 1987 and March 1990. *See*
13 August 2005 Draft Supplemental EIS for the Translocation of Southern Sea Otters (“DSEIS”),
14 at 1.

15 84. The translocation effort was plagued with difficulty from the beginning, and
16 resulted in much higher levels of otter deaths and disappearances than predicted during the
17 rulemaking process. By March 1991 (approximately 3.5 years after the initiation of
18 translocation), only 14 individual otters—10 percent of those released—remained within the
19 translocation zone surrounding San Nicolas Island. *Id.* at 12.

20 85. The causes of the low otter retention in the San Nicolas Island translocation
21 zone were varied. Some died as a direct result of translocation, many swam back north of Point
22 Conception to the parent population, and some moved into the no-otter zone. *Id.* However, the
23 fate of more than half of the translocated otters—more than 70 individual animals of an
24 imperiled population—was simply unknown. *Id.*

25 86. In 1991, FWS “stopped translocating sea otters to San Nicolas Island due to
26 high rates of dispersal and poor survival.” *Id.*

27 87. FWS’ efforts to enforce the no otter zone also faced unanticipated challenges
28 which resulted in higher levels of otter deaths than predicted. In total, 24 sea otters were

1 captured and removed from the no otter zone and returned to their parent range between
2 December 1987 and February 1993. At least two of these otters swam back hundreds of miles
3 to the no otter zone, where they were captured and moved again. In February 1993, two sea
4 otters that had been captured in the no otter zone were found dead after being transported back
5 to the parent population. *Id.* The cost of capturing and moving otters also proved to be much
6 higher than anticipated, and according to one estimate was as much as \$10,000 per otter.

7 88. The difficulties in maintaining the no otter zone, and its pronounced negative
8 effects on sea otters, caused FWS to reassess its efforts. Indeed, “concerned that sea otters
9 were dying as a result of [its] containment efforts,” the agency “suspended all sea otter capture
10 activities” in 1993. *Id.* at 13. After an evaluation of capture and transport methods, FWS
11 “recognized that available capture techniques, which proved to be less effective and more
12 labor-intensive than originally predicted, were not an efficient means of containing southern
13 sea otters.” *Id.*

14 89. The unanticipated high levels of sea otter mortality in both the translocation and
15 management aspects of the final rule were soon recognized and acknowledged by FWS. “As
16 early as 1990,” FWS monitoring reports “noted that the program appeared to meet” at least one
17 of the failure criteria contained in the 1987 rule. *See* Draft Evaluation at 13.

18 90. In 1992, “after 5 years of experience with the translocation and containment
19 programs,” FWS prepared the first of several draft evaluations of the translocation and
20 management rule, none of which have ever been finalized. *Id.* at 14; *see also* July 21, 2000
21 Biological Opinion, Reinitiation of Formal Consultation on the Containment Program for the
22 Southern Sea Otter (“Biological Opinion”) at 11. This draft “white” paper addressed three
23 potential options for the future of the translocation effort, two of which would have eliminated
24 the management zone designation. Based on its analysis, FWS “concluded that the
25 management zone could not be maintained in the long-term using available non-lethal
26 techniques, and that the persistence of the management zone would reduce the options
27 available to recover the southern sea otter and likely delay recovery.” Biological Opinion at
28 13.

1 91. As stated by FWS in that first draft failure evaluation, prepared almost 20 years
2 ago, “the major issues [it] viewed as affecting the recovery of the southern sea otter were the
3 existence of the management zone and the feasibility of non-lethal containment techniques.”
4 *Id.* At that time, the maximum number of sea otters at San Nicolas Island had never exceeded
5 17 individuals.

6 92. Moreover, new information had come to light casting doubt on the belief that
7 the translocated animals would be secure from a major oil spill threatening the existing central
8 coast population, one of the primary purposes of attempting to establish a new population at
9 San Nicolas Island. As stated by FWS:

10 Further, [FWS] observed that even if a viable population were eventually
11 established, a southern sea otter colony at San Nicolas Island may not
12 provide substantial protection to the species in the event a large oil spill
13 contacted the parent population. Observations from the Exxon *Valdez* oil
14 spill demonstrated that impacts from such a spill could be far reaching.

13 *Id.*

14 93. The 1992 draft evaluation also noted that the recovery team for the southern sea
15 otter had already recommended, “in an internal draft of a [revised] recovery plan, that the
16 southern sea otter be allowed to expand its range through natural processes and against further
17 translocation efforts,” *i.e.* that in order to ensure recovery of the species, that the no otter zone
18 must be abolished. *Id.* at 13.

19 94. In sum, “[b]ased on the results of the translocation and containment programs,
20 and the recommendations of the recovery team, the [1992] draft [evaluation] concluded that the
21 management zone could not be maintained in the long-term using available non-lethal
22 techniques, and that the persistence of the management zone would reduce the options
23 available to recover the southern sea otter and likely delay recovery.” *Id.*

24 95. However, in response to input from California Department of Fish and Game,
25 this first draft evaluation “was never finalized, and no formal action was taken to declare the
26 translocation program a failure.” Draft Evaluation at 14.

27 96. In 1993, FWS prepared a second draft evaluation concluding that the
28 translocation and management effort had failed. In addition to the problems already

1 documented in the 1992 draft evaluation, FWS noted in this draft document “that the stress of
2 being captured, held in captivity, and ... undergoing surgery to implant tracking devices
3 resulted in a mortality rate that was higher than anticipated.” At the time of this evaluation,
4 “15 southern sea otters were known to have died as a result of [FWS’] containment and
5 translocation actions.” As stated by FWS, “[p]erhaps more importantly, the fates of most of the
6 southern sea otters moved for translocation and containment purposes were unknown.”

7 Biological Opinion at 13.

8 97. In the 1993 evaluation, FWS specified that both failure criteria #2 and failure
9 criteria #3 had been met. *Id.* at 13-14.

10 98. According to FWS, the “overall intent of the 1993 draft evaluation was to assess
11 the translocation program and to determine whether the program met regulatory criteria to be
12 declared a failure.” Draft Evaluation at 15.

13 99. On December 13, 1993, FWS met with California Department of Fish and Game
14 and “advised that the program had met certain failure criteria and that the translocation
15 program no longer served the recovery purpose as identified in the 1982 recovery plan.”

16 Biological Opinion at 14.

17 100. California Department of Fish and Game disagreed with FWS’ conclusion,
18 based on its belief that not enough time had passed to allow for the successful colonization of
19 San Nicolas Island. Accordingly, the Department again sought to delay the declaration of
20 failure as provided for by 50 C.F.R. § 17.84(d)(8)(iii). *Id.* at 14-15.

21 101. FWS agreed to the delay, but in 1995 prepared another draft evaluation as part
22 of a status report, and “again raised concerns about the viability of maintaining the
23 management zone for southern sea otters using non-lethal techniques.” Biological Opinion at
24 15.

25 102. At this time, the agency also expressed its intention “that a decision regarding
26 success or failure of the program was anticipated in the next year.” *Id.* at 15.

27 103. Following the 1995 draft evaluation, “[b]etween 1996 and 1999, [FWS] did not
28 conduct any further evaluation of the translocation program,” and although it “submitted

1 reports on the translocation program in its annual report to Congress,” these reports “did not
2 review the failure criteria.” *Id.*

3 104. As summarized by FWS, “[a]lthough each of the evaluations [conducted in the
4 1990s] concluded that the translocation program was failing to meet its objectives, none
5 resulted in a formal administrative finding that the translocation program had failed.” *Id.* at 13.

6 **H. The Natural Expansion of Southern Sea Otters Into Southern California Waters**
7 **and Fish and Wildlife Service’s Conclusion That Continuation of Translocation**
8 **and Management Violates Section 7 of the Endangered Species Act**

9 105. From 1993 to 1997, few otters were seen in the no otter zone, while only a
10 handful continued to remain in the San Nicolas Island translocation zone.

11 106. In the winters of 1997-1998 and 1998-1999, as predicted by FWS in 1987, large
12 groups of more than 100 sea otters moved of their own volition south of Point Conception into
13 the waters of southern California. *Id.* at 13.

14 107. At this same time, sea otter populations in the parent central coast population
15 experienced significant declines. Between 1995 and 1998, it is estimated that the range-wide
16 population of sea otters declined approximately 10 percent. *Id.*

17 108. In response, FWS asked the sea otter recovery team for its recommendation on
18 how to respond to these changing circumstances. The team “recommended that [FWS] not
19 move sea otters from the management zone to the parent population because moving large
20 groups of sea otters and releasing them within the parent range would be disruptive to the
21 social structure of the parent population.” *Id.*

22 109. This recommendation would eventually be incorporated into a revised recovery
23 plan. A draft of this plan, issued for public comment in January 2000, identified “cessation of
24 the containment program [as] the primary action for promoting the recovery of the southern sea
25 otter.” Biological Opinion at 29.

26 110. In light of these and other changing circumstances, FWS reinitiated ESA section
27 7 consultation on the sea otter translocation and management rule on March 19, 1999, and
28 issued a final biological opinion on July 19, 2000. As stated by the agency, “our reinitiation of
consultation was prompted by the receipt of substantial new information on the population

1 status, behavior, and ecology of the southern sea otter that revealed adverse effects of
2 containment that were not previously considered.” *Id.* at 13.

3 111. In addition to new information regarding the translocation and management
4 effort, several other new circumstances had arisen in the 12 years since otter translocations
5 began. In the biological opinion, FWS identified five categories of new information and
6 circumstances prompting reinitiation: (1) in 1998 and 1999, sea otters moved into the no otter
7 zone “in much greater numbers than in previous years”; (2) analysis of carcasses indicated that
8 otters “were being exposed to environmental contaminants and diseases that could be affecting
9 the health of the population throughout California”; (3) sea otter populations were declining
10 range-wide; (4) new information, including the observed effects of the Exxon *Valdez* oil spill,
11 indicated that sea otters at San Nicolas Island “would not be isolated from the potential effects
12 of a single large oil spill”; and (5) “the capture and release of large groups of southern sea
13 otters could result in substantial adverse effects on the parent population.” *Id.* at 13-14.

14 112. The biological opinion also addressed the high levels of mortality and
15 disappearances that had occurred as a result of translocation, as well as removals of otters from
16 the no otter zone. According to the agency, 12 otters “are confirmed to have died as a result of
17 being captured, held, and transported during containment and translocation activities.”
18 Biological Opinion, at 31. Moreover, FWS acknowledged that it “does not possess any new
19 information on capturing and moving animals that is likely to result in a lowered mortality
20 rate.” *Id.*

21 113. In addition, FWS noted that the fates of “approximately 73 southern sea otters
22 moved to San Nicolas Island ... could not be found [and] their fates are not known.” *Id.* at 32.
23 As acknowledged by the agency, “[t]he potential exists that a large percentage of these animals
24 perished as a result of being captured and removed,” and “[i]f that is the case, the direct adverse
25 effects of capturing and moving animals would be severe.” *Id.*

26 114. In the context of the failed translocation and management effort, the southern
27 sea otter recovery team concluded that the “primary action for promoting the recovery of this
28 population at this time is the cessation of the ‘otter-free management zone’ in the southern

1 California Bight.” Without such change, FWS concluded that “[c]ontinuation of the
2 containment program will ... restrict the natural range expansion of the southern sea otter ...
3 [and] increases the likelihood that oil spills and stochastic events would affect a greater
4 percentage of the individuals in the population ... [and] precludes the ability of the southern
5 sea otter to expand its range to the south and reduce those risks.” *Id.* at 32. Accordingly,
6 [w]ithout such a change in management, the current population decline could worsen.” *Id.* at
7 32.

8 115. The final biological opinion concludes “that continuing the containment
9 program and restricting the southern sea otter to the area north of Point Conception ... is likely
10 to jeopardize [the southern sea otter’s] continued existence.” *Id.* at 37.

11 116. FWS based its conclusion on two primary reasons: (1) continuation of
12 containment may result in the direct deaths of individuals and exacerbate the decline of the
13 species; and (2) expansion of the southern sea otter’s distribution is “*essential to its survival*
14 *and recovery*,” and the containment “will perpetuate the species’ artificially restricted range
15 and its vulnerability to the adverse effects of oil spills, disease, and stochastic events.” *Id.*
16 (emphasis added).

17 117. FWS also found that “there are no reasonable and prudent alternatives that
18 would avoid jeopardy to the species while still meeting the intended purpose of the
19 containment program which is to remove southern sea otters from the management zone.” *Id.*

20 118. In order to address its own conclusion that translocation and management of
21 southern sea otters is in substantive violation of section 7 of the ESA, FWS stated its intent “to
22 undertake a comprehensive review of the translocation program under NEPA” and evaluate
23 whether it should be continued, modified, or terminated. *Id.*

24 119. As described in detail above, FWS had already “undertaken” multiple
25 comprehensive reviews of the translocation effort—as required by its regulations—beginning
26 seven years earlier, in 1992, making its first draft determination that the failure criteria had
27 been met. Similar draft evaluations were completed in 1993 and 1995.

28

1 120. The jeopardy opinion, while notably concluding that continuation of sea otter
2 containment and management threatened the continued existence of the southern sea otter,
3 reiterated many of conclusions already expressed by the agency many years earlier, and was
4 thus merely a continuation of FWS' consistently expressed belief that the translocation effort
5 had clearly failed under the failure criteria.

6 121. This conclusion was reiterated in the final revised recovery plan for the southern
7 sea otter issued in April 2003, which identifies the cessation of the experimental population
8 designation as a primary action for promoting the recovery of the species. *See Revised*
9 *Southern Sea Otter Recovery Plan* at 28 (“[I]t is in the best interest of the southern sea otter
10 population to declare the experimental translocation of sea otters to San Nicolas Island a failure
11 and to discontinue the maintenance of the otter-free zone in southern California.”).

12 **I. The Long Delayed, Still Uncompleted Failure Determination Process**

13 122. Despite its conclusion that the translocation and management rule was in
14 substantive violation of the ESA, the mandate of its revised recovery plan, and an already
15 pronounced delay in applying the failure criteria as required by its own regulations, FWS did
16 not even initiate the first, “scoping” phase of the NEPA process until nearly a year later, in
17 April 2001.

18 123. In the scoping report, FWS stated that it would “publish and distribute a draft
19 supplemental EIS in the Fall of 2001.” *Scoping Report*, at 9.

20 124. In reality, the Draft Supplemental EIS was not released until another *four and a*
21 *half years later*, in August 2005.

22 125. In the DSEIS, FWS identified alternative 3C as its proposed action, under which
23 it would terminate the translocation effort, while not removing any sea otters residing within
24 either the translocation or no otter zones.

25 126. FWS based its preferred alternative on yet another draft evaluation of the
26 translocation effort, this one prepared in 2005.

27
28

1 127. The 2005 draft evaluation acknowledged that the agency had already conducted
2 other draft evaluations, and provided a detailed description of those evaluations. Draft
3 Evaluation at 13-16.

4 128. Like the draft evaluations conducted more than a decade previously, the 2005
5 draft evaluation again concluded that at least one failure criteria had been met. As stated by
6 FWS, “we find that the translocation program meets failure criterion 2 as defined in the original
7 1987 translocation plan,” and that it also “meets, in spirit, failure criteria 3 and 4.” Draft
8 Evaluation at 22.

9 129. Addressing criteria 2, FWS noted that for the majority of years since
10 translocation was begun, the number of individual sea otters at San Nicolas Island has remained
11 below 25, and has never numbered more than 32. Thus, “[t]he future of the colony remains
12 uncertain, despite the fact that 18 years have passed since the initial translocation.” *Id.* at 23.
13 FWS thus concludes in the draft evaluation that “[i]t appears unlikely ... that the colony will
14 ever be large enough to supply the numbers of sea otters that would be needed to perform a
15 successful translocation to the mainland range if the parent population were reduced or
16 eliminated by a catastrophic event.” *Id.* at 24.

17 130. The 2005 draft evaluation concludes as follows:

18 The primary purpose of the southern sea otter translocation program was
19 to bring southern sea otters closer to recovery and eventual delisting as a
20 threatened species. Based on our evaluation of the translocation program
21 against the goals for which it was undertaken and the failure criteria for its
22 assessment, *we conclude that the translocation program has failed to*
23 *fulfill its purpose and that our recovery and management goals for the*
24 *species cannot be met by continuing the program.*

25 The San Nicolas Island sea otter colony is small, and its future is
26 uncertain. Even if the colony were to become established, the resulting
27 population would not likely be sufficient to ensure survival of the species
28 should the parent population be adversely affected by a widespread
catastrophic event. Recovery of the southern sea otter will ultimately
depend on the growth and expansion of the southern sea otter’s range.
Although we recognize that there are conflicts between an expanding sea
otter population and fisheries that have developed in the absence of otters,
zonal management of sea otters has proven to be ineffective and
compromises the ability of the species to recover.

Draft Evaluation, at 26 (emphasis added).

1 131. In its DSEIS, FWS directly addressed the potential effects of terminating the
2 experimental population on stakeholders. For example, FWS “propose[s] to work closely with
3 the California Department of Fish and Game and affected fishers to develop fishery
4 management strategies that would minimize effects on individual fishers,” while noting that
5 the southern sea otters’ expansion of range into southern California “would take place over
6 many decades, allowing for a gradual transition of fishery and ecotourism activities that would
7 likely dampen any regional economic impacts that could occur.” DSEIS at 6.

8 132. More than four years have now passed since FWS released in DSEIS,
9 more than eight years have passed since it began its NEPA scoping process, nearly a
10 decade has passed since it released its biological opinion finding the translocation and
11 management effort to be in substantive violation of the ESA section 7 jeopardy
12 mandate, and more than 17 years have passed since FWS issued its first draft
13 evaluation finding that the effort met failure criteria, and yet the agency to this date
14 has failed to finish the failure determination process as required by its own
15 regulations.

16 **PLAINTIFFS’ CLAIM FOR RELIEF**
17 (Violation of Administrative Procedure Act)

18 133. Paragraphs 1 through 132 are fully incorporated into this paragraph.

19 134. FWS has promulgated a rule pursuant to section 10(j) of the
20 Endangered Species Act, 16 U.S.C. § 1539(j), and P.L. 99-625, establishing a sea
21 otter translocation area at San Nicolas Island and designating all other southern
22 California waters and islands as a “no otter zone,” while designating all sea otters
23 found in southern California as an experimental population not entitled to the full
24 protections of the ESA. 50 C.F.R. § 17.84(d).

25 135. Under this regulation, FWS is required to determine whether the
26 translocation effort has failed as measured by five criteria. Three of these failure
27 criteria were required to be considered at specific time periods of the translocation
28 effort that have long since passed: criteria 1 was to be applied “after the first year

1 following initiation of translocation”; criteria 2 was to be applied “within three years
2 from the initial transplant”; and criteria 3 was to be applied “after two years following
3 the completion of the transplant phase.” 50 C.F.R. § 17.84(d)(8)(i)-(iii).

4 136. The transplant phase ended in July 1990, thus the last of the first three
5 criteria was to be applied by July 1992.

6 137. Under FWS regulations, if “any one of these criteria” is met, then the
7 agency is required to “terminate the experimental population,” following consultation
8 with the State of California and the Marine Mammal Commission, through a
9 transparent rulemaking process published in the *Federal Register*. 50 C.F.R. §
10 17.84(d)(vi)-(vii).

11 138. FWS has thus long been under a legal duty to apply the failure criteria
12 and, if it finds that any of such criteria are met, to amend or withdraw its 1987
13 translocation and management rule to terminate the experimental population
14 designation.

15 139. FWS has prepared several draft evaluations declaring the 1987
16 translocation and management rule a failure, including evaluations conducted in
17 1992, 1993, 1995, and 2005.

18 140. By failing to make a final determination as to whether any of the
19 failure criteria have been met, as required by 50 C.F.R. § 17.84(d), defendants have
20 “unreasonably delayed” agency action, in violation of 706(1) of the Administrative
21 Procedure Act.

22 141. Defendants’ actions have injured and continue to injure plaintiff in the
23 manner described in paragraphs 15-19. Plaintiffs have no other adequate remedy at
24 law.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, plaintiffs respectfully request that the Court grant the following
27 relief:

1 A. Declare that defendants have violated Section 706(1) of the
2 Administrative Procedure Act by unreasonably delaying a final decision determining
3 whether the sea otter translocation effort has met any of the five failure criteria, as
4 required by 50 C.F.R. § 17.84(d)(8);

5 B. Order defendants to take the following actions within 180 days of such
6 Order:

7 (1) Issue a final determination as to whether the translocation effort
8 has failed, as determined by the five regulatory failure criteria;

9 (2) As part of the final failure determination, give full consideration to
10 maintaining existing southern sea otters within the translocation and management
11 areas;

12 (3) Publish the results of the failure determination in the *Federal*
13 *Register*; and

14 (4) In the event that Defendants determine that the translocation effort
15 is a failure, publish a proposed rulemaking (with opportunity for notice and comment)
16 in the *Federal Register* to terminate the experimental population designation and
17 associated “management,” or “no otter zone” designation.

18 C. In the event that Defendants determine that the translocation effort is a
19 failure, order defendants to take the following action within 360 days of such Order:

20 (1) Publish a final rulemaking on the proposed rulemaking to
21 terminate the experimental population designation and associated “management,” or
22 “no otter zone” designation.

23 D. Permanently enjoin defendants from removing southern sea otters
24 from the southern California no otter management zone and San Nicolas Island
25 translocation zone;

26 E. Award plaintiffs their costs and reasonable attorneys’ fees in this
27 action; and

28 F. Grant such further and other relief as the Court deems just and proper.

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Respectfully submitted this 23rd day of December, 2009,

ENVIRONMENTAL DEFENSE CENTER
LINDA KROP
BRIAN SEGEE

/s/
Brian Segee
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2009, I electronically filed plaintiffs' FIRST AMENDED COMPLAINT with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

Benjamin Zachary Rubin and George Mannina: gmannina@nossaman.com

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s/ Brian Segee

Brian Segee

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