

# CALIFORNIA SEA URCHIN COMMISSION

California Department of Food and Agriculture  
1621B 13<sup>th</sup> Street, Sacramento, CA. 95814

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March 6, 2006

Ms. Diane Noda  
Field Supervisor  
U.S. Fish and Wildlife Service  
Ventura Fish and Wildlife Office  
2493 Portola Road, Suite B  
Ventura, CA 93003-7726

Dear Ms. Noda:

The California Sea Urchin Commission is pleased to submit the enclosed comments on the Draft Supplemental Environmental Impact Statement regarding the Translocation of Southern Sea Otters ("DSEIS"). The Commission was created under the laws of California for the purpose of promoting a scientifically and economically sustainable sea urchin fishery. The Commission is authorized to engage in scientific monitoring and data collection to support responsible fishery management. In addition, the Commission is able to advocate both policy and legislative decisions that are compatible with the interests of the fishery.

The Commission has devoted substantial time and effort to reviewing the DSEIS. At the outset, the Commission is deeply concerned about the accuracy and completeness of the data contained in the DSEIS. There are significant data which are incomplete, missing, not current, or inaccurate. The data are of sufficient importance to the analysis contained in the DSEIS that the document needs to be updated before any decisions can reasonably be based on this draft.

Equally important, the conclusion in the DSEIS that the translocation program has failed is not supported by either the data within the DSEIS or the most recent data which should be included within the DSEIS. The translocation has not failed. Instead, the Fish and Wildlife Service had unrealistic expectations for when certain milestones would be reached. Indeed, the DSEIS admits the Service's expectations were unrealistic and further admits that the translocation population is a successfully reproducing population which, in terms of numbers and growth, is precisely where it should be at this point in time. Rather than recognize this data and reevaluate the Service's original expectations, the Service has chosen to declare translocation a failure. To reach that conclusion, the Service has not only ignored the best scientific data available, but the Service has also used evaluation standards found nowhere in the

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existing regulations. The Service has simply minted new standards to evaluate the translocation without complying with the Administrative Procedure Act.

The Commission is also greatly disturbed by the Service's proposal to retain the sea otters at San Nicolas Island. The existing regulations, in furtherance of P.L. 99-625, provide that if the translocation is declared a failure, the otters at San Nicolas Island must be removed from that location. The DSEIS proposes to ignore the law and the regulations and to retain the otters at San Nicolas Island even after declaring translocation a failure. The Service cannot disregard the law and the regulations.

The Commission appreciates the opportunity to submit these Comments and looks forward to further discussions with the Service.

Sincerely,

A handwritten signature in black ink, appearing to read "Vern Goehring". The signature is written in a cursive, slightly slanted style.

Vern Goehring  
Executive Director

## **Written Comments of the California Sea Urchin Commission on the Draft Supplemental Environmental Impact Statement Regarding Translocation of Southern Sea Otters**

### **I. Introduction**

This Draft Supplemental Environmental Impact Statement (“DSEIS”) represents a significant opportunity for the Fish and Wildlife Service (“FWS” or “Service”) to utilize the National Environmental Policy Act (“NEPA”) process to correct outdated and irrelevant information that has driven the development of policy regarding the southern sea otter management program since the late 1990s. Unfortunately, as currently drafted, the DSEIS appears to be headed toward continuing a pattern of mischaracterizing the science surrounding the southern sea otter and hindering the development of the tools necessary to recover this species while minimizing direct and indirect conflicts on ecosystems and shellfisheries affected by ongoing range expansion of the southern sea otter. Unless corrected, the result will be the continuation of misdirected policy and a related failure to meet increasing responsibilities under the Endangered Species Act (“ESA”).

Since the release of the 2000 Biological Opinion (“BO”) and the more or less concurrent release of the 2003 Recovery Plan, the FWS has remained out of compliance with the requirements of P.L. 99-625. The Service justified this lack of compliance by somewhat disingenuously targeting translocation and containment as twin culprits not only threatening recovery but also actually causing jeopardy under the ESA. That this policy reversal was achieved in the face of what had only recently been a commitment based on the virtual certainty that these concepts could serve as the pillars supporting the Service’s responsibilities under three sets of statutes and regulations is incredible. The manner in which these actions were taken, and the justifications supporting them, need to be critically reexamined and this DSEIS offers a key opportunity for that reexamination.

#### **A. The Brief but Frantic History of Translocation and Containment**

The history of the translocation program has been well documented but is not particularly well summarized in the DSEIS. In less than three years following the establishment of a program that selected San Nicolas Island in lieu of five other possible sites, 140 sea otters were released there. Although the fate of many of the otters translocated to San Nicolas is uncertain, the summary statement by FWS in Chapter 2.1 of the DSEIS that 14 otters were thought to have remained there and that the fate of more than half of the population taken to San Nicholas was never determined falls far short of accurately characterizing what actually happened on the island.

The truth is that since 1999 the population at San Nicolas has grown at a rate of about 10% per year, exceeding the maximum growth rate of the mainland population. Biological Analysis of Sea Otters and Coastal Marine Ecosystems in Central and Southern California: Synopsis and Update; J.A. Estes, B. Hatfield, and M.T. Tinker (“Estes *et al.*”) at 3-4. Moreover, studies of sex ratios, foraging behavior, mortality, dispersal and other factors affecting the San Nicolas Island population may ultimately be important in other ways to the overall future of the southern sea otter. Given the increasing importance of the San Nicolas Island population, it is

not surprising that the FWS wants to keep the population at San Nicolas Island even in the face of an unequivocal promise in their 2000 BO as well as the regulatory requirement in 50 CFR § 17.84 that the otters will be returned to the mainland in the event that translocation fails. To summarily dismiss the importance of translocation based on the brief experience with it between 1987 and 1990 is short-sighted and, in the face of the now clear desire to keep the sea otter population at San Nicolas Island, it is nothing short of disingenuous. Below, we discuss the actual history and success of translocation, the failure criteria, the potential importance of both the San Nicolas Island population, and the future possible use of translocation in the recovery of the southern sea otter.

While the history of the containment effort was somewhat longer, slightly exceeding five years, only 24 otters were captured and removed from the management zone during that time. Meanwhile cooperative activities involving the California Department of Fish and Game (“CDFG”), FWS and others have resulted in the capture, tagging, movement and release of hundreds of sea otters over many years with little or no mortality. (Ames, et. al. 1983; CDFG unpublished data; Wendell, et. al. 1984).

Nevertheless, based on just two mortalities in February 1993, the concern that containment efforts might constitute a threat to the continued existence of the population as a whole evolved into a determination in the 2000 BO that containment did in fact constitute such a threat. The fact that the otters were released in apparent good health and that the mortalities were not known to have been directly related to containment activities was inconsequential in the final analysis. Containment ceased in 1993 and with it the opportunity to develop other containment techniques beyond capture and relocation, as was originally promised.

Given the failure to develop containment capability and the not surprising declaration by CDFG that it could no longer sustain its sea otter research, FWS was in no way prepared for the further and inevitable movements of larger numbers of sea otters into the management zone. So, in 1998 at about the same time that range-wide counts of the sea otter population were indicating a population decline, the stage was set for a unilateral declaration that containment caused jeopardy. While the importance of the failure to develop containment capabilities is also discussed in more detail below, the critical nature of this failure as it relates to the actual or potential capability to manage conflicts between sea otters, which are apex predators, and other resources, some of which are now themselves threatened with extinction, is critically important.

Meanwhile, the focus of recovery was readjusted in 2003 and the abandonment of any apparent commitment to translocation and zonal management, in contravention of the existing legal requirements of P.L. 99-625, became de facto policy. The path to the current DSEIS was clear. The Service concluded based on less than three years of experience with translocation and slightly over five years of experience with containment that translocation failed and containment caused jeopardy. By doing so, the Service abandoned substantial programmatic commitments that were made in the late 1980s that were always known to be difficult to achieve. The Service is also ignoring the fact that there now exists a substantial body of information to assess whether or not the assumptions that led to the initial expectations regarding translocation were correct or whether they now need to be readjusted and refined as possible management tools for the future.

The fact that the Service chooses to adopt a preferred alternative that would actually keep the animals that now reside at San Nicolas in contravention of both the regulations and the Service's own 2000 BO belies the conclusion that translocation has "failed." The truth is that translocation has succeeded, but perhaps not to the level that the Service anticipated it would or should have succeeded. The fact that CDFG and others considered the expectations of the FWS to be overly optimistic has apparently been long forgotten.

Given a more reasonable set of expectations, the results of translocation at San Nicolas Island can be seen in a totally different light. Viewed in this manner, translocation should not be abandoned and the concept needs to be reconsidered and perhaps modified as a management tool for the future. Meanwhile, the threats to the recovery of the sea otter populations in the coastal marine environments demand that translocation be more carefully considered. The idea itself was not necessarily faulty, but the expectations and assumptions regarding what could be done with the idea may well have been excessive. Finally, and most importantly, the failure analysis supporting these conclusions is biased and unreasonable. This issue, among others, is discussed in more detail below.

Notwithstanding the outdated and failed analyses that provide the basis for this DSEIS, the consequences of adopting the preferred alternative are not good for either the southern sea otter or for other fishery resources or the habitats in which they reside.

## **II. The Proper Role of NEPA in The Recovery and Management of the Southern Sea Otter**

In considering and evaluating the role of translocation in the management and recovery of southern sea otters at this point in time, the focus of the National Environmental Policy Act ("NEPA") should be carefully considered and thoughtfully linked to the requirements of the Endangered Species Act ("ESA"), the Marine Mammal Protection Act ("MMPA"), and P.L. 99-625. Unfortunately, the manner in which the Service has used NEPA in developing the DSEIS is contrary to the purposes of NEPA, conflicts with the requirements of these other statutes, and confounds the critical need for flexible and realistic management of the southern sea otter based on the most accurate, current and relevant information. At this point in the two decade long process to recover and manage the southern sea otter, the failure of the Service to fully implement the NEPA process is troubling. Rather than pursuing the spirit and purpose of NEPA, the focus of the DSEIS appears to be to validate, after the fact, decisions that were made many years ago based on information that was questionable then and is outdated and irrelevant now. Using the DSEIS to formalize policy with what has become practice as a result of an outdated BO and a confused approach to recovery contravenes NEPA's purposes and its implementing regulations.

### **A. The Purpose For and Requirements of NEPA**

NEPA requires the preparation of an environmental analysis for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The regulations implementing this statutory directive are clear. NEPA procedures "must insure" that the required environmental analysis is available "before decisions are made and before actions

are taken.” 40 C.F.R. § 1500.1(b). As noted above, the Service made its decision to terminate the translocation program before complying with NEPA. Thus, the purpose of the DSEIS appears to be to justify a decision already made, a clear violation of the regulations which provide:

Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

40 C.F.R. § 1502.2(g). [Emphasis added].

Given this situation, the question of how this DSEIS fulfills NEPA’s requirements emerges with special force. To truly comply with the requirements of NEPA the Service should withdraw this DSEIS and begin anew. The Service should prepare an EIS focusing more precisely on the status of the southern sea otter as well as the present and future actions necessary to recover the sea otter under the ESA. Simultaneously the Service needs to carefully consider how to comply with the dictates of the countervailing requirements of the ESA on behalf of other species and also how to continue to comply with the requirements of P.L. 99-625 and the MMPA. The ESA clearly requires that federal agencies use their authority to further the conservation goals of the ESA. Yet the ESA also requires the protection and anticipation of threats to other protected species. In proposing to prematurely terminate translocation and containment, the Service’s actions in this DSEIS, when taken as a whole, are likely to adversely impact other species protected under the ESA in clear contravention of the ESA.

The proper use of the NEPA process is to evaluate and understand the overall environmental impacts of an agency action. Rather than segmenting the process and examining translocation in a vacuum, NEPA requires that the Service focus on all of the interrelated ESA, MMPA, ecosystem, and resource conflict issues associated with sea otter management. Unlike what appears to be happening with this DSEIS, such an approach would further NEPA’s goals of protecting the environment.

Indeed, the NEPA regulations specifically provide for the preparation of a broader programmatic environmental analysis when there are “closely related” actions involved. 50 C.F.R. § 1508.25. The regulations amplify on this standard, stating that proposals which are related to each other closely enough to be, in effect, a single course of action “shall” be evaluated in a single impact statement. 40 C.F.R. § 1502.4(a). [Emphasis added].

This regulatory directive has been interpreted to discourage agencies from dividing actions into smaller segments thereby subverting the NEPA process by denying the agency the opportunity to examine the total impact of an interrelated action. Here, the proper issue for NEPA analysis is not just the translocation program, but the effects on sea otter recovery and conflict management needs of other species as well. While the DSEIS focuses on translocation, it glosses over the impacts of sea otter range expansion on other species, some of which are protected under the ESA. The DSEIS admits the existence of, but fails to analyze, other factors affecting sea otters such as waste discharges and pollution. In particular, the DSEIS ignores P.L. 99-625 which directs the Service to implement and maintain a sea otter management zone “to

prevent, to the maximum extent feasible, conflict with other fishery resources ...” P.L. 99-625, § 1(b)(4).

The facts are that translocation is but one segment of an overall sea otter recovery and management strategy. The real agency action at issue is the effort to recover the southern sea otter while simultaneously not causing harm to other ESA protected species and minimizing conflicts with fishery resources. To consider one segment of this matter in a vacuum thwarts the purposes of NEPA.

This is particularly true given the fact that the DSEIS was actually written several years ago and has not been updated to reflect the best available scientific information. As set forth in the NEPA regulations, the information in an EIS “must be of high quality” and “[a]ccurate scientific analysis” is “essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). The multi-year delay between the time the DSEIS was written and when it was published, and the significant amount of new information that has emerged but has not been reflected in the DSEIS results in the inevitable conclusion that the DSEIS no longer complies with NEPA’s standard of using the most accurate and complete scientific information – information that is relevant not only to translocation but also to the larger issues that should be the focus of a more complete environmental analysis satisfying the purposes of NEPA.

#### B. The Purpose For and Requirements of the ESA

In considering the proper scope of an EIS, the Service cannot hide behind the 2000 BO which concluded that containment was likely to jeopardize the continued existence of sea otters. Far from precluding a broader environmental analysis, the ESA demands one.

##### 1. White Abalone § 7 Consultation

Section 7(a)(1) of the ESA, 16 U.S.C. § 1536(a)(1), requires the Secretary of the Interior (“Secretary”) to review programs administered by her and to utilize such programs in furtherance of the purposes of the ESA. The southern sea otter management and recovery program administered by the Secretary, of which translocation is but one segment, is a program within the meaning of § 7(a)(1) of the ESA. When implementing that program, the Secretary must comply with § 7(a)(1). Part of that compliance includes following the dictates of § 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2). That section of law requires all federal agencies, including the Service, to “insure” that any action authorized or carried out by that agency is not likely to jeopardize the continued existence of any ESA protected species. Here, the Service’s decision to terminate the translocation program and the prior decision to terminate the sea otter containment program may threaten the survival and interfere with the recovery of ESA-protected abalone by bringing sea otter predators into direct contact with potentially critical abalone populations. In order to avoid further statutory conflict, consistent with the requirements of NEPA and in order to comply with the ESA, § 7(a)(2) requires a jeopardy determination prior to undertaking any action that may threaten the survival of now-listed abalone populations. Neither the 2000 BO nor the DSEIS are a substitute for the consultation and associated biological opinion now required by § 7(a)(2). There is no question that termination of the translocation and containment program will result in a prohibited take of abalone. The question is when and that is a subject that demands

