



MARINE MAMMAL COMMISSION

24 October 2011

The Honorable Daniel M. Ashe
Director
Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Dear Mr. Ashe:

The Fish and Wildlife Service published a proposed rule on 26 August 2011 (76 Fed. Reg. 53381) to terminate the translocation program for southern sea otters at San Nicolas Island. In accordance with the requirements of 50 C.F.R. § 17.84(d)(8)(vi), the Service consulted with the Marine Mammal Commission prior to publishing the proposed rule. Therefore, the Commission has already commented on much of the substance of that proposal. The Commission asks that the enclosed 10 August 2011 letter to Mr. Lohofener commenting on the Draft Evaluation of the Southern Sea Otter Translocation Program be considered as comments on the proposed rule and made part of the rulemaking record.

In that letter, the Commission concurred with the Service's overall conclusion that the translocation program has failed to fulfill its primary purpose as a recovery action and that the program should be declared a failure. The Commission agreed that, technically, failure Criterion 2 has been met and should be used as the basis for making a failure determination. The Commission also supported the Service's plan to retain the existing otter population at San Nicolas Island after a failure determination is made to give the population an opportunity to become fully established and to avoid the unnecessary risks to otters associated with capturing and returning animals from the translocation zone to the parent population. The sole recommendation made by the Commission was that the Service include in the proposed rule an amendment that would eliminate the requirement set forth in section 17.84(d)(8)(vi) that "all otters remaining within the translocation zone will be captured and all healthy otters will be placed back into the range of the parent population." For unexplained reasons, the Service decided not to include such a provision in the proposed rule.

The Commission continues to believe that explicitly amending the regulations to eliminate that requirement prior to declaring the translocation a failure and repealing section 17.84(d) of the regulations in its entirety would be prudent. The Marine Mammal Commission therefore reiterates the recommendation that, before finalizing the proposed rule, the Service amend section 17.84(d)(8)(vi) to eliminate the requirement to return sea otters from the translocation zone to the parent population.

As discussed on page 53386 of the *Federal Register* notice, the Service believes that by removing section 17.84(d) in its entirety, it would eliminate the requirement that otters be captured and removed from the translocation zone and the management zone. This is a plausible interpretation of the legal effect of deleting paragraph (d). However, it is not the only possible interpretation. An argument also could be made that carrying out the directive to return otters to the parent population extends beyond the life of the regulations. Certainly, there had been a long-term expectation that otters would be returned in these circumstances. Furthermore, there is a logical

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inconsistency in the Service's position that should not be ignored. In essence, the Service is saying that this provision of the regulations becomes operative only if a failure determination is made, but that if such a determination is made, the provision becomes inoperative.

Among the possible outcomes of litigation challenging a failure determination, the one that could have an adverse impact on the conservation of the southern sea otter is a ruling that otters must be removed from the translocation zone and/or the management zone. Therefore, the Commission believes that the Service should take all possible steps to ensure that this does not happen. The Commission believes that the chance of adverse litigation could be reduced significantly by engaging in the two-step rulemaking it has been advocating for several months. The Commission also believes that a supplemental rulemaking on this one point could be completed in time to meet the December 2012 deadline for making a final determination set forth in the stipulated settlement agreement in *The Otter Project v. Salazar*. If the Service believes that more time would be required, it may be that the plaintiffs would be willing to amend the settlement agreement to accommodate that need.

The Commission notes that the Service issued a biological opinion under section 7 of the Endangered Species Act in July 2000 finding that continuing to carry out otter containment activities in the management zone would jeopardize the continued existence of the southern sea otter. Based on that opinion, the Service published a policy statement on 22 January 2001 (66 Fed. Reg. 6649) that it would no longer capture and remove otters found in the management zone. Presumably, the rationale for that biological opinion and the Service's policy about removing otters also applies to otters within the translocation zone. If this is the case, the Commission believes that this issue should be discussed within the scope of this rulemaking and reflected in the administrative record. This would provide an alternative legal basis to support a decision not to remove otters from the translocation zone upon finalizing a failure determination. That is, even if the translocation regulations are interpreted as requiring that otters be removed from the translocation zone, the Service would have a sound basis for arguing that doing so would constitute jeopardy and that adherence to the requirements of section 7 takes precedence over the provisions of Public Law 99-625 and its implementing regulations.

Please let me know if you have any questions concerning these comments or would like to discuss any of these points further with the Commission.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosure
Cc with enclosure: Michael J. Bean