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**CONSERVATION GROUPS BRING LAWSUIT CHALLENGING
GOVERNMENT'S FAILURE TO PROTECT SOUTHERN SEA OTTERS**

Santa Barbara/San Jose, CA-The Otter Project and the Environmental Defense Center (EDC) filed a lawsuit in federal district court against the U.S. Fish and Wildlife Service today, in response to the Service's failure to issue a final decision repealing the no otter zone--an outdated rule prohibiting southern sea otters from reestablishing historic populations in California waters south of Point Conception. The suit was filed during Sea Otter Awareness Week, which has been officially recognized by the California state legislature.

The southern sea otter, listed as threatened under the Endangered Species Act, once ranged throughout the California coast. Southern sea otters are today largely restricted to the central coast, and expansion of this range into historic southern California habitats is recognized by the Service as the single most important action necessary to recover the species.

Despite this fact, the agency has failed to repeal its 22 year old rule designating the entire southern California bight as a "no otter zone." Once otters swim into the "no otter zone" they are no longer fully protected by the ESA, which means they become more susceptible to harassment, illegal killings, and other harmful actions.

"Southern sea otters are a vital part of southern California's natural heritage, and the Fish and Wildlife Service recognizes that the return of the otter to these historic habitats is essential to its recovery," stated Allison Ford, Executive Director of the Otter Project. "We've been pushing this rock uphill for a while now, with no agency action to show for it. It is long past time for the agency to repeal its outdated rule declaring southern California as a 'no otter zone'."

The 1987 rule grew out of a Service proposal to artificially establish a new, "experimental", population of sea otters at San Nicolas Island, 60 miles off of the southern California coast and controlled by the U.S. Navy. The proposal engendered significant opposition from the shellfish industry, and as a result the Service issued a "compromise" rule allowing the translocation but prohibiting otters from all other southern California waters. The translocation effort failed, however, and a sustainable population of otters has never been established at San Nicolas.

“The role of the U.S. Fish and Wildlife Service is to facilitate the recovery of the southern sea otter, yet for at least 16 years the agency has recognized the threat posed by the ‘no otter zone’ without taking definitive and final action to abolish its own harmful rule” stated Brian Segee, staff attorney with EDC. “It is our hope that the lawsuit will finally compel this long-overdue action.”

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

The decision to sue the Service comes after recent news that the sea otter population is once again in decline. Otters are dying of a variety of causes, many of which can be attributed to poor water quality from urban and agricultural runoff. The highest rates of mortality occur in areas near agricultural and urban centers. Scientists also speculate that food limitation in the middle of the otter range could be contributing to otter mortality.

“Otters are dying,” said Ford, “and that’s all the more reason to allow for natural range expansion. It’s unrealistic to expect all the members of a struggling population to stay in a small, increasingly polluted patch of the ocean. They’re going to spread out naturally, and it’s the Service’s job to make sure that they are fully protected when they get where they’re going.”

Santa Barbara has long been the next stop in the otters’ expanding range. A raft of about 100 otters moved south of Point Conception in 1998, causing FWS to readdress the no otter zone. Despite the fact that the Service has issued numerous draft proposals declaring the effort a failure since 1992, after a nearly two decade delay the agency has still yet to issue its required final decision.

The Otter Project and EDC have filed suit to bring about a final ruling, ending the no otter zone and restoring protections to otters in the no otter zone. While both organizations are fully committed to following through on the case legally, both hope that its filing will prompt the Service to take action without further delay.

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The Otter Project exists to promote the rapid recovery of the California sea otter, an indicator of near shore ocean health and a keystone species, through science based policy and advocacy. Founded in 1998, The Otter Project has worked to facilitate research and communicate research results to the general public and policy makers and to offer policy recommendations for action leading to sea otter recovery and improved ocean health.

The Environmental Defense Center protects and enhances the local environment through education, advocacy, and legal action and works primarily within Santa Barbara, Ventura and San Luis Obispo counties. Since 1977, EDC has empowered community based organizations to advance environmental protection. Program areas include protecting coast and ocean resources, open spaces and wildlife, and human and environmental health. For more information, please see www.EnvironmentalDefenseCenter.org.



SEA OTTERS

LEARN THE FACTS

Sea otters are the smallest of the marine mammals, known for their charismatic faces, use of tools, and thick coat of fur. California sea otters have struggled to survive alongside increasingly developed coastlines where they face threats from poor water quality, fisheries conflicts, oil and gas development, boat strikes, and entrapment in fishing gear. The struggling population of otters is expanding southward into its historic range, but without proper legal protections. The Otter Project and the Environmental Defense Center (EDC) are committed to seeing the full recovery of the California sea otter by ensuring otters full protections under the Endangered Species Act.

RANGE:

- Otters used to ring the entire Pacific Rim, but were driven to the brink of extinction by the Pacific Fur Trade of the 1700 and 1800s.
- Scientists now recognize distinct sub-populations of sea otters in California, Alaska and Russia, and transplanted populations in Washington state and British Columbia.
- The California sea otter range is officially from Pigeon Point in Half Moon Bay to Point Conception, just north of Santa Barbara. In reality, otters moved south of Point Conception more than 10 years ago. Although they are occasionally spotted north of Half Moon Bay, regular range expansion is occurring in southern California.

HABITAT & FEEDING:

- Sea otters live in the near-shore ocean, where they tend to inhabit kelp forests and rocky intertidal zones rich in marine invertebrates like clams, sea urchin, abalone and lobster.
- Sea otters are known for their use of tools such as rocks and hard shells, which they use to crack into tough prey like abalone. When foraging, they wrap their loose fur coat to create a pouch which they stuff full of prickly prey like sea urchin.
- Otters are the only marine mammal without blubber to keep warm—in order to keep their metabolisms going they eat up to 25% of their body weight every day! At about 60 lbs, that's a lot of sea urchin—if human children ate like that, you would have to feed your child up to 60 quarter-pounds a day!
- Otters are keystone species, which means they are extremely important to the existence of their habitat. Otters eat herbivorous creatures like sea urchin, which, if left unchecked, will mow through a kelp forest resulting in urchin barrens that are low in productivity and biodiversity.



Photo by Jeff Foott

THE NO OTTER ZONE:

- The no-otter zone encompasses the coastal waters of California south of Point Conception
- U.S. Fish and Wildlife Service (FWS) declared this area the no-otter zone in 1987 as part of a translocation program that established an experimental population of otters on San Nicolas Island. The intention of establishing an otter population at San Nicolas Island was to provide protection from an oil spill.
- From its beginning, the translocation effort was plagued with difficulty, and after the fourth year of translocation only 10 percent of the 140 translocated otters remained at San Nicolas Island. The remaining 90 percent died during translocation, attempted to swim back north of Point Conception, or moved into the no otter zone and were removed. In 1991, FWS stopped translocating otters to the island, due to its concerns that the effort was resulting in unacceptable levels of mortality.
- As part of the translocation program, FWS promised to move otters in the no otter zone back out of the zone. This proved fatal to the otters, so FWS stopped moving them, but left the no otter zone in place.
- The no otter zone was part of the sea otters' native habitat before they were wiped out by fur hunters.



Photo by Jeff Foott

STATUS & PROTECTION:

- Sea otters were first given protection under the 1911 North Pacific Fur Seal Treaty—the first international treaty for wildlife protection.
- Today, California otters are protected under the Marine Mammal Protection Act and the Endangered Species Act everywhere except the no-otter zone.
- Otters in the no otter zone are not fully covered by the Endangered Species Act or the Marine Mammal Protection Act.

FEDERAL GOVERNMENT FAILS TO PROTECT SEA OTTERS:

Sixteen years have passed since FWS began assessing the failure of the no otter zone. In that time, they have stated multiple times that the no otter zone puts sea otters in jeopardy, including in the 2003 Recovery Plan. The Service has begun the process of ending the no otter zone several times, but never finalized its ruling. The Service last held public comment hearings in 2005, with a promised ruling by the end of 2006. Since then, no further action has been taken. Failure to end the no otter zone puts sea otters at unreasonable risk.

EDC & THE OTTER PROJECTS'S ACTION—HOW YOU CAN HELP

The Otter Project and EDC have requested that FWS issue a final ruling on the no otter zone by releasing the final version of the Supplemental Environmental Impact Statement (SEIS) immediately. This would result in the end of the no otter zone, with full protections restored to otters in Southern California. Having exhausted other means, The Otter Project and EDC have filed a lawsuit against the Service, in hopes that an agreement can be reached, but with the full intention to pursue legal action as necessary.

You can join our campaign to protect the southern sea otter by supporting The Otter Project and EDC .

Together we can ensure that sea otters have the right to return to their native habitat without fear of getting shot. Please visit www.edcnet.org or www.otterproject.org to support this important cause.

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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 Plaintiffs,

16 vs.

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

22 Defendants.

23 Case No: _____

24 **COMPLAINT FOR DECLARATORY
25 AND INJUNCTIVE RELIEF**

26 **INTRODUCTION**

27 1. This case challenges the U.S. Fish and Wildlife Service’s (“FWS”) unreasonable
28 delay in finalizing its determination that the 22-year old translocation and management rule for
the southern sea otter (*Enhydra lutris nereis*), a threatened species under the Endangered
Species Act (“ESA”), 16 U.S.C. § 1531 *et seq*, has failed, and thus by its own terms must be
withdrawn.

29 2. The rule, promulgated in 1987, authorized FWS to establish a new,
“experimental” population of southern sea otters on San Nicolas Island in southern California
by reintroducing, via translocation, individual otters to there from the species’ sole remaining

1 population, located along the central coast of California. *See Final Rule Establishing an*
2 *Experimental Population of Southern Sea Otters*, 52 Fed. Reg. 29,754 (Aug. 11, 1987),
3 *codified at 50 C.F.R. § 17.84(d)* (“1987 rule”). Although the southern sea otter historically
4 ranged throughout the California coastline and into Baja California in the Republic of Mexico,
5 it was intensively hunted for its luxurious fur throughout the 1700s and 1800s, and by the early
6 20th century had been reduced to a handful of animals along the Big Sur Coast. The
7 translocation was intended to fulfill a provision of the 1982 Southern Sea Otter Recovery Plan,
8 which directed FWS to establish a new population of the species distant from its existing
9 population along California’s central coast in order to protect against the possibility of an oil
10 spill, or other catastrophic human-caused or natural event, driving the species extinct.
11 Although the southern sea otter was expected to naturally expand its range into southern
12 California waters within 10 to 20 years without an active translocation program, FWS and other
13 species experts believed that more urgent action was necessary to establish a second
14 population.

15 3. The proposed translocation was opposed by the oil and gas industry, as well as
16 the shellfish industry, whose members believed that the reintroduced sea otters would deplete
17 harvests of abalone and urchin, and thus threaten their economic livelihood. In order to address
18 these concerns, the 1987 rule also designated *all* southern California waters and islands outside
19 of the San Nicolas Island translocation area as a “no otter zone,” and directed that all otters
20 found within that zone would be captured and moved back to waters north of Point Conception.

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

27 4. From its beginning in August 1987, the translocation effort was plagued with
28 difficulty, and after the fourth year of translocation only 10 percent of the 140 translocated

1 otters remained at San Nicolas Island. The remaining 90 percent died during translocation,
2 attempted to swim back north of Point Conception, or moved into the no otter zone and were
3 removed. In 1991, FWS stopped translocating otters to the island, due to its concerns that the
4 effort was resulting in unacceptable levels of mortality.

5 5. The 1987 rule requires FWS to conduct an evaluation of the translocation effort
6 as measured by five “failure criteria.” 50 C.F.R. § 17.84(d)(8)(i)-(vii). The rule directs FWS
7 to consider these criteria at specified times during the translocation effort, and *mandates* that it
8 be terminated, and the experimental population and no otter zone designation be withdrawn, if
9 *any* of the criteria are met. The latest of these criteria was to be applied two years following
10 completion of translocation efforts in 1991.

11 6. In spite of its clear regulatory mandate, obvious failure of the translocation
12 effort, and consistent draft findings by FWS itself over the course of 20 years acknowledging
13 this failure, the agency to this date has failed to finalize the required assessment. Indeed, as
14 early as 1990, FWS monitoring reports concluded that the translocation was failing. FWS
15 prepared its first formal draft determination of failure in 1992, and prepared subsequent draft
16 failure determinations in 1993, 1995, and 2005. The agency, however, never finalized any of
17 these determinations, and now has delayed its required decision to formally terminate the
18 translocation effort and withdraw its 1987 rule for *more than 16 years* since it first formally
19 proposed to declare the translocation a failure.

20 7. Compounding FWS’s failure to terminate the translocation project as required
21 by its regulations, substantial new information regarding the population status, behavior, and
22 ecology of sea otters has arisen. Most notably, in the winters of 1997-1998 and 1998-1999,
23 southern sea otters began naturally migrating in large numbers south of Point Conception into
24 the no otter zone, while the central coast population declined and the species failed to expand
25 its range northward as quickly as anticipated. In light of these circumstances and the failure of
26 the translocation effort at San Nicolas Island, FWS has revised its Southern Sea Otter Recovery
27 Plan to identify the termination of the translocation rule, abolishment of the no otter zone, and
28 continued natural expansion of sea otters south of Point Conception as primary actions

1 necessary to ensure the species’ recovery. Indeed, FWS in 2000 concluded that continuation of
2 the project jeopardizes the continued existence of the species in substantive violation of section
3 7 of the ESA, 16 U.S.C. § 1536(a). Nonetheless, under the 1987 rule, southern sea otters
4 remain officially prohibited from southern California waters outside of San Nicolas Island.

5 8. As detailed in this Complaint, defendants’ failure to finalize the failure
6 determination, formally terminate the translocation effort, abolish the no otter zone, and
7 withdraw the 1987 rule long after such action was required by its regulations—and even though
8 FWS itself has repeatedly acknowledged its duty to do so and concluded that the rule violates
9 section 7 of the ESA—constitutes agency action “unreasonably delayed” in violation of the
10 Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1).

11 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

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

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

20 **PARTIES**

21 11. Plaintiff THE OTTER PROJECT is a non-profit organization based in Monterey
22 and incorporated under the laws of California. The Otter Project has more than 3,000
23 members. The Otter Project’s mission is to promote the rapid recovery of the southern, or
24 California, sea otter, a near shore indicator and keystone species, through the communication of
25 research and science-based policy and advocacy. The Otter Project, as an organization and on
26 behalf of itself and its members, has long been involved in seeking to promote the protection
27 and recovery of sea otters, including continued involvement in advocating to end the no otter
28 zone, protecting sea otter habitat through ecosystem-based management of otters and habitat,

1 monitoring otter population status, keeping large vessel traffic out of key sea otter habitat,
2 preventing high oil-spill risk activities, and sponsoring important research projects that benefit
3 otter recovery.

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

11 13. Plaintiff organizations both have long-standing interests in the preservation and
12 recovery of sea otters, and The Otter Project, as its name implies, was specifically formed to
13 advocate for sea otter conservation. Plaintiffs’ members place great value on this “keystone”
14 species, meaning that the presence of sea otters is essential to the healthy functioning of the
15 California marine ecosystem in which they evolved. Plaintiffs have actively sought to conserve
16 and recover the species through a broad diversity of efforts including public education,
17 outreach to residents and elected officials, scientific analysis and advocacy, and legal efforts.
18 These interests are directly harmed by defendants’ failure to finalize the failure determination,
19 abolish the no otter zone, and withdraw the 1987 rule, and that harm would be remedied by an
20 Order of this Court compelling such action.

21 14. Plaintiffs’ members use sea otter habitat in both central and southern California
22 for a variety of pursuits. For example, plaintiffs’ members have recreational interests in sea
23 kayaking, sailing, SCUBA diving and other activities, during which they seek to view otters in
24 their native and unspoiled natural habitats. Plaintiffs’ members utilize sea otter habitat for
25 scientific, educational, and professional purposes, and many of the groups’ members, as well as
26 their organizational professional staff and volunteers, have been involved in, and personally
27 invested in, sea otter conservation and recovery efforts. Plaintiffs’ members seek to view sea
28 otters in waters north and south of Point Conception, and defendants’ challenged action has

1 reduced their opportunities to do so. The legal violations alleged in this complaint cause direct
2 injury to the aesthetic, economic, conservation, recreational, scientific, educational, and
3 wildlife preservation and conservation interests of plaintiffs' members.

4 15. The above-described aesthetic, economic, conservation, recreational, scientific,
5 educational, wildlife preservation and conservation, and other interests of plaintiffs and their
6 members have been, are being, and will continue to be irreparably harmed by defendants'
7 violation of law. The harm to these interests would be remedied by an Order of this Court
8 compelling required agency action to finalize the failure determination, terminate the
9 translocation project, abolish the no otter zone, and withdraw the 1987 rule. Plaintiffs have no
10 adequate remedy at law, and thus the requested relief is appropriate under the APA.
11 Defendants' failure to act has also resulted in informational, procedural, and organizational
12 harm to plaintiffs.

13 16. Defendant KEN SALAZAR is Secretary of the Department of the Interior
14 ("DOI"). In that capacity, Secretary Salazar has statutory and supervisory responsibility over
15 FWS. Defendant Salazar is sued in his professional capacity.

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

18 18. Defendant U.S. DEPARTMENT OF THE INTERIOR is a cabinet-level agency
19 responsible for managing and administering various provisions of the ESA.

20 19. Defendant U.S. FISH AND WILDLIFE SERVICE, an agency of DOI, is
21 responsible for managing and administering various provisions of the ESA.

22 **STATUTORY AND REGULATORY BACKGROUND**

23 **A. The Endangered Species Act**

24 20. Finding that "fish, wildlife, and plants are of esthetic, ecological, educational,
25 historical, recreational, and scientific value to the Nation and its people," Congress enacted the
26 ESA in order to "provide a program for the conservation of ... endangered species and
27 threatened species," and to "provide a means whereby the ecosystems upon which endangered
28 species and threatened species depend may be conserved." 16 U.S.C. § 1531(a)(1), (b).

1 21. “Conservation” is defined, in turn, as ”the use of all methods and procedures
2 which are necessary to bring any endangered species or threatened species to the point at which
3 the measures provided pursuant to this chapter are no longer necessary.” *Id.* § 1532(3).
4 Accordingly, the primary purpose of the ESA is not simply to prevent the extinction of
5 imperiled species, but to recover them to the point where the protections of the Act are no
6 longer necessary. Under ESA regulations, FWS has been delegated responsibility for
7 administering the Act as it pertains to the southern sea otter. 50 C.F.R. § 402.01(b).

8 22. The ESA provides for the listing of imperiled species as “threatened” or
9 “endangered.” 16 U.S.C. § 1533. The Act defines an endangered species as “any species
10 which is in danger of extinction throughout all or a significant portion of its range,” and a
11 threatened species as “any species which is likely to become an endangered species within the
12 foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(6), (20). In
13 determining whether a species is threatened or endangered, FWS is directed to list based on the
14 presence of any one of the following five factors: the present or threatened destruction,
15 modification, or curtailment of its habitat or range; overutilization for commercial, recreational,
16 scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory
17 mechanisms; or other natural or manmade factors affecting its continued existence. *Id.* §
18 1533(a)(1)(A)-(E).

19 23. Once a species is listed, the ESA provides several procedural and substantive
20 mechanisms intended to halt and reverse population declines, with the ultimate goal of
21 recovering the species to the point where the protections of the Act are no longer necessary.
22 The Secretary of the Interior, through FWS, is responsible for administering many of these
23 provisions, including the designation of critical habitat, *id.* § 1533(a)(3)(A); the development
24 and implementation of recovery plans, *id.* § 1533(f); acquisition of lands to conserve fish,
25 wildlife, and plants, *id.* § 1534; review and oversight of agency efforts to further the purposes
26 of the ESA and consultation on the effects of their actions on listed species, *id.* § 1536(a); and
27 the assessment of civil penalties and prosecution of criminal violations of the ESA. *Id.* §
28 1540(a)-(b).

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

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

11 26. At the conclusion of a section 7(a)(2) consultation, FWS issues a “biological
12 opinion” that “set[s] forth [FWS’s] opinion, and a summary of the information on which the
13 opinion is based, detailing how the agency action affects the species or its critical habitat.” *Id.*
14 § 1536(b)(3)(A). Under FWS regulations, if “jeopardy . . . is found, [FWS] shall suggest those
15 reasonable and prudent alternatives which [FWS] believes would not violate subsection (a)(2)
16 of this section and can be taken by the Federal agency or applicant in implementing the agency
17 action.” *Id.* § 1536(b)(3)(A). The reasonable and prudent alternatives must be actions that
18 “can be implemented consistent with the scope of the Federal agency’s legal authority and
19 jurisdiction.” 50 C.F.R. § 402.02.

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

25 28. Section 10(j) was amended to the ESA to address FWS’s “frustration over
26 political opposition to reintroduction efforts perceived to conflict with human activity.”
27 *Wyoming Farm Bureau v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000). Accordingly,
28 “Congress purposefully designed section 10(j) to provide [FWS] flexibility and discretion in

1 managing the reintroduction of an endangered species.” *Id.* at 1233. Most notably, the ESA
2 provides that experimental populations are largely exempt from the Act’s section 7 consultation
3 and section 4 critical habitat designation requirements.

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

7 30. Protective regulations for experimental populations must always “provide for
8 the conservation of the species.” 16 U.S.C. § 1533(d). FWS must thus ensure that its actions
9 always provide sufficient protection to ensure continued progress towards removal of the
10 species as a whole from the list of threatened and endangered species. *Sierra Club v. Clark*,
11 755 F.2d 608, 612 (8th Cir. 1985).

12 **B. Public Law 99-625**

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

19 32. In the event FWS chose to utilize its authority under P.L. 99-625, Congress also
20 required the agency to designate a “management,” or no otter zone. The no otter zone was to
21 “surround” the translocation zone, but could not “include the existing range of the parent
22 population or adjacent range where expansion is necessary for the recovery of the species.”
23 Section 1(b)(4)(A)-(B). Within the no otter zone, FWS was directed to “use all feasible non-
24 lethal means and measures to capture any sea otter ... and return it to either the translocation
25 zone or to the range of the parent population.” Section 1(b)(4)(B).

26 **C. The Administrative Procedure Act**

27 33. The APA provides for review of “final agency action for which there is no other
28 adequate remedy.” 5 U.S.C. § 704. Agency action is defined to “include[] the whole or a part

1 of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure*
2 *to act.*” *Id.* § 551(13) (emphasis added).

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

6 **FACTUAL BACKGROUND**

7 **A. The Near Extinction of the Southern Sea Otter and Its Consequent Listing Under** 8 **the Endangered Species Act**

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

16 36. Despite their relatively small size, sea otters are a classic example of a
17 “keystone” species within the nearshore marine kelp forest habitats they inhabit. While
18 definitions vary, the essence of a keystone species is that it plays an essential role in shaping its
19 respective ecosystem, such that the ecosystem will experience significant changes in the
20 species’ absence. One of the main reasons sea otters fulfill the keystone role within kelp forests
21 is because one of their primary prey is sea urchins. The elimination of sea otters throughout
22 much of their historic range has resulted in an explosion of sea urchin populations in many
23 areas, which have in turn devoured and decimated the kelp forest ecosystems, negatively
24 affecting the many other species that rely on those ecosystems.

25 37. Sea otters historically numbered between half million and one million
26 individuals, ranging throughout the north Pacific basin. They were found off the coast of
27 Japan, along the Aleutian chain of islands off the coast of Alaska, and down the Pacific
28

1 coastline, including the entire California coastline, to the central portion of Baja California in
2 the Republic of Mexico.

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

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

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

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

20 41. Subsequent to the listing of the southern sea otter as a threatened species, the
21 Marine Mammal Commission began to strongly advocate for the establishment of new
22 populations of sea otters through translocation as means of ensuring the survival and recovery
23 of the species. The Marine Mammal Commission is an independent federal agency created
24 under the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. 1361 *et seq.*, to be the federal
25 government’s primary, scientifically-based adviser on marine mammal conservation issues, and
26 consists of three members appointed by the President and subject to Senate consent. 16 U.S.C.
27 § 1401(b)(1). Each member must be “knowledgeable in the fields of marine ecology and
28

1 resource management ... [and] not in a position to profit from the taking of marine mammals.”

2 *Id.*

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

11 43. In the original Recovery Plan prepared for the southern sea otter pursuant to
12 section 4(f) of the ESA in 1982, FWS adopted the Marine Mammal Commission’s
13 recommendation, identifying the need to establish, through translocation, one or more sea otter
14 colonies as a primary management action necessary to ensure recovery.

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

20 **C. Origins of “Zonal Management” and Designation of Southern California Waters**
21 **As a “No Otter” Zone**

22 45. On June 27, 1984 FWS published a public notice announcing its intention to
23 conduct rulemaking, and to prepare an Environmental Impact Statement under the National
24 Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, on its proposal to translocate
25 southern sea otters to an area within the species’ historic range. 49 Fed. Reg. 26,313 (June 27,
26 1984). In that notice, FWS identified San Nicolas Island off the coast of southern California as
27 its preferred translocation site. *Id.*

1 46. FWS’s proposal to translocate southern sea otters to San Nicolas Island was
2 strongly opposed by some fishing interests, which believed that the otters would adversely
3 affect urchin and other shellfish fisheries.

4 47. FWS released its draft Environmental Impact Statement (“DEIS”) on the
5 translocation proposal on August 15, 1986. Under FWS’s preferred alternative, San Nicolas
6 Island continued to be identified as the proposed translocation site.

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

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

20 50. FWS’s preferred alternative defined the otter-free zone expansively, to
21 “include[] *all U.S. waters south of Point Conception*, including those along the mainland as
22 well as the offshore islands except the San Nicolas Island translocation zone.” *Id.* (Emphasis
23 added).

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

25 51. Despite the major concessions made by FWS in its DEIS, fishing interests
26 continued to oppose translocation, arguing that the MMPA “may be too restrictive to allow for
27 long-term containment and management of an experimental population of sea otters.” *Id.* at
28 29,785.

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

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

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

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

27 56. In enacting P.L. 99-625, Congress made clear that any translocation and
28 management plan prepared pursuant to its authority was not intended to address long-term

1 management of California sea otters, but to instead be “primarily a planning mechanism for the
2 translocation itself.” 1987 Rule, 52 Fed. Reg. 29,754, at 29,756. As stated in the legislative
3 history, “[t]he translocation itself . . . is not intended to replace the Recovery Plan as the
4 primary long-term management document.” *Id.*

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

6 57. Utilizing its existing authority under section 10(j) of the ESA, 16 U.S.C. §
7 1539(j), as well as the authority provided by P.L. 99-625, FWS on August 11, 1987 finalized its
8 rulemaking and associated NEPA process designating the waters around San Nicolas Island as
9 the translocation zone, with all other California waters and islands south of Point Conception
10 designated as the no otter management zone. *See* 52 Fed. Reg. 29,754 (final 1987 rule),
11 *codified at* 50 C.F.R. § 17.84(d); 52 Fed. Reg. 29,784 (NEPA Record of Decision).

12 58. In finalizing the rulemaking process, FWS expressed optimism that the
13 translocation effort would succeed within a fairly short time frame. For example, in its
14 response to comments on the draft rule, the agency stated that the “available information on
15 habitat quality and carrying capacity at San Nicolas Island, combined with the numbers and sex
16 composition of the animals to be translocated (primarily females) strongly suggests that the
17 recruitment of at least 20 young into the experimental population for 3 to 5 years should be
18 readily achieved, possibly by the end of the first 5 years.” 1987 Rule, 52 Fed. Reg. 29,754 at
19 29,762; *id.* at 29,778 (“There is a strong likelihood that an experimental population of southern
20 sea otters released at San Nicolas Island will become established within 10 years after
21 translocation is begun, and possibly in as few as 5 years.”). These projections would never
22 come close to being realized.

23 59. The final rule established specific and quantitative criteria for measuring the
24 anticipated success of the translocation. Under the rule, an “established experimental
25 population of southern sea otters” is defined as an “estimated combined minimum of 150
26 healthy male and female sea otters residing within the translocation zone, little or no
27 emigration into the management zone occurring, and a minimum annual recruitment to the
28 experimental population in the translocation zone of 20 sea otters for at least 3 years of the

1 latest 5-year period, or replacement yield sufficient to maintain the experimental population at
2 or near carrying capacity during the post-establishment and growth phase or carrying capacity
3 phase of the experimental population.” 50 C.F.R. § 17.84(d)(1)(vi).

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

10 61. The establishment of the no otter zone was specifically intended to mitigate the
11 anticipated economic effect of a *successful* translocation effort and establishment of a new sea
12 otter colony at San Nicolas Island on the shellfish industry. As stated by FWS, “[m]aintenance
13 of this management zone free of otters *is the principal mitigation feature of the proposal for*
14 *fisheries* and other environmental and socioeconomic impacts.” NEPA ROD, 52 Fed. Reg.
15 29,784, at 29,787. (emphasis added).

16 62. The assumption of a successful translocation effort was also the basis for FWS’s
17 concluding, in its ESA section 7 consultation with itself on the proposal, that the effort would
18 not jeopardize the continued existence of the species.

19
20 Although a short-term reduction in the size of the parent population of
21 southern sea otters will result as a consequence of translocation, any
22 adverse effects of removal of no more than 70 mostly immature otters the
23 first year and only supplemental removals in subsequent years if needed
24 should be temporary and diminished by natural growth and expansion of
25 the parent population, *and will be outweighed by the achievement of a*
26 *primary recovery criterion that can result from a successful*
27 *translocation.*”

28 (emphasis added).

29 **F. The Failure Criteria**

30 63. FWS’s optimism was not shared by all stakeholders, and during the rulemaking
31 process, some questioned the suitability of San Nicolas Island as a translocation site. *See* 1987
32 Final Rule 52 Fed. Reg. 29,754 at 29,759 (comment expressing concern that San Nicolas is

1 very close to existing offshore oil and gas operations, and thus may be vulnerable to oil spills);
2 *id.* at 29,760 (comment stating that “[c]arrying capacity of San Nicolas Island is too small to
3 achieve the desired recovery and research purposes [and] could result in another genetic
4 bottleneck.”).

5 64. This concern was great enough that commenters requested that criteria to judge
6 whether the translocation has failed be specifically included as part of the rule’s final language.
7 FWS agreed with this comment, stating that the criteria “are critical to whether or not the
8 experimental population will achieve its intended purposes *or have to be terminated*, which
9 would involve [FWS] evaluation and informal rulemaking procedures.” *Id.* at 29,764
10 (emphasis added).

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

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

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

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

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

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

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

12 72. The final rule also provides that “termination of the project under [the criteria]
13 may be delayed if reproduction is occurring and the degree of dispersal into the management
14 zone is small enough that the efforts to continue to remove otters from the management zone
15 are acceptable to [FWS] and California Department of Fish and Game.” *Id.*

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

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

24 74. In accordance with its final 1987 rule, FWS began translocating sea otters to San
25 Nicolas Island in 1987, releasing 140 individuals between August 1987 and March 1990. *See*
26 August 2005 Draft Supplemental EIS for the Translocation of Southern Sea Otters (“DSEIS”),
27 at p. 1.
28

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

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

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

13 78. FWS’s efforts to enforce the no otter zone also faced unanticipated challenges
14 which resulted in higher levels of otter deaths than predicted. In total, 24 sea otters were
15 captured and removed from the no otter zone and returned to their parent range between
16 December 1987 and February 1993. At least two of these otters swam back hundreds of miles
17 to the no otter zone, where they were captured and moved again. In February 1993, two sea
18 otters that had been captured in the no otter zone were found dead after being transported back
19 to the parent population. *Id.* The process of capturing and moving otters also proved to be
20 much higher than anticipated, and according to one estimate was as much as \$10,000 per otter.

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

1 80. The unanticipated high levels of sea otter mortality in both the translocation and
2 management aspects of the final rule were soon recognized and acknowledged by FWS. “As
3 early as 1990,” FWS monitoring reports “noted that the program appeared to meet” at least one
4 of the failure criteria. *See* Draft Evaluation of the Southern Sea Otter Translocation Program
5 1987-2004, at 13 (“Draft Evaluation”).

6 81. In 1992, “after 5 years of experience with the translocation and containment
7 programs,” FWS prepared the first of several draft evaluations of the translocation and
8 management rule declaring it a failure, none of which have ever been finalized. *See* July 21,
9 2000 Biological Opinion, Reinitiation of Formal Consultation on the Containment Program for
10 the Southern Sea Otter) (“Biological Opinion”) at 11.

11 82. As stated by FWS in that first draft failure evaluation, prepared almost 20 years
12 ago, “the major issues [it] viewed as affecting the recovery of the southern sea otter were the
13 existence of the management zone and the feasibility of non-lethal containment techniques.”
14 *Id.* At that time, the maximum number of sea otters at San Nicolas Island had never exceeded
15 17 individuals.

16 83. Moreover, new information had come to light casting doubt on the belief that
17 the translocated animals would be secure from a major oil spill threatening the existing central
18 coast population, one of the primary purposes of establishing a new colony at San Nicolas
19 Island. As stated by FWS:

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

25 *Id.*

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

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

6 86. In 1993, FWS prepared a second draft evaluation concluding that the
7 translocation and management effort had failed. In this evaluation, FWS specified that both
8 failure criteria #2 and failure criteria #3 had been met. *Id.* at 13-14.

9 87. On December 13, 1993, FWS met with California Department of Fish and Game
10 and “advised that the program had met certain failure criteria and that the translocation
11 program no longer served the recovery purpose as identified in the 1982 recovery plan.” *Id.* at
12 14.

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

17 89. FWS agreed to the delay, but in 1995 again stated its belief that the failure
18 criteria had been met.

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

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

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

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

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

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

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

13 96. In light of these changing circumstances, FWS reinitiated ESA section 7
14 consultation on the sea otter translocation and management rule on March 19, 1999, and issued
15 a final biological opinion on July 19, 2000. As stated by the agency, “our reinitiation of
16 consultation was prompted by the receipt of substantial new information on the population
17 status, behavior, and ecology of the southern sea otter that revealed adverse effects of
18 containment that were not previously considered.” *Id.* at 13.

19 97. In addition to new information regarding the translocation and management
20 effort, several other new circumstances had arisen in the 12 years since otter translocations
21 began. In the biological opinion, FWS identified five categories of new information and
22 circumstances prompting reinitiation: (1) in 1998 and 1999, sea otters moved into the no otter
23 zone “in much greater numbers than in previous years”; (2) analysis of carcasses indicated that
24 otters “were being exposed to environmental contaminants and diseases that could be affecting
25 the health of population throughout California”; (3) sea otter populations were declining range-
26 wide; (4) new information, including the observed effects of the Exxon Valdez oil spill,
27 indicated that sea otters at San Nicolas Island “would not be isolated from the potential effects
28

1 of a single large oil spill”; and (5) “the capture and release of large groups of southern sea
2 otters could result in substantial adverse effects on the parent population.” *Id.* at 13-14.

3 98. The biological opinion also addressed the high levels of mortality and
4 disappearances that had occurred as a result of translocation, as well as removals of otters from
5 the no otter zone. According to the agency, 12 otters “are confirmed to have died as a result of
6 being captured, held, and transported during containment and translocation activities.”

7 Biological Opinion, at 31. Moreover, FWS acknowledged that it “does not possess any new
8 information on capturing and moving animals that is likely to result in a lowered mortality
9 rate.” *Id.*

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

15 100. In the context of the failed translocation and management effort, the southern
16 sea otter recovery team concluded that the “primary action for promoting the recovery of this
17 population at this time is the cessation of the ‘otter-free management zone’ in the southern
18 California Bight.” Without such change, FWS concluded that “[c]ontinuation of the
19 containment program will ... restrict the natural range expansion of the southern sea otter ...
20 [and] increases the likelihood that oil spills and stochastic events would affect a greater
21 percentage of the individuals in the population ... [and] precludes the ability of the southern
22 sea otter to expand its range to the south and reduce those risks.” *Id.* at 32. Accordingly,
23 [w]ithout such a change in management, the current population decline could worsen.” *Id.* at
24 32.

25 101. The final biological opinion concludes “that continuing the containment
26 program and restricting the southern sea otter to the area north of Point Conception ... is likely
27 to jeopardize [the southern sea otter’s] continued existence.” *Id.* at 37.
28

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

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

10 104. In order to address its own conclusion that the translocation and management
11 rule is in substantive violation of section 7 of the ESA, FWS stated its intent “to undertake a
12 comprehensive review of the translocation program under NEPA” and evaluate whether it
13 should be continued, modified, or terminated. *Id.*

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

18 106. The jeopardy opinion, while notably concluding that continuation of the
19 translocation and management rule threatened the continued existence of the southern sea otter,
20 reiterated many of conclusions already expressed by the agency many years earlier, and was
21 thus merely a continuation of FWS’s consistently expressed belief that the rule had clearly
22 failed under its own criteria.

23 107. This conclusion would be reiterated in the final revised recovery plan for the
24 southern sea otter issued in April 2003, which identifies the cessation of the translocation rule
25 as a primary action for promoting the recovery of the species. *See Revised Southern Sea Otter*
26 *Recovery Plan* at 28 (“[I]t is in the best interest of the southern sea otter population to declare
27 the experimental translocation of sea otters to San Nicolas Island a failure and to discontinue
28 the maintenance of the otter-free zone in southern California.”).

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I. The Long Delayed, Still Uncompleted Failure Determination Process

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

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

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

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

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

113. The 2005 draft evaluation acknowledged that the agency had already conducted other draft evaluations, including one prepared *12 years earlier*, in 1993. As stated by FWS, the “overall intent” of the 1993 evaluation was “to determine whether the program met regulatory criteria to be declared a failure.”

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

115. Addressing criteria 2, FWS noted that for the majority of years since translocation was begun, the number of individual sea otters at San Nicolas Island has remained

1 below 25, and has never numbered more than 32. Thus, “[t]he future of the colony remains
2 uncertain, despite the fact that 18 years have passed since the initial translocation.” *Id.* at 23.
3 FWS thus concludes in the draft evaluation that “[i]t appears unlikely ... that the colony will
4 ever be large enough to supply the numbers of sea otters that would be needed to perform a
5 successful translocation to the mainland range if the parent population were reduced or
6 eliminated by a catastrophic event.” *Id.* at 24.

7 116. The 2004 draft evaluation concludes as follows:

8 The primary purpose of the southern sea otter translocation program was
9 to bring southern sea otters closer to recovery and eventual delisting as a
10 threatened species. Based on our evaluation of the translocation program
11 against the goals for which it was undertaken and the failure criteria for its
12 assessment, *we conclude that the translocation program has failed to*
13 *fulfill its purpose and that our recovery and management goals for the*
14 *species cannot be met by continuing the program.*

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

25 Draft Evaluation, at 26 (emphasis added).

26 117. More than four years have now passed since FWS released in DSEIS,
27 more than eight years have passed since it began its NEPA scoping process, nearly a
28 decade has passed since it released its biological opinion finding the translocation and
management effort to be in substantive violation of the ESA section 7 jeopardy
mandate, and more than 16 years have passed since FWS issued its first draft
evaluation finding that the effort met failure criteria, and thus must be terminated
under its regulations.

29 **PLAINTIFFS’ CLAIM FOR RELIEF**
30 (Violation of Administrative Procedure Act)

31 118. Paragraphs 1 through 117 are fully incorporated into this paragraph.

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

7 120. Under this rule, FWS is required to determine whether the
8 translocation effort has failed as measured by five criteria. Three of these failure
9 criteria were required to be considered at different stages of the translocation effort
10 that have long since passed: criteria 1 was to be applied “after the first year following
11 initiation of translocation”; criteria 2 was to be applied “within three years from the
12 initial transplant”; and criteria 3 was to be applied “after two years following the
13 completion of the transplant phase.” 50 C.F.R. § 17.84(d)(8)(i)-(iii).

14 121. The transplant phase ended in July 1990, thus the last of the first three
15 criteria was to be applied by July 1992.

16 122. If “any one of these criteria” is met, then the agency is required to
17 “terminate the experimental population.” 50 C.F.R. § 17.84(d)(vi).

18 123. FWS has thus long been under a legal duty to apply the failure criteria
19 and, if any of such criteria were met, to withdraw the translocation rule and abolish
20 the no otter zone.

21 124. FWS has prepared several draft evaluations declaring the 1987
22 translocation and management rule a failure, including evaluations conducted in
23 1992, 1993, 1995, and 2005.

24 126. By failing to finalize its evaluation of the failure criteria and terminate
25 the experimental population designation and abolish the no otter zone as required by
26 50 C.F.R. § 17.84(d), defendants have “unreasonably delayed” agency action, in
27 violation of Sections 555(b) and 706(1) of the Administrative Procedure Act.
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Attorneys for Plaintiffs