

Total Annual Responses: 5959.  
Total Annual Non-Hour Cost Burden:  
\$149,000.

Dated: January 16, 2001.

Mark Phillips,

Service Information Collection Officer.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Notice of Policy Regarding Capture and Removal of Southern Sea Otters in a Designated Management Zone

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Statement of policy.

**SUMMARY:** This notice advises the public that we, the U.S. Fish and Wildlife Service (Service), have determined that we will not capture and remove southern sea otters from the southern California sea otter management zone pending completion of our ongoing reevaluation of the southern sea otter translocation program including the preparation of a supplemental environmental impact statement (EIS) and release of a final evaluation of the translocation program.

On July 19, 2000, we finalized a biological opinion in accordance with section 7(a)(2) of the Endangered Species Act of 1973, as amended (ESA), evaluating containment of southern sea otters, including the capture and removal of otters from a designated management zone. That biological opinion is based on substantial new information on the population status, behavior, and ecology of the southern sea otter, and concludes that continued containment of southern sea otters will likely jeopardize the continued existence of the southern sea otter. On July 27, 2000 (65 FR 46172), we published a notice of intent to prepare a supplemental EIS on the southern sea otter translocation plan.

We have determined, based on our recent biological opinion, that containment of southern sea otters, at present, is not consistent with the requirement under the Act to avoid jeopardy to the species. We are in the process of reevaluating the translocation program and expect to complete a supplemental EIS and finalize our evaluation of the translocation program, including evaluation of the failure criteria developed for the program, by December 2002. We have provided and will continue to provide for public participation during that process. Upon

completion of these documents, we will determine whether the southern sea otter translocation plan needs to be modified (including under what circumstances containment of southern sea otters can resume) or terminated to make it consistent with the survival and recovery needs of the species.

**FOR FURTHER INFORMATION CONTACT:** Mr. Greg Sanders, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, California, 93003-7726, (telephone: 805/644-1766; facsimile: 805/644-3958).

#### SUPPLEMENTARY INFORMATION:

##### Background

On January 14, 1977 (42 FR 2968), we listed the southern sea otter (*Enhydra lutris nereis*) as a threatened species under the ESA on the basis of its small population size, greatly reduced range, and the potential risk from oil spills. We established a recovery team for the species in 1980 and approved a recovery plan on February 3, 1982. In the recovery plan, we identified the translocation of southern sea otters to a remote location in order to establish a second colony of otters as an effective and reasonable recovery action, although we acknowledged that a translocated southern sea otter population could impact shellfish fisheries that had developed in areas formerly occupied by southern sea otters. Goals cited in the recovery plan included: minimizing risk from potential oil spills; establishing at least one additional breeding colony outside the then-current southern sea otter range; and compiling and evaluating information on historical distribution and abundance, available but unoccupied habitat, and potential fishery conflicts.

The purpose of the translocation program was to establish southern sea otters in one or more areas outside the otters' then-current range to minimize the possibility of a single natural or human-caused catastrophe, such as an oil spill, adversely affecting a significant portion of the population. Ultimately, it was anticipated that translocation would result in a larger population size and a more continuous distribution of animals throughout the southern sea otter's former historical range. We viewed translocation as important to achieve recovery and to identify the optimum sustainable population (OSP) level for the southern sea otter as required under the Marine Mammal Protection Act (MMPA).

Translocation of a listed species to establish experimental populations is

specifically authorized under section 10(j) of the ESA. However, the southern sea otter is protected under both the ESA and the MMPA, and the MMPA contains no similar translocation provisions. For southern sea otters, this dilemma was resolved by the passage of Public Law (P.L.) 99-625 (Fish and Wildlife Programs: Improvement; Section 1. Translocation of California Sea Otters) on November 7, 1986, which specifically authorized development of a translocation plan for southern sea otters administered in cooperation with the affected State.

If the Secretary of the Interior chose to develop a translocation plan under P.L. 99-625, the plan was to include: the number, age, and sex of sea otters proposed to be relocated; the manner in which sea otters were to be captured, translocated, released, monitored, and protected; specification of a zone into which the experimental population would be introduced (translocation zone); specification of a zone surrounding the translocation zone that did not include range of the parent population or adjacent range necessary for the recovery of the species (management zone); measures, including an adequate funding mechanism, to isolate and contain the experimental population; and a description of the relationship of the implementation of the plan to the status of the species under the ESA and determinations under section 7 of the ESA. The purposes of the management zone were to facilitate the management of southern sea otters and containment of the experimental population within the translocation zone and to prevent, to the maximum extent feasible, conflicts between the experimental population and other fishery resources within the management zone. Any sea otter found within the management zone was to be treated as a member of the experimental population. The Service was required to use all feasible non-lethal means to capture sea otters in the management zone and return them to the translocation zone or to the range of the parent population.

On March 6, 1987, we completed an intra-Service biological opinion that evaluated translocation of southern sea otters to San Nicolas Island, our preferred translocation site. That biological opinion analyzed effects on the parent population caused by removal of southern sea otters from the population for translocation and the effects on the species of containment (removal) of otters from the management zone. The proposed translocation plan was found to be a well-designed recovery action that maximized the

opportunity for success while minimizing negative impacts on the parent population. We concluded that the southern sea otter translocation plan would not likely jeopardize the continued existence of the species.

In May 1987, we finalized an EIS which analyzed the impacts of establishing a program to translocate southern sea otters from their then-current range along the central coast of California to areas of northern California, southern Oregon, or San Nicolas Island off the coast of southern California. San Nicolas Island was identified as our preferred alternative. A detailed translocation plan meeting the requirements of Pub. L. 99-625 was included as an appendix to the final EIS.

Regulations to implement Pub. L. 99-625 were finalized August 11, 1987 and are found at 50 CFR 17.84(d). They provide details of the translocation plan, including criteria for determining whether the translocation program would be considered a failure. Waters surrounding San Nicolas Island were designated as the translocation zone, and all waters south of Point Conception, California, with the exception of waters surrounding San Nicolas Island, were designated as the management zone.

On August 19, 1987, as part of our cooperative actions with the State of California, we signed a Memorandum of Understanding with the California Department of Fish and Game (CDFG) providing for cooperative research and management efforts to promote recovery of the southern sea otter population in California. The agreement also included provisions to minimize conflicts between southern sea otters, existing shellfish fisheries, and other users of marine resources through containment of sea otters that might enter the management zone.

We implemented the translocation plan and began moving groups of southern sea otters from the coast of central California to San Nicolas Island starting on August 24, 1987. In December 1987, in coordination with the CDFG, we began capturing and moving sea otters that entered the designated management zone in an effort to minimize conflicts between sea otters and fisheries within the management zone and to facilitate the management of sea otters at San Nicolas Island.

We released 140 southern sea otters at San Nicolas Island between August 1987 and March 1990. As of March 1991, approximately 14 sea otters (10 percent) were thought to remain at the island. Some sea otters died as a result

of translocation; many swam back to the parent population, some moved into the management zone; and the fate of more than half the sea otters taken to San Nicolas is unknown. In 1991, we stopped translocating sea otters to San Nicolas Island, due to low retention and survival. However, we continued monitoring the sea otters remaining in the translocation zone. Sea otter surveys at San Nicolas Island are now conducted by the Biological Resources Division of the U.S. Geological Survey on a bimonthly basis.

Sea otters were captured and removed from the management zone until February 1993. At that time, two sea otters that had been recently captured in the management zone were found dead shortly after their release in the range of the parent population. A total of four sea otters were known or suspected to have died within 2 weeks of being moved from the management zone. We suspended all sea otter capture activities in the management zone to evaluate sea otter capture and transport methods. Results of the evaluation were inconclusive, but we remained concerned that capture and transport of sea otters found in the management zone could result in the death of some animals. Between December 1987 and February 1993, 24 sea otters were captured and removed from the management zone and returned to the parent range. Of these, 2 sea otters were captured twice in the management zone after being moved to the northern end of the parent range, suggesting that capture and relocation were ineffective. We discontinued containment efforts after 1993 in response, in part, to our concerns about the unexpected mortalities of otters experienced during or shortly following their removal from the management zone. We also recognized that techniques at the time, which proved to be less effective than originally predicted and were labor intensive, were not a feasible means of containing otters. In 1997, CDFG announced that they also would no longer be able to assist with sea otter captures in the management zone.

A group of approximately 100 southern sea otters moved from the parent range into the northern end of the management zone in 1998. At the same time, range-wide counts of the southern sea otter population indicated a decline of approximately 10 percent since 1995. Given the decline in the southern sea otter population, we asked the Southern Sea Otter Recovery Team, a team of biologists with special expertise in sea otter ecology, for a recommendation regarding the capture and removal of sea otters in the

management zone. The recovery team recommended that we not move sea otters from the management zone to the parent population because moving large groups of sea otters and releasing them within the parent range would be disruptive to the social structure of the parent population.

In August 1998, we held two public meetings to provide information on the status of the translocation program, identify actions we intended to initiate, and solicit general comments and recommendations. At these meetings, we announced that we would reinitiate consultation under section 7 of the ESA for the containment program and begin the process of evaluating failure criteria established for the translocation plan. The technical consultant group for the Southern Sea Otter Recovery Team, composed of representatives from the fishery and environmental communities as well as State and Federal agencies, was also expanded to assist with evaluating the translocation program. We provided updates on the translocation program and status of the southern sea otter population to the California Coastal Commission, Marine Mammal Commission, and California Fish and Game Commission in 1998 and 1999.

In March 1999, we distributed our draft evaluation of the translocation program to interested parties. The draft document included the recommendation that we declare the translocation program a failure because fewer than 25 sea otters remained in the translocation zone and reasons for the translocated otters' emigration or mortality could not be identified and/or remedied. We received substantive comments from agencies and the public following release of the draft for review.

We prepared a draft biological opinion evaluating southern sea otter containment and distributed it to interested parties for comment on March 19, 1999. We completed a final opinion on July 19, 2000. Our reinitiation of consultation was prompted by the receipt of substantial new information on the population status, behavior, and ecology of the southern sea otter that revealed effects of containment that were not previously considered. Specifically, the biological opinion noted that in 1998 and 1999 southern sea otters moved into the management zone in much greater numbers than had occurred in prior years; analysis of carcasses indicated that southern sea otters were being exposed to environmental contaminants and diseases which could be affecting the health of the population; range-wide counts of southern sea otters found

numbers were declining; recent information, in particular the implications of the effects of the Exxon Valdez oil spill, indicated that sea otters at San Nicolas Island would not be isolated from the potential effects of a single large oil spill; and the capture and release of large groups of sea otters was likely to result in substantial adverse effects on the parent population. The Service concluded that reversal of the southern sea otter population decline and expansion of the southern sea otter's population distribution are essential to its survival and recovery. The Service further concluded that continuation of the containment program, while restricting the southern sea otter to the area north of Point Conception, will likely exacerbate recent sea otter population declines and increase vulnerability to a catastrophic oil spill or other man-made or natural stochastic events, and, therefore, likely jeopardize the continued existence of the species.

On February 8, 2000, a draft revised recovery plan for the southern sea otter was released for public review and comment (65 FR 6221). Based on the observed decline in abundance and shift in distribution of the southern sea otter population, the recovery team recommended in the draft revised recovery plan that it would be in the best interest of the southern sea otter to declare the experimental translocation of southern sea otters to San Nicolas Island a failure and discontinue maintenance of the management zone. The recovery team's recommendation will be fully evaluated through our ongoing NEPA process on the translocation action.

#### Current Status

In 4 of the past 5 years, population counts have shown a decline in southern sea otters. Survey data collected in spring 2000 were encouraging, with the number of southern sea otters counted approaching the highest recorded count for the population. However, more survey data are needed to determine whether the spring 2000 count was an anomaly or the beginning of a positive trend in southern sea otter population growth. In spite of more than 140 sea otters having been translocated and evidence of reproduction, the population of sea otters at San Nicolas Island currently comprises only approximately 20 adults.

To date, the southern sea otter translocation program has not met the primary goal of establishing a viable population of southern sea otters at San Nicolas Island. In the translocation plan

we determined that a self-sustaining colony size of 150 southern sea otters would be necessary to consider the population at San Nicolas Island viable. Based on trends since the translocation program began and current circumstances, the best scientific information indicates that a population of this size may not be attainable.

On July 27, 2000 (65 FR 46172), we published in the **Federal Register** a notice of intent to prepare a supplemental EIS on the southern sea otter translocation program. The need for a supplemental EIS is based on changed circumstances and new information since the original EIS on translocation of southern sea otters was prepared in 1987. Public scoping meetings were held on August 15 and 17, 2000, with the purpose of soliciting information to be used in defining the overall scope of the supplemental EIS, identifying significant issues to be addressed, and identifying alternatives to be considered. The technical consultants to the Southern Sea Otter Recovery Team met to discuss the supplemental EIS on September 26, 2000. We expect a draft supplemental EIS to be completed and released for public comment by September 2001 and a final document to be completed approximately a year later. The draft evaluation of the translocation program released in March 1999 will be finalized following further opportunity for public participation in the decision-making process and completion of the EIS.

#### Public Law 99-625 and the ESA

Section 7 of the ESA mandates that no Federal agency—including the U.S. Fish and Wildlife Service—may take any action that is likely to jeopardize the continued existence of a listed species. The translocation plan we developed in 1987 pursuant to the discretionary authority vested in the Secretary of the Interior was a Federal action for which consultation was required. Therefore, prior to implementing the translocation program, we conducted an internal consultation under section 7. That internal consultation resulted in a biological opinion dated March 6, 1987, in which we concluded that implementation of the translocation plan as proposed was not likely to jeopardize the southern sea otter. Specifically we concluded that implementing zonal management of sea otters by establishing a translocation zone surrounding San Nicolas Island to which otters would be moved, establishing a surrounding "otter free" management zone south of Point Conception from which otters would be removed, demarcating the southward

limit of the parent range at Point Conception to allow for range expansion by the parent population, removal and translocation of up to 250 sea otters from the parent population to San Nicolas Island, and containment of otters by non-lethal means and their return to the parent population or San Nicolas Island would not likely jeopardize the continued existence of the species. Had we concluded in our 1987 biological opinion that implementation of the translocation plan, or any of its components, would result in jeopardy to the sea otter, the program could not have legally proceeded as implementation would have violated the ESA.

Our implementing regulations at 50 CFR 402.16(b) require any Federal agency to reinstate consultation if new information reveals that an action may affect a listed species in a manner or to an extent not previously considered. Significant new information that has come to light since inception of the translocation plan has included evidence of: (1) Recent annual declines in the parent population; (2) exposure of otters to contaminants; (3) movement of significant numbers of otters from the parent range into the management zone; (4) potential effects of a single, large oil spill on the entire sea otter population, including San Nicolas Island; and (5) substantial adverse impacts to the parent population likely to result from reintroduction of large numbers of contained otters. Pursuant to our section 7 responsibilities, we reinstated consultation in 1999 on the containment component of the translocation plan to consider the significant new information about the potential effects of containment on the parent population of southern sea otters. In our July 2000 biological opinion we concluded that containment of sea otters from the management zone and reintroduction back into the parent population would likely jeopardize the continued existence of the species. In light of the determination from our July 2000 biological opinion, we may not proceed with containment until the factors that may cause jeopardy to the southern sea otter are addressed.

Our determination is consistent with both the structure and intent of Pub. L. 99-625. The statute as written recognizes the applicability of the ESA generally—and section 7 in particular—to the translocation plan throughout its various subsections (*e.g.*, sections 1(b)(6), 1(c), 1(d), 1(e), and 1(f)). Further, the intent of Pub. L. 99-625 was to allow the Secretary to implement what was then identified as a critical recovery action under the 1982 recovery plan,

and any implementation contrary to this recovery goal would contradict the purpose of the statute. Indeed, we have determined that containment under the present circumstances could lead to extinction of the species. Finally, apart from the specific references to section 7 throughout Pub. L. 99-625, the statute's discretionary grant of authority to the Secretary to develop and implement a translocation plan in the first instance brings the Secretary's affirmative decision to develop—and to continue to implement—the plan squarely within the universe of federal actions to which section 7 of the ESA applies. Having concluded under section 7 that implementation of the containment component of the plan would likely jeopardize the sea otters' continued existence, we may not proceed with that aspect of the translocation plan.

Without the legal protection afforded by section 7, actions undertaken by the Service, an authorized State agency, or an authorized agent of either the Service or such agency to effect containment are not insulated from liability under section 9 of the ESA and implementing regulations, which prohibit take of listed species unless otherwise authorized or exempt. Section 1(f) of Pub. L. 99-625 declares that no act by the Service or authorized State agency personnel to effect the translocation or management of a sea otter under the translocation plan may be treated as a violation of the ESA or the Marine Mammal Protection Act. However, the protective shield provided by this section no longer applies where the Service has determined that a component of the underlying plan itself—containment—is likely to jeopardize the continued existence of the sea otter. Under the present circumstances, any act by Service or authorized State agency personnel to remove otters from the management zone and relocate them to the parent population that results in take of an otter in either the management zone or the parent population would be in violation of section 9 of the ESA and subject to appropriate enforcement action.

#### Service's Position

Our mission is to work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. The southern sea otter is threatened with extinction. The southern sea otter translocation plan was developed to help this species recover by establishing an experimental population. We have yet to establish an experimental population, the southern

sea otter continues to be threatened with extinction, and we have concluded that implementing the containment provisions of the southern sea otter translocation plan under the current circumstances will likely jeopardize the continued existence of the species.

We are preparing a supplemental EIS to evaluate new information regarding the translocation program and the status of the sea otter and to consider whether modifications to the southern sea otter translocation program as presently structured, or termination of the program, would be appropriate. We will also finalize our evaluation of the translocation program, including analysis of the failure criteria established for the program. Containment of southern sea otters under the current circumstances would violate our duty under the Endangered Species Act to avoid any action that would likely jeopardize the continued existence of the species. Therefore, we will not capture and remove sea otters from the management zone until we complete our reevaluation of the translocation program unless, during this interim period, new information or changed circumstances indicate that containment no longer poses likely jeopardy to the species. We will continue to solicit public input and comments regarding the translocation plan as part of our NEPA review and any rulemaking process.

Dated: January 16, 2001.

**Jamie Rappaport Clark,**

*Director, U.S. Fish and Wildlife Service.*

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## DEPARTMENT OF THE INTERIOR

[AZ-070-01-1232-EA, SRP-070-01-07/08]

### Bureau of Land Management

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Temporary Closure of Selected Public Lands in La Paz County, Arizona, during the operation of the 2001 Whiplash Parker 400K/200K (kilometer) Desert Races.

**SUMMARY:** The Lake Havasu Field Office Manager announces the temporary closure of selected public lands under its administration in La Paz County, Arizona. This action is being taken to help ensure public safety and prevent unnecessary environmental degradation during the official permitted running of the 2001 Whiplash Parker 400K/200K Desert Races.

**DATES:** February 2, 2001, through February 4, 2001.

**SUPPLEMENTARY REGULATIONS:** Specific restrictions and closure periods are as follows:

#### Designated Course

1. The portion of the race course comprised of BLM lands, roads and ways located two miles either side of:
  - (a) Shea Road from the eastern boundary of the Colorado River Indian Tribes Reservation to the junction with Swansea Road, and two miles either side of Swansea Road from its junction with Shea Road to the eastern bank of the Central Arizona Project Canal.
  - (b) Swansea Road from its junction with Shea Road to the Four Corners intersection. The unpaved road from Midway north to Mineral Wash, and then west to the CAP Canal is closed to public use from 6:00 a.m. Friday, February 2, 2001 to 6:00 p.m. Sunday, February 4, 2001.
2. The entire designated race course is closed to all vehicles except authorized and emergency vehicles.
3. Vehicle parking or stopping in areas affected by the closure is prohibited except in the designated spectator areas. Emergency parking for brief periods of time is permitted on roads open for public use.
4. Spectator viewing on public land is limited to the designated spectator areas located south and north of Shea Road, as signed, approximately eight miles east of Parker, Arizona.
5. The following regulations will be in effect for the duration of the closure. Unless otherwise authorized, no person shall:
  - a. Camp in any area outside of the designated spectator areas.
  - b. Enter any portion of the race course or any wash located within the race course, including all portions of Osborne Wash.
  - c. Spectate or otherwise be located outside of the designated spectator or pit areas.
  - d. Possess or use fireworks.
  - e. Operate any vehicle, other than registered event vehicles, which is not legally registered for street and highway operation, including operation of such a vehicle in any area affected by this closure.
  - f. Park any vehicle in violation of posted restrictions, or in such a manner as to obstruct or impede normal or emergency traffic movement or the parking of other vehicles, create a safety hazard, or endanger any person, property or feature.