

2. Amend § 17.11(h) by revising the entry for “Wolf, gray” under MAMMALS in the List of Endangered

and Threatened Wildlife to read as follows:

**§ 17.11 [Amended]**

\* \* \* \* \*  
(h) \* \* \*

| Species                                   |                          | Historic range   | Vertebrate population where endangered or threatened  | Status | When listed      | Critical habitat | Special rules        |
|---|--------------------------|--|---|--------|------------------|------------------|----------------------|
| Common name                               | Scientific name          |  |   |        |                  |                  |                      |
| MAMMALS                                   |                          |  |   |        |                  |                  |                      |
| Wolf, gray .....                          | <i>Canis lupus</i> ..... | Holarctic .....  | U.S.A.: All of CA, CO, KS, NE, and NV; those portions of AZ, NM, TX, and WY not included in an experimental population as set forth below; and portions of IA, MO, ND, OK, OR, SD, TX, UT, and WA as follows:<br>(1) Southern IA, (that portion south of the centerline of Highway 80);<br>(2) Northwestern MO (that portion northwest of the centerline of Interstate Highway 44 and northwest of the centerline of Interstate Highway 70 east of St. Louis);<br>(3) Western ND (that portion south and west of the Missouri River upstream to Lake Sakakawea and west of the centerline of Highway 83 from Lake Sakakawea to the Canadian border);<br>(4) Western OK (that portion west of the centerline of Interstate Highway 35 and northwest of the centerline of Interstate Highway 44 north of Oklahoma City);<br>(5) Western OR (that portion west of the centerline of Highway 395 and Highway 78 north of Burns Junction and that portion of OR west of the centerline of Highway 95 south of Burns Junction);<br>(6) Western SD (that portion south and west of the Missouri River);<br>(7) Western TX (that portion west of the centerline of Interstate Highway 35);<br>(8) Most of Utah (that portion south and west of the centerline of Highway 84 and that portion south of Highway 80 from Echo to the UT/WY Stateline); and<br>(9) Western WA (that portion west of the centerline of Highway 97 and Highway 17 north of Mesa and that portion west of the centerline of Highway 395 south of Mesa).<br>Mexico.<br>U.S.A. (portions of AZ, NM, and TX—see § 17.84(k)) .....<br>U.S.A. (WY—see § 17.84(i) and (n)) ..... | E      | 1, 6, 13, 15, 35 | N/A              | N/A                  |
| Do .....                                  | ..... do .....           | ..... do .....   | U.S.A. (portions of AZ, NM, and TX—see § 17.84(k)) .....  | XN     | 631              | NA               | 17.84(k)             |
| Wolf, gray [Northern Rocky Mountain DPS]. | <i>Canis lupus</i> ..... | U.S.A. (MT, ID, WY, eastern WA, eastern OR, and north central UT). | U.S.A. (WY—see § 17.84(i) and (n)) .....  | XN     | 561, 562         | NA               | 17.84(i)<br>17.84(n) |

Dated: August 16, 2011.  
**Gregory E. Siekanic,**  
*Acting Director, U.S. Fish and Wildlife Service.*  
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**BILLING CODE 4310-55-P**

**DEPARTMENT OF THE INTERIOR**  
**Fish and Wildlife Service**

**50 CFR Part 17**

[Docket No. FWS-R8-FHC-2011-0046; 94310-1337-0000-D2]

RIN 1018-AX51

**Endangered and Threatened Wildlife and Plants; Termination of the Southern Sea Otter Translocation Program**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; notice of availability.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to remove the regulations that govern the southern sea otter (*Enhydra lutris nereis*) translocation program, including the establishment of an experimental population of southern sea otters, and all associated management actions. We are also proposing to amend the Authority citation for 50 CFR part 17 by removing the reference to Public Law 99-625, the statute that authorized the Secretary to promulgate regulations establishing the southern sea otter translocation program. Removal of the regulations will terminate the program. We are proposing this action because we believe that the southern sea otter translocation program has failed to fulfill its purpose, as outlined in the southern sea otter translocation plan, and that our recovery and management

goals for the species cannot be met by continuing the program. Our conclusion is based, in part, on an evaluation of the program against specific failure criteria established at the program’s inception. This proposed action would terminate the designation of the experimental population of southern sea otters, abolish the southern sea otter translocation and management zones, and eliminate the current requirement to remove southern sea otters from San Nicolas Island and the management zone. This proposed rule would also eliminate future actions, required under the current regulations, to capture and relocate southern sea otters for the purpose of establishing an experimental population, and to remove southern sea otters in perpetuity from an “otter-free” management zone. As a result, it would allow southern sea otters to expand their range naturally into southern California waters. We have prepared a

revised draft supplemental environmental impact statement (SEIS) and an initial regulatory flexibility analysis (IRFA) to accompany this proposed rule.

**DATES:** We will consider comments on the proposed rule, associated revised draft SEIS (which includes a revised draft translocation program evaluation as Appendix C), and the IRFA that are received or postmarked on or before October 24, 2011 or at a public hearing. We will hold two public informational open houses from 5 p.m. to 6 p.m., each followed by a public hearing from 6 p.m. to 8 p.m., on October 4, 2011, and October 6, 2011, at the locations identified in the **ADDRESSES** section.

**ADDRESSES: Written Comments:** You may submit comments on the proposed rule, the revised draft SEIS, and the IRFA by one of the following methods:

- *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Enter Keyword or ID box, enter FWS-R8-FHC-2011-0046, which is the docket number for this rulemaking. Then click on the Search button. On the resultant screen, you may submit a comment by clicking on "Submit a Comment."

- *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R8-FHC-2011-0046; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

- *In person:* Individuals may attend a public hearing and present oral or written comments, or both, on the proposed rule, revised draft SEIS, or the IRFA.

We will not accept e-mail or faxes. We will post all information received on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more details).

**Copies of Documents:** The proposed rule, revised draft SEIS, and IFRA are available by the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. In the Enter Keyword or ID box, enter FWS-R8-FHC-2011-0046, which is the docket number for this rulemaking. Then click on the Search button. On the resultant screen, you may view supporting documents by clicking on the "Open Docket Folder" icon.

- *Agency Web site:* You can view supporting documents on our Web site at <http://www.fws.gov/ventura/>.

- *In person:* You can make an appointment, during normal business hours, to view the documents,

comments, and materials in person at the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003-7726; by telephone (805/644-1766); by facsimile (805/644-3958); or by visiting our Web site at <http://www.fws.gov/ventura/>. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Services (FIRS) at 800-877-8339.

**Public Hearings:** We will hold two public informational open houses, each followed by a public hearing, at Fleischmann Auditorium, Santa Barbara Museum of Natural History, 2559 Puesta Del Sol, Santa Barbara, CA 93105 on October 4, 2011, and at La Feliz Room, Seymour Marine Discovery Center, Long Marine Laboratory, 100 Shaffer Road, Santa Cruz, CA 95060 on October 6, 2011. See the **DATES** section above for the times of these hearings.

**FOR FURTHER INFORMATION CONTACT:**

Lilian Carswell, at the above Ventura street address, by telephone (805/644-1766), by facsimile (805/644-3958), or by electronic mail ([Lilian\\_Carswell@fws.gov](mailto:Lilian_Carswell@fws.gov)). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Services (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**Public Comments**

We wish to ensure that any final action resulting from this proposed rule will be based on information that is as accurate as possible. Therefore, we invite tribal and governmental agencies, the scientific community, industry, and other interested parties to submit comments or recommendations concerning any aspect of this proposed rule, the revised draft SEIS, or the IFRA. Comments should be as specific as possible. In addition, please include sufficient information with your comments to allow us to authenticate any scientific or commercial data you reference or provide. In particular, we seek comments concerning the following:

- (1) The reasons why the southern sea otter translocation program, including the management and translocation zones and associated regulations, should or should not be terminated, including information that supports the need for any changes to the proposed rule;

- (2) Current or planned activities in the subject area and their possible effects on southern sea otters that have not been adequately considered in the proposed rule, revised draft SEIS, and IRFA;

- (3) Any foreseeable economic or other impacts resulting from the proposed termination of the southern sea otter translocation program that have not been adequately considered in the proposed rule, revised draft SEIS, and IRFA;

- (4) Any substantive information on real or potential effects on southern sea otters of the proposed termination of the southern sea otter translocation program that have not been adequately considered in the proposed rule, revised draft SEIS, and IRFA; and

- (5) Any actions that could be considered in lieu of, or in conjunction with, the proposed rule that would provide equivalent opportunity for the recovery of the southern sea otter.

Prior to issuing a final rule on this proposed action, we will take into consideration all comments and any additional information we receive. Such information may lead to a final rule that differs from this proposal. All comments and recommendations, including names and addresses, will become part of the supporting record.

You may submit your comments and materials concerning the proposed rule, revised draft SEIS, or IRFA by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. Finally, we will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section. Comments must be submitted to <http://www.regulations.gov> before midnight (Eastern Time) on the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—at <http://www.regulations.gov>. If your written comment includes your street address, phone number, or e-mail address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post hardcopy submissions at <http://www.regulations.gov>. Please note that comments submitted to this Web site are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publicly viewable until we post it, which might not occur until several days after submission.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection at <http://www.regulations.gov>, or by

appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

### Public Hearing

We have scheduled two formal public hearings to afford the general public and all interested parties with an opportunity to make formal oral comments or to submit written comments in person on the proposed rule, revised draft SEIS, or IRFA.

We will hold the public hearings at the locations listed in **ADDRESSES** on the dates listed in **DATES**. The public hearings will last from 6 p.m. to 8 p.m. We will hold a public informational open house prior to each hearing from 5 pm to 6 pm to provide an additional opportunity for the public to gain information and ask questions about the proposed rule. This open house session should assist interested parties in preparing substantive comments on the proposed rule.

Persons needing reasonable accommodations in order to attend and participate in a public hearing should contact the Ventura Fish and Wildlife Office, at the address or phone number listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible. In order to allow sufficient time to process requests, please contact us for assistance no later than one week before the hearing.

Written comments submitted during the comment period receive equal consideration with comments presented at a public hearing. All comments we receive at the public hearing, both verbal and written, will be considered in making our final decision.

### Background

#### *Previous Federal Actions*

On January 14, 1977, we listed the southern sea otter as a threatened species under the ESA (16 U.S.C. 1531 *et seq.*), on the basis of its small population size, its greatly reduced range, and the potential risk from oil spills (42 FR 2965). 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 as an effective and reasonable recovery action, acknowledging that a translocated southern sea otter colony could impact shellfish fisheries that had developed in areas formerly occupied by southern sea otters. The objectives of southern sea otter translocation, as stated in the 1982 recovery plan, included: (1) Establishing

a second colony (or colonies) sufficiently distant from the parent population such that a smaller portion of the southern sea otter range would be affected in the event of a large-scale oil spill; and (2) establishing a database for identifying the optimal sustainable population level for the southern sea otter. We anticipated that translocation would ultimately result in a larger population size and a more continuous distribution of animals throughout the southern sea otter's historic range.

Under the ESA, the Secretary has inherent authority to establish new or translocated populations of listed species. Section 10(j) of the ESA provides the Secretary with additional flexibility to relax the protective provisions of the ESA when translocating a population of a listed species by allowing the Secretary to designate the translocated population as an experimental population. However, the southern sea otter is protected under both the ESA and the MMPA, and at the time, the MMPA did not contain similar provisions. This inconsistency was resolved in the case of the southern sea otter translocation program by the passage of Public Law (Pub. 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 Pub. L. 99-625, the plan was required to include: (1) The number, age, and sex of southern sea otters proposed to be relocated; (2) the manner in which southern sea otters were to be captured, translocated, released, monitored, and protected; (3) specification of a zone into which the experimental population would be introduced (translocation zone); (4) specification of a zone surrounding the translocation zone that did not include the range of the parent population or adjacent range necessary for the recovery of the species (management zone); (5) measures, including an adequate funding mechanism, to isolate and contain the experimental population; and (6) 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: (1) Facilitate the management of southern sea otters and the containment of the experimental population within the translocation zone; and (2) prevent, to the maximum extent feasible, conflicts between the

experimental population and fishery resources within the management zone. Any southern sea otter found within the management zone was to be treated as a member of the experimental population. We were required to use all feasible, nonlethal means to capture southern sea otters in the management zone and to return them to the translocation zone or to the range of the parent population.

On August 15, 1986, we published a proposed rule to establish an experimental population of southern sea otters at San Nicolas Island, Ventura County, California, in conjunction with a management zone from which sea otters would be excluded (51 FR 29362). Concurrently, we released a draft environmental impact statement (EIS) that analyzed the impacts of six alternatives, which included establishing a program to translocate southern sea otters from their then-current range along the central coast of California to areas of the northern coast of California, the southern coast of Oregon, or San Nicolas Island off the coast of southern California. We identified translocation to San Nicolas Island as our preferred alternative, with the management zone including the coastline from Point Conception to the Mexican border and all of the offshore islands except San Nicolas Island. On May 8, 1987, we made available our final EIS (52 FR 17486). A detailed translocation plan meeting the requirements of Public Law 99-625 was included as an appendix to the final EIS. On August 11, 1987, we published a final rule providing implementing regulations for the translocation program (52 FR 29754); these regulations are codified at 50 CFR 17.84(d). These regulations define the boundaries of the translocation and management zones, provide the framework for the program, and include a set of criteria for determining if the translocation should be considered a failure.

#### *Implementation of the Translocation Program*

The purpose of the southern sea otter translocation program was to: (1) Implement a primary recovery action for the southern sea otter; and (2) obtain data for assessing southern sea otter translocation and containment techniques, population dynamics, ecological relationships with the nearshore community, and effects on the donor population of removing individual southern sea otters for translocation (52 FR 29754; August 11, 1987). The translocation of southern sea otters was intended to advance southern

sea otter recovery, with the ultimate goal of delisting the species under the ESA. Through translocation, we hoped to establish a self-sustaining southern sea otter population (experimental population) that would provide a safeguard in the event that the parent southern sea otter population was adversely affected by a catastrophic event, such as an oil spill. We expected that, to achieve this aim, the colony at San Nicolas Island would need to grow to a size such that it could remain viable while furnishing up to 25 sea otters per year for up to 3 years to repopulate affected areas of the parent range. Based on the magnitude of oil spills that had occurred up to that time, San Nicolas Island appeared to be sufficiently distant from the parent range to provide a reasonable safeguard in the event of such a catastrophic occurrence.

On August 24, 1987, we began to implement the translocation plan by moving groups of southern sea otters from the coast of central California to San Nicolas Island. The translocation plan allowed for a maximum of 70 southern sea otters to be moved to San Nicolas Island during the first year of the program (USFWS 1987). This number could be supplemented with up to 70 animals annually (up to 250 total) in subsequent years, if necessary, to ensure the success of the translocation and to prevent the colony from declining into an irreversible downward trend. Assuming that a core population of 70 southern sea otters could be maintained through translocation, we anticipated that the experimental population could be established within as few as 5 or 6 years. In this context, the term "established" had a specific meaning: When at least 150 southern sea otters resided at the island and the population had a minimum annual recruitment of 20 animals (52 FR 29754; August 11, 1987).

Between August 1987 and March 1990, we captured 252 southern sea otters along the central California coast and released 140 at San Nicolas Island. More than 100 of the captured sea otters were deemed unsuitable for translocation and released near their capture sites, and 6 of the 252 animals died of stress-related conditions before translocation to San Nicolas Island. Some sea otters died as a result of translocation, many swam back to the parent population, and some moved into the management zone. As of March 1991, approximately 14 independent (non-pup) southern sea otters (10 percent of those translocated) were thought to remain at the island.

Because of the unexpected mortalities and high emigration encountered during

the first year, we amended our regulations for the translocation program in 1988 (53 FR 37577; September 27, 1988). The amendments were intended to minimize stress on captured sea otters, to improve the survival of translocated animals, and to minimize the dispersal of translocated sea otters from the translocation zone. Specifically, we provided more flexibility in selecting the ages of sea otters for translocation, eliminated the restriction to capture them only within an August to mid-October timeframe, eliminated the requirement to move a specified number of sea otters previously implanted with transmitters, provided the flexibility either to transport them immediately or to hold them on the mainland before releasing them at San Nicolas Island, and eliminated the requirement to translocate a minimum of 20 animals at a time.

The fate of approximately half the sea otters taken to San Nicolas Island was never determined, although an intense effort was made to locate translocated animals at San Nicolas Island, in the management zone, and in the parent range. In 1991, we stopped translocating sea otters to San Nicolas Island due to high rates of dispersal and poor survival. However, we continued monitoring the sea otters remaining in the translocation zone.

In December 1987, in coordination with the California Department of Fish and Game, we began capturing and moving southern sea otters that entered the designated management zone. Containment efforts were intended to keep the management zone free of otters, in accordance with Public Law 99-625 and our implementing regulations. Containment operations consisted of three interdependent activities: (1) Surveillance of the management zone; (2) capture of southern sea otters in the management zone; and (3) relocation of captured animals to the parent range or San Nicolas Island.

Between December 1987 and February 1993, 24 southern sea otters were captured, removed from the management zone, and released in the parent range. Of these, two sea otters were captured twice in the management zone, despite being released at the northern end of the parent range after their first removal. In February 1993, 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. In total, four sea otters were known or suspected to have died within 2 weeks of being moved from the management

zone. We were concerned that sea otters were dying as a result of our containment efforts; therefore, in 1993, we suspended all sea otter capture activities in the management zone to evaluate capture and transport methods. We recognized that available capture techniques, which had proven to be less effective and more labor-intensive than originally predicted, were not an efficient means of containing sea otters. From 1993 to 1997, few sea otters were reported in the management zone, and there appeared to be no immediate need to address sea otter containment. In 1997, the California Department of Fish and Game notified us that it intended to end its sea otter research project and would no longer be able to assist if we resumed capturing sea otters in the management zone.

In 1998, a group of approximately 100 southern sea otters moved from the parent range into the northern end of the management zone, inaugurating a pattern of seasonal movements of large numbers of sea otters into and out of the management zone. Subsequent radio-telemetry studies have determined that these animals are moving great distances throughout their range and are an important component of the population (*i.e.*, the same territorial males that hold territories and sire pups within the center of the range may be found seasonally aggregated in "male areas," often at the range ends) (Tinker *et al.* 2006). At the same time, rangewide counts of the southern sea otter population indicated a decline of approximately 10 percent between 1995 and 1998. In light of the decline in the southern sea otter population, we were concerned about the potential effects on the parent population of moving the large number of southern sea otters that had moved into the management zone. We asked the Southern Sea Otter Recovery Team, a team of biologists with expertise pertinent to southern sea otter recovery, for their recommendation regarding the capture and removal of southern sea otters in the management zone. The recovery team recommended that we not move southern sea otters from the management zone to the parent population because moving large groups of southern sea otters and releasing them within the parent range would be disruptive to the social structure of the parent population. We agreed with their recommendation.

In order to notify stakeholders of our intended course of action, we held two public meetings in August 1998. At these meetings, we provided information on the status of the translocation program, solicited general comments and recommendations, and

announced that we intended to reinstate consultation under section 7 of the ESA for the containment program and to begin the process of evaluating the failure criteria established for the translocation program. Subsequent to these meetings, the group of technical consultants (a body composed of representatives from the fishery and environmental communities, as well as State and Federal agencies) to the Southern Sea Otter Recovery Team was expanded to assist in evaluating the translocation program. We provided updates on the translocation program and the status of the southern sea otter population to the California Coastal Commission, the Marine Mammal Commission, and the California Fish and Game Commission in 1998 and 1999.

In March 1999, we distributed a draft evaluation of the translocation program to interested parties for their comment. 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 sea otters' emigration or mortality could not be identified or remedied. We received comments from State and Federal agencies and the public following release of the draft for review. Some comments supported declaring the translocation program a failure, while others opposed it. The majority of respondents cited new information that became available after publication of our 1987 EIS and record of decision for the program. Many respondents encouraged us to look at new alternatives that were not identified in our 1987 EIS or corresponding implementing regulations.

During the same period, we prepared a draft biological opinion, pursuant to section 7 of the ESA, evaluating the containment aspects of the southern sea otter translocation program. We distributed the draft to interested parties for comment on March 19, 1999, and issued a final biological 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 adverse effects of containment that were not previously considered. In the biological opinion, we cited the following information and circumstances as prompting reinitiation:

(1) In 1998 and 1999, southern sea otters moved into the management zone in much greater numbers than in previous years;

(2) Analysis of carcasses indicated that southern sea otters were being

exposed to environmental contaminants and diseases that could be affecting the health of the population throughout California;

(3) Rangewide counts of southern sea otters indicated that numbers were declining;

(4) Recent information, in particular the observed effects of the Exxon Valdez oil spill, indicated that southern sea otters at San Nicolas Island would not be isolated from the potential effects of a single large oil spill; and

(5) The capture and release of large groups of southern sea otters could result in substantial adverse effects on the parent population.

The biological opinion concluded with our assessment that continuation of the containment program would likely jeopardize the continued existence of the species on the grounds that: (1) Reversal of the southern sea otter's population decline is essential to the survival and recovery of the species, whereas continuation of containment could cause the direct deaths of individuals and disrupt social behavior in the parent range, thereby exacerbating population declines; and (2) expansion of the southern sea otter's distribution is essential to the survival and recovery of the species, whereas continuation of the containment program would artificially restrict the range to the area north of Point Conception, thereby increasing the vulnerability of the species to oil spills, disease, and stochastic events.

On July 27, 2000, we published in the **Federal Register** a notice of intent to prepare a supplement to our 1987 EIS on the southern sea otter translocation program (65 FR 46172), and on January 22, 2001, we issued a policy statement regarding the capture and removal of southern sea otters in the designated management zone (66 FR 6649). Based on our July 2000 biological opinion, we determined that the containment of southern sea otters was not consistent with the requirement of the ESA to avoid jeopardy to the species. The notice advised the public that we would not capture and remove southern sea otters from the management zone pending completion of our reevaluation of the southern sea otter translocation program, which would include the preparation of a supplement to our 1987 EIS and release of a final evaluation of the translocation program that contains an analysis of failure criteria.

Public scoping meetings were announced in the July 27, 2000, issue of the **Federal Register** (65 FR 46172) and were held in Santa Barbara, California, on August 15, 2000, and in Monterey, California, on August 17, 2000. We also

convened the technical consultants to the Southern Sea Otter Recovery Team on September 26, 2000, to discuss scoping of the supplement. In April 2001, we published a scoping report that identified alternatives we would consider in the supplement and summarized comments received during the scoping period.

On April 3, 2003, we made available our Final Revised Recovery Plan for the Southern Sea Otter (68 FR 16305; USFWS 2003, <http://www.fws.gov/ventura/>). This document updated the original recovery plan published in 1982. The revised recovery plan incorporated significant revisions, including a shift in focus from translocation as a primary recovery action to efforts to reduce the mortality of prime-aged animals. Based on the recommendations of the recovery team, the revised recovery plan concluded that additional translocations were not the best way to accomplish the objective of increasing the range and number of southern sea otters in California. According to the revised plan, range expansion of sea otters in California would occur more rapidly if the existing population were allowed to recover autonomously than it would under a recovery program that included actively translocating sea otters. The revised plan also recommended that it would be in the best interest of southern sea otter recovery to declare the translocation program a failure, to discontinue maintenance of an otter-free zone, and to allow the sea otters currently at San Nicolas Island to remain there.

On October 7, 2005, we made available a draft SEIS on the translocation program (70 FR 58737). A draft evaluation of the translocation program was included as Appendix C. We solicited comments on both the draft SEIS and the draft evaluation during the public comment period, which began October 7, 2005 (70 FR 58737), and ended March 6, 2006 (70 FR 77380). Comments we received during the 5-month comment period, including those addressing the translocation program evaluation, are summarized in Appendix G to the revised draft SEIS.

As of December 2010, up to 46 independent southern sea otters have been counted at San Nicolas Island. Dependent pups are frequently observed with these animals. Data from quarterly counts indicate that the population has fluctuated between 13 and 46 individuals since July 1990. One sea otter pup was born at San Nicolas Island during the first year of the translocation program (1987–88), and new pups have been observed in each subsequent year. At least 151 pups are known to have

been born at the island since the program's inception.

At present, it is likely that most, if not all, of the southern sea otters at San Nicolas Island are offspring of those originally translocated to the island. This is because the original animals were translocated more than 2 decades ago, and the average life expectancy of southern sea otters in the wild is 10 to 15 years. Although it is possible that sea otters could disperse from the mainland range to San Nicolas Island, we have no information to indicate that any exchange of animals between these two locations has occurred subsequent to the return of many of the translocated sea otters to the mainland range in the early years of the program. To date, we have gathered a significant amount of data to assess capture, transport, reintroduction, and containment techniques. However, the goal of implementing a primary recovery action for the southern sea otter remains unfulfilled. The original intention, to create a colony that would provide a safeguard in the event that the parent southern sea otter population was adversely affected by a catastrophic event, such as an oil spill, has not been accomplished.

#### *Availability of Revised Draft SEIS*

Concurrent with publication of this proposed rule, we are releasing a revised draft SEIS. The revised draft SEIS updates and responds to comments received on the draft SEIS released in 2005, discusses details of the events of the translocation program from 1982 to the present, analyzes a range of alternatives for the southern sea otter translocation program, and includes a detailed draft evaluation of the program as Appendix C. The preferred alternative in the revised draft SEIS is to terminate the southern sea otter translocation program and, further, to allow southern sea otters in the former translocation and management zones to remain there upon termination of the program. Allowing sea otters to remain at San Nicolas Island and in the management zone upon termination of the translocation program is contrary to 50 CFR 17.84(d)(8)(vi) of the current regulations, which requires removal of sea otters from both locations if the translocation program is terminated. This proposed rule would implement the recommendations of the Final Revised Recovery Plan for the Southern Sea Otter, which is also the preferred alternative in the revised draft SEIS. This proposed rule would terminate the southern sea otter translocation program through removal of the regulations at 50 CFR 17.84(d) that established and

govern implementation of the translocation program. Among the regulatory requirements that would be eliminated by the removal of 50 CFR 17.84(d), in its entirety, is the current requirement to remove sea otters from San Nicolas Island and from the management zone if the translocation program is terminated.

#### **Assessment of Failure Criteria Identified in Translocation Plan**

Public Law 99-625 authorized southern sea otter translocation and provided requirements for a southern sea otter translocation plan should we pursue such a plan. It did not address the possibility of the program's failure. As a consequence, it did not specify criteria that would be used to determine whether the program had failed, nor did it recommend actions that should be taken in the case of failure. When we developed the translocation plan and implementing regulations for the program, we received public comment asking us to define what constituted failure of the program and what actions we would take if the program failed. We responded by delineating specific failure criteria in the 1987 Translocation Plan (52 FR 29754; August 11, 1987).

The purpose of the failure criteria was to identify circumstances under which we would generally consider the translocation program to have failed. The five failure criteria were defined before any translocations of southern sea otters were undertaken and without the benefit of what we know today about the translocation, containment, and recovery needs of southern sea otters. The criteria focus on the status of the translocated population and, in hindsight, do not address all the circumstances that are relevant to a complete evaluation of the program. For example, the failure criteria do not address the possibility that containment might not be successfully accomplished because of southern sea otters entering the management zone from the mainland range rather than from the population at San Nicolas Island, the possibility that the founding population of the San Nicolas Island colony might be fewer than 70 animals, or even the possibility that an "established" population at San Nicolas Island (as defined at 52 FR 29754; August 11, 1987) may be insufficient to attain the recovery goals established for the program. Similarly, the failure criteria do not anticipate the possibility that the capture and relocation of sea otters from the management zone could result in the deaths of some animals. Ultimately, failure is determined by our inability to attain the objectives of the translocation

program, which are clearly set out in the final rule for the establishment of an experimental population of southern sea otters (52 FR 29754; August 11, 1987).

In the draft translocation program evaluation (Appendix C to the revised draft SEIS), we find that the translocation program meets failure criterion 2. A summary of our analysis of each failure criterion in the draft translocation program evaluation is given below.

*Criterion 1:* If, after the first year following initiation of translocation or any subsequent year, no translocated southern sea otters remain within the translocation zone, and the reasons for emigration or mortality cannot be identified and/or remedied.

Criterion 1 has not been met. Southern sea otters have been observed in the translocation zone at San Nicolas Island every year since the beginning of the program.

*Criterion 2:* If, within 3 years from the initial transplant, fewer than 25 southern sea otters remain in the translocation zone and the reason for emigration or mortality cannot be identified and/or remedied.

Criterion 2 has been met. The initial transplant occurred in August 1987. Within 3 years of the initial transplant (August 1990), a maximum of 17 sea otters (14 independent animals and 3 pups) resided in the translocation zone.

We chose to delay declaring the translocation program a failure in 1990 because southern sea otters were reproducing, dispersal into the management zone had abated, and the California Department of Fish and Game expressed a desire to continue zonal management of southern sea otters. Although sea otters at the island continue to reproduce, the colony remains small to this day; dispersal of sea otters from the parent range into the management zone is now regularly occurring; and the California Department of Fish and Game informed us in 1997 that it would no longer be able to assist us if we resumed capturing sea otters in the management zone.

We consider emigration from San Nicolas Island to be the primary reason for the small size of the population (17 sea otters, including pups) remaining at the island within 3 years of the initial transplant. Fifty-four (54) translocated sea otters were later detected elsewhere (either back in the mainland range or in southern California waters). The number of sea otters resighted in the mainland range (36), despite the absence of a focused effort to identify them there (efforts were focused instead at San Nicolas Island and in the management zone), suggests that additional sea otters

may have returned without being detected. There is some evidence of sea otter mortality at San Nicolas Island (three sea otters were found dead at San Nicolas Island within days of being translocated), but no additional deaths of translocated sea otters at San Nicolas Island were verified. Of the animals that remain unaccounted for, it seems likely that most either emigrated successfully and escaped further detection or attempted to emigrate but died before reaching suitable habitat.

Although high rates of dispersal had been seen in all earlier sea otter translocations (Estes *et al.* 1989), we believed that the translocation to San Nicolas Island would not result in the significant dispersal of animals because of the abundance of prey items, the apparent suitability of the habitat, and the perceived barrier imposed by the surrounding deep water. After the first year of translocation, we made significant changes to the program with the intent of minimizing or eliminating emigration (53 FR 37577; September 27, 1988). These changes were implemented during the second year of the program, when we selected younger sea otters for translocation, transported sea otters more quickly and in smaller groups, abandoned the use of holding pens at the island, and released newly translocated sea otters in the vicinity of sea otters already residing at the island. Despite our efforts, none of these changes appeared to result in a decrease in emigration. In the final year of the translocation effort, we attempted to gain more information on sea otter movements by implanting radio transmitters in sea otters immediately prior to their transport to San Nicolas Island. Two of the initial three southern sea otters that received implants died before they could be transported to the island, causing us to abandon this effort.

We conclude that the translocation program has failed under criterion 2. We believe that emigration from San Nicolas Island is the primary reason that substantially fewer than 25 otters remained in the translocation zone within 3 years of the initial transplant. Although we modified the program significantly after the first year in an attempt to reduce emigration and otherwise reduce sea otter mortality associated with the program, we were unable to remedy the situation. Therefore, failure criterion 2 has been met.

The fact that the translocation program has failed under criterion 2 does not necessarily mean that the sea otter colony at San Nicolas Island is destined to disappear. In fact, it appears to have a low cumulative probability of

extinction (Carswell 2008). However, the final rule establishing the program clearly states, "The Service does not consider the mere presence of sea otters in the translocation zone as an indication that a new population is established" (52 FR 29754 at 29774; August 11, 1987). The colony would be considered "established" when at least 150 southern sea otters resided at the island and the population had a minimum annual recruitment of 20 animals (52 FR 29754 at 29774; August 11, 1987). The initial high rate of dispersal of translocated sea otters from San Nicolas Island is the primary cause of failure under this criterion not only because of its direct effect on the subsequent size of the San Nicolas Island colony, but also because of its implications for the recovery strategy at the heart of the program: the intended function of the San Nicolas Island population as a self-sustaining "reserve colony for providing stock to restore subsequently damaged areas" in the southern sea otter's range (52 FR 29754 at 29774; August 11, 1987). The high rate of dispersal of translocated sea otters suggests it is unlikely that the colony will ever be large enough to supply the numbers of sea otters necessary to perform a successful translocation and re-establishment of population in the mainland range if the parent population were reduced or eliminated by a catastrophic event.

*Criterion 3:* If, after 2 years following the completion of the transplant phase, the experimental population is declining at a significant rate, and the translocated southern sea otters are not showing signs of successful reproduction (*i.e.*, no pupping is observed); however, termination of the project under this and the previous criterion may be delayed, if reproduction is occurring and the degree of dispersal into the management zone is small enough that the effort to remove southern sea otters from the management or no-otter zone would be acceptable to us and the affected State.

We are unable to evaluate whether the program has failed under criterion 3 because we never reached the minimum number of sea otters at San Nicolas Island required to complete the transplant phase of the program. The translocation plan defines the transplant phase as ending when there are at least 70 healthy southern sea otters of mixed ages and sexes within the translocation zone and we determine that the population is increasing due to natural reproduction. Although we translocated twice this number, we never achieved the requisite core population of 70 animals.

From a practical perspective, however, the transplant phase ended when the last sea otter was translocated to the island in 1990. The population declined at a significant rate from the program's inception in 1987 to 1993, at which time the number of independent sea otters at the island was 12. Although pups were observed from 1987 to 1993, there appeared to be little or no recruitment into the population. The 15 sea otters at the island in 1993 (12 independent animals and 3 pups) were fewer than the minimum number (25) required to avoid a declaration of failure under failure criterion 2; however, under provisions of failure criterion 3 we could delay termination of the program because pupping was occurring and dispersal of translocated sea otters into the management zone had abated.

The experimental population has fluctuated in number since 1993, and now appears to be increasing overall; reproduction continues to occur. Although pupping is occurring, it is not certain that the San Nicolas colony will persist. If it does persist, it will have been founded on a small subset of the core number of 70 healthy sea otters of mixed ages and sexes that were intended to found the population, a fact that has implications for the genetic makeup of the resulting population. The current rate of emigration from the island is unknown, but we now know that the deep ocean channels surrounding the island do not present the anticipated barrier to dispersal.

*Criterion 4:* If we determine, in consultation with the affected State and the Marine Mammal Commission, that southern sea otters are dispersing from the translocation zone and becoming established within the management zone in sufficient numbers to demonstrate that containment cannot be successfully accomplished. This standard is not intended to apply to situations in which individuals or small numbers of southern sea otters are sighted within the management zone or temporarily manage to elude capture. Instead it is meant to be applied when it becomes apparent that, over time (1 year or more), southern sea otters are relocating from the translocation zone to the management zone in such numbers that: (1) An independent breeding colony is likely to become established within the management zone; or (2) they could cause economic damage to fishery resources within the management zone. It is expected that we could make this determination within a year, provided that sufficient information is available.

Technically, criterion 4 has not been met. This criterion clearly specifies that the program would be declared a failure

if sea otters moved from the translocation zone and became established in the management zone. The criterion does not strictly apply if animals immigrate into the management zone from the parent range. Nevertheless, beginning in 1998, large groups (50 to 150 individuals) of sea otters have seasonally moved into the management zone from the parent range. Since 2006, monthly surveys have counted an average of 40 otters with considerable variation over time (standard deviation of  $\pm 19$ ) (K.D. Lafferty, USGS, pers. comm. 2011). In January 2011, three pups were detected, suggesting that a permanent breeding colony may be establishing itself in the management zone. Commercial fishing interests contend that local shellfish populations available to the fishery have been reduced by the presence of these sea otters.

The difficulties associated with sea otter capture and transport, our concern for the welfare of animals removed from the management zone, the adverse effects of sea otter containment on the parent population, and the adverse effects on fisheries are concerns regardless of whether sea otters enter the management zone from the parent range or from San Nicolas Island. Although criterion 4 is specific and applies only to sea otters originating from San Nicolas Island, our experience with sea otters entering the management zone from either the parent range or the translocation zone indicates that successful containment of sea otters, or maintenance of an "otter-free" management zone, cannot be accomplished by simply capturing animals in the management zone and moving them to another location.

*Criterion 5:* If the health and well-being of the experimental population should become threatened to the point that the colony's continued survival is unlikely, despite Federal and State laws. An example would be if an overriding military action for national security was proposed that would threaten to devastate the colony and the removal of southern sea otters was determined to be the only viable way of preventing loss of the colony.

Criterion 5 has not been met. The experimental population at San Nicolas Island, although small and vulnerable, has persisted. There are no proposed Federal, State, or local actions that threaten to devastate the colony. The Department of Defense is responsible for the majority of human activity at San Nicolas Island. They have conferred with us and given consideration to southern sea otters when developing projects at San Nicolas Island. To date,

no projects have posed a threat to the colony.

### Conclusion

We therefore conclude that the translocation program has failed under Criterion 2. Criterion 3 cannot be evaluated. Criteria 1, 4, and 5 have not been met.

The primary purpose of the southern sea otter translocation program was to advance southern sea otter recovery, with the ultimate goal of delisting the species. Based on a broader evaluation of the translocation program against the goals for which it was undertaken and current recovery goals, in concert with the failure criteria established for the program's assessment, we again conclude that the translocation program has failed. It has failed to fulfill its purpose, and our recovery and management goals for the species cannot be met by continuing the program.

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

We therefore propose to terminate the translocation program and remove the regulations at 50 CFR 17.84(d) in their entirety. This proposed action would:

- Terminate the designation of the experimental population of southern sea otters;
- Abolish the southern sea otter translocation and management zones;
- Eliminate future actions, required under the current regulations, to capture and relocate southern sea otters for the purposes of establishing an experimental population or restricting movements of southern sea otters into an "otter-free" management zone; and
- Allow southern sea otters to expand their range naturally into southern California waters.

Removal of the translocation program regulations in their entirety would also eliminate the current requirement at 50 CFR 17.84(d)(8)(vi) to remove southern sea otters from San Nicolas Island and

from the management zone upon termination of the program.

### *Regulatory Environment Upon Termination of the Translocation Program*

Public Law 99-625 states that the Service, through the Secretary of the Interior, "may" develop and implement a plan for the relocation and management of sea otters, and then goes on to specify what must be included if such a plan is developed. Therefore, termination of the translocation program and removal of the regulations governing the program would render the specific provisions of Public Law 99-625 inoperative. The translocation and management zones would be abolished, and the exemptions under Public Law 99-625 from the duty to consult under section 7 of the ESA for defense-related activities within the former translocation zone and for all Federal activities within the former management zone, as well as the exemption from the incidental take prohibitions of the ESA and the MMPA for activities within the former management zone, would end.

Any incidental take by a Federal agency (authorized through the ESA section 7 process) or by a State or tribal government or private entity (authorized through the ESA section 10 process) would also have to be authorized under the MMPA. Under both the ESA and the MMPA, incidental take is prohibited unless it has been authorized. Section 101(a)(5)(A) of the MMPA states that we may authorize the taking of small numbers of marine mammals within a specified geographical region over periods of not more than 5 consecutive years, provided we find that the total of such taking during the period will have a negligible impact on the species or stock. Section 101(a)(5)(D) allows for similar authorization, for not more than 1 year for the incidental taking by harassment of only small numbers of marine mammals. Provisions specific to military readiness activities may also apply to the authorization of incidental take under the MMPA for defense-related agency actions.

The incidental take authorization provisions under section 101(a)(5) of the MMPA apply to activities other than commercial fishing. Take incidental to commercial fishing is authorized under different provisions of the MMPA. However, because of specific amendments to the provisions under section 118, incidental take of southern sea otters in commercial fisheries cannot be authorized under the MMPA. Therefore, incidental take of southern sea otters by commercial fisheries in southern California waters would be



prohibited, as it is now throughout the remainder of the range of the species (north of Point Conception). All intentional take would continue to be prohibited, as it is under the current regulatory environment, unless authorized under both the ESA and the MMPA.

Federal agencies proposing actions (including the permitting or funding of actions proposed by non-Federal entities) that may affect southern sea otters anywhere in southern California waters, including all actions planned within the former management zone and defense-related actions in the former translocation zone, would be required to consult with the Service under section 7 of the ESA, as they do now within the remainder of the species' range. Under section 7, we must determine whether a proposed Federal action is likely to jeopardize the continued existence of the southern sea otter. Our determination is made through the issuance of a biological opinion at the conclusion of the consultation stating our opinion whether the action, if carried out as proposed, is likely to jeopardize the continued existence of the species. If we conclude the proposed action would likely result in jeopardy, we also indicate any reasonable and prudent alternatives to the proposed action that would meet its intended purpose while avoiding jeopardy to the southern sea otter. If a proposed action is likely to jeopardize the continued existence of the southern sea otter, it may not go forward unless the Federal action agency applies for and is granted an exemption under section 7(h) of the ESA. If we determine that the proposed Federal action is not likely to jeopardize the continued existence of the southern sea otter, we may include an incidental take statement that exempts take of sea otters incidental to the proposed action from the take prohibition of section 9 of the ESA. Our incidental take statement would include terms and conditions that must be complied with to minimize the effects of any incidental take by the Federal action agency. In addition, the entity conducting the action would need to obtain incidental take authorization under the MMPA (discussed below).

The current exemption under State law for incidental take of southern sea otters in the management zone would also end once the translocation program is declared a failure. While California Fish and Game Code Section 4700 generally prohibits the take of southern sea otters, section 8664.2 of the Fish and Game Code provides that "the taking of a sea otter that is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity within the

sea otter management zone \* \* \* is not a violation of the California Endangered Species Act \* \* \* or Section 4700." Section 8664.2 further provides, "this section shall become inoperative if the sea otter translocation experiment is declared a failure pursuant to the provisions of Public Law 99-625."

To the extent otherwise allowable under State law, proposed non-Federal activities in California that would result in take of southern sea otters if the translocation program is terminated would require an incidental take permit from the Service under section 10(a)(1)(B) of the ESA. Among other requirements, an applicant for an incidental take permit under section 10(a)(1)(B) of the ESA must submit a conservation plan that we find minimizes and mitigates the impacts of the proposed take to the maximum extent practicable. In addition, we must find that the proposed take will avoid appreciably reducing the likelihood of the survival and recovery of the southern sea otter in the wild.

#### Economic Analysis

An economic analysis for this proposed rule and associated alternatives is included in our revised draft SEIS on the translocation of southern sea otters. A copy of the revised draft SEIS is posted on <http://www.regulations.gov> and may also be obtained from the Ventura Fish and Wildlife Office (see ADDRESSES section). When compared to the existing baseline (suspension of southern sea otter translocation and containment), the proposed rule and subsequent actions would have no economic effects except possible indirect effects that may occur as a result of regulatory changes. The benefits to fisheries that may result from enforcing a southern sea otter management zone and retaining incidental take exemptions within this zone are included in our economic analysis for comparative purposes.

#### Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998 to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listing in the ADDRESSES section. To help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the section where you feel lists or tables would be useful, *etc.*

#### Required Determinations

##### Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this rule is not a significant regulatory action. The Office of Management and Budget (OMB) makes the final determination under Executive Order 12866. OMB bases its determination on the following four criteria:

- (1) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.
- (2) Whether the rule will create inconsistencies with other Federal agencies' actions.
- (3) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.
- (4) Whether the rule raises novel legal or policy issues.

##### Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (such as small businesses, small organizations, and small government jurisdictions) (5 U.S.C. 601 *et seq.*). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for "significant impact" and a threshold for a "substantial number of small entities." See 5 U.S.C. 605(b). SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

Federal courts have held that an RFA analysis should be limited to impacts on entities subject to the requirements of the regulation, but not entities that may be indirectly affected by the regulation. This proposed rule directly affects only southern sea otters and their regulatory status in southern California waters with respect to the ESA and MMPA. Economic effects potentially resulting from future regulatory changes applicable to commercial fisheries and effects of sea otter range expansion on the nearshore marine environment, including the availability of certain prey species for harvest by commercial fishers, are indirect. The Service does not have direct regulatory authority over marine fisheries. Therefore, there are no direct effects on small businesses from the proposed termination of the translocation program. In spite of these rulings, in its guidance to Federal agencies on conducting screening analyses, the Small Business Administration (SBA) recommends considering impacts on entities that may be indirectly affected by the proposed regulation. Therefore, we prepared an Initial Regulatory Flexibility Analysis (IRFA), which we briefly summarize below, to accompany this rule.

The Service is proposing to terminate the southern sea otter translocation program and to allow all sea otters in southern California waters at the time of the program's termination to remain there. We are proposing this action because we have concluded, in a draft translocation program evaluation, that the program has failed to meet its objectives and that our recovery and management goals for the species under the ESA and MMPA cannot be met by continuing it. The Service has management authority for the southern sea otter, which is listed as "threatened" under the ESA and is considered "depleted" under the MMPA, and is authorized by regulations (50 CFR 17.84(d)(8)) implementing the translocation program under Pub. L. 99-625 to promulgate a rule to terminate the translocation program if we determine the program has failed.

#### Summary of Economic Analysis

A detailed economic analysis for this proposed rule and associated alternatives is included in the revised draft SEIS. The following discussion estimates the baseline and the expected economic effects of terminating the southern sea otter translocation program.

The purpose of this rule is to propose: To terminate the southern sea otter translocation program, to allow all sea otters to remain where they are upon

termination of the program, and to remove the experimental population designation from the sea otters at San Nicolas Island. This action would allow southern sea otters to recolonize their historic range throughout southern California. We define the baseline (status quo) as the current physical and regulatory environment (*i.e.*, the biological and socioeconomic environment resulting from management practices that have been in place since 1993). These practices include the suspension of containment activities in the management zone. Using the current physical and regulatory environment (rather than the environment as it might be today if containment activities had not been suspended) as the baseline is essential to an accurate characterization of present conditions and to predictions of how conditions would change under each of the alternatives under consideration in the revised draft SEIS. Under baseline (current) conditions, southern sea otter movement throughout the species' range is not restricted or contained. Under the proposed rule, containment activities would not be resumed. Southern sea otters would have the ability, as they have since 1993, to continue to expand their range into southern California waters southeast of Point Conception, and to increase in number at San Nicolas Island. Accordingly, the economic effects of both the baseline and the proposed rule are the same (in that sea otters are allowed to expand their range naturally in both cases) except in the case of potential indirect economic effects on gill and trammel net fisheries stemming from regulatory changes, which we describe below. This statement should not be interpreted to mean that economic changes are not expected to occur as a result of natural range expansion. An expanding sea otter population will have numerous effects, including effects on certain commercial and recreational fisheries and the industries that depend on them. Effects of all the alternatives under consideration in the revised draft SEIS are examined in detail in that document, including an alternative that would entail resuming full implementation of the translocation program and its associated translocation and management zones (Alternative 1), the economic effects of which we present here for comparison.

Here and in the revised draft SEIS, we limit the quantitative analysis to a 10-year time horizon. (In the revised draft SEIS, we additionally describe long-term economic and other effects, but in

qualitative terms only.) The rationale for limiting the quantitative analysis to 10 years is based in part on the extent of uncertainty involved in predicting sea otter range expansion, in part on the indirect nature of most projected impacts (and hence possible changes over time in the relationship between sea otter presence and resultant impacts), and in part on the uncertainty associated with management regimes and economic conditions beyond 10 years.

The uncertainty involved in predicting range expansion stems from: (1) The possibility that the southern sea otter range expansion model (Tinker *et al.* 2008a), although it is the best available, may not capture all population dynamics that might ultimately prove to be relevant to range expansion; and (2) the possibility that future variation in the vital rates and movements of southern sea otters, on which predictions are based, will be different from what has been observed in the past. The uncertainty arising from the indirect nature of most impacts stems from the fact that (1) any departure from predicted range expansion will also change associated impacts, and (2) changes in the ecosystem resulting from the presence of sea otters may occur differently than anticipated because of changes in a multitude of other variables unrelated to the presence of sea otters, such as global climate change, the spread of novel diseases or invasive species, or human activity (overexploitation of marine organisms, inputs of pollutants, and so forth). The uncertainty associated with management regimes and economic conditions results from the fact that (1) fisheries may open, close, or be subject to permit or gear restrictions for reasons unrelated to the presence or absence of sea otters, and (2) commercial fisheries revenues are driven largely by market forces (which are themselves influenced by the global economic environment) that determine consumer demand. Because of these manifold sources of uncertainty, we believe it is unreasonable to attempt to establish a baseline for the impact topics we consider, and thus to attempt to quantify impacts, beyond a limited time horizon. Although the choice of 10 years rather than 5 or 15 years is somewhat arbitrary, a review of past changes in southern sea otter population dynamics and commercial fisheries landings indicates that a 10-year time horizon represents a reasonable timeframe within which to quantify impacts. Whether sea otters would re-occupy other areas of the Southern California

Bight in subsequent years would be a function of sea otter demographic rates, food supply, and other variables. Based on past rates of range expansion, it is expected that sea otters would not be present in most areas of southern California for decades.

To capture some of the uncertainty involved in forecasting range expansion, we present range expansion in terms of upper and lower confidence bounds. To the extent that the range expansion model captures the key population dynamics and that future variation in vital rates and movements is not fundamentally different from the range of variation already observed, these bounds have a 95-percent probability of encompassing the realized range expansion. Within the 10-year time horizon, economic effects are projected for two areas where sea otter numbers are expected to increase under baseline conditions: (1) The coastline from Point Conception to Carpinteria (lower 95 percent confidence bound) or Oxnard (upper 95 percent confidence bound), and (2) San Nicolas Island. We project that an expanding sea otter population will have economic effects on commercial fisheries (sea urchin, crab, lobster, and sea cucumber), recreational fisheries (lobster), and the sea urchin processing industry in southern California. Assumptions underlying the economic analysis are described in Chapter 6 of the revised draft SEIS. Numerous other non-economic effects are expected to occur as a result of sea otter range expansion within 10 years. We discuss these effects in the revised draft SEIS, but because these effects are difficult or impossible to quantify in economic terms, we do not discuss them here.

*Baseline.* Selected fisheries, both commercial (sea urchin, crab, lobster, and sea cucumber) and recreational (lobster), would likely be eliminated in mainland coastline areas predicted to be re-occupied by sea otters over the next 10 years: Point Conception to Carpinteria (lower bound) or Oxnard (upper bound). These fisheries are also likely to be affected, to some degree, by a growing sea otter population at San Nicolas Island. During this period, commercial sea urchin landings averaging 56,360 to 61,016 pounds annually along the affected portion of the mainland coastline are expected to be eliminated. Average annual landings at San Nicolas Island are expected to be reduced from 351,333 pounds to 324,280 pounds. These losses represent 1 percent and 0.2 percent, respectively, of annual commercial sea urchin landings in southern California. Commercial lobster landings averaging

54,674 to 75,649 pounds annually along the affected portion of the mainland coastline are expected to be eliminated. Average annual landings at San Nicolas Island are expected to be reduced from 41,622 pounds to 38,417 pounds. These losses represent 8 to 11 percent and 0.4 percent, respectively, of annual commercial lobster landings in southern California. Commercial crab landings averaging 253,572 to 385,743 pounds annually along the affected portion of the mainland coastline are expected to be eliminated. Average annual landings at San Nicolas Island are expected to be reduced from 10,634 pounds to 9,816 pounds. These losses represent 23 to 35 percent and 0.06 percent, respectively, of annual commercial crab landings in southern California. Commercial sea cucumber landings averaging 155,714 to 158,636 pounds annually along the affected portion of the mainland coastline are expected to be eliminated. Average annual landings at San Nicolas Island are expected to be reduced from 53,683 to 49,549 pounds. These losses represent 27 to 28 percent and 1.5 percent, respectively, of annual commercial sea cucumber landings in southern California. Also during this 10-year period, the seafood processing industry would be affected by the declining sea urchin harvest. However, because the decline in sea urchin harvest represents less than 2 percent of the sea urchin harvest in southern California over the next 10 years, anticipated impacts on the seafood processing industry would be negligible.

With respect to the recreational dive industry, lobster dive trips on commercial passenger fishing vessels along the affected mainland coastline are negligible. Dive trips at San Nicolas Island are expected to be reduced from an annual average of 434 to 401. This loss represents approximately 0.5 percent of total dive trips taken annually in southern California, assuming divers do not choose to dive at a different location. In the longer term, those areas re-occupied by sea otters would likely cease to support commercial and recreational shellfish fisheries, but the magnitude and timing of this potential change is unknown.

*Economic Effects of Proposed Rule (Alternative 3C).* This proposed rule would not result in economic effects beyond those described above for baseline conditions, except in the case of potential indirect economic effects stemming from regulatory changes, namely the elimination of incidental take exemptions associated with the management zone upon termination of the translocation program. Federal agencies planning activities that may

affect sea otters in southern California would be required to consult with the Service under the ESA, and if their activities would result in take of southern sea otters, to seek authorization for incidental take under both the ESA and the MMPA. The economic effects of this change are expected to be negligible in the context of already existing consultation and permitting requirements for other endangered or threatened species and marine mammals under the ESA and MMPA, particularly in light of the fact that few otherwise legal activities result in take of southern sea otters and the expectation that sea otters would not be present in most areas of southern California for decades. If otherwise allowable under applicable State law, non-Federal activities that would result in take of southern sea otters in California would require an incidental take permit from the Service under the ESA and authorization for incidental take of sea otters under the MMPA. Incidental take of southern sea otters in commercial fisheries cannot be authorized under the MMPA. Therefore, incidental take of southern sea otters in commercial fisheries throughout southern California would be prohibited, as it is currently prohibited in the remainder of the range of the species (north of Point Conception, California).

Gill and trammel nets are known to be lethal to sea otters (Herrick and Hanan 1988; Wendell *et al.* 1986; Cameron and Forney 2000; Carretta 2001; Forney *et al.* 2001). Therefore, the regulatory changes associated with this proposed rule may indirectly affect portions of the commercial halibut and white seabass fisheries utilizing gill and trammel net gear. The use of gill and trammel nets is already banned throughout much of California. With respect to southern California, the Marine Resources Protection Act of 1990 (California Constitution Article 10B) prohibits the use of gill and trammel nets in waters less than 70 fathoms or within 1 mile of the Channel Islands, whichever is less, and generally within 3 nautical miles offshore of the mainland coast from Point Arguello to the Mexican border. However, some areas within southern California waters are characterized by a relatively shallow shelf that extends beyond the area currently closed to gill net fishing. The primary fisheries using gill and trammel net gear in these areas target halibut and white seabass. Effects on these fisheries would occur if the State acted, in response to regulatory changes associated with this rule, to extend the existing gill and trammel net

closure in southern California waters to depths that would be fully protective of sea otters. Furthermore, effects would occur only in areas where sea otters are not already fully protected, and likely only in areas that sea otters were expected to recolonize in the near future. (A closure to protect sea otters would not likely be imposed in areas where sea otters did not occur and were not expected to occur in the near future.) No effects would occur at San Nicolas Island because incidental take by commercial fisheries is currently prohibited within the translocation zone and would continue to be prohibited upon termination of the program.

Estimated annualized costs for the commercial halibut fishery range from \$0 (no additional closure) to \$250,000 (immediate closure of the affected area), representing a loss of 0 to 21 percent to the commercial halibut fishery in southern California. To calculate the present value for a 10-year time period, the social discount rates of 3 percent and 7 percent are applied per OMB guidance. The 10-year present value impact to the commercial halibut fishery would be approximately \$2.2 million discounted at 3 percent or \$1.7 million discounted at 7 percent. Estimated annualized costs for the white seabass fishery range from \$0 (no additional closure) to \$285,000 (immediate closure of the affected area), representing a loss of 0 to 42 percent to the commercial white seabass fishery in southern California. The 10-year present value impact to the commercial white seabass fishery would be approximately \$2.3 million discounted at 3 percent or \$1.7 million discounted at 7 percent. Estimates of maximum effects represent an upper bound. Realized effects are likely to be lower because (1) the State may not impose an immediate closure, (2) participants in the fishery already using alternate gear would benefit from the increased availability of halibut and white seabass, and (3) participants in the fishery using gill and trammel nets may switch gear or choose to fish elsewhere.

*Economic Effects from Enforcement of the Management Zone (Alternative 1).* As discussed, this proposed rule (Alternative 3C) would not result in any additional economic effects compared to the baseline, except the potential indirect effects stemming from regulatory changes summarized above. For comparison purposes, we present

the economic effects that would occur if southern sea otters were excluded from the management zone through a resumption of zonal management under Alternative 1. These effects are further detailed in the revised draft SEIS. Implementation of sea otter containment in the management zone would affect the coastline southeast of Point Conception. Sea otters have been seasonally sighted in the Cojo Anchorage area since 1998. Since 2006, monthly surveys have counted an average of 40 otters with considerable variation over time (standard deviation of  $\pm 19$ ) (K.D. Lafferty, USGS, pers. comm. 2011). The enforcement of containment in the management zone, if fully successful, would remove any sea otters from these areas and re-establish an otter-free management zone, thereby possibly increasing fishery harvests and also increasing the Service's administrative costs. The cost to the Service of implementing a zonal management program to contain southern sea otter range expansion over 10 years would total approximately \$4.3 million discounted at 7 percent or \$5.6 million discounted at 3 percent.

Effects on fisheries could occur due to (1) increased shellfish populations resulting from the elimination of sea otter predation currently occurring within the management zone (*i.e.*, the restoration of a pre-sea otter baseline), and (2) increased shellfish populations due to the future containment of sea otters. These estimates differ from the baseline not only in direction but also in magnitude because the baseline does not account for effects on commercial and recreational fisheries that would result from the removal of sea otters that are currently in the management zone. If sea otter containment in the management zone were to be enforced and fully successful, then the estimated annualized ex-vessel revenue benefit for the commercial sea urchin, lobster, crab, and sea cucumber fisheries would be \$184,000 to \$186,000, \$420,000 to \$530,000, \$210,000 to \$310,000, and \$116,000 to \$118,000, respectively, relative to the baseline. To calculate the present value for a 10-year time period, the social discount rates of 3 percent and 7 percent are applied per OMB guidance. Discounted at 3 percent, the 10-year present value impact for the commercial sea urchin, lobster, crab, and sea cucumber fisheries would be \$1.4 to \$1.5 million, \$3.2 to \$4.1

million, \$1.6 to \$2.4 million, and \$893,000 to \$903,000, respectively. Discounted at 7 percent, the 10-year present value impact for the commercial sea urchin, lobster, crab, and sea cucumber fisheries would be \$1.1 million, \$2.3 to \$2.9 million, \$1.1 to \$1.7 million, and \$641,000 to \$653,000, respectively. Minor positive effects on the sea urchin processing industry could result from an increase in sea urchin landings, depending on operating capacity and consumer demand. Recreational dive trips may increase along the coastline from Point Conception to Santa Barbara, but this increase is expected to result in negligible economic benefit because the mainland coastline is not an important area for recreational lobster diving.

#### Effects on Small Businesses

Potential impacts to small businesses, such as owners of halibut fishing vessels and white seabass fishing vessels, are summarized below. For more information pertaining to the economic impacts, please refer to the revised draft SEIS.

The SBA defines a "small business" as one with an annual revenue or number of employees that meets or is below an established size standard. The SBA "small business" size standard is \$4 million for "Finfish Fishing" and "Shellfish Fishing" (North American Industry Code (NAICS) 114111 and 114112) and fewer than 500 employees for "Fresh and Frozen Seafood Processing" (NAICS 311712). Most of the businesses in the finfish and shellfish fishing industries have fewer than 5 employees, and all of the businesses in the seafood processing industry have fewer than 500 employees. Therefore, all businesses participating in these industries are considered "small businesses." The numbers of commercial fishing vessels participating in selected southern California fisheries in the area expected to be affected within 10 years and in southern California as a whole are shown in Table 1. Although some establishments may own more than one vessel, we utilize the vessel estimate provided by California Department of Fish and Game to ensure a conservative approach to our analysis of the number and proportion of small entities affected (*i.e.*, we may overestimate the number and proportion of small entities affected).

**Table 1. Number of commercial fishing vessels making at least one landing in selected fisheries south of Point Conception**

|                   | Fishery                                      | Number of vessels making at least one landing in southern California (2000-2009 average) | Number of vessels making at least one landing from area expected to be affected within 10 years (2000-2009 average) | Percentage of Small Businesses Affected Under Proposed Rule | Percentage of Small Businesses Affected Under Alternative 1 |
|-------------------|--|--|---|---|---|
| Finfish Fishing   | Calif. halibut, with set and drift gill nets | 49   | 19  | 39%   | —   |
|                   | Calif. halibut, all other gear               | 138  | 57  | 41%   | —   |
|                   | White seabass, with set and drift gill nets  | 45   | 18  | 40%   | —   |
|                   | White seabass, all other gear                | 42   | 25  | 60%   | —   |
| Shellfish Fishing | Sea urchin                                   | 131  | 18-20*  | —   | 14% - 15%*  |
|                   | Calif. lobster                               | 169  | 23-31*  | —   | 14% - 18%*  |
|                   | Crab (all species)                           | 147  | 34-58*  | —   | 23% - 39%*  |
|                   | Sea cucumber                                 | 49   | 13-15*  | —   | 27% - 31%*  |

Source: California Department of Fish and Game (2010, 2011)

\*Numbers of vessels are presented as a range not because of uncertainty in the number of vessels making at least one landing from a particular statistical block but because of uncertainty regarding the extent of area likely to be recolonized by sea otters within 10 years.

#### *Impacts on Small Businesses Due to Proposed Rule (Alternative 3C)*

The proposed rule would not result in any effects on small entities, relative to the baseline, except potential indirect economic impacts stemming from regulatory changes by the State. Thus, the sea urchin, lobster, crab, and sea cucumber industries would not be impacted by the proposed rule. However, an additional gill and trammel net closure, if imposed by the State in response to the elimination of incidental take exemptions associated with the management zone, would affect portions of the halibut and white seabass fisheries utilizing gill and trammel net gear in Santa Barbara County and Ventura County within the next 10 years. Industries in Los Angeles, Orange, San Diego, Santa Barbara, and Ventura Counties (hereafter referred to collectively as "southern California") are included in the analysis because of their proximity to the affected area.

Estimates of the relative impact on vessels and the number of vessels affected may be overestimates because the data available to us do not allow us to account for vessels participating in multiple fisheries. Additionally, estimates of relative impact are averages (*i.e.*, some vessels will be more affected than others in the same fishery). All estimates of decreases in ex-vessel revenues assume that fishers would not choose to fish elsewhere or with alternate gear and hence would not supplement their revenues or increase harvest pressure in other areas. Finally, ex-vessel values reflect gross rather than net revenues and thus overestimate impacts because they fail to account for the savings in boat fuel and labor that could be re-employed elsewhere if commercial fishing activity in affected areas were reduced. Ex-vessel revenue and vessel number data are from the California Department of Fish and Game.

Table 2 shows the potential indirect effects if the State closes additional areas to gill and trammel net fishing in Santa Barbara and Ventura Counties. Potential indirect annualized effects on the commercial halibut fishery range from \$0 (no additional closure) to \$250,467 (immediate closure of the affected area), representing a loss to the commercial halibut fishery in southern California of 0 to 41 percent of landings made using gill and trammel net gear only (or 0 to 21 percent of all halibut landings) relative to the baseline. Potential indirect annualized effects on the commercial white seabass fishery range from \$0 (no additional closure) to \$284,638 (immediate closure of the affected area), representing a loss to the commercial white seabass fishery in southern California of 0 to 44 percent of landings made using gill and trammel net gear only (or 0 to 42 percent of all white seabass landings) relative to the baseline.

TABLE 2—ESTIMATED MAXIMUM ANNUAL IMPACT ON EX-VESSEL REVENUE FOR SELECTED FISHERIES FROM THE PROPOSED RULE (2009\$)

|  | Total annualized industry gross revenue loss (2012–2021) | Annual gross revenue decrease per small business |
|--|--|--|
| Halibut Fishery (with set and drift gill nets) ..... | \$250,467 .....  | \$13,182.  |
| Seabass Fishery (with set and drift gill nets) ..... | \$284,638 .....  | \$15,813.  |
| Sea Urchin Fishery .....                             | No impact .....  | No impact.                                       |
| Spiny Lobster Fishery .....                          | No impact .....  | No impact.                                       |
| Crab Fishery .....                                   | No impact .....  | No impact.                                       |
| Sea Cucumber Fishery .....                           | No impact .....  | No impact.                                       |

*Impacts on Small Businesses Due to Alternative 1*

For comparison purposes, we analyze the effects on small entities that would occur if southern sea otters were excluded from the management zone through a resumption of zonal management (full implementation of the translocation program) as detailed in the revised draft SEIS under Alternative 1. These effects are also indirect and stem from estimated impacts of sea otter predation on species targeted by commercial shellfish fisheries. If zonal management were resumed as described under Alternative 1 in the revised draft SEIS, the following industries would be affected, relative to the baseline: (1) Shellfish Fishing (NAICS 114112), and (2) Seafood Manufacturing (NAICS 3117). Industries that support recreational diving are not included here because economic impacts to those entities are expected to be negligible, as shown in the baseline section. Under baseline conditions, changes over the next 10 years are expected to occur along the coastlines of Santa Barbara County and Ventura County as a result of a naturally expanding sea otter population. Alternative 1 would prevent this expansion and would entail the

removal of sea otters currently residing within the management zone. Enforcement of a management zone, if successful, would benefit commercial shellfish fisheries because competition with sea otters would be eliminated. Industries in southern California are included in the analysis because of their proximity to the affected area. Within the shellfish fishing industry, we analyze four fisheries in depth: The sea urchin fishery, lobster fishery, crab fishery, and sea cucumber fishery. These predation effects are expected to occur under the baseline and under implementation of the proposed rule, but would not occur if sea otters were excluded from all southern California waters except those surrounding San Nicolas Island, as would be required under Alternative 1. Impacts under Alternative 1 are summarized in Table 3. Potential indirect annualized effects on the commercial sea urchin fishery are estimated to be \$184,054 to \$186,140 relative to the baseline, representing a gain to the commercial sea urchin fishery in southern California of 3 percent of landings relative to the baseline. Potential indirect annualized effects on the commercial lobster fishery are estimated to be \$419,812 to \$528,611

relative to the baseline, representing a gain to the commercial lobster fishery in southern California of 6 to 7 percent of landings relative to the baseline. Potential indirect annualized effects on the commercial crab fishery are estimated to be \$207,601 to \$311,647 relative to the baseline, representing a gain to the commercial crab fishery in southern California of 15 to 16 percent of landings relative to the baseline. Potential indirect effects on the commercial sea cucumber fishery are estimated to be \$116,157 to \$118,338 relative to the baseline, representing a gain to the commercial sea cucumber fishery in southern California of 15 percent of landings relative to the baseline. Minor positive indirect effects on the sea urchin processing industry could result from an increase in sea urchin landings, depending on operating capacity and consumer demand. Thirty-two (32) seafood product preparation and packaging entities meet the SBA “small business” size standard in southern California. Maximum benefits would reflect the gain to the commercial sea urchin fishery in southern California of 3 percent of landings relative to the baseline.

TABLE 3—ESTIMATED ANNUAL EX-VESSEL REVENUE BENEFIT FOR SELECTED FISHERIES FROM ALTERNATIVE 1 (2009 \$)

|  | Annualized industry gross revenue benefit (2012–2021) | Gross revenue annual impact per small business |
|--|---|--|
| Sea Urchin Fishery .....                             | \$184,054 to \$186,140                                | \$9,307 to \$10,225.                           |
| Spiny Lobster Fishery .....                          | \$419,812 to \$528,611                                | \$17,052 to \$18,253.                          |
| Crab Fishery .....                                   | \$207,601 to \$311,647                                | \$5,373 to \$6,106.                            |
| Sea Cucumber Fishery .....                           | \$116,157 to \$118,338                                | \$7,889 to \$8,935.                            |
| Halibut Fishery (with set and drift gill nets) ..... | No impact .....                                       | No impact.                                     |
| Seabass Fishery (with set and drift gill nets) ..... | No impact .....                                       | No impact.                                     |

Under Alternative 1, the regulatory environment for fishing would remain unchanged relative to the baseline. Because any potential effects on the portion of the halibut and seabass fisheries using gill and trammel net gear

would stem from regulatory changes, there is no effect on these two fisheries. Under Alternative 1, impacts to the sea urchin processing industry would be a positive function of the change in sea urchin landings. Impacts to the sea

urchin processing industry would be dependent upon whether individual companies are operating at capacity and whether they are capable of processing different seafood products. If companies are operating at capacity, then there may

be room for growth in the industry for an additional company. If companies are not operating at capacity, then revenues may increase in relation to any increase in raw product. Companies receiving sea urchins harvested along the affected coastline would be disproportionately affected. Because of the expected 3 percent increase in sea urchin inputs from the Southern California Bight, Alternative 1 is not expected to have a significant impact on the seafood processing industry.

#### *Small Business Regulatory Enforcement Fairness Act*

Amendment of Title 50 of the Code of Federal Regulations to remove § 17.84(d) is not a major rule under 5 U.S.C. 804(2). Our draft economic analysis concludes that removal of 50 CFR 17.84(d):

(a) Would not have an annual effect on the economy of \$100 million or more. The maximum annualized ex-vessel revenue loss to the halibut and white seabass industries would be \$535,105 (10-year present value of \$4.5 million discounted at 7 percent and \$3.4 million discounted at 3 percent).

(b) Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

#### *Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Service makes the following findings:

(a) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)-(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement

authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

The proposed rule to terminate the southern sea otter translocation program does not impose a legally binding duty on non-Federal government entities or private parties.

(b) We do not believe that this rule would significantly or uniquely affect small governments because it would not produce a mandate of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This determination is based on the economic analysis prepared as part of the revised draft SEIS on the sea otter translocation program. As such, a Small Government Agency Plan is not required.

#### *Takings*

In accordance with Executive Order 12630 "Government Actions and Interference with Constitutionally Protected Private Property Rights," we have analyzed the potential takings implications of terminating the southern sea otter translocation program. This assessment concludes that the proposed amendment to Title 50 of the Code of Federal Regulations to remove § 17.84(d) does not pose significant takings implications. While small segments of the fishing industry may be indirectly affected by changes resulting from termination of the southern sea otter translocation program, fishery resources are public resources in which private entities have no Constitutionally protected property interest.

#### *Federalism Assessment*

In accordance with Executive Order 13132, the proposed amendment to Title 50 of the Code of Federal Regulations to remove § 17.84(d) does not have significant Federalism effects. A

Federalism assessment is not required. The proposed amendment would not have substantial direct effects on the State, in the relationship between the Federal Government and the State, or on the distribution of power and responsibilities among the various levels of government. In keeping with Department of the Interior policy, we requested information from, and coordinated with, the State of California to the extent possible on the development of this proposed rule.

#### *Civil Justice Reform*

In accordance with Executive Order 12988, the proposed amendment to Title 50 of the Code of Federal Regulations to remove § 17.84(d) does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

#### *Paperwork Reduction Act*

The proposed amendment to Title 50 of the Code of Federal Regulations to remove § 17.84(d) does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, is required. The proposed amendment would not impose new record keeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

#### *National Environmental Policy Act*

We have considered this action with respect to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and have determined that this action requires the preparation of an environmental impact statement. A revised draft SEIS is now available for review. You may obtain a copy of this document at <http://www.regulations.gov>, at <http://www.fws.gov/ventura/>, or by contacting the Ventura Fish and Wildlife Office (see ADDRESSES section).

#### *Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a Government-to-Government basis. We have evaluated possible effects on federally recognized Indian Tribes and have determined that there are no effects.

*Energy Supply, Distribution, or Use*  
(Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use. Although adoption of this proposed rule would result in additional consultation requirements for energy activities that may affect southern sea otters, in the context of the current regulatory environment, it would not significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

**References Cited**

A complete list of all references cited in this proposed rule is available on <http://www.regulations.gov> or upon request from the Ventura Fish and Wildlife Office (see **ADDRESSES** section).

**Author**

The primary author of this proposed rule is Lilian Carswell of the Ventura Fish and Wildlife Office (see **ADDRESSES** section).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

Accordingly, for the reasons set forth in the preamble, we propose to amend

part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 17—[AMENDED]**

1. The authority citation for part 17 is revised to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; unless otherwise noted.

**§ 17.84 [Amended]**

2. Amend § 17.84 by removing and reserving paragraph (d).

Dated: July 22, 2011.

**Rachel Jacobson,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2011–21556 Filed 8–25–11; 8:45 am]

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