DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR 17

[FWS–R8–FHC–2011–0046]; [FF09E32000-134-FXES11130900000]

RIN 1018-AX51

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

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule and record of decision.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are removing 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. Removal of the regulations terminates the program. We analyzed the environmental consequences of this action, and alternatives to

it, in a final supplemental environmental impact statement (final SEIS), which we made available to the public on November 9, 2012. This **Federal Register** document records our decision to select the preferred alternative, Alternative 3C.

DATES: This rulemaking becomes effective [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION].

ADDRESSES: This final rulemaking and supporting documentation, including public comments, are available on the Internet at http://www.regulations.gov. In the search field, enter FWS-R8-FHC-2011-0046, which is the docket number. Then click on the Search button. On the resulting screen, you may view documents associated with the docket. Comments and materials received, as well as supporting documentation used in the preparation of this rulemaking, are also available for public inspection, by appointment, during normal business hours at the Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003.

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). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Services (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

With this final rulemaking, we are removing the regulations that govern the southern sea otter translocation program, including the establishment of an experimental population of southern sea otters, and all associated management actions. We are also amending the authority citation for 50 CFR part 17 by removing the reference to Public Law (Pub. L.) 99-625, the statute that authorized the Secretary to promulgate regulations establishing the southern sea otter translocation program. Removal of the regulations terminates the program. We are taking this action because we have determined 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 action terminates the designation of the experimental population of southern sea otters, abolishes the southern sea otter translocation and management zones, eliminates the obligation to remove southern sea otters in perpetuity from an "otter-free" management zone, and removes the current requirement to remove southern sea otters from San Nicolas Island and the management zone upon termination of the program. As a result, it allows southern sea otters to expand their range naturally into southern California waters.

We analyzed the environmental consequences of this action, and alternatives to it, in a final SEIS that we made available to the public on November 9, 2012 (77 FR 67302;

77 FR 67362). This **Federal Register** document records our decision to select the preferred alternative, Alternative 3C. We have prepared a final regulatory flexibility analysis (FRFA) to accompany this rulemaking.

Decision

We published a final SEIS on November 9, 2012 (77 FR 67302; 77 FR 67362), which evaluates options for continuing, revising, or terminating the southern sea otter translocation program, initiated in 1987. The final SEIS describes the proposed action and alternatives under consideration and discloses the direct, indirect, and cumulative environmental effects of each of the alternatives. We analyzed six alternatives:

- **No Action Alternative**: Maintain the status quo. This alternative serves as the baseline for comparison with all other alternatives;
- **Alternative 1**: Resume implementation of the 1987 southern sea otter translocation plan;
- **Alternative 2**: Implement a modified southern sea otter translocation program with a smaller management zone;
- **Alternative 3A**: Terminate the southern sea otter translocation program based on a failure determination pursuant to 50 CFR §17.84(d) ***and*** remove all sea otters residing within the translocation and management zones at the time the decision to terminate is made;
- **Alternative 3B**: Terminate the southern sea otter translocation program based on a failure determination pursuant to 50 CFR §17.84(d) ***and*** remove only sea otters residing within the translocation zone at the time the decision to terminate is

made;

- **Alternative 3C (Preferred Alternative)**: Terminate the southern sea otter translocation program based on a failure determination pursuant to 50 CFR §17.84(d) ***and*** do not remove sea otters residing within the translocation or management zones at the time the decision to terminate is made.

Comments: We received 12 comments on the final SEIS. These comments did not raise any new substantive issues regarding the final SEIS or this rulemaking. The comment letters and a summary of our responses are available on the Service's website at the internet address identified in the ADDRESSES section of this document.

Based on a thorough review of the alternatives and their adverse and beneficial environmental consequences, as described in the final SEIS, the decision of the Service is to implement Alternative 3C, the preferred alternative. We are selecting Alternative 3C because we have determined 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.

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 Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 *et seq*.).

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.

Our conclusion that the southern sea otter translocation program has failed is based on an in-depth evaluation of the translocation program (see Appendix C to the final SEIS). The translocation program evaluation compares results to date with the program's objectives and specific failure criteria established at the program's inception. We have determined that the translocation program meets failure criterion 2. We also note that 1) the colony of southern sea otters at San Nicolas Island remains small, and its ability to become established and persist is uncertain; 2) establishment and maintenance of an isolated southern sea otter colony at San Nicolas Island will not provide an adequate safeguard should the mainland southern sea otter population be adversely affected by a catastrophic event; 3) attempts to limit natural range expansion of southern sea otters disrupt seasonal patterns of movement and hinder recovery of the southern sea otter; 4) capturing and moving sea otters out of a "no-otter" management zone has proven to be ineffective as a long-term management action, largely because of the difficulties inherent in sea otter capture, the ability of sea otters to return rapidly to the management zone, and the elevated mortality associated with the holding, transport, and release of sea otters; 5) the recovery strategy for the southern sea otter has changed since the original recovery plan was released in 1982, in part because of points 1-4 above; in the revised recovery plan for the southern sea otter (USFWS 2003), the recovery team recommends that we declare the translocation program a failure and discontinue maintenance of a "no-otter"

management zone.

Alternative 3C allows for the continued natural range expansion of sea otters into their historic range in southern California waters. This alternative reflects the recommendation made in the revised recovery plan, which advises against additional translocations and instead advocates allowing natural range expansion (USFWS 2003). In light of these and other considerations of effects on southern sea otters and on our ability to meet our mandates under the ESA and the Marine Mammal Protection Act of 1972, as amended (MMPA) (16 U.S.C. 1361 *et seq*.), discussed in sections 6.7.3.3 and 6.7.11.1 of the final SEIS, we are selecting Alternative 3C.

The No Action Alternative reflects baseline environmental conditions that have been in place since the suspension of containment in 1993. It serves as the baseline for comparison with the other alternatives, but we do not consider it to be a viable alternative because the legal regime reflected in the No Action Alternative (continuation of the translocation program without containment) is untenable. In 2001, we published a Notice of Policy (66 FR 6649; January 22, 2001) notifying the public that we would not implement the containment component of the translocation program pending completion of a supplemental environmental impact statement and a final evaluation of the program. In the notice, we acknowledged the conclusion of our 2000 biological opinion that capture and removal (containment) of southern sea otters from the management zone—a key component of the translocation program—would likely jeopardize the continued existence and impede the recovery of the species. In light of our inability to implement the translocation program as designed and intended, we committed to a full and final evaluation of the program. We have now completed that evaluation and determined that

the translocation program has failed. For additional discussion of the No Action Alternative, see our responses to comments below under the heading "Positions on Proposed Action."

Alternatives 1 and 2 would entail resumption of implementation of the translocation program, including resumption of its containment component (though with differently configured management zones). However, we determined that resumption of containment would jeopardize the southern sea otter and violate Section 7 of the ESA (USFWS 2000). We based this conclusion, in part, on the recognition that reversal of southern sea otter population declines and expansion of the southern sea otter's range is essential to the survival and recovery of the species. In order to resume containment, we would have to reinitiate consultation under the ESA to consider any new information and conclude that continuation of the program would not jeopardize the southern sea otter. Resumption of sea otter containment could result in increased mortality of sea otters and disrupt behavior throughout the range of the species. It would also artificially restrict the southern sea otter's range, increasing its vulnerability to oil spills, disease, and stochastic events relative to the baseline. In combination, these effects would slow or prevent the recovery of the species. Additionally, it is now well established that sea otters can return rapidly to areas from which they have been removed; thus, our ability to influence sea otter movements by means of capture and removal is limited. Successful implementation of containment would likely require the repeated removals of some individuals. In light of these and other effects on southern sea otters and on our ability to meet our mandates under the ESA and the MMPA, discussed in sections 6.3.3.3, 6.3.11.1, 6.4.3.3, and 6.4.11.1 of the final SEIS, we have not selected Alternatives 1 or 2.

Alternatives 3A and 3B would recognize that the translocation program has failed, but they would be less likely to achieve our objectives than Alternative 3C. Alternatives 3A and 3B would require that we remove sea otters from the translocation zone and/or management zone at the time the decision to terminate the program was made. The attempted removal of sea otters from San Nicolas Island or the management zone, even over the short term, could result in increased mortality of the removed sea otters and temporarily disrupt behavior throughout the range of the species. Additionally, because sea otters can return rapidly to areas from which they have been removed (and can also potentially disperse to new areas), attempting these removals would be not only harmful but likely futile. In light of effects on southern sea otters and on our ability to meet our mandates under the ESA and the MMPA, discussed in sections 6.5.3.3, 6.5.11.1, 6.6.3.3, and 6.6.11.1 of the final SEIS, we have not selected Alternatives 3A or 3B.

We identified Alternative 3C as the environmentally preferable alternative. While the regulatory change in the status of sea otters in the Southern California Bight may result in indirect effects on gill and trammel net fisheries if additional depth restrictions are adopted in the future, we have determined that, on balance, Alternative 3C causes the least damage to the biological and physical environment, in that it would allow a "keystone species" to return to its former range off southern California and would help to restore the natural functioning of the nearshore marine ecosystem. For an in-depth discussion of the effects of sea otters on the nearshore marine ecosystem, see section 6.2.2 of the final SEIS.

We have adopted all practicable means to avoid or minimize potential environmental harm from Alternative 3C. Natural range expansion of sea otters (which is

occurring under baseline conditions and is expected to continue to occur under Alternative 3C) could affect the endangered white abalone (*Haliotis sorenseni*) and the endangered black abalone (*Haliotis cracherodii*) if sea otters encounter individuals that are not in cryptic or otherwise inaccessible habitat. We recognize our affirmative responsibilities under the ESA and fully support recovery efforts for endangered white and black abalone. To lessen the risk that natural range expansion of sea otters could interfere with recovery efforts for white and black abalone, we are committed to working closely with the National Marine Fisheries Service (NMFS) to share information that may affect recovery actions for these species. Specifically, we are working with NMFS to convene a working group composed of managers and scientists that have southern sea otter and abalone expertise to benefit the recovery of abalone and sea otters. We are also pursuing a Memorandum of Understanding with NMFS to formalize this and other cooperative efforts to facilitate the recovery of sea otters alongside the recovery of endangered abalone.

While Alternative 3C (termination of the translocation program) is not anticipated to affect defense-related agency actions that are currently carried out within the translocation zone around San Nicolas Island, we acknowledge that Alternative 3C could result in an increased regulatory burden on the Department of Defense if actions significantly different from those currently being carried out are implemented in the future. To mitigate regulatory effects that may occur, we are continuing to work with the Department of Defense to identify possible mutually agreeable solutions, including streamlining ESA and MMPA compliance. While the Service does not have management authority for marine fisheries, we will also work closely with the California

Department of Fish and Game (CDFG), NMFS, and affected fishers to identify and develop fishery management strategies, as feasible, to minimize effects on individual fishers.

Background

Previous Federal Actions

On January 14, 1977, we listed the southern sea otter as a threatened species under the ESA 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 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 Pub. L. 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 CDFG, 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 Pub. L. 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, CDFG 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 reinitiate 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 supplemental environmental impact statement (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; December 30, 2005). 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.

On August 26, 2011, we made available a revised draft SEIS on the translocation program, a proposed rulemaking, and an accompanying initial regulatory flexibility analysis (76 FR 53381). A revised draft evaluation of the translocation program was again included as Appendix C. We solicited comments on the revised draft SEIS, revised draft evaluation of the translocation program, proposed rulemaking, and initial regulatory flexibility analysis during the 60-day public comment period, which began August 26, 2011 and ended October 24, 2011 (76 FR 53381). We reopened the comment period on November 4, 2011 for an additional 18 days, until November 21, 2011 (76 FR 68393). On November 9, 2012, we made available a final SEIS (77 FR 67302; 77 FR 67362). Comments we received during the comment period, including those addressing the revised draft evaluation of the translocation program, are summarized in Appendix G to the final SEIS.

Approximately 50 independent southern sea otters currently exist 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 51 independent animals 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 174 pups are known to have been born at the island since the program's inception.

At present, all of the southern sea otters at San Nicolas Island are believed to be offspring of those originally translocated to the island. This is because the original animals were translocated 25 years 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.

We have selected the preferred alternative in the final SEIS, which 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. The preferred alternative reflects the recommendations of the revised recovery plan for the southern sea otter (USFWS 2003). This final rulemaking and record of decision documents our selection of the preferred alternative, Alternative 3C, and implements it. 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)), which required removal of sea otters from both locations if the translocation program were to be terminated. This rulemaking terminates the southern sea otter translocation program through removal of the regulations at 50 CFR 17.84(d) that established and governed implementation of the translocation program. Among the regulatory requirements that are eliminated by the removal of 50 CFR 17.84(d), in its entirety, is the previous requirement to remove sea otters from San Nicolas Island and from the management zone if the translocation program were terminated.

Termination of the translocation program through this rulemaking is not anticipated to affect defense-related agency actions that are currently carried out within the translocation zone around San Nicolas Island. The provisions of the MMPA have remained applicable under P.L. 99-625 to defense-related activities in that zone, and despite the low threshold for MMPA authorization of military activities (*i.e.,* disturb or is likely to disturb a marine mammal or injure or has the significant potential to injure a marine mammal), the Navy has not required MMPA authorization for any of its activities there to date. Therefore, defense-related activities of the type currently carried out at San Nicolas are unlikely to need authorization under the generally higher thresholds of the Endangered Species Act.

Summary of Comments and Recommendations

In the August 26, 2011, proposed rulemaking and notice of availability, we requested comments concerning any aspect of the proposal and the accompanying revised draft SEIS (including the revised draft evaluation of the translocation program) and initial

regulatory flexibility analysis (76 FR 53381). We provided a 60-day comment period, which closed on October 24, 2011 (76 FR 53381). In response to a request from the California Sea Urchin Commission, we reopened the comment period on November 4, 2011 for an additional 18 days, until November 21, 2011 (76 FR 68393; November 4, 2011).

We sent notifications about the proposal and supporting documents to Federal and State agencies, Congressional representatives, conservation groups, industry organizations, other entities, and numerous private citizens who may be affected or had expressed an interest in the proposal. We issued a news release on August 26, 2011, and published newspaper advertisements announcing public hearings in the Ventura County Star, Santa Barbara News Press, and Santa Cruz Sentinel. We held public informational open houses and public hearings in Ventura (September 27, 2011), Santa Barbara (October 4, 2011), and Santa Cruz, California (October 6, 2011). Approximately 190 people attended the public hearings, and 68 provided testimony. During the two comment periods, which totaled 78 days, we received 6,843 comment letters, postcards, and emails. Among the comment letters were 5 petitions with 12,514 signatories.

Most of the comments (approximately 99 percent) expressed support for termination of the translocation program generally or for the proposed action specifically. We received numerous substantive comments on the revised draft SEIS and revised draft evaluation of the translocation program that were also pertinent to the proposed rulemaking. We developed the following summary of comments to address the major issues raised during the comment period that are pertinent to the proposed rulemaking. Some of the comments are relevant to the revised draft SEIS or revised draft evaluation

of the translocation program as well. We refer readers to Appendix G of the final SEIS for responses to all comments submitted during the comment period.

Positions on Proposed Action

Comment: Approximately 750 commenters and 12,500 signatories to petitions expressed support for the proposed action (Alternative 3C) for one or more of the following reasons: Range expansion is important for sea otter recovery; sea otters are a native, keystone species in kelp forest habitats; the presence of sea otters would enhance biodiversity in southern California waters; the presence of sea otters would enhance the economy by producing benefits for tourism and industries that depend on ocean health; sea otters have an intrinsic right to recolonize and make use of their historic habitat, the nearshore marine environment, without human-imposed restrictions.

Our Response: Thank you for your comments. They have been noted and will be included in the administrative record for this action.

Comment: Approximately 6,000 commenters did not specifically identify an alternative but expressed support for terminating the translocation program and ending the "no-otter" zone for one or more of the following reasons: Range expansion is important for sea otter recovery; sea otters are a native, keystone species in kelp forest habitats; the presence of sea otters would enhance biodiversity in southern California waters; the presence of sea otters would enhance the economy by producing benefits for tourism and industries that depend on ocean health; sea otters have an intrinsic right to recolonize and make use of their historic habitat, the nearshore marine environment,

without human-imposed restrictions.

Our Response: Thank you for your comments. They have been noted and will be included in the administrative record for this action.

Comment: Implementing the No Action Alternative is the best way to allow sea otters to expand their range into southern California while still maintaining the incidental take exemptions provided in Pub. L. 99-625 for the fisheries.

Our Response: The No Action Alternative is not a viable alternative. While the environmental consequences of the No Action Alternative are the same as baseline environmental conditions and as such form an integral part of our analysis, the legal regime reflected in the No Action Alternative (continuation of the translocation program without containment) is not a reasonable path forward. In the revised draft SEIS and final SEIS, we considered the following additional alternatives: resume implementation of the translocation program (Alternative 1), modify it (Alternative 2), or terminate it (Alternatives 3A-3C). In 2001, we published a Notice of Policy (66 FR 6649; January 22, 2001) notifying the public that we would not implement the containment component of the translocation program pending completion of a supplemental environmental impact statement and a final evaluation of the program. In the notice, we acknowledged the conclusion of our 2000 biological opinion that capture and removal (containment) of southern sea otters from the management zone—a key component of the translocation program—would likely jeopardize the continued existence and impede the recovery of the species. In light of our inability to implement the translocation program as designed and intended, we committed to a full and final evaluation of the program. We have also faced litigation over the translocation program twice during the past 12 years: First, for

failing to implement the containment component of the translocation program, and second, for failing to complete our evaluation of whether the translocation program has failed. In resolution of the second lawsuit, we committed to evaluating whether the translocation program has failed under 50 CFR 17.84(d)(8), and if we determined the program has failed, to promulgate a final rulemaking to terminate the program. Continuing to maintain the status quo, which is reflected in the No Action Alternative, when we cannot implement the translocation program as intended by Congress in Pub. L. 99-625 and have concluded in our evaluation of the translocation program that the program has failed and does not further recovery of the southern sea otter, is not reasonable, and cannot be justified on the basis that it would maintain current incidental take exemptions for fisheries. We prepared a final SEIS and completed a final evaluation of the translocation program. This rulemaking reflects our decision to implement the proposed action (Alternative 3C).

Fisheries

Comment: Closing additional areas outside 3 miles along the coastline between Santa Barbara and Port Hueneme, Santa Barbara and Ventura Counties, to gill and trammel net fishing, will devastate the halibut and white seabass fisheries. Sea otters have not been observed in this area, and two seasons of observation by NMFS observers did not document any interactions.

Our Response: The Service does not have management authority for gill and trammel net fisheries, and this rulemaking does not include a proposal to close any area

to fishing. We do not advocate closures in areas where sea otters do not occur. We are aware that sea otters are currently very rare in the area we have analyzed as being potentially subject to fishery closures, although individual sea otters likely occasionally transit it. As a result, it is expected that at present the potential for interactions between sea otters and gill and trammel net gear is extremely low. However, if the southern sea otter range expands as expected, the potential for interactions will likely increase in the future.

Comment: The Service should monitor the actual migration of sea otters and adjust regulations as needed to protect local fisheries from premature and unwarranted closure. The Service should also treat the drift-net and set-net fisheries differently because drift gear is deployed overnight, and few or no sea otters have been observed swimming or foraging 3 to 5 miles offshore at night.

Our Response: The Service does not have management authority for gill and trammel net fisheries, and this rulemaking does not include a proposal to close any area to fishing. We do not advocate closures in areas where sea otters do not occur. The shore-based method of radio-tracking sea otters (which generally requires both the ability to receive a radio signal and visibility) has limited both night-time and far-offshore observations of sea otters. However, time-depth recorders, which are not subject to a shore-bias and do not require visibility, indicate that sea otters frequently forage and travel at night. Therefore we do not concur that the drift-net and set-net fisheries pose widely different risks to sea otters.

Comment: The Service has grossly underestimated the value of the white seabass fishery by using a 10-year average ex-vessel price rather than current market values.

Our Response: In order to allow for the comparison of different alternatives across many different impact topics, it is necessary to maintain a consistent methodology. In our analysis of impacts, we use a 10-year average to establish the baseline for commercial fisheries landings and ex-vessel revenues. The ex-vessel value of all fisheries tends to fluctuate according to demand and available supply. For some fisheries, the ex-vessel price will be higher at the end of this period, whereas for others, the price will be highest during the middle or at the beginning of this period. We use a 10-year average to dampen these fluctuations and standardize ex-vessel values for inflation to 2009 dollars.

Comment: It appears that the Service has already decided what its recommendation to CDFG will be regarding potential gill and trammel net closures and that comments submitted during the comment period will not be considered.

Our Response: The Service does not have management authority for gill and trammel net fisheries, and this rulemaking does not include a proposal to close any area to fishing. We do not advocate closures in areas where sea otters do not occur. Our analysis of effects on these fisheries presents a low estimate (no additional closure) and a high estimate (immediate closure of the area to 104 meters (m) (341 feet (ft)). Our intention is not to advocate for such a closure but to disclose the maximum potential effect on these fisheries, while also acknowledging that this effect might not occur at all.

Comment: The multiplied retail value of halibut and white seabass is 100 to 200 percent higher to the consumer than the ex-vessel price. These multiplied retail values should be presented in addition to ex-vessel values.

Our Response: A detailed economic analysis for this rulemaking and associated

alternatives is included in a final SEIS, available at http://www.fws.gov/ventura/species_information/so_sea_otter/index.html. We include an estimate of the regional economic impacts in the analysis of effects on commercial fisheries under each alternative in that document. Because our primary intent in this rulemaking is to characterize effects on particular industries and not on the regional economy as a whole, we do not present multiplied effects here.

Comment: The Service should offer mitigation for the financial hardship that will result from gill and trammel net closures associated with the proposed action.

Our Response: The Service does not have management authority for gill and trammel net fisheries, and this rulemaking does not include a proposal to close any area to fishing. We do not advocate closures in areas where sea otters do not occur. Nevertheless, we recognize that additional gill and trammel net closures imposed by the State or NMFS are a potential indirect consequence of the change in regulatory status of sea otters under this rulemaking. We remain committed to working cooperatively with these management agencies to ameliorate any economic effects as they deem appropriate and feasible.

Comment: Impacts to the shellfish industry are overstated. While we appreciate the Service's desire to err on the side of caution by overestimating, rather than underestimating, impacts on fisheries, we are concerned that the agency's approach is fueling misconceptions that the otters' return to southern California will result in the end not only of shellfish fisheries, but of fisheries in general.

Our Response: Our assumption that under a scenario involving natural range expansion, sea otters will eliminate fisheries for sea urchins, lobsters, crabs, and sea

cucumbers is based in part on data on proportional prey consumption by sea otters in southern California and in part on past interactions between sea otters and shellfish fisheries along the central coast (Estes and VanBlaricom 1985). Based on recent observations of proportional prey consumption by sea otters at San Nicolas Island (Bentall 2005), it is probable that sea urchin fisheries will be more heavily impacted than crab or lobster fisheries. However, because we lack data on absolute abundance of the prey species in question and the level at which fisheries for lobsters, crabs, and sea cucumbers would become inviable, we conservatively assume that these fisheries cannot coexist with sea otters once an area of range has been fully reclaimed. Although effects may be overestimated, they represent a reasonable upper bound and are sufficient to inform our decisionmaking. We note that these effects occur equally under the baseline and under this rulemaking.

Comment: The Service misdefines the baseline in a manner that overestimates landings and does not account for reduced catches in many fisheries in recent years. The Service should revise its estimates to provide an accurate baseline that reflects the current state of fishing landings and revenue.

Our Response: Cyclic variations in populations, adverse weather, market

demand, and other factors influence catch from one year to the next. We use a 10-year

average to account for such fluctuations in estimating the baseline ex-vessel value of fisheries. While we recognize that using a 10-year average to determine a baseline for effects on landings under the various alternatives will overestimate these effects if a fishery is in decline, we consider this approach to be more reasonable than basing 10-year projections on only 1 or 2 years of data.

Incidental Take

Comment: If the only acceptable number of sea otter 'takes' is zero, the Service should be addressing other, non-fishery, impacts, such as propeller strikes.

Our Response: Termination of the southern sea otter translocation program entails the removal of all associated regulatory provisions, such as the exemption from

the incidental take prohibitions of the ESA and the MMPA for activities within the management zone. Allowable incidental take of sea otters in southern California commercial fisheries will thus be zero, as it is throughout the remainder of the southern sea otter's range, because such take cannot be authorized under section 118 of the MMPA. Boat strikes remain a low but persistent source of sea otter mortality. Many such strikes appear to occur as boats exit harbors. We continue to work with enforcement authorities to ensure compliance with speed limits in and near harbors.

Comment: The Service should work with fishermen to provide incidental catch authorization for sea otters, as is available for other marine mammals.

Our Response: Section 118 of the MMPA, which governs the incidental taking of marine mammals in the course of commercial fishing operations, does not apply to southern sea otters. Section 118 of the MMPA would need to be amended before the incidental taking of southern sea otters in commercial fisheries could be authorized.

Comment: The Service does not adequately present the importance of the U.S. Navy (Navy) agreeing to have sea otters translocated to San Nicolas provided the Navy was given exemption from ESA and MMPA requirements.

Our Response: We acknowledge that the Navy agreed to allow sea otters to be translocated to San Nicolas Island provided it was given an exemption from ESA and MMPA requirements for southern sea otters. However, we note that the MMPA exemption applies only to the management zone, not the translocation zone. Our observations of the colony to date suggest that the presence of southern sea otters at San Nicolas Island is compatible with naval operations. We appreciate the Navy's cooperation in establishing and implementing the translocation program and the Navy's

continuing contribution to southern sea otter recovery efforts.

Expansion and Health of the Southern Sea Otter Population

Comment: The proposed action does not address the real problem for southern sea otter recovery: disease resulting from degraded water quality.

Our Response: Addressing disease is one component of the overall recovery strategy for southern sea otters. That strategy is outlined in the Final Revised Recovery Plan for the Southern Sea Otter (USFWS 2003). The translocation program was not intended or designed to address every action necessary to recover the southern sea otter. 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. Our translocation program evaluation concludes that the translocation program has failed under one of the specific failure criteria set forth in 50 CFR 17.84(d)(8) and has also failed to achieve its overall recovery objectives. Maintaining an otter-free zone as provided in the translocation plan would prevent the natural range expansion of southern sea otters; that is, it would preclude the natural repopulation of southern California waters by southern sea otters and is detrimental to southern sea otter recovery. Additionally, it would make it difficult, if not impossible, to reach the Optimum Sustainable Population level for sea otters in California under the MMPA.

We recognize the importance of addressing disease in southern sea otters, but that issue is beyond the scope and specific objectives of the translocation program and is not relevant to our determination that the translocation has failed to achieve its primary recovery goal of producing a second, self-sustaining population of sea otters that could produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality and has failed under the specific regulatory criteria established to evaluate the program. Further, the commenter is incorrect in assuming that solely addressing water quality issues is sufficient to bring about the recovery and delisting of the southern sea otter. The occurrence of infectious disease in sea otters resulting from land-borne pathogens appears to be related synergistically to exposure to harmful algal blooms and to nutritional stress (food limitation). These factors often interact in complex ways that we are just beginning to understand. For example, lower per-capita food availability leads to poorer body condition and greater reliance on suboptimal prey, which increases exposure and susceptibility to novel disease-causing pathogens, which may be further exacerbated by chronic domoic acid exposure) (Tinker, pers. comm. 2012). We are continuing to support research to understand these complex processes in order to identify management actions that target areas with the maximum growth potential for sea otters and thus the maximum effect on recovery.

While a reasonable range of alternatives associated with the translocation program was analyzed in our final SEIS, this rulemaking does not in any way preclude continued

efforts to understand and address disease in sea otters. In fact, because food limitation increases exposure and susceptibility to disease, the natural movement of sea otters into areas with higher prey abundance, such as will continue to occur under the current action, will likely result in a lower incidence of disease in those sea otters.

Comment: The Service should address the problem of *Toxoplasma gondii* from cat feces.

Our Response: The pathways by which sea otters are becoming exposed to *Toxoplasma gondii* are more complex than were at first recognized. Until recently, it was believed that cats (both domesticated and wild) were the only definitive host for this protozoal parasite. However, the widespread exposure of other marine mammals to *T. gondii*, including those whose habitat is mostly pelagic and distant from human population centers, as well as recent laboratory analyses, have suggested that there may be a definitive host in the marine environment (for example, Jensen *et al.* 2010). If sea otters are being exposed by this route, then efforts to control cat feces will have no effect on *T. gondii* exposure in sea otters. The relative contribution of parasites from wild felids versus domestic or feral cats is also an outstanding question (one that is currently under investigation, for example, Miller *et al.* 2008); efforts to control domestic cat feces will have no effect on sea otter exposure to *T. gondii* parasites from wild felids. Finally, recent research indicates that *T. gondii* is only one of a number of closely related protozoan parasites that infect sea otters (*Sarcocystus neurona* is another), and genetic work has revealed that in many cases sea otters and other marine mammals actually have co-infections of multiple parasite species (for example, Gibson *et al.* 2011, Colegrove *et al.* 2011). A better understanding of the sources of the various parasite genotypes, the

routes by which they are entering marine food webs, and the degree to which they have significant health impacts on sea otters is needed before specific management actions can be recommended. We are continuing to support research to understand the pathways by which sea otters are being exposed to *Toxoplasma gondii* and other parasites and the effects of these parasites on recovery.

Comment: The issues regarding the sea otter translocation program are not about striking a balance between economics and environmentalism, but about doing what is right. Hijacking a program intended to nurse the sea otter population back to healthy abundance in order to preserve declining industries, at the expense of those very populations, is not right.

Our Response: Thank you for your comment. It has been noted and will be included in the administrative record for this action.

Comment: The southern sea otter population needs to expand into southern California beyond Point Conception if this species is ever to recover its original range. Sea otters are also an important functional element of the coastal marine ecosystem in that region (Estes *et al.,* 2011). Preventing their recovery by any means would be contrary to the conservation and management goals of the Service under the both the ESA and the MMPA.

Our Response: We agree. This rulemaking allows for the continued natural range expansion of sea otters into their historic range in southern California waters. Our decision reflects the recommendation made in the revised recovery plan, which advises against additional translocations and instead advocates allowing natural range expansion (USFWS 2003).

Comment: A recent population viability analysis (PVA) conducted by Dr. Daniel Doak demonstrates that increases in the southern sea otter population and the probability of meeting the Service's recovery goals for the species substantially differ depending on whether zonal management is terminated and sea otters are allowed to remain at San Nicolas Island. The likelihood of recovery, resulting in the delisting of the southern sea otter, and even the likelihood of uplisting the otter to endangered status will be significantly influenced depending on whether the management zone is maintained or abandoned. Termination of zonal management and removal of the exclusion zone will result in a 14 percent increase in the probability of the southern sea otter meeting the recovery criteria at the end of the 10-year period adopted by the Service. This outcome translates into a greater than 55 percent proportional reduction in risk if zonal management is terminated. Lesser differentials in the probability of recovery have been considered unacceptable for other listed species. These results support the conclusion that continuing the containment program would hinder recovery and violate the conservation mandate. Clearly, the Service cannot meet its affirmative duty to achieve recovery when it is carrying out an action that makes species conservation and delisting significantly less likely. The Service's conclusions, supported by this most recent analysis, make clear that continuation of the containment program would violate the Service's section 7(a)(1) obligations. The program must be declared a failure and ended.

In addition, when the PVA takes into account the well-documented but poorly understood periodic dips in the southern sea otter population, it shows that maintenance of the containment zone does result in 4.4 to 5.6 percent risk of the southern sea otter population dipping below the threshold for uplisting it to endangered status under the

ESA. While these risks are not significant in and of themselves, they do highlight the nontrivial risk that uplisting could take place, despite current growth trends.

Finally, as Doak demonstrates, the number of otters that would have to be captured and moved to maintain the management zone program is very large, resulting in unacceptably high sea otter mortality and requiring the Service to spend significant funds to enforce the "no-otter zone." An average of at least 45 otters would have to be pursued, captured, and translocated each year, in perpetuity. Over the next 10 years, a total of 393 otters would have to be removed from the management zone. Using the Service's expected mortality rate of 17 percent, an expected 66–67 otters would die as a direct result of the containment program.

Our Response: We have incorporated the results of the referenced population viability analysis (Doak 2011) into our analysis.

Retention of the Sea Otter Colony at San Nicolas Island

Comment: If the Service declares the translocation program a failure, it should remove sea otters from San Nicolas Island. Leaving them there is counter to all of the discussions, commitments, and intentions expressed during development of the original plan and rule.

Our Response: The commenter recommends that the Service remove the small but healthy population of southern sea otters from San Nicolas Island if we terminate the translocation program because that is the commitment we made when the program was initiated 25 years ago. Our decision to declare the program a failure but to retain sea

otters at San Nicolas Island is based in part on the recognition, gained from our experience implementing the translocation program, that if sea otters were removed from the island, some would return, some would die, and the introduction of these sea otters into the mainland population would likely further stress that food-limited population.

During public hearings, one fisherman reported that he and other fishermen had discussed the issue and recognized that if the San Nicolas Island population were removed, some sea otters would likely return immediately to San Nicolas Island (just as many returned immediately to the mainland range after being translocated to San Nicolas Island) and stated that although they believed the program should not be declared a failure, they did not want sea otters to be removed from San Nicolas Island if the program were declared a failure. We conclude that removal of southern sea otters from San Nicolas Island, if it were determined to be allowable under the ESA, would not further the species' survival or its recovery. It is for this reason that we proposed terminating the translocation program, including removing the existing regulatory requirement to remove sea otters from San Nicolas Island, and requested public review and comment on this issue.

Comment: The small population at San Nicolas Island should not be captured and translocated elsewhere. We are particularly concerned that the relocation of sea otters from San Nicolas Island back to the mainland could result in increased risk of mortality due in part to the stress associated with capture, handling, and time out of water, and in part to the general lack of familiarity of the animals with their new environments.

Previous translocation efforts have shown that such stress and mortality are both significant and inevitable. Further, competition with the resident sea otter populations in the central part of the California coast would be detrimental to both populations competing for limited food resources.

Our Response: We agree. Our decision to declare the program a failure but to retain sea otters at San Nicolas Island is based in part on the recognition that if sea otters were removed from the island, some would return, some would die, and the introduction of these sea otters into the mainland population would likely further stress that food-limited population.

Comment: Since the zonal management system was first implemented, substantial new information on the population status, behavior, and ecology of the southern sea otter has revealed that effects of containment that were not previously considered have continued to develop and placed a renewed importance on retention of the San Nicolas Island population. Recent studies have demonstrated that moving sea otters from San Nicolas Island and the "otter-free" zone into the central part of the range would have potentially deleterious effects on social structure and could greatly exacerbate problems involving competition in a very food-limited area. Removal of southern sea otters from San Nicolas Island will result in the direct deaths of individuals (presumably at the same 17 percent rate specified in the 2000 biological opinion) and the disruption of social behavior in the parent population, in that those affected individuals

will have reduced potential for survival and reproduction. In order to avoid these negative consequences and meet the requirements of ESA Section 7(a)(2), southern sea otters should be left at San Nicolas Island according to Alternative 3C.

Our Response: Relocating sea otters from the management zone and San Nicolas Island to the northern or central portion of the existing range would increase competition among sea otters, especially in areas of the central coast now thought to be food-limited (see Tinker *et al.* 2008), disrupt natural behaviors, and likely result in the deaths of otherwise healthy animals. The incidental injury or death of sea otters removed from San Nicolas Island or the management zone would likely be unavoidable. The relocation of sea otters results in increased risk of mortality due in part to the stress associated with capture, handling, and time out of water, and in part to the general lack of familiarity of the animals with their new environments (Estes *et al*., n.d.). Sea otters that have learned to forage in prey-rich environments (such as San Nicolas Island) may experience additional stress or even starvation resulting from their inability to find adequate food in prey-limited areas of the mainland range. For males, there may be an added risk of death or injury from encountering territorial males in unfamiliar habitats (Estes *et al*., n.d.). Some sea otters would likely attempt to return to their location of capture, depleting their energy reserves and increasing their risk of mortality. Overall, relocating sea otters from San Nicolas Island or the management zone to the mainland range would be disruptive, harmful, or possibly lethal, both to the relocated animals and to those in the receiving population. The effects of removing the population of southern sea otters from San Nicolas Island and relocating them into the parent population would be similar to those analyzed in the 2000 biological opinion that resulted in our jeopardy determination. Prior

to making a decision to remove otters from San Nicolas Island, we would have to complete a formal internal Section 7 consultation under the ESA and determine that such relocation would not result in jeopardy to southern sea otters.

Impacts on Other Species and the Ecosystem

Comment: The Service admits that "sea otter range expansion along the central California coast is known to have reduced abalone population levels and size distributions" but concludes there is no conflict between the preferred alternative and white abalone survival and recovery. Introducing an apex predator into abalone habitat will have significant, if not fatal, consequences for the future of this endangered species.

Our Response: Potential future effects on white abalone of this action are identical to baseline conditions. Currently, southern sea otters are present at San Nicolas Island and are naturally recolonizing their historic range in the management zone. Under this action, those conditions will continue. The National Oceanic and Atmospheric Administration (NOAA), the federal agency with ESA jurisdiction over the endangered white abalone, has stated that it "supports USFWS' efforts to recover southern sea otters throughout their range," and NMFS, which NOAA oversees, has stated that it "does not support the alternatives that involve some level of sea otter removal from the management and/or translocation zones" (NOAA 2011).

The effect of this action is not to "introduce" an apex predator into abalone habitat as the commenter suggests. Rather, it would continue baseline conditions of natural sea otter range expansion. Sea otters are naturally recolonizing their historic range, which

formerly encompassed the entire range of white abalone until sea otters were hunted to near extinction during the 18th and 19th centuries. Sea otters and white abalone coevolved. We note that white abalone were federally listed as endangered not because of sea otter predation but because of dramatic declines in abundance due primarily to overharvesting for human consumption (66 FR 29046; May 29, 2001). Sea otters have been absent from nearly all of the range of white abalone since approximately 1850 (Scammon 1968). Therefore, very little is known about the specific ecology of sea otter–white abalone interactions. According to one researcher with specific expertise with white abalone, "sea otters and abalone have coexisted historically. Many abalone traits are probably the result of selection by sea otters. To that end, sea otters will probably deplete abalone abundance, but not extirpate them. […] [W]hite abalone have a depth refuge from otters" (Lafferty, pers. comm. 2012).

Nevertheless, we acknowledge that populations that have been reduced to very low densities are subject to risks that healthy populations are not and that sea otters may consume white abalone where their geographic and depth ranges overlap. We recognize our affirmative responsibilities under the ESA and fully support recovery efforts for endangered white abalone. To lessen the risk that natural range expansion of sea otters (which would occur both under baseline conditions and under alternatives that terminate the translocation program) could interfere with recovery efforts for white abalone, we are committed to working closely with NMFS, CDFG, and the White Abalone Recovery Team to share information that may affect recovery actions for this species. We are also pursuing a Memorandum of Understanding with NMFS to formalize our agencies' mutual commitment to cooperate in facilitating both southern sea otter and abalone

recovery efforts.

Comment: The Service's preferred alternative threatens both the survival and the recovery of black abalone. Although the Service admits that black abalone "have nearly been extirpated in southern California waters," the Service apparently sees no problem with introducing a voracious apex predator into an already precarious circumstance for black abalone.

Our Response: Potential future effects on black abalone of this action are identical to baseline conditions. We conducted an internal biological evaluation of the proposed rulemaking on the black abalone under Section 7(a)(2) of the Act and concluded that the proposed rulemaking would have no effect on the species or black abalone critical habitat. Currently, southern sea otters are present at San Nicolas Island and are naturally recolonizing their historic range in the management zone. Under this action, those conditions will continue. NOAA, the federal agency with ESA jurisdiction over the endangered black abalone, has stated that it "supports USFWS' efforts to recover southern sea otters throughout their range," and NMFS has stated that it "does not support the alternatives that involve some level of sea otter removal from the management and/or translocation zones" (NOAA 2011).

The effect of this action is not to "introduce" an apex predator into abalone habitat as the commenter suggests. Rather, it would continue baseline conditions of natural sea otter range expansion. Sea otters are naturally recolonizing their historic range, which formerly overlapped with much of the range of black abalone until sea otters were hunted to near extinction during the 18th and 19th centuries. Sea otters and black abalone coevolved. The extirpation of southern sea otters from most of their former range is

considered to have been responsible for the large aggregations of black abalone evident in California and Mexico during the nineteenth and twentieth centuries (Haaker *et al.* 2001). We note that black abalone were federally listed as endangered not because of sea otter predation but because of dramatic declines in abundance due to disease and overfishing (74 FR 1937; January 14, 2009, Van Blaricom *et al.* 2009).

Nevertheless, we acknowledge that the severe reduction of black abalone populations as a result of human overexploitation and disease has rendered them more vulnerable to all sources of mortality, including natural sources such as predation by marine organisms. The final status review for black abalone ranks the severity of the overall threat level posed by sea otter predation as "medium" (see Table 6, Van Blaricom *et al.* 2009). It notes that although sea otters are known to prey on black abalone, the quantitative ecological strength of the interaction is poorly understood (Van Blaricom *et al.* 2009). In its responses to comments in the final critical habitat designation for black abalone, NMFS states, "the best available data do not support the idea that sea otter predation was a major factor in the decline of black abalone populations or that it will inhibit the recovery of the species" (76 FR 66806; October 27, 2011).

We recognize our affirmative responsibilities under the ESA and fully support recovery efforts for endangered black abalone. To lessen the risk that natural range expansion of sea otters (which would occur both under baseline conditions and under this action) could interfere with recovery efforts for black abalone, we are committed to working closely with NMFS, CDFG, and the Black Abalone Recovery Team (once it has been convened), to share information that may affect recovery actions for this species. We are also pursuing a Memorandum of Understanding with NMFS to formalize our

agencies' mutual commitment to cooperate in facilitating both southern sea otter and abalone recovery efforts.

Comment: Section 7(a)(2) of the ESA requires that every Federal agency "shall...insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined... to be critical." 16 U.S.C. §1536(a)(2). The Service simply cannot ensure that the preferred alternative will not jeopardize the continued existence of endangered abalone. Section 7(a)(1) of the ESA requires that the Secretary of the Interior review programs administered by the Interior Department and utilize such programs in furtherance of the purposes of the ESA. 16 U.S.C. §1536(a)(1). The failure to take action to protect the endangered white abalone and the endangered black abalone violates this mandatory duty. Further, allowing unlimited sea otter range expansion is an action that will result in a taking of endangered white and black abalone in violation of the prohibition set forth in §9(a)(1)(B) of the ESA, 16 U.S.C. §1538(a)(1)(B). In sum, the Service is proposing a preferred alternative that likely violates the ESA at several levels. First, the agency action will allow unlimited sea otter range expansion, which will result in a prohibited taking of endangered abalones. Second, the Service has failed to implement its §7(a)(1) responsibilities because it has failed to fully and adequately consider the impact of its actions on the survival and recovery of endangered abalone and to affirmatively take action to protect these abalone. Finally, the Service is proposing an action that will jeopardize the continued existence of endangered abalone in violation of §7(a)(2).

Our Response: We have carefully considered the effects of this rulemaking on endangered white and black abalone and black abalone critical habitat. We note that the effects of this rulemaking are identical to baseline conditions. We conducted an internal biological evaluation of the proposed rulemaking on the endangered abalone species, designated critical habitat for black abalone, and the southern sea otter under Section 7(a)(2) of the Act and concluded that the proposed rulemaking would have no effect on the two abalone species or black abalone critical habitat and is not likely to adversely affect the southern sea otter. Thus, we have met our obligations under Section 7(a)(2). Currently, southern sea otters are present at San Nicolas Island and are naturally recolonizing their historic range in the management zone. Under the proposed action, those conditions will continue. NOAA has stated that it "supports USFWS' efforts to recover southern sea otters throughout their range," and NMFS has stated that it "does not support the alternatives that involve some level of sea otter removal from the management and/or translocation zones" (NOAA 2011).

We recognize our affirmative responsibilities under the ESA and fully support recovery efforts for endangered white and black abalone. To lessen the risk that natural range expansion of sea otters (which would occur both under baseline conditions and under alternatives that terminate the translocation program) could interfere with recovery efforts for white or black abalone, we are committed to working closely with NMFS, CDFG, the White Abalone Recovery Team, and the Black Abalone Recovery Team (once it has been convened), to share information that may affect recovery actions for these species. We are also pursuing a Memorandum of Understanding with NMFS to formalize our agencies' mutual commitment to cooperate in facilitating both southern sea

otter and abalone recovery efforts.

Resumption of the containment component of the translocation program could potentially benefit abalone by preventing the effects of sea otter predation predicted under future baseline conditions and Alternative 3C. However, we determined that resumption of containment would jeopardize the southern sea otter and violate Section 7 of the ESA (USFWS 2000). We based this conclusion, in part, on the recognition that reversal of southern sea otter population declines and expansion of the southern sea otter's range is essential to the survival and recovery of the species. In order to resume containment, we would have to reinitiate consultation under the ESA to consider any new information and conclude that continuation of the program would not jeopardize the southern sea otter. Resumption of sea otter containment could result in increased mortality of sea otters and disrupt behavior throughout the range of the species. Additionally, it would artificially restrict the southern sea otter's range, increasing its vulnerability to oil spills, disease, and stochastic events relative to the baseline. In combination, these effects would slow or prevent the recovery of the species.

We are not at liberty to jeopardize the southern sea otter in order to benefit listed abalone species. Given these circumstances and the ESA mandate that the Service and NMFS seek to recover threatened and endangered species, the best—and currently the only legal—approach available to us is to cooperate with NMFS to facilitate recovery actions that benefit both species and minimize adverse effects on both species. This approach is in furtherance of, and not violative of, our obligations under both sections 7(a)(1) and 7(a)(2) of the ESA. The commenter's assertion that the Service is "taking" abalone by failing to restrict sea otters from inhabiting their historic range reflects a

misunderstanding of the ESA. Southern sea otters are naturally expanding into their former range. The Service could deter range expansion only by taking affirmative action to contain sea otters and return them to the parent range. The Service may not take such affirmative action because containment would jeopardize the continued existence of the southern sea otter (USFWS 2000). Thus, any effects that southern sea otter range expansion may have on abalone are a function of the natural migration and predation patterns of the sea otter and not the result of—or attributable to any—action on the part of the Service.

Comment: NMFS does not support the alternatives that involve some level of sea otter removal from the management and/or translocation zones, as this has proven to be biologically, economically, and/or logistically infeasible. However, NMFS is concerned about the potential conflict of the preferred alternative with the goals of recovering the federally listed abalone over the long term (beyond the 10-year timeframe). NMFS believes that the likelihood and intensity of the conflict can be mitigated by creating a working group composed of managers and scientists that have southern sea otter and abalone expertise. NMFS would like the Service to make a commitment to organizing a working group that is focused on minimizing impacts of the preferred alternative to potentially affected ESA species managed by NMFS.

Our Response: The Service supports recovery efforts for white and black abalone and is committed to working closely with NMFS to share information that may affect recovery actions for these species. Toward that goal, we are pursuing an MOU with NMFS. This action further meets our obligations under Section 7(a)(1) of the Act. We agree that convening a working group composed of managers and scientists that have

southern sea otter and abalone expertise would be beneficial for the recovery of white and black abalone, and we will work with NMFS to convene this group.

Comment: Several other species of shellfish (besides abalone) will also see their populations plummet, perhaps to endangered status, if the preferred alternative is adopted. The Service states that sea otters "consume an amount of food equivalent to 23 to 33 percent of their body weight per day." Having admitted this fact, the Service never considers its implications for the future of California's shellfish. Those implications are made clear by examining what will happen to commercial fishermen if the preferred alternative is adopted. As scientists have noted, "Unless the sea otter is eventually contained, the State's Pismo clam, sea urchin, abalone, certain crab, and possibly lobster fisheries will be precluded. Sea otters do not extirpate these shellfish stocks, they merely reduce the exposed biomass to densities well below those necessary for profitable commercial exploitation or satisfactory recreational use."

Our Response: We acknowledge that sea otters are likely to decrease the densities of benthic invertebrates within the sea otters' dive depth range as they recolonize their historic habitat. However, the commenter does not offer any information to support the assertion that sea otters would cause shellfish populations to decline to "endangered status" and does not identify which species are the subject of this concern. The statement quoted by the commenter notes that although sea otters may reduce the noncryptic portion of certain shellfish populations to densities that cannot sustain profitable commercial fisheries, "sea otters do not extirpate these shellfish stocks." We disagree with the commenter's assertion that we do not consider the implications of sea otter prey consumption on shellfish populations currently exploited by commercial

fisheries in California. We considered the implications of sea otter range expansion (and the restriction of natural range expansion) on shellfish fisheries in detail in our analysis of the program.

Comment: NOAA's Office of National Marine Sanctuaries uses ecosystem-based management approaches to protect our Nation's most vital coastal and marine natural and cultural resources. We believe the proposed action (Alternative 3C) furthers an ecosystem-based management approach by allowing sea otters to recover naturally through expansion from central California into their historic range to the south. We support terminating the southern sea otter translocation program and are committed to research and monitoring with our Federal and State partners to assess changes to the marine ecosystem. We commend the Service in proposing to terminate the failed translocation program and in proposing a course of action that has the potential to reverse the decline in sea otter population numbers.

Our Response: Thank you for your comment. It has been noted and will be included in the administrative record for this action.

Failure Determination

Comment: The Service is basing its failure determination on Criterion 2. However, it is difficult to understand how the failure criteria have been met. There are now 50+ sea otters on the island, and the population has been growing at an average of 7 percent per year. The Service's determination that the translocation program has failed is a political construct. Given that the 1930s Big Sur population of 40–50 otters was the

source of the 2,800 sea otters currently in the mainland range, it is obvious that the San Nicolas population could serve the same function if necessary after a large oil spill. As such, the translocation program is not a failure under the intent of Pub. L. 99-625.

Our Response: Pub. L. 99-625 did not address the prospect of the program's failure. The failure criteria were established at the inception of the translocation program based on the scientific judgment of the agency biologists who designed the program. These criteria are codified at 50 CFR 17.84(d) in the rule implementing the translocation program. The final translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria at 50 CFR 17.84(d)(8). In that evaluation, we conclude that the translocation program has failed to fulfill its primary purpose as a recovery action and that, measured against the specific regulatory failure criteria governing the translocation program, the program has failed under Criterion 2.

Under Criterion 2, the count of southern sea otters at San Nicolas Island is based on the number present within 3 years from the initial transplant—not on the number present as of 2012, 25 years after the initial transplant. The initial high rate of dispersal of translocated sea otters from San Nicolas Island is the primary cause of failure under Criterion 2 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; 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 reestablishment of the population in the mainland range if the parent population were reduced or eliminated by a catastrophic event. The translocation program has not achieved its primary recovery goal of producing a second, self-sustaining population of sea otters that could produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality.

The fact that a remnant population of southern sea otters numbering approximately 50 animals in 1914 (Bryant 1915) grew over the course of nearly a century in essentially unrestricted habitat to the current mainland population size of 2,711 animals (in 2010) does not contradict our finding that the translocation program has failed. Rather, it emphasizes the precariousness of both the mainland population and the San Nicolas Island colony and the need for continued range expansion. It should be noted that, based in part on data gained while implementing the translocation program, the recovery strategy has fundamentally changed. The revised recovery plan recommends against additional translocations and instead advocates allowing natural range expansion (USFWS 2003).

Comment: Implementing regulations for the translocation program (52 FR 29754; August 11, 1987) state that the Service must conduct a full evaluation into the probable causes of failure prior to declaring the translocation a failure. If the causes can be determined and if legal, reasonable remedial measures can be identified and

implemented, then consideration is to be given to continuing to maintain the translocated population. Evaluation of the program's failure has not been conducted in accordance with the regulations. There are several theories for sea otter mortality and fecundity that have not been considered in the analysis, and an investigation of alternative implementation methods that would maintain the translocated population has not been adequately conducted. Finally, there has been no real consideration of maintaining portions of the program. If capturing and relocating otters has negative effects, consideration should be given to terminating only those portions of the program.

Our Response: We describe our efforts to determine and remedy the causes of failure in our translocation program evaluation. We have concluded that the translocation program has failed under Criterion 2. We conclude 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. We do not agree that we have failed to give adequate consideration to remedial measures that would enable continuation of the translocation program. 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 translocation program evaluation discusses the translocation and containment results, including remedial efforts undertaken to address program implementation concerns, and their relationship to the failure criteria in detail. We are unable to address the commenter's assertion that there are "several theories for sea otter mortality and fecundity that have not been considered in the analysis" because the commenter does not identify or describe these theories. Because

translocation and containment are integral, required components of the translocation program under the authorizing legislation, the program, if it were to continue, could not continue without both components.

Comment: The proposed rulemaking states that the "experimental population has fluctuated in number since 1993, and now appears to be increasing overall." This statement is misleading and does not adequately represent the population's present status. Three-year average counts (used statewide to estimate sea otter abundance) have increased every year on San Nicolas Island since 1997, with the exception of 1 year where the 3-year average dropped by less than 0.5 otters (2005). This is not a fluctuating population, but rather an increasing population, with the 2011 count reaching 54 otters and pups.

Our Response: Different methodologies are used for the counts along the mainland and at San Nicolas Island. Three-year running averages based on an annual census are not used to characterize population trends at San Nicolas Island as they are for the mainland population. Because it is a small island with a limited coastline, counts are conducted there quarterly, and the high quarterly count is adopted as the official count for the year. The high count for 2011 was 48 independent sea otters plus 5 pups. Although on average the San Nicolas Island colony has been growing at an annual rate of approximately 7 percent since its low point in 1993, this rate has been variable from year to year. Specifically, the number of independent (non-pup) sea otters at San Nicolas Island decreased (relative to the previous year's count) in 1995, 1997, 1998, 2004, 2005, and 2009. Therefore, we do not consider the statement misleading, and we have retained the original language.

Comment: The translocation has not failed. Instead, the Fish and Wildlife Service had unrealistic expectations for when certain milestones would be reached. Indeed, the revised draft SEIS admits the Service's expectations were unrealistic and further admits that the translocation population is a successfully reproducing population in terms of numbers and growth. Rather than recognize these data and reevaluate the Service's original expectations, the Service has chosen to declare the translocation a failure. To reach that conclusion, the Service has ignored the best scientific data available and has used evaluation standards found nowhere in the existing regulations. The Service has simply minted new standards to evaluate the translocation without complying with the Administrative Procedure Act.

Our Response: The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria contained in the rule at 50 CFR 17.84(d) that established the translocation program. We have concluded that the translocation program has failed to fulfill its primary purpose as a recovery action. Additionally, in our formal review of the program, we have determined that the program has failed under Criterion 2 of the specific regulatory failure criteria at 50 CFR 17.84(d)(8). Thus the commenter is incorrect in asserting that we relied on new evaluation standards not found in the regulations. It is the commenter who appears to suggest that we should disregard the regulatory failure criteria, stating that "the Fish and Wildlife Service had unrealistic expectations for when certain milestones would be reached…and should reevaluate [its] expectations."

Comment: The potential for a catastrophic spill of the same magnitude of the *Exxon Valdez* was present when the translocation was planned and implemented. Then, it

was not perceived as a problem. Then, the establishment of the San Nicolas Island population was "essential" for sea otter recovery. Today, with no change in the size of a potential spill, but with the addition of new and improved navigation and safety programs, the Service claims a sudden and new awareness of the threat of an oil spill, and the San Nicolas Island translocation is somehow a failure. If the translocation is a failure because it is within the range of a catastrophic oil spill, then so too is the preferred alternative of range expansion. The Service cannot use the catastrophic oil spill scenario to declare translocation a failure without simultaneously admitting the preferred alternative cannot meet its objective. The Service is using a fatally flawed double standard to declare translocation a failure.

Our Response: Our conclusion that the program has failed is based on our analysis of the regulatory failure criteria in 50 CFR 17.84(d)(8). We determined that the program has failed under Criterion 2. We did not conclude—contrary to the commenter's assertion—that the translocation program failed because the population of southern sea otters at San Nicolas Island is within the range of a potential catastrophic oil spill. However, our evaluation of the translocation program does recognize that although the potential for a spill of the magnitude of the *Exxon Valdez* disaster may have existed when the translocation program was initiated, that risk was not adequately appreciated. Our experience until then had led us to expect that San Nicolas Island was sufficiently distant from the mainland population to serve as a reasonable safeguard for sea otters in the event of an oil spill. The *Exxon Valdez* spill demonstrated (and the Deepwater Horizon spill further demonstrated) that this is not the case. The evaluation of the translocation program thus acknowledges that not only is the San Nicolas Island population too small

to produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality, but that San Nicolas Island is not sufficiently distant from the mainland range to insulate the San Nicolas Island population from the effects of a catastrophic oil spill within the mainland range. The evaluation of the translocation program also recognizes that containment was far more difficult to achieve than expected and that the recovery strategy for southern sea otters has fundamentally changed (USFWS 2003), such that we now recognize that allowing southern sea otters to naturally expand their range is key to the future recovery of the species.

In summary, we have concluded that the translocation program has met failure Criterion 2 and that the overarching recovery goal of the program—the establishment of a distant population of southern sea otters at San Nicolas Island to provide a source population of sea otters should the mainland population experience catastrophic mortality—cannot be achieved because (1) the population at San Nicolas Island is much too small to provide an adequate source population of sea otters, (2) even if the San Nicolas Island population were eventually to become "established," a substantial number of sea otters translocated to the parent range would likely emigrate back to the island and thus not repopulate the parent range; and (3) the San Nicolas Island population is not sufficiently distant from the parent population to be insulated from the effects of a catastrophic oil spill. In addition, artificially restricting the natural range of southern sea otters through containment—a required component of the translocation program—is not only detrimental to the recovery of the species but, if resumed, is likely to jeopardize the continued existence of the species in violation of the ESA.

Comment: The second underlying basis for the Service's decision to declare

translocation a failure is the assertion that the San Nicolas Island population is small and its future uncertain. That is far different than saying the San Nicolas Island population is still not critical to the recovery of southern sea otters. The fact that the Service's preferred alternative is to leave the sea otters at San Nicolas Island, even after declaring the translocated population a failure, proves that the translocation did not fail and that the San Nicolas Island population is important for sea otter recovery.

Our Response: The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria provided in the rule at 50 CFR 17.84(d) that established the translocation program. We have determined that program has failed under Criterion 2. We have also concluded that the translocation program has failed to fulfill its primary purpose as a recovery action and noted that the San Nicolas Island population remains small, its future is uncertain, and it is unlikely that it will ever be able to produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality, which was the primary recovery goal of the translocation program. This conclusion does not mean that the San Nicolas Island population of southern sea otters is unimportant or that its removal from the island would not result in adverse consequences. Indeed, the Service's decision to declare the program a failure but to retain sea otters at San Nicolas Island is based in part on the recognition that if sea otters were removed from the island, some would return, some would die, and the introduction of these sea otters into the

mainland population would likely further stress that food-limited population. Our

recognition of the value of maintaining in place the small but stable San Nicolas population, which is reflected in this rulemaking, does not mean that the translocation has been successful as evaluated against the specific regulatory failure criteria in 50 CFR 17.84(d) or against the overarching recovery goals of the translocation program. As we explain in detail in the translocation program evaluation, the program has failed under both measurements.

Comment: The intent of the translocation program was to establish a breeding nucleus of 70 sea otters. That 70 would expand into an established population of 150. To achieve the breeding nucleus, the plan was to translocate 70 sea otters in the first year of the program. That number would be supplemented with up to 70 sea otters annually, to a total of 250 that could be moved. However, the Service translocated only 140 sea otters between 1987 and 1990, 56 percent of the 250 originally planned to be part of the translocation. Given that the Service stopped the actual translocation at just over 50 percent of the original objective, it is arbitrary and capricious to judge success of the current population level at San Nicolas Island based on the original assumptions about when and how population levels would be achieved if 250 sea otters were translocated. Since the Service elected to implement only half of the translocation program, transferring to San Nicolas Island only about half of the number allowed to be placed there, the actual standard should not be 25. It is only half of that, in which case Criterion 2 is not met because, within 3 years of the initial transplant, 17 sea otters were at the Island.

If the full translocation program had been implemented, it is reasonable to assume we would now have a breeding nucleus of 70 animals and would be moving toward the

population level of 150. At the current reproduction rate, which is approximately 10 percent annually, the San Nicolas Island population should reach 70 within 4 years. Even the Service admits the initial objective of 70 sea otters at San Nicolas Island will occur. The fact that this event may not have occurred as rapidly as the Service hoped does not mean the translocation program failed, particularly when the Service's implementation of the program is a principal cause of the delay. In light of these facts, the Service should recognize under its existing regulatory authority that the translocation has not failed. The Service simply did not give the translocation sufficient time to achieve the population objectives given the reduction in the number of animals actually translocated.

Our Response: The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria contained in the rule at 50 CFR 17.84(d) that established the translocation program. We have determined that the program has failed under Criterion 2. The number of sea otters translocated to San Nicolas Island is not a factor considered in any of the failure criteria, including Criterion 2. We disagree with the commenter's assertion that it is arbitrary and capricious to determine failure by the standards specifically established in the translocation rule for that purpose.

Nevertheless, it should be noted that the translocation plan did not require that 250 sea otters be translocated but rather authorized the Service to translocate "up to" 250 sea otters. The Service captured the maximum number of sea otters allowed by the translocation plan. Of these, 139 (plus 1 rehabilitated pup) were deemed to be appropriate for translocation. The commenter suggests that because the Service did not move the maximum allowable numbers of sea otters to San Nicolas Island, it is unfair to

conclude that the translocation has failed. Under the translocation rule, an established population at San Nicolas Island is defined as a minimum of 150 healthy sea otters, with a minimum annual recruitment of 20 sea otters. A stabilized population consists of a minimum of 70 sea otters under the rule. In fact, the Service translocated 69 sea otters, one fewer than the maximum number allowed during a 1-year period, to San Nicolas Island during the first year, and yet, at the end of that year, a total of only 20 sea otters remained at the island. The following year, after making modifications to the program to increase the likelihood that sea otters would be successfully translocated, we translocated 57 additional sea otters to San Nicolas Island, again not far below the maximum number of otters allowed to be translocated in a given year. At the end of 2 years (and a total translocation of 126 sea otters) even fewer sea otters—only 17—remained at San Nicolas Island. The translocation rule itself states that following the initial translocation of 70 sea otters the first year, "it is not likely that supplemental translocation after the initial 70 will involve more than small numbers of southern sea otters" 50 CFR 17.84(d)(2). In our third and final attempt to translocate sea otters, we moved an additional 14 sea otters to San Nicolas Island. At the end of that year—the third year of the translocation—only 15 adult and subadult sea otters and 3 dependent pups remained at the island out of a total of 140 translocated sea otters.

We have concluded that the high dispersal rate of sea otters from San Nicolas Island is the primary reason that the population was so small after 3 years of translocation effort and why, 25 years after the initial translocation, the population is far from becoming "established" under the translocation rule, and has yet even to reach "stabilized" status. The commenter's hypothesis that simply translocating more sea otters

to San Nicolas would have resulted in an established population or even a stabilized population today or would have avoided failure under Criterion 2 is unsupported by the facts surrounding the translocation.

That a population size of 70 animals or more may eventually be attained at San Nicolas Island is not relevant to our determination of failure. As indicated above, the translocation rule defines an established population as a minimum of 150 healthy male and female otters, originating from a breeding nucleus of 70 sea otters, not a total of 70 sea otters originating from a breeding nucleus of 12 or fewer animals. Over the 25 years it has been in existence, the translocation program has never come close to achieving its primary goal of producing a second, self-sustaining population of sea otters at San Nicolas Island that could produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality. The initial high rate of dispersal of translocated sea otters from San Nicolas Island is the primary cause of failure under Criterion 2 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; August 11, 1987). The high rate of dispersal of translocated sea otters from San Nicolas Island following 3 years of translocation effort refutes the commenter's speculation that simply translocating more otters to San

Nicolas Island would have resulted in a larger current population at San Nicolas Island. The high rate of dispersal of translocated sea otters also suggests it is unlikely that the colony will ever be large enough to remain viable *and* to supply the numbers of sea otters necessary to perform a successful translocation and reestablishment of the population in the mainland range if the parent population were reduced or eliminated by a catastrophic event. It should be noted that, based in part on data gained while implementing the translocation program, the recovery strategy has fundamentally changed. The revised recovery plan recommends against additional translocations and instead advocates allowing natural range expansion (USFWS 2003).

Comment: Four other factors confirm the success of the translocation: (1) Virtually all of the sea otters at San Nicolas Island are offspring of the originally translocated population, indicating there is a healthy and successfully reproducing population at San Nicolas Island; (2) at least 150 pups have been born at San Nicolas Island, further confirming the presence of a healthy reproducing population; (3) the San Nicolas Island population is reproducing at a rate of 10 percent annually, which is better than the 5–6 percent rate of the parent population; and (4) the San Nicolas Island population is healthier than the parent population, in that a comparison of the translocated population with the parent population found that the "length and mass at age and the age-specific mass-to-length ratios were significantly greater for sea otters at San Nicolas Island than in the central population." This does not sound like a failed population. It sounds like a population that is healthier than the parent population.

Our Response: While the commenter is correct that the San Nicolas Island colony is successfully reproducing, that it has grown since its low point in the early 1990s

at an average annual rate that exceeds the growth rate of the mainland population (although the overall average annual growth rate has dropped from 9 percent to 7 percent with the inclusion of the past several years of data), and that sea otters at San Nicolas Island exhibit greater mass-to-length body ratios than those in the mainland range, these facts do not alter our assessment that the translocation program has failed.

The commenter seeks to substitute new standards for those clearly outlined in the translocation plan and implementing regulations for the program. The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria contained in the rule at 50 CFR 17.84(d) that established the translocation program. We have determined that the program has failed under Criterion 2. The initial high rate of dispersal of translocated sea otters from San Nicolas Island is the primary cause of failure under Criterion 2 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; 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 remain viable *and* to supply the numbers of sea otters necessary to perform a successful translocation and reestablishment of the population in the mainland range if the parent population were reduced or eliminated by a catastrophic event. The translocation program has not

achieved its primary recovery goal of producing a second, self-sustaining population of

sea otters that could produce sufficient numbers of sea otters to repopulate the mainland range in the event of catastrophic mortality.

Comment: The Service incorrectly concludes that "the creation of an established southern sea otter population at San Nicolas Island does not appear to be achievable." The facts regarding the status, trend, and health of the San Nicolas Island population belie that conclusion.

Our Response: We make this statement because the translocation rule at 50 CFR 17.84(d)(1)(vi) defines an "established experimental population" of southern sea otters as "an estimated combined minimum of 150 healthy male and female otters residing within the translocation zone, little or no emigration into the management zone occurring, and a minimum annual recruitment to the experimental population in the translocation zone of 20 sea otters for at least 3 years of the latest 5-year period, or replacement yield sufficient to maintain the experimental population at or near carrying capacity during the postestablishment and growth phase or carrying capacity phase of the experimental population." The logic underlying this definition is explained in the preamble to the final rule implementing the translocation program: "The Service does not consider the mere presence of sea otters in the translocation zone an indication that a new population is established. If a catastrophic event were to decimate a portion of the parent population, it is possible that the relocated otters could be used to restore the damaged portion of the parent population; however, it would also likely eliminate the value of the new population to serve as a reserve colony for providing stock to restore subsequently damaged areas and it could eliminate the reproductive viability of the colony such that the remaining animals could not be self-sustaining. Therefore, to be considered

established it must be a reproductively viable unit, capable of maintaining itself even if 25 animals are removed each year for 1 to 3 years or replacement yield is sufficient to maintain the experimental population at or near carrying capacity during the post-establishment and growth phase or carrying capacity phase for the purposes of repairing damage to the parent population" (52 FR 29754; August 11, 1987).

Two circumstances make achievement of this objective unlikely. First, the future of the San Nicolas Island colony is uncertain. Its small population size (hence its susceptibility to demographic as well as environmental stochasticity) makes it difficult to predict when, if ever, the population may become "established." Second, if the San Nicolas Island colony were to become "established" at some point in the future (with a population size of 150 southern sea otters and an annual recruitment of 20 animals), our experience with the translocation of southern sea otters to San Nicolas Island indicates that if a catastrophic event were to affect the parent population, it is unlikely that we would be able to reestablish a viable southern sea otter population by moving small numbers of animals (25) from San Nicolas Island to the parent population annually over a 3-year period. The high emigration apparently inherent in sea otter translocations combined with the small number of animals available to be moved would make it unlikely that a core population could become established in the damaged area.

Comment: The Service's conclusion that the San Nicolas Island translocation has failed is arbitrary and capricious under the Administrative Procedure Act. The Supreme Court has held an agency action is arbitrary and capricious if the agency (1) has relied on factors Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs

counter to the evidence before the agency, or (4) has offered an explanation for its action that is so implausible it could not be ascribed to a difference of view or the product of agency expertise. Here, at a minimum, the Service has offered an explanation for its decision that runs counter to the evidence.

Our Response: The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria contained in the rule at 50 CFR 17.84(d). We have determined that the translocation program has failed under Criterion 2 of the specific regulatory failure criteria at 50 CFR 17.84(d)(8). We have also concluded that the translocation program has failed to fulfill its primary purpose as a recovery action. The translocation program evaluation provides a clear and rational explanation for our failure determination based on a careful review of the facts surrounding the translocation in relation to the regulatory failure criteria and the program's recovery purpose. We reject the commenter's assertion that the evaluation of the translocation program is arbitrary or capricious or counter to the evidence before us.

Comment: The primary purpose of the translocation program was to increase the population toward the delisting level. That objective is met. The Service's failure finding is without merit.

Our Response: The primary purpose of the translocation program was not simply to increase the number of southern sea otters but to achieve a primary recovery action for the species. The translocation rule at 50 CFR 17.84(d) quotes the recovery plan (USFWS 1982) at length to elucidate the relationship of the translocation program to recovery: "Sea otter translocation, if properly designed and implemented, should provide the

necessary foundation for ultimately obtaining the Recovery Plan's objective and restoring the southern sea otter to a non-threatened status and maintaining OSP by: (i) Establishing a second colony (or colonies) sufficiently distant from the present population such that a smaller portion of southern sea otters will be jeopardized in the event of a large-scale oil spill and (ii) establishing a data base for identifying the optimal sustainable population level for the sea otter." The translocation program has not achieved its primary recovery goal. In fact, based in part on data gained while implementing the translocation program, the recovery strategy has fundamentally changed. The revised recovery plan recommends against additional translocations and instead advocates allowing natural range expansion (USFWS 2003).

Comment: The Service uses newly minted standards to reach its conclusion that the translocation program has failed. One of these newly minted standards is that the translocated population is small and its ability to become established is uncertain. However, the applicable regulations set a minimum acceptable population for translocated sea otters at 25, a number well below the current population of 46. That the population is small is not the relevant standard. The existing regulatory standards for declaring translocation a failure are not satisfied.

Our Response: The translocation program evaluation assesses the program in relation to the objectives for which it was undertaken and the specific regulatory failure criteria contained in the rule at 50 CFR 17.84(d). We have concluded that the translocation program has failed to fulfill its primary purpose as a recovery action. Additionally, in our formal review of the program, we have determined that the program has failed under Criterion 2 of the specific regulatory failure criteria at 50 CFR

17.84(d)(8). Thus the commenter is incorrect in asserting that we relied on new standards not found in the regulations. The commenter proposes that the Service rewrite regulatory failure Criterion 2 in the translocation rule to provide that a minimum of 25 sea otters must be present today at San Nicolas Island and not as of 1990, which was 3 years following the initial translocation, as the criterion states. The commenter's interpretation of failure Criterion 2 is at odds with its plain language and disregards the primary recovery goal underlying the translocation program. The goal of the program was not simply to create a small, distant colony of sea otters. The goal of the program was to establish a distant population of at least 150 healthy male and female otters residing with a minimum annual recruitment of 20 sea otters (50 CFR 17.84(d)(1)(vi)).

The logic underlying this definition is explained in the preamble to the final rule implementing the translocation program: "The Service does not consider the mere presence of sea otters in the translocation zone an indication that a new population is established. If a catastrophic event were to decimate a portion of the parent population, it is possible that the relocated otters could be used to restore the damaged portion of the parent population; however, it would also likely eliminate the value of the new population to serve as a reserve colony for providing stock to restore subsequently damaged areas and it could eliminate the reproductive viability of the colony such that the remaining animals could not be self-sustaining. Therefore, to be considered established, it must be a reproductively viable unit, capable of maintaining itself even if 25 animals are removed each year for 1 to 3 years or replacement yield is sufficient to maintain the experimental population at or near carrying capacity during the post-establishment and growth phase or carrying capacity phase for the purposes of repairing

damage to the parent population" (52 FR 29754; August 11, 1987). The population of southern sea otters at San Nicolas Island—even after 25 years—has yet to reach the status of an "established" or even a "stabilized" population as defined by the translocation rule at 50 CFR 17.84(d)(1)(vi) or (vii) and is unlikely ever to serve the recovery purpose envisioned for it under the translocation program.

Comment: Another newly minted standard set forth to judge the translocation is that there were issues associated with the original capture program, which ceased over 14 years ago. The applicable regulations required that captured animals be transported to the relocation area no more than 5 days after capture (50 CFR 17.84(d)(3)(ii) and (iii)). Often, however, those time requirements were not observed, and the animals were kept in temporary holding areas for much longer periods. Further, many animals were subjected to questionable and dangerous surgical procedures to implant tracking devices. Several failed to survive the surgery. Problems associated with the prior capture and transport process resulted not from weaknesses in the transport program but from the Service's actions. Such problems could have been remedied. Thus, the Service's complaints about the capture and transfer program are suspect. These problems have nothing to do with the current status of the San Nicolas Island population.

Our Response: It is unclear whether the commenter is referring to the containment portion of the program, which was suspended in 1993 (now 19 years ago), or the translocation portion of the program, which is described in the specific section of the rule that the commenter cites. In the translocation program evaluation, we summarize the history of the translocation program, including the difficulties we experienced capturing and moving sea otters both into the translocation zone and out of the management zone,

in order to provide an honest and accurate assessment of the program. That several otters died either during or as a likely consequence of translocation or containment is a fact. However, we have concluded that the translocation program is a failure because it has failed to achieve its overarching recovery purpose and, specifically, because it has failed under Criterion 2 of the regulatory failure criteria established in the translocation rule at 50 CFR 17.84(d)(8). Thus the commenter is incorrect in asserting that our failure determination is based on new standards not found in the regulations.

With regard to the commenter's specific assertions about the transport process, we estimate that 6 sea otters out of a total of 252 sea otters captured for potential translocation died of stress-related causes prior to transport. We made changes in our translocation procedures prior to the second year of the program in an effort to decrease the time between capture and release and thereby reduce stress on captured sea otters. We also made changes to containment operations to reduce stress on captured sea otters. The initial strategy of releasing sea otters at their known original capture sites in the mainland range resulted, in most cases, in lengthy travel times and additional handling of the animals. To reduce this source of stress on captured sea otters, we revised our strategy to release recaptured animals at more easily accessible sites in the northern portion of the parent range. Despite the increased distance, the accessibility of these sites reduced transport times and resulted, we believed, in reduced stress and the improved well-being of moved sea otters. We also hoped that releasing animals at the northern end of the range would reduce the likelihood that animals would return to the management zone because of the greater distances they would have to travel. Despite these changes, 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. Of the 24 sea otters captured in the management zone from 1987 to 1993, removal from the management zone was known or suspected to have killed 4 sea otters within 2 weeks. These deaths led to a determination to suspend containment of sea otters in the management zone.

The commenter is correct that none of these problems is the primary reason the San Nicolas Island population declined so precipitously after the translocation of 140 otters to the island. We consider the emigration of translocated sea otters from the island to be the primary reason for the population's initial (and hence continued) small size.

Comment: The Service has asserted that it is "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." Given the significant decline in the population evident 2 years after the effective end of the transplant phase, and the lack of substantial population growth in the intervening 19 years, the Coalition (Defenders of Wildlife, Friends of the Sea Otter, The Humane Society of the United States, the Monterey Bay Aquarium, and Oceans Public Trust Initiative, a project of Earth Island Institute's International Marine Mammal Project) believes that the spirit and intent of Criterion 3 have been met and that these facts provide an additional basis for declaring the translocation a failure.

While the Service is correct that the minimum population was never reached at San Nicolas Island, that does not mean that Criterion 3 cannot be evaluated. In 1992, two years following the effective end of the transplant phase in 1990, the San Nicolas Island population was a mere 13 sea otters, down from 140 released at San Nicolas Island

originally. Thus, rather than witnessing reasonable population levels and evidence of recruitment of otters born to translocated animals, project managers observed a dramatic decline in the population at San Nicolas Island during the transplant phase of the translocation. Based on the plain language of the regulation and the population numbers present at the required time of evaluation, the translocation must be declared a failure.

Our Response: We acknowledge in the translocation program evaluation that although we never achieved the requisite number of 70 sea otters to consider the transplant phase completed and thus cannot evaluate the program under Criterion 3, from a practical perspective the transplant phase ended with the translocation of the last sea otter to San Nicolas Island in 1990. At that time, after the translocation of 140 sea otters to the island, 14 independent sea otters remained. Two years later, 13 independent sea otters remained, and despite evidence of pupping, there appeared to be little or no recruitment into the population. Criterion 3 clearly does not anticipate that the "significant declines" to which it refers would occur immediately upon the release of sea otters at the island, such that even with the transport of 140 sea otters, we were still unable to retain, at any one time, the minimum number of 70 sea otters at the island. In this sense, the program may be seen as having failed more dramatically than was anticipated under Criterion 3.

Unlike Criterion 3, Criterion 2 effectively captures the realized outcome of immediate significant declines and a resulting core population size well below the threshold of 70 animals. We note that, under 50 CFR 17.84(d)(8), a determination that any one of the failure criteria has been met is sufficient to declare that the translocation program has failed (50 CFR 17.84(d)(8)). We have determined that the program has

failed under Criterion 2.

Comment: The Service states in the draft evaluation of the translocation program that "[t]echnically, criterion 4 has not been met." We disagree. The Service has reached the conclusion that "containment cannot be successfully accomplished," and thus the standard for failure has been met. Pursuant to 50 CFR 17.84(d)(8)(iv), the translocation has failed if "FWS determines … that 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:

[M]eant to be applied when it becomes apparent that, over time, (one year or more), 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 [FWS] could make this determination within a year, provided that sufficient information is available. The key element of this criterion is otters "becoming established within the management zone in sufficient numbers to demonstrate that containment cannot be successfully accomplished."

While southern sea otters have not moved from the *translocation zone* to the management zone, since 1998, 50–150 southern sea otters have seasonally moved from the parent range to the management zone. The Service determined that containing this emigration is ineffective as a long-term management action and stated: "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." Further, as the Service concluded in the 2000 biological opinion, continuing the containment policy will likely jeopardize the continued existence of the southern sea otter. This finding prohibits the Service from continuing the containment program under section 7(a)(2) of the ESA. Therefore, Criterion 4 has been satisfied because, as the Service has determined, containment "cannot be accomplished." While the sea otters entering the management zone are not from the San Nicolas Island population, they nevertheless have led the Service to conclude that containment is not feasible and would violate the ESA, and therefore, the program should be declared a failure.

Our Response: We acknowledge that successful containment of sea otters, or maintenance of an "otter-free" management zone is likely infeasible and cannot be accomplished by simply capturing animals in the management zone and moving them to another location. Returning southern sea otters that have migrated south into the management zone from the mainland range back to the parent population would likely result in jeopardy to the species. Moving southern sea otters that entered the management zone from the mainland range to San Nicolas Island would likely result in dispersal of the sea otters from the island back into the management zone or back into the parent population, as occurred during the initial translocation phase of the translocation program. Thus, containment of southern sea otters from the management zone would likely be unsuccessful. Nevertheless, applying the literal language of failure Criterion 4, which refers to southern sea otters dispersing from the translocation zone into the management zone rather than to southern sea otters dispersing into the management zone from the mainland range, we have not changed our conclusion that the translocation

program has not met this criterion.

Comment: The Service determined that "[c]riterion 5 has not been met." We disagree, and we believe that the Service's own statements about the prospects for the San Nicolas Island population support a failure determination under Criterion 5. Pursuant to 50 CFR 17.84(d)(8)(v), the translocation has failed if the: [H]ealth and well-being of the experimental population should become threatened to the point that the colony's continued survival is unlikely, despite the protections given to it by [FWS], State, and applicable laws and regulations. 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 otters was determined to be the only viable way of preventing the loss of the colony. The health and well-being of the SNI population is seriously in question due to its small size, vulnerability to an oil spill, epizootic, or other catastrophic event, and potential lack of genetic diversity due to the small parent population. In the Service's brief explanation of its conclusion regarding Criterion 5, it states that "[t]here are no proposed Federal, State or local actions that threaten to devastate the colony." While this is true, it is not the proper basis to evaluate Criterion 5. The proper consideration is the likelihood of the SNI population's survival. In this regard, the Service points out that the population has "persisted," but it has also stated "it is not certain that the San Nicolas colony will persist." Given the Service's own doubts about the future viability of the San Nicolas Island population, the Service should follow the plain language of Criterion 5 and declare the translocation program a failure on that basis.

Our Response: We agree with the commenter that the San Nicolas Island colony remains vulnerable due to its small size and the potential for an oil spill, epizootic, or

other catastrophic event. Nevertheless, there are no proposed actions that would threaten to devastate the colony. We have not changed our reasoning regarding whether the translocation program has met Criterion 5.

Procedural and Legal Issues

Comment: The Service's "preferred alternative" violates the intent of Congress in passing Pub. L. 99-625. The law established a dual mandate to protect the sport and commercial fisheries of Southern California from the effects of sea otters, both biologically and legally, along with establishing a viable otter population at San Nicolas Island.

Our Response: Pub. L. 99-625 authorized—but did not require—the Service to develop and implement a southern sea otter translocation plan. It set forth certain components that such a plan must contain, if developed, including provisions to minimize conflict between sea otters and shellfish fisheries. Implementing regulations for the translocation program (52 FR 29754; August 11, 1987) specifically address the possibility that the translocation program could fail. We have determined that the translocation program authorized under Pub. L. 99-625 has failed and should be

terminated.

Comment: The Marine Mammal Commission supports the Service's plan to retain the existing otter population at San Nicolas Island and give it an opportunity to become fully established. The Southern Sea Otter Recovery Team advised the same, and the Service's biological opinion also recognized that capture and removal would pose an unnecessary risk to the San Nicolas Island otters and the population as a whole. However, the applicable regulations do not contain such an option. Therefore, to address this concern, the Marine Mammal Commission recommends that, as part of a proposed rulemaking to terminate the sea otter translocation, the Fish and Wildlife Service include proposed amendments to § 17.84(d)(8)(vi) to eliminate the requirement that sea otters at San Nicolas Island be returned to the parent population and complete that part of the rulemaking prior to making a final failure determination. It is our understanding that the Service intends to repeal § 17.84(d) in its entirety in the contemplated rulemaking. If this is the case, it may be necessary for the Service to include different effective dates for different provisions, so that paragraph (d)(8)(vi) is amended prior to repeal of paragraph (d) as a whole. Only in that way can the Service ensure that it will not be required to remove otters from San Nicolas Island as a consequence of making a failure determination.

Our Response: The Service appreciates the concern of the Marine Mammal Commission regarding elimination of the existing regulatory requirement to remove otters from San Nicolas Island and from the management zone prior to declaring the program a failure. We do not consider a two-step regulatory process to be legally required to terminate the program. We have been very clear in the draft SEIS, revised

draft SEIS, final SEIS, and in our **Federal Register** notice on the proposed rulemaking (76 FR 53381; August 26, 2011) that the proposed action is to terminate the program while allowing southern sea otters to remain at San Nicolas Island and in the management zone. We have held public hearings and requested public comment on the proposed action. The means of effectuating this action is to remove, in its entirety, the translocation rule at 50 CFR 17.84(d), which governs the establishment, goals, operation, and termination of the translocation program. By removing the translocation rule in its entirety through the final rulemaking, we are eliminating all of the internal components of the rule, including the requirements to remove sea otters from San Nicolas Island and from the management zone following a determination that the program has failed.

This rulemaking process is consistent with that set forth in 50 CFR 17.84(d)(8), which requires the Service to amend the rule to terminate the program if we determine the program has failed. The only difference is that we are eliminating the rule in its entirety—including the requirement to remove sea otters from the management zone and San Nicolas Island—rather than amending the rule to terminate the program while leaving the removal requirements in place. Given the significant opportunities we have provided to stakeholders and members of the public to review and comment on the proposed action, we do not agree that a two-step rulemaking process, which would require the development, publication, and public comment and review of a separate intervening amendment to 50 CFR 17.84(d)(8) to eliminate the obligation to remove southern sea otters from San Nicolas Island and the management zone prior to elimination of 50 CFR 17.84(d) in its entirety, is necessary. Indeed, the extensive public comment we received on the draft SEIS, the revised draft SEIS, and the proposed

rulemaking to remove 50 CFR 17.84(d) demonstrates that members of the public are well informed about the proposed action and its consequences. We note that the obligation to remove sea otters from San Nicolas Island and from the management zone in the event of a failure determination is not triggered under 50 CFR 17.84(d) until the rule has been amended to terminate the translocation program. For that reason, we consider the Marine Mammal Commission's concern that we would be compelled to remove sea otters upon declaration of failure and prior to finalization of the proposed rulemaking that eliminates the removal requirement to be misplaced.

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

L. 99-625 and its implementing regulations.

Our Response: Our decision to declare the program a failure but to retain sea otters at San Nicolas Island is based in part on the recognition that if sea otters were removed from the island, some would return, some would die, and the introduction of these sea otters into the mainland population would likely further stress that food-limited population. The effects of moving large numbers of otters from the management zone back into the parent population were thoroughly evaluated in our 2000 biological opinion on the containment component of the translocation program (USFWS 2000). We concluded that moving large numbers of sea otters back into the parent range was likely to jeopardize the continued existence of the species. The effects of removing the population of southern sea otters from San Nicolas Island and relocating them into the parent population would be similar to those analyzed in the 2000 biological opinion that resulted in our jeopardy determination. Prior to removing sea otters from San Nicolas Island, we would have to complete a formal internal Section 7 consultation under the ESA and determine that such relocation would not result in jeopardy to southern sea otters.

Comment: Termination of the translocation program does not change the statutory status of sea otters translocated under the program. Without amending the statute, once translocated, the translocated population of sea otters remains under the special status afforded by Pub. L. 99-625.

Our Response: Pub. L. 99-625 authorized but did not require the Secretary to develop and implement the translocation plan. The statute further provided that if the Secretary chose to develop and implement such a plan, it must include a translocation zone and a management zone. The translocation and management zones are component parts of the translocation plan implemented by the Secretary and were designated by regulation when the translocation program was put in place (52 FR 29754; August 11, 1987) and codified at 50 CFR 17.84(d). Termination of the program, also by regulation, eliminates the zones to which the provisions defining the status of sea otters found in those zones are attached.

Comment: The difference between the No Action Alternative and the proposed action, Alternative 3C, is minor and is not supported by adequate comparative analysis and science, even though the No Action Alternative is a valid option. As such, a decision to follow Alternative 3C over the No Action Alternative, or some combination of the two, is arbitrary and capricious.

Our Response: The environmental consequences of the No Action Alternative (status quo) and Alternative 3C (the proposed action) are identical except with respect to changes in the regulatory status of sea otters in southern California that would occur under Alternative 3C. Under Alternative 3C, the exemptions from the take prohibitions of the ESA and/or MMPA that currently exist in the management zone and translocation zone would end.

The No Action Alternative is not a viable alternative. It would continue the translocation program, even though the program has failed to meet its primary recovery objective, and even though a primary component of the program—maintenance of an

otter-free zone—cannot be legally implemented. It would also legally restrict, though without an ability to enforce that restriction, the natural movement of southern sea otters southward from central California into their historic range in the Southern California Bight, in contravention of the recovery needs of the species. Alternative 3C, on the other hand, would terminate the translocation program while leaving in place the San Nicolas Island population of southern sea otters and any sea otters in the management zone. It would contribute to the recovery of southern sea otters by allowing for natural range expansion and the continuation of the San Nicolas Island population free of the artificial boundaries and legal strictures imposed pursuant to Pub. L. 99-625.

Comment: The California Coastal Commission has stated unequivocally that any decision by the Service to declare the translocation a failure, to terminate the management zone, and to allow sea otters to remain at San Nicolas Island will require a determination by the Coastal Commission regarding the consistency of any such action with California's coastal zone management plan as to the impact on commercial fisheries.

Our Response: On June 14, 2012, by a unanimous vote, the California Coastal Commission concurred with the consistency determination that the Service submitted for the termination of the southern sea otter translocation program. The Commission found the project to be consistent to the maximum extent practicable with the California Coastal Management Program.

Comment: Because the zonal management program is in violation of section 7(a)(2) of the ESA, it is not hard to find that the program also violates the Service's affirmative duty to conserve the species under section 7(a)(1) of the ESA to pursue sea otter conservation. The ESA defines "conservation" as "the use of all methods and

procedures, which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." The courts construe this duty to be a strong mandate on the Secretary and the Service to not carry out programs adverse to species recovery and conservation. The Service has concluded that containment practices are ineffective and harmful to sea otters, and thus they can no longer be supported as conservation measures for the benefit of the species. Therefore, the Service must discontinue any containment actions and leave all remaining southern sea otters at San Nicolas Island. Failing to do so would be directly contrary to conservation. Thus, the obligations imposed on the Service under section 7(a)(1) require a complete end to the translocation and containment program.

Our Response: This rulemaking terminates the southern sea otter translocation program, including any containment actions, and retains sea otters at San Nicolas Island.

Comment: The Service is obligated to act in accordance with the Recovery Plans it develops for listed species. In *Friends of Blackwater v. Salazar*, 772 F.Supp.2d 232 (D.D.C. 2011), the court held that the Service violated the protections of Section 4 by deciding to delist a species based on considerations not included in the management actions and conservation and survival goals included in their recovery plan. While the recovery plan may be a guidance document, the Service is bound by its definitions of "recovery." *Id*. Here, the recovery plan acknowledges that the southern sea otter's recovery is dependent on the termination of zonal management and allowing the existing San Nicolas Island population to remain in its current location. This finding similarly "binds" the Service to act accordingly and finalize the proposed rulemaking.

Our Response: One of the high-priority recovery actions identified in the Final

Revised Recovery Plan for the Southern Sea Otter (USFWS 2003) is to evaluate the translocation program in light of changed circumstances and determine whether one or more failure criteria have been met. While we have analyzed a full range of alternatives, including resuming implementation of the program, we recognize that this rulemaking reflects the recommendations made by the Southern Sea Otter Recovery Team and affords the best opportunity for sea otter recovery.

Comment: Congress set forth specific requirements in Pub. L. 99-625 that would govern the establishment and implementation of the management zone. One of these requirements is the mandate that the management zone be established so as to "not include the existing range of the parent population *or adjacent range where expansion is necessary for the recovery of the species*." As explained in the legislative history, in creating the zone to provide sufficient room for range expansion the Service "must accommodate, among other important biological needs, the feeding behavior of the sea otter." Thus, foraging, as well as all other biological needs of the sea otter, were required to be taken into account in establishing this zone. The zone boundaries, as currently determined, are not in compliance with these requirements. As stated in the 2003 recovery plan, natural range expansion is necessary to achieve recovery. In addition, the Doak analysis confirms that zonal management will greatly impede recovery and that large numbers of sea otters would have to be moved continuously, resulting in mortality and negative effects on the parent population. Over the 10-year period contemplated by the Service, Dr. Doak anticipates that 393 sea otters would have to be removed from the management zone, resulting in an anticipated 67 deaths.

Our Response: Portions of the central California range are now food-limited,

which further suggests the necessity of range expansion for sea otter recovery. This rulemaking reflects the recovery strategy of allowing natural range expansion.

Comment: The containment program violates Pub. L. 99-625, and the Service accordingly must declare it a failure. P.L 99-625(b)(4), in stating the purpose of the management zone, requires that the "Service shall use all feasible *non-lethal* means and measures" to implement the containment policy and remove otters from the management zone (emphasis added). The history of the containment program and the available containment methods and technologies have proven that the capture and removal of sea otters cannot be undertaken by nonlethal means. Many sea otters are certain to die as a result of capture and removal. The Service's 2000 biological opinion notes that "the stress of being captured, held in captivity, and (for some individuals) undergoing surgery to implant tracking devices resulted in a mortality rate that was higher than the anticipated mortality rate of three to five percent (Benz, pers. comm. in Service 1987b) that had been expected to result from the handling of southern sea otters during translocation." The 2000 biological opinion also states that, "[b]y the time of the 1993 draft evaluation, seven southern sea otters had died at Monterey Bay Aquarium while waiting to be translocated to San Nicolas Island or after surgery to implant radios, three died at San Nicolas Island while waiting to be released, one died after being captured in the parent range for translocation and released at the point of capture, and four died within two weeks of being released after being captured during containment activities." This level of mortality is far higher than what was anticipated when the containment program was developed. The Service's current estimate of expected mortality of 17 percent is far higher than the 1987 biological opinion's estimates of three to five percent,

and can in no reasonable way be interpreted as "non-lethal" as required under Pub. L. 99-625.

Our Response: Comment noted. We acknowledge that the level of mortality resulting from the capture and relocation of sea otters was higher than anticipated.

Comment: There is nothing in P.L 99-625 that requires the removal of the San Nicolas Island sea otters. Pub. L. 99-625 refers only to the removal of any sea otters in the *management zone*. The fact that Congress considered whether to require the removal of sea otters after a failure determination, and declined to include the translocation zone in the area from which capture would occur, indicates an intention to allow the animals to remain at San Nicolas Island. The absence of any statutory requirement for removal of animals from San Nicolas Island also confirms the discretion available to the Service for this purpose.

Our Response: Pub. L. 99-625 authorized but did not mandate the development and implementation of the translocation program. Nor did Pub. L. 99-625 address the potential failure of the program. The command in the legislation to remove sea otters from the management zone applies while the plan is in effect. By rulemaking implementing the translocation program, the Service specified criteria to evaluate whether the program is a failure and set forth the consequences of a failure determination, which included an obligation to remove sea otters from the management zone and from San Nicolas Island (50 CFR 17.84(d)). By removing the translocation rule in its entirety through the present rulemaking, we are eliminating all of the internal components of the rule at 50 CFR 17.84(d), including the requirements to remove sea otters from San Nicolas Island and from the management zone following a determination that the

program has failed.

Assessment of Failure Criteria Identified in Translocation Plan

Pub. L. 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 final translocation program evaluation (Appendix C to the final SEIS), we find that the translocation program meets failure criterion 2. A summary of our analysis of each failure criterion in the final 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 CDFG 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 CDFG 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 conclude 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 reestablishment of the 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 (that is to say 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 +/- 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 terminate the translocation program and remove the regulations at 50 CFR 17.84(d) in their entirety. This action:

- Terminates the designation of the experimental population of southern sea otters;

- Abolishes the southern sea otter translocation and management zones;
- Eliminates future actions, required under the previous 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
- Allows southern sea otters to continue to expand their range naturally into southern California waters.

Removal of the translocation program regulations in their entirety also eliminates the previous 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

Pub. L. 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 renders the specific provisions of Pub. L. 99-625 inoperative. The translocation and management zones are abolished, and the exemptions under Pub. L. 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, end.

Under both the ESA and the MMPA, incidental take is prohibited unless it has been authorized. 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) also has to be authorized under the MMPA. 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 of the MMPA, 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 is prohibited, as it is throughout the remainder of the range of the species (north of Point Conception). All intentional take of southern sea otters continues to be prohibited 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, are required to consult with the Service under section 7 of the ESA, as they do 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, as discussed above.

The exemption under State law for incidental take of southern sea otters in the management zone also ends with this action. 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 Pub. L. 99-625." Recently, California amended the Natural Community Conservation Planning Act to allow CDFG to authorize the incidental take of fully protected species, including the southern sea otter, that are conserved under an approved Natural Community Conservation Plan (Cal. Fish and Game Code § 2835).

To the extent otherwise allowable under State law, proposed non-Federal activities in California that would result in take of southern sea otters will 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 rulemaking and associated alternatives is included in our final SEIS on the translocation of southern sea otters. A copy of the final 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), this rulemaking and subsequent actions 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.

Required Determinations

Regulatory Planning and Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and

an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

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 rulemaking directly affects only southern sea otters, with respect to their regulatory status in southern California waters under the ESA and MMPA. Economic effects potentially resulting from future regulatory changes

applicable to commercial fisheries are indirect. Potential effects of sea otter range expansion on the nearshore marine environment, including the availability of certain prey species for harvest by commercial fishers, are identical to effects under baseline conditions and are also indirect. Because the Service does not have direct regulatory authority over marine fisheries, there are no direct effects on small businesses from the proposed termination of the translocation program. Therefore we certify that this rulemaking will not have a significant economic impact on a substantial number of small entities and a regulatory flexibility analysis is not required. Notwithstanding our certification, we acknowledge that 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 a Final Regulatory Flexibility Analysis (FRFA), which we briefly summarize below, to accompany this rulemaking.

The Service is terminating the southern sea otter translocation program and allowing all sea otters currently in southern California waters to remain there. We are taking this action because we concluded, in a final 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 rulemaking and associated alternatives is included in the final SEIS. The following discussion estimates the baseline and the expected economic effects of terminating the southern sea otter translocation program.

The purpose of this rulemaking is 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 allows southern sea otters to recolonize their historic range throughout southern California. We define the baseline (status quo) as the current physical and regulatory environment (that is to say 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 in the final SEIS. Under baseline (current) conditions, southern sea otter movement throughout the species' range is not restricted or contained. Under this rulemaking, containment activities will not be resumed. Southern sea otters continue to have the ability, as they have since 1993, 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 this rulemaking 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 final 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 final SEIS, we limit the quantitative analysis to a 10-year time horizon. (In the final 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 consider it 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 will reoccupy other areas of the Southern California Bight in subsequent years will 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 will 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 final SEIS. Numerous other noneconomic effects are expected to occur as a result of sea otter range expansion within 10 years. We discuss these effects in the final 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), will likely be eliminated in mainland coastline areas predicted to be reoccupied 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 will be negligible.

With respect to the recreational lobster fishing industry, trips on commercial

passenger fishing vessels (CPFVs) along the affected mainland coastline are negligible. 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 recreational lobster fishing trips taken annually in southern California on CPFVs, assuming recreational lobster fishers do not choose to fish from CPFVs at a different location. Information from the limited number of lobster report cards returned from 2008 through 2011 indicates that, under the baseline, if all lobster trips (both private and CPFV) are eliminated as a result of sea otter recolonization of the coastline to Carpinteria (lower bound) or Oxnard (upper bound) within the next 10 years, then the total number of trips in the Southern California Bight will be reduced by 3–7 percent. Because the proportion of trips to San Nicolas Island is already so small relative to the total number of trips in the Southern California Bight, the projected increase in the number of sea otters at San Nicolas Island would not be expected to have a detectable effect there. These proportional reductions should be considered provisional because they are based on limited data.

In the longer term, those areas reoccupied by sea otters will likely cease to support commercial and recreational shellfish fisheries, but the magnitude and timing of this potential change is unknown.

Economic Effects of Rulemaking (Alternative 3C). This rulemaking will 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 will 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 will 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 will 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 is 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 rulemaking 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 or NMFS acted, in response to regulatory changes associated with this rulemaking, to extend the existing gill and trammel net closure in southern California waters to depths that protect southern sea otters (that is to say depths that encompass 99 percent of all known dives). 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 will continue to be prohibited with 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 appropriate State or Federal authority may not impose an immediate closure and (2) participants in the fishery already using alternate gear would benefit from the increased availability of halibut and white seabass.

Economic Effects from Enforcement of the Management Zone (Alternative 1). As discussed, this rulemaking (Alternative 3C) will 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 final 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 +/- 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 reestablish 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 (in other words, 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 lobster fishing trips on CPFVs 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 fishing from CPFVs. Information from the limited number of lobster report cards returned from 2008 through 2011 suggests that 3–7 percent of the total number of recreational lobster fishing trips (including CPFV trips) in the Southern California Bight occur along the portion of mainland coastline that is expected to be affected by natural range expansion under baseline conditions during the next 10 years. Alternative 1 would prevent the reduction in trips expected under baseline conditions from occurring. Effects at San Nicolas Island are the same as under the baseline.

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 final 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 CDFG 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 Rulemaking	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 this Rule (Alternative 3C)

This rulemaking does not result in any effects on small entities, relative to the baseline, except potential indirect economic impacts stemming from regulatory changes by the State or NMFS. Thus, the sea urchin, lobster, crab, sea cucumber, and recreational fishing industries are not affected by this rulemaking. However, an additional gill and trammel net closure, if imposed by the appropriate State or Federal authority 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 (that is to say, 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 reemployed elsewhere if commercial fishing activity in affected areas were reduced. Ex-vessel revenue and vessel number data are from CDFG.

Table 2 shows the potential indirect effects if the appropriate State or Federal authority 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 this rulemaking (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 final 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 lobster fishing (*i.e.,* CPFVs) 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 this rulemaking, 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 economic analysis concludes that removal of 50 CFR 17.84(d):

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

- This rulemaking 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."

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

- This rulemaking will not significantly or uniquely affect small

governments because it will 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 final SEIS on the sea otter translocation program. As such, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630, this rulemaking will not have significant implications concerning taking of private property by the Federal Government. 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. This rulemaking will substantially advance a legitimate government interest (conservation and recovery of listed species) and will not present a bar to all reasonable and expected beneficial use of private property.

Federalism Assessment

In accordance with Executive Order 13132, the 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 amendment will 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 rulemaking.

Civil Justice Reform

In accordance with Executive Order 12988, the 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 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 will not impose new recordkeeping 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 determined that this action required the preparation of an environmental impact statement. A final SEIS is available 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)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rulemaking is not expected to significantly affect energy supplies, distribution, and use. Although adoption of this rulemaking will 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.

Endangered Species Act

In accordance with the requirements under section 7 of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531 *et seq*.), we have evaluated the effects of this action on the endangered white abalone, the endangered black abalone, and designated critical habitat for the black abalone. We determined that this action will have no effect on these species or designated critical habitat. In addition, we performed an internal Service consultation and found that the effects of this action are not likely to adversely affect the southern sea otter.

References Cited

A complete list of all references cited in this rulemaking 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 rulemaking 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.

Regulation Promulgation

Accordingly, for the reasons set forth in the preamble, we 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; 1531–1544; and 4201–4245, unless otherwise noted.

2. In § 17.11(h), in the List of Endangered and Threatened Wildlife under Mammals, amend the entries for "Otter, southern sea *(Enhydra lutris nereis)*" as follows:

a. Revise the first entry; and

b. Remove the second entry.

The revision reads as follows:

§ 17.11 Endangered and threatened wildlife.

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed
Common name	Scientific name				
Mammals					
* * * * * * *					
Otter, southern sea	*Enhydra lutris nereis*	West Coast, U.S.A. (CA, OR, WA) south to Mexico (Baja California)	Entire	T	21
* * * * * * *					

§ 17.84 [Amended]

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

Dated: December 13, 2012.

Michael J. Bean

Acting Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310-55

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