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THE OCEAN CONSERVANCY

Before the

Subcommittee on Fisheries, Wildlife, and Oceans

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Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to present our views on the Marine Mammal Protection Act (MMPA), specifically marine mammal species in California. My name is Kaitilin Gaffney. I am the California Central Coast Program Manager for The Ocean Conservancy, and I work out of our field office in Santa Cruz, California.

I. SUMMARY STATEMENT

The Ocean Conservancy (formerly the Center for Marine Conservation) played a leadership role in the development of the 1994 amendments to the MMPA, especially those governing the incidental take of marine mammals in commercial fisheries. Since that time we have been one of the few organizations that has actively participated in the amendments' implementation. The Ocean Conservancy believes that, in the sweeping changes made in 1994, Congress refined the Act and brought it closer toward achieving its goals of recovering marine mammal populations. The MMPA is an international model for effective conservation and protection of marine mammals. In short, the problems with the MMPA stem not from the Act itself, but often the agencies' failure to implement the Act fully and effectively, compounded by a chronic lack of resources for effective implementation.

A. Pinnipeds and Salmonids

Pinnipeds have never been the primary cause of a salmonid decline, nor has it been scientifically demonstrated that they have been a primary factor in the delayed recovery of a depressed salmonid species. Studies show that salmonids make up only a small percentage of pinniped diets, and that habitat loss is a primary factor in salmonid decline. Nonetheless, in 1994, the environmental community, the fishing industry, and Congress provided the National Marine Fisheries Service (NMFS) with the tools in Section 120 of the MMPA to effectively address the issue of pinniped predation on threatened and endangered salmonid stocks. Section 120 serves its purpose. NMFS successfully used these provisions to authorize the removal of California sea lions preying on steelhead trout at the Ballard Locks. In future conflicts NMFS must choose to use these tools wisely.

The Ocean Conservancy asserts that, as currently codified in law, Sections 109 and 120 of the MMPA [16 U.S.C. §§ 1379,1389] offer effective and precautionary approaches to protecting pinnipeds, salmonid fishery stocks, biodiversity, and human health and welfare. Consequently, there is no need to amend the MMPA to allow a blanket authorization for the intentional lethal removal of pinnipeds by state and federal resource

agencies. Nor do we believe that such a blanket authorization would be acceptable to the public.

Non-lethal deterrents hold the most promise to resolve the problems of "nuisance" animals and as such should be the first line of defense as opposed to lethal removal. NMFS has failed, however, to publish final guidelines for what constitute acceptable non-lethal deterrents. NMFS and Congress have also not placed a sufficient priority on dedicated and aggressive research into the development of safe, effective non-lethal deterrents. Development of such deterrents will aid in reducing not only predation on threatened and endangered salmonid stocks, but also other conflicts between pinnipeds and humans.

The Ocean Conservancy strongly opposes any attempt to remove the statutory prohibition on shooting marine mammals or even to modify this provision to allow limited, controlled shooting of pinnipeds by fishermen. Any change to the prohibition will only result in the wounding, maiming, and death of hundreds of marine mammals. Furthermore, allowing fishermen to target marine mammals will create an unreasonable risk to special status species such as Steller sea lions, southern sea otters, and harbor porpoise, which could easily be shot "by mistake." Because NMFS cannot adequately enforce the existing statutory prohibition, amending it will only create an "open season" on marine mammals throughout the United States.

B. Southern Sea Otters

The U.S. Fish and Wildlife Service's (FWS) efforts to recover the southern sea otter (*Enhydra lutris nereis*), found mainly off the central California coast and listed as threatened under the federal Endangered Species Act (ESA), have not been successful. The southern sea otter population steadily increased between the mid-1980s and 1995, but since 1995, the population has declined by 9 %. The current population is over 2,100 individuals, a drastic decline from an estimated historical population of 16,000-20,000 animals. The greatest extant threats to the subspecies include oil spills, infectious disease, water pollution, and fishing gear and nets.

In accordance with the Translocation Law (Public Law 99-625 (1986)), in 1986, FWS began an experiment to move (translocate) a number of southern sea otters to San Nicolas Island off of Santa Barbara -- south of their current range--in an attempt to create a viable second colony. The goal was to minimize the chance that the entire subspecies could be wiped out by an oil spill along the central California coast. FWS estimates that the translocated colony on San Nicolas Island currently numbers less than 25 sea otters. The Translocation Law also created an otter-free zone to protect shellfish fisheries from sea otter competition, as these areas were devoid of otters at the time of the law's passage. Despite their declining population, a group of predominantly, male sea otters have seasonally expanded their geographical range into this otter-free zone. Moreover, new information on sea otters discovered since the Translocation Law's enactment demonstrate that its statutory provisions are no longer in the southern sea otter's best interests.

Last year, FWS found in a biological opinion that the removal of sea otters from the Southern California "otter free management zone" would jeopardize their "continued existence" and that allowing the southern sea otter to expand its range is "essential to the species' survival and recovery." Furthermore, FWS has completed a Draft Evaluation of the Southern Sea Otter Translocation Program, in which the agency proposes to designate the translocation a failure, and has initiated development of a Supplemental Environmental Impact Statement (SEIS) to reevaluate the translocation program. Given the decline in the southern sea otter population, The Ocean Conservancy concurs with the biological opinion and believes that moving any animals out of the management zone would likely result in mortality that would further impede recovery, in violation of the ESA.

Preventing further range expansion will limit the natural growth rate of the mainland population. Access to historical habitat may halt the population decline, prevent nonspecific resource competition, and decrease the potential for disease by providing more space. Therefore, The Ocean Conservancy supports declaring the translocation a failure, eliminating the management zone, allowing the existing population at San Nicolas Island to remain, and allowing sea otters to naturally expand their range.

In the past, our organization has engaged in discussions with the fishing industry about how to recover the southern sea otter while working to ensure the sustainability of commercial shellfish fisheries. We would be interested in resuming this dialogue with the fishing industry to continue to explore potential areas of common ground that we have identified that, utilizing the existing statutory and regulatory framework would promote both the recovery of the southern sea otter and healthy fisheries. In the meantime, we urge Congress not to amend the MMPA, but to direct FWS to expeditiously complete its reevaluation of the translocation. We also request that Congress provide funds to undertake activities that the environmental community and the fishing industry have identified as beneficial to the sea otter recovery and fisheries.

II. BACKGROUND

In 1994, Congress reauthorized the Marine Mammal Protection Act. As part of the reauthorization, a coalition of environmental organizations, animal welfare groups, commercial fishing industry representatives, and Alaska Natives, assisted by a professional facilitator, developed a negotiated proposal to govern the incidental take of marine mammals during commercial fishing operations. A subgroup of the negotiating parties also met to address the issue of pinniped predation on declining salmon stocks. This subgroup proposed to Congress a multi-phased process to evaluate whether all feasible methods of non-lethal deterrence had been tried and whether the target marine mammals were responsible for the fish declines. This proposal also called for a task force to consult with the Secretary of Commerce about seals and sea lions considered "nuisance" animals because of their predation of steelhead and salmon, species prized by commercial and recreational fishermen, at the Ballard Locks in Seattle and in the Columbia River. Based on the outcome of the consultation and an evaluation by the task force, the subgroup's proposal suggested creating a process whereby the Secretary of Commerce could authorize a State to lethally remove pinnipeds that prey on endangered salmonid stocks, provided that the nuisance pinniped(s) is identified as habitually exhibiting dangerous or damaging behavior that could not be deterred by other means. Congress enacted this proposal, as part of its 1994 amendments. It was ultimately codified at Section 120 of the MMPA.

As amended, the MMPA requires the Secretary of Commerce to engage in a scientific investigation to determine whether California sea lions and Pacific harbor seals are having a significant negative impact on the recovery of salmonid fishery stocks that have been listed under the ESA or are approaching endangered or threatened status, or are having broader impacts on the coastal ecosystem of Washington, Oregon, and California [16 U.S.C. § 1389(f)(1)]. In 1997, NMFS published a Technical Memorandum with the results of those investigations. The MMPA also required NMFS to enter into a discussion with the Pacific States Marine Fisheries Commission to develop recommendations to address problems NMFS identified in its scientific investigations [16 U.S.C. § 1389(f)(2)]. In February 1999, NMFS issued a Report to Congress on the agency's investigations and consultations with the states of Washington, Oregon, and California concerning the impact of California sea lions and Pacific harbor seal impacts on salmonid stocks and coastal marine ecosystems.

III. THE OCEAN CONSERVANCY'S GENERAL RESPONSE TO NMFS': Report to Congress:

Impacts of California Sea Lions and Pacific Harbor Seals on Salmonids and West Coast Ecosystems

The Report to Congress contains four recommendations: (1) implement site-specific management for California sea lions and Pacific harbor seals; (2) develop safe, effective non-lethal deterrents; (3) selectively reinstate authority for the intentional lethal taking of California sea lions and Pacific harbor seals by commercial fishermen to protect gear and catch; and (4) conduct research to fulfill information needs. **The Ocean Conservancy strongly opposes the first and third recommendations: Congress should neither amend the MMPA to implement site-specific management for pinnipeds, nor selectively reinstate authority to allow intentional lethal taking of pinnipeds by commercial fishermen to protect gear and catch. The Ocean Conservancy strongly supports the second and fourth recommendations: Congress should direct NMFS to develop safe, effective non-lethal deterrents and conduct the research necessary to fulfill significant information gaps.**

NMFS' recommendations in the Report to Congress are based on a scientifically unsubstantiated leap from the conclusions of the Working Group Report. At no time did the Working Group Report recommend the lethal removal of pinnipeds. Rather it identified data gaps and provided recommendations for additional research. Although The Ocean Conservancy fully supports the Working Group Report's recommendations, it is our position that, based on the information presented in both the Report to Congress and the Working Group Report, NMFS fails to make its case that these species of pinnipeds are "having a significant negative impact on the recovery of salmonid fishery stocks" or "are having broader impacts on the coastal ecosystem of Washington, Oregon, and California."

California sea lions and Pacific harbor seals are a natural part of the Pacific ecosystem, opportunistically utilizing a prey source concentrated by man-made structures (e.g., dams) and habitat changes. The reasons for salmonid declines are complex, and are largely unrelated to pinniped predation. Indeed, studies demonstrate that salmonids make up a very small percentage of pinniped diets. If NMFS expects to recover salmonid stocks, it must begin by fully addressing human-induced causes of these declines. Until NMFS has effectively addressed the human causes of salmonid declines, or until one of the salmonid stocks is demonstrably threatened with extinction by continued pinniped predation, there is no justification for NMFS' recommendation to amend the MMPA to exponentially expand lethal removal authorizations.

The Ocean Conservancy strongly recommends that Congress instruct NMFS to continue to evaluate and assess the level of pinniped predation on salmonids and aggressively pursue the research recommendations outlined in both the Report to Congress and the Working Group Report. Furthermore, we strongly recommend that, once data become available, NMFS compare levels of pinniped predation to the impacts of other activities (including commercial and sport fishing, dam operations, silvicultural and agricultural practices), and investigate and propose actions to mitigate the decline of salmonid stocks by all sources. Blaming pinnipeds for the salmonid stocks' failure to recover merely distracts from efforts to find real solutions to the problems facing the salmonids. Because NMFS was unable to demonstrate that California sea lions and Pacific harbor seals are "having a significant negative impact on the recovery of salmonid fishery stocks" or "are having broader impacts on the coastal ecosystem of Washington, Oregon, and California," no amendments to the existing statutory scheme are warranted. The Ocean Conservancy strongly urges NMFS to use the existing tools in the MMPA such as Section 120 and to enforce fully the prohibition on intentional shooting of marine mammals.

Although The Ocean Conservancy recognizes that NMFS continues to encounter problems with public interactions with marine mammals, recovering marine mammal populations also provide tremendous benefits to coastal communities and to the public. Increasing populations of both humans and marine

mammals along the nation's coasts have brought about not only competition for space on boats, docks, and beaches, but also increased opportunities for wildlife viewing, education, and benefits to coastal tourism.

Increased interactions between humans and pinnipeds potentially produce "nuisance" pinnipeds. The public's desire to feed, swim with, and otherwise interact with these animals can modify an animal's behavior and create conflicts when marine mammals do not distinguish between taking fish out of commercial gear and food from well-meaning citizens. The Ocean Conservancy will continue our efforts to educate the public about how enjoy viewing marine mammals from a distance without modifying their behavior.

The Ocean Conservancy agrees with NMFS that there is insufficient data to evaluate the impacts of pinnipeds on the marine ecosystem and the economic losses to the fishery from pinniped depredation of catch and damage to gear. But we contend that pinniped competition with humans for fisheries resources is not a sound scientific reason to call for the lethal removal of pinnipeds. Rather, NMFS and the fishing industry should reevaluate the fishery management allocation system in order to provide an adequate allocation to predators (e.g., pinnipeds) whose very survival is inextricably linked to fishery resources. Moreover, NMFS and the fishing industry must recognize, as other industries do, that there are cost associated with doing business and that these costs include a certain level of acceptable loss due to interactions with resident wildlife.

Below, we provide more detailed comments on NMFS' recommendations contained in its Report to Congress.

A. "Implement Site-specific Management for California Sea Lions and Pacific Harbor Seals"

The Ocean Conservancy strongly opposes NMFS' "framework" proposed under its first recommendation: "(1) In situations where California sea lions or Pacific harbor seals are preying on salmonids that are listed or proposed for listing under the ESA salmonids or salmon populations the states identified as being of special concern ("depressed," "critical," or "sensitive"), immediate use of lethal removal by state or federal resource agency officials would be authorized; (2) In situations where California sea lions or Pacific harbor seals are preying on salmonid populations of concern or are impeding passage of these populations during migration as adults or smolts, lethal takes by state or federal resource agency officials would be authorized if (a) non-lethal deterrence methods are underway and are not fully effective, or (b) non-lethal methods are not feasible in the particular situation or have proven ineffective in the past; (3) In situations where California sea lions or Pacific harbor seals conflict with human activities, such as at fishery sites and marinas, lethal removal by state or federal resource agency officials would be authorized as a last resort when an individual pinniped fails to respond to repeated deterrence attempts, or when repeated deterrence attempts do not affect the behavior of an individual pinniped over the long-term." Although all lethal removals would have to be within the Potential Biological Removal level for the pinniped stock established by NMFS in accordance with the MMPA,[(1)] The Ocean Conservancy asserts that NMFS' proposal is unnecessary and unjustified.

Section 120 of the MMPA already establishes the appropriate procedures for lethal removal of California sea lions or Pacific harbor seals where these species are preying upon ESA-listed.

Section 120 requires that, for a lethal take to be authorized, the applicant (a state) must demonstrate that individually identifiable pinnipeds are having a significant negative impact on the decline or recovery of

salmonid fishery stocks that are listed or are approaching the status of threatened or endangered species under the ESA. The Ocean Conservancy strongly disagrees with the characterization of these provisions by NMFS and the states of California, Oregon, and Washington as cost prohibitive, cumbersome, restrictive, and unworkable. We also dispute the assertion that the amount of evidence needed to establish that specific pinnipeds are having a significant negative impact on a salmonid population is "time-intensive, difficult, and expensive to obtain." The Ocean Conservancy firmly believes that Section 120 provides the flexibility to conserve salmonid stocks and establishes the appropriate burden of proof to demonstrate both that pinnipeds are having a significant negative impact on the decline or recovery of salmonid fishery stocks and that all reasonable and prudent non-lethal measures have failed.

During the 1994 MMPA reauthorization process, environmental and fishing interests as well as Congress recognized the need to address the role of pinnipeds in the conservation of endangered salmonid populations. The provisions of Section 120 are the result of a compromise that allows NMFS to take action where necessary to protect salmonid populations, yet preserves the protective nature of the MMPA. The Ocean Conservancy believes that a blanket authorization to states for the immediate use of lethal removal is contrary to the precautionary protection goals and objectives of the MMPA, will not guarantee that these pinnipeds receive the protections afforded by the MMPA, and fails to recognize that lethal removal is a flawed management tool. A general authorization would grant too much authority and discretion to state agencies, while removing two key components of Section 120--scientific review and assessment of existing data, and public oversight and participation in the process. If pinniped populations have in fact expanded to the point where they need to be managed, the MMPA provides a process for transfer of management authority to the states subject to specified conservation standards.

In this context, it is worth noting that an authorization under Section 120 has been used only once, at the Ballard Locks in Seattle, Washington. On June 30, 1994, the Washington Department of Fish and Wildlife (WDFW) requested authority under Section 120 to kill problem California sea lions at the Ballard Locks. Evidence indicated that the non-lethal methods tried--underwater firecrackers, chaser boats, acoustic deterrence and harassment devices, taste aversion conditioning, experimental barrier nets, trapping and relocation - had not succeeded in eliminating sea lion predation. On January 6, 1995 (less than six months later), NMFS provided WDFW with a three-year conditioned authority to lethally remove fifteen California sea lions to protect steelhead salmon from predation at the Ballard Locks.

The Ocean Conservancy believes not only that this single experience is an insufficient basis for recommending significant statutory amendments to Section 120, but that it actually demonstrates that the process worked as intended. Specifically, it took less than six months from the request letter to the Secretary to the removal of animals at the Locks. Although NMFS and WDFW accused the process of being "cumbersome and time-consuming," Section 120 enabled wildlife management officials to conduct removals at the locks expeditiously and efficiently.

Restoring anadromous fisheries and managing human and pinniped competition are not easy goals to achieve. The Ocean Conservancy strongly believes, however, that a lasting solution to these challenges must be collaborative, must be based on adequate scientific research, and must address the values and interests of fishers, conservation organizations, and the general public. There are, no doubt, refinements that could be made in the process that do not require amendments to the MMPA. Consequently, we recommend that NMFS and the states of Oregon, Washington, and California work with the conservation community to reevaluate the process and devise mechanisms to make implementation of Section 120 more responsive and effective, but that Congress decline to amend Section 120 as proposed by NMFS.

B. "Develop Safe, Effective Non-lethal Deterrents"

The Ocean Conservancy strongly supports NMFS' recommendation that safe, effective non-lethal deterrents be developed and that these deterrents should not have detrimental incidental effects. We agree that research and development of pinniped deterrence methods and devices should be a priority and should receive adequate funding. However, The Ocean Conservancy disagrees with the statement in the Report to Congress that "lethal removal remains the only effective alternative until satisfactory deterrence measures are developed." Rather, we agree with the Working Group Report's statement indicating that lethal removal or pinniped population control may not always result in the expected outcome and may, in fact, be detrimental to fish populations and the ecosystem as a whole.

Many fishing industries and environmental groups have long supported the use of non-lethal deterrents. In 1998, representatives from conservation and animal welfare organizations, commercial and recreational fishing associations, universities, and federal and state agencies gathered at the Monterey Bay Aquarium to discuss the interactions of California sea lions and Pacific harbor seals with wild salmon stocks and commercial and recreational fisheries that operate off the West Coast. During these discussion it became clear that representatives from both the fishing industry and the conservation/animal welfare community are frustrated with NMFS' failure to issue final guidance on non-lethal methods to deter pinnipeds from dangerous or damaging interactions with fishing gear and catch. The group sent a joint letter to NMFS requesting the immediate release of the non-lethal deterrents guidelines. Although NMFS originally published draft guidelines for public comment in the spring of 1995 (60 Fed. Reg. 22345 (May 5, 1995)), nearly six years later, NMFS has ignored this and other requests and still has not released final guidelines. We believe it is now time for Congress to direct NMFS to promptly release final guidelines for the use of non-lethal deterrents by commercial and recreational fisheries in interactions with marine mammals. In addition, we believe Congress should amend the MMPA to require NMFS to promulgate binding and enforceable regulations for the use of non-lethal deterrents, as set forth in Attachment A.

The Ocean Conservancy continues to believe that the best hope to address pinniped interactions with salmonid stock and fishermen is to develop safe, non-lethal deterrents. To further this goal, we also recommend that MMPA Section 120 be amended to provide for an aggressive and dedicated research program to develop and test safe, non-lethal deterrents, as follows:

AMENDMENT--At Section 120 strike existing section (f) and insert new section (f) as follows:

1) (A) Within six months of enactment, the Secretary shall undertake a review of all non-lethal methods that have been used to deter marine mammals and, in consultation with the Marine Mammal Commission, representatives of academic and scientific organizations, environmental groups, commercial and recreational fisheries groups, gear technologists, and others as the Secretary deems appropriate, shall develop a research plan for the development and testing of safe, non-lethal deterrents. In developing the research plan the following criteria should be considered--

(i) Such deterrents may be used to deter marine mammal interactions with (a) fishing gear and catch; (b) aquaculture resources; or (c) salmonid fishery stocks that have been listed as endangered or threatened under the Endangered Species Act of 1973 (16 U.S.C. § 1531), or that the Secretary finds are approaching endangered or threatened status; and

(ii) The research and development of such deterrents shall provide for the humane take of marine

mammals by harassment, as defined at Section 3(18)(A)(ii) of this Act.

2) The Secretary shall undertake and complete the research plan, and any related studies, developed pursuant to paragraph (1) not later than 2 years after the date of enactment.

3) The Secretary shall submit a report of the findings and recommendations for additional research or action to the Committee on Resources of the House of Representatives and the Committee on Commerce, Science and Transportation of the Senate 3 year after the date of enactment.

4) The Secretary shall make the report and the recommendations submitted under paragraph (3) available to the public for review and comment for a period of 90 days.

5) For the purposes of carrying out this section, the Secretary may accept, solicit, receive, hold, administer, and use gifts, devices, in-kind contributions, and bequests.

6) There are authorized to be appropriated to the Secretary $1,500,000 annually to carry out the provisions of this subsection.

C. "Selectively Reinstate Authority for the Intentional Lethal Taking of California Sea Lions and Pacific Harbor Seals by Commercial Fishermen to Protect Gear and Catch"

The Ocean Conservancy strongly opposes NMFS' recommendation to amend the MMPA to allow NMFS to authorize lethal removal of marine mammals on a case-by-case basis to protect gear and catch in certain fisheries, even if, as NMFS proposes, the authorization is subject to the following conditions: 1) there is a demonstrated need; 2) the lethal authorization would be limited to specific areas and fisheries; 3) fishermen who receive such authorizations should be trained or demonstrate the ability to distinguish among pinniped species; 4) the taking would have little effect on the pinniped stock's continued growth and recovery; and 5) the taking would be within the PBR for the stock.

In 1994, the environmental community and the fishing industry negotiated a proposal to prohibit the intentional lethal taking of marine mammals to protect gear and catch, which became a critical provision in the 1994 Amendments to the MMPA. Congress' intent in enacting this provision is clear not only from the plain language of the statute but also from testimony and statements in the Congressional Record. The Ocean Conservancy, as one of the negotiating parties, felt strongly that the fishing industry should not intentionally shoot marine mammals to deter them from gear and catch. In addition, The Marine Mammal Center (TMMC) presented compelling evidence that shooting as a deterrence method is inhumane and often results in wound rather than dead. The industry conceded that, given the availability of various non-lethal deterrents, shooting marine mammals to deter them from fishing gear and catch was not necessary. Furthermore, intentional shooting of marine mammals is unacceptable to the general public.

Despite the enactment of this hard-won landmark provision, fishermen continue to shoot marine mammals. In fact, from 1992 to 2000, TMMC documented 305 gunshot pinnipeds and sea otters along the Central California coast alone. TMMC further estimates, based on extrapolated data from estimates of gunshot wounds in live stranded marine mammals, that between two to three hundred pinnipeds die each year along the entire California coast from gunshot wounds. Consequently, there is no reason to believe that NMFS would be able to adequately monitor and enforce any authorization for lethal removal and compliance with conditions thereto. Permitting lethal removal to protect gear and catch, when fishermen continue to disobey the existing law and shoot marine mammals, would be tantamount to providing the fishing industry with a

blanket authorization to dramatically increase killing and wounding pinnipeds and sea otters. We strongly oppose any efforts to lift the existing prohibition on intentional shooting of marine mammals.

D. "Information Needs"

The Ocean Conservancy supports NMFS' recommendations for additional research and the research programs outlined in the Report. However, The Ocean Conservancy does not support the direct lethal collection of pinnipeds for analysis of stomach contents given that non-lethal methods exist to achieve the same objective.

IV. THE OCEAN CONSERVANCY'S VIEWS ON MANAGEMENT AND RECOVERY EFFORTS FOR THE SOUTHERN SEA OTTER

A. Background

1. The Translocation Law

Scientists and managers have been concerned for some time that this already threatened population could be wiped out as a result of a single large oil spill that would likely drift across the entire extent of the sea otter's range. In December 1980, the Marine Mammal Commission recommended to FWS that the agency implement a zonal management strategy to establish one or more sea otter colonies outside the existing southern sea otter range, which would ultimately result in a larger population size and a more continuous distribution of animals throughout the range.

In 1986, Congress passed the Translocation Law to authorize the development and implementation of a program to establish at least one sea otter colony outside the existing sea otter range in California. The Translocation Law authorized FWS to move a group of southern sea otters from central California to San Nicolas Island in the Santa Barbara Channel--the translocation zone. FWS believed that this area would be far enough away from the parent population to prevent animals moving back to that population, while also providing sufficient space to allow recovery of the species and protect it from an oil spill off the central coast of California.

At the same time, the southern California shellfish fishery expanded to include sea urchins as well as abalone. To protect commercial and recreational shellfish fisheries that had developed in the absence of otters, otter-free zones or management zones were developed to prevent sea otters from recolonizing areas where substantial shellfish fisheries existed.

In the management (otter-free) zone surrounding the translocation zone, sea otters would be excluded and only accorded the status of species that have been proposed for listing ("candidate species") under the ESA. Under the Translocation Law, sea otters found in the management zone must be removed and relocated into either the translocation zone or to the parent population by non-lethal means. In addition, the law provides that incidental takes of sea otters by non-lethal means in the management zone do not violate either the ESA or the MMPA. The capture and relocation of the sea otters found in the management zone was designed to contain the experimental translocated population, minimize conflicts between sea otters and commercial and recreational fisheries, and protect the otters because protection measures within the management zone are less stringent. Finally, the law specifically acknowledges that members of the parent population may be found in the management zone and requires their removal to maintain that zone free of otters.

2. Implementation of the Translocation Law

The overall goal was to ensure that 70 sea otters would remain on San Nicolas Island and form the core nucleus of breeding sea otters. Within the 1997 to 2002 time frame, the San Nicolas population was expected to reach its carrying capacity of about 500 animals.

Between 1987 and 1990, 252 sea otters were captured from the central California coast for translocation to San Nicolas Island, but only 140 were actually released. These otters did not fare well. Some returned to the coast, primarily back to their original range of southern sea otters, but the fate of most is unknown, despite the fact that all were tagged. Some of these otters may have lost their marking tags while returning to the mainland, while others probably died. At least seven of the 140 took up residency at the island, and the population was estimated to be 14 to 17 in 1998. Since 1990, the population at San Nicolas Island has not change significantly, numbering between 6 to 23 animals.

3. Failure of the Translocation

It is FWS' responsibility to keep the management zone free of sea otters. Between 1987 and 1994, twenty independent sea otters (10 male and 10 female) and four dependent pups have been captured in the management zone and released in the northern portion of the mainland population.

The containment effort, which includes monitoring, capture, and relocation of the sea otters, proved expensive and largely unsuccessful. Support for the program has waned in recent years. In 1990, the California Fish and Game Commission voted to cease supporting the project, and subsequently, the California Coastal Commission asked FWS to stop the project. In 1993, four sea otters died within a two-week period, shortly after release into the parent population. As a result, relocation/containment efforts were put on hold.

FWS had anticipated that approximately 5 percent of the animals captured and relocated could die from associated stress, but the mortality rate in 1993 alone was approximately 16 percent. These deaths called into question whether the relocation/containment methods were being conducted by non-lethal means. Since 1993, the FWS has not removed any otters from the management zone. FWS data indicated that the numbers of sea otters at San Nicolas Island were continuing to decline, and the translocation program should be evaluated.

During the past few years, a number of southern sea otters have entered the management zone. In March 1998, 65 sea otters were found in and near Cojo Anchorage. By April, the number of otters grew to 101, mostly male sea otters. From January through February 1999, the number of sea otters around Gaviota Pier to Cojo Cove (areas within the management zone) increased from 50 to 152 animals. The possibility that this many sea otters may inhabit the management zone prompted FWS to reevaluate the management plan.

The increase in the number of otters in the management zone raised concerns within the fishing industry that the animals may have devastating effects on shellfish fisheries in the management zone. On the other hand, some scientists noted that, given the recent data indicating that the population has declined by 9% since 1995, the range expansion was likely not due to an increasing population, but may be a population in search of new or additional prey, or a population that may be moving due to limited prey resources in some areas of its range. The Recovery Team noted that the capture and relocation of a large number of sea otters could result in the deaths of animals, and disrupt the existing social structure of resident groups, increase competition for resources, and very possibly exacerbate the observed population decline.

B. FWS Actions

Between 1999 and 2000, FWS completed a Biological Opinion (BO) under the ESA and a Draft Evaluation of the Southern Sea Otter Translocation Program, in which FWS proposed to designate the translocation a failure. In addition, during the summer of 2000, the FWS published a notice of intent and held scoping meetings to prepare a supplemental Environmental Impact Statement (EIS) that will reevaluate the current translocation program for southern sea otters and analyze a number of sea otter management alternatives.

1. FWS' Current Position on Containment/Translocation

In completing the BO, the FWS determined that moving the animals out of the management zone would jeopardize the species, in violation of Section 7 of the ESA. This conclusion was reached because:

· "Reversal of the southern sea otter's population decline is essential to its survival and recovery. Continuation of the containment program will result in the capture, transport, and release of large numbers of southern sea otters from the management zone into the parent population. These actions may result in direct deaths of individuals and disrupt social behavior in the parent population to the degree that those affected individuals will have reduced potential for survival and reproduction. These effects will exacerbate the recent decline of the southern sea otter population."

· "Expansion of the southern sea otter's distribution is essential to its survival and recovery. Continuation of the containment program will result in the exclusion of southern sea otters from the area south of Point Conception. This effect will perpetuate the species' artificially restricted range and its vulnerability to the adverse effects of oil spills, disease, and stochastic events."

The Ocean Conservancy concurs with the FWS' findings, and fully supports the jeopardy analysis in the BO.

2. The Ocean Conservancy's Position on Containment and Translocation

The Ocean Conservancy recognizes that the decision by FWS to declare the translocation a failure will have ecological effects for southern sea otters and their habitat, and economic effects on commercial shellfish fisheries and their future management requirements. However, we believe that moving any animals out of the management zone would likely result in mortality that would further impede the recovery of this species, in contravention of the ESA. Moreover, we assert that the sea otter population must be allowed to expand its range, to promote recovery, avoid nonspecific resource competition, and decrease the potential for disease. **Therefore, The Ocean Conservancy supports declaring the translocation a failure, eliminating the management zone, allowing the population at San Nicolas Island to remain, and allowing sea otters to naturally expand their range to allow for the recovery of the species under the ESA and to achieve its Optimum Sustainable Population under the MMPA. We urge Congress not to amend the MMPA to address this issue and, instead, ask Congress to direct FWS to move forward expeditiously to complete its EIS on the translocation.**

C. Litigation

In April 2000, a segment of the southern California commercial shellfish fishery filed a lawsuit seeking to force FWS to capture and remove sea otters from the management zone. The plaintiffs took this action, even though they were engaged in discussions with the environmental community in an effort to find consensus

on issues of concern. The Ocean Conservancy, Defenders of Wildlife and Friends of the Sea Otter successfully intervened in this case on the side of FWS, despite opposition by the plaintiff fishing groups. The Humane Society of the United States and the Animal Protection Institute received amicus curiae status.

The fishing groups who brought this case did not represent the views of many components of the California fishing community, which favored instead an approach of trying to achieve consensus through negotiations. The existence of the lawsuit brought the discussions between the fishing industry and environmental community to a halt.

Without ever pressing their case, the plaintiff fishing organizations dropped this case in July, 2001. They dismissed the case without obtaining any relief or even submitting pleadings. Now that the lawsuit has been dropped, efforts are underway to explore the possibility of resuming the discussions.

D. The Next Chapter--Looking for Common Ground

The Ocean Conservancy supports public policies that foster healthy marine ecosystems and the recovery of threatened species, but values doing so with sensitivity to the needs of fishing communities. We believe that existing law, including the ESA and the MMPA, provides appropriate mechanisms for conserving sea otters while addressing the concerns of fishing communities.

In October 1999, members of the fishing industry and conservation community met to explore areas of common interest and identify actions to recover southern sea otters while at the same time ensuring the sustainability of commercial shellfish fisheries. At their first meeting group established as an objective: ***Maintain well-managed and abundant fisheries, healthy marine ecosystems, and recover the southern sea otter population.***

To achieve this objective, the group framed an action plan that included three broad-based goals: 1) pollution prevention; 2) southern sea otter and ecosystem health assessment and maintenance; and 3) habitat enhancement.

In March 2000, the group devised tasks within the action plan to achieve these goals and objectives. They are:

1) **Support State Funding for Ecosystem Health Monitoring:** More than five years of data indicate that nearly 40% of the dead sea otters examined had an infection at the time of death. We must determine sea otter infection rates, how and to what degree infections are communicable, and the incidence and impact of environmental contaminants, toxins and parasites on sea otters and their critical habitat. The marine ecosystem health monitoring program should be a jointly funded cooperative research effort to collect and coordinate ecological, biomedical, chemical and physical oceanographic and atmospheric information to identify trends and events affecting otter and shellfish populations.

2) **Fishing Gear Modifications:** The commercial fishing industry can play a leadership role in efforts to avoid sea otter entrapment in fishing gear by establishing gear advisory groups. The gear advisory groups could work to mitigate potential entrapment in live fish traps, including crab and lobster traps, which may be used within sea otter habitat.

3) **Sea Otter Health Assessment:** A multi-agency, public/private effort is needed to assess the health of wild California sea otters. We propose using the model that NMFS has successfully implemented to obtain

valuable information on the health status of the Hawaiian Monk Seal population.

4) **Jump Start the Sea Otter Recovery Plan:** As FWS nears completion of an updated Southern Sea Otter Recovery Plan, we should work jointly to secure federal, state, and private funding for its implementation.

5) **Enhance Shellfish Recruitment and Harvest within and beyond the Sea Otter Range:** If adequate research and development funds were available, fishermen could develop and test devices to enhance protected habitat for commercial shellfish harvesting. We should work to engage scientists, engineers, and funders in developing pilot projects for creation of artificial shellfish refugia and cryptic habitat.

6) **Map Fisheries and Key Facilities Within Current and Potential Otter Range:** Managers may be able to effectively and cooperatively develop adaptive conservation and management strategies allowing for the co-existence of fisheries and sea otters, if information systems exist to easily identify fisheries, activities, and facilities that may affect or be affected by current or future overlap of the sea otter range expansion and fishing grounds.

7) **Adaptive Management Strategies to Address Otter Range Expansion:** To improve conservation and management, scientists must better understand and develop predictive models to assess the impact of sea otter movements on fisheries and the ecosystem. This will require additional research into the dynamics of sea otter range expansion and correlations to overall indicators of ecosystem health, pollution or disease conditions and prey availability.

8) **Identify Mitigation Measures for Fisheries That Could Be Affected by Sea Otter Range Expansion:** Although no one can predict to what degree sea otters may continue expanding their range, scientists, fishermen, environmentalists, and managers should work toward identifying possible measures to reduce potential adverse impacts on certain fisheries and mariculture projects. The mitigation measures should help reduce fishery impacts due to area or species closures, disease or pollution and should take into consideration the social and economic consequences of changes to the fisheries, marine habitat, and sea otter recovery brought about by the movement of sea otters.

Both the fishing industry and the conservation community have expressed an interest in resuming these discussions that were stalled due to the litigation. The Ocean Conservancy believes that these action items provide a possible basis to continue these discussions. We will work to promote both the recovery of the southern sea otter and its co-existence with healthy fisheries. We request that Congress refrain from amending the MMPA, but instead support this effort to find common ground and instruct FWS to actively participate in these discussions. We anticipate that, where we reach consensus on actions that will benefit both sea otters and fisheries, we will request that Congress provide the necessary funding.

V. OTHER MARINE MAMMAL PROTECTION ACT ISSUES

The Ocean Conservancy continues to play a key role in the implementation of the MMPA. We currently serve on all of the take reduction teams established by NMFS under the Act and provided our views on their implementation to the Committee at its hearing on the MMPA on April 6, 2000. We have witnessed significant progress toward the MMPA's goal of recovering marine mammal populations. The MMPA has been and remains an international example for effective conservation and protection of marine mammals. In our opinion, the problems with the Act stem not from the MMPA itself, but from ineffective implementation and a chronic lack of resources.

Consequently, The Ocean Conservancy believes that, at most, only minor, non-controversial amendments to fine-tune the Act are needed when the Act is reauthorized. Our attached recommendations provide such changes. Specifically, The Ocean Conservancy's goals for a reauthorization are to: (1) preserve gains that were made in 1994 (e.g., Sections 109 and 120); (2) prevent weakening of the definition of harassment; (3) further define the zero mortality rate goal; (4) strengthen the MMPA penalty and enforcement provisions to effectively deter violations of the MMPA; (5) improve the implementation of the take reduction team process; (6) protect and strengthen the Act's co-management provisions to allow co-management of non-depleted species/stocks; (7) increase authorized funding levels for the Act overall, and specifically the authorized funding levels for the health and stranding response provisions, (8) expand authority under Section 118 to allow the Secretary to authorize a take reduction team for fishery interactions involving prey related issues and other human-related threats (e.g. ship strikes); and (9) devise and implement a research plan to develop non-lethal deterrents to prevent marine mammals from interacting with fishers gear and catch.

In conclusion, the MMPA has many of the tools it needs to protect marine mammals. Its implementation could be greatly improved if appropriators would fund the statute at currently authorized levels. Additionally, NMFS and FWS should work with the environmental community and the fishing industry to undertake needed research and improve the MMPA's implementation. At this juncture, these actions may actually do more to conserve marine mammals than additional amendments to the Act.

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[1] Potential Biological Removal (PBR) is defined as the maximum number of individuals that can be removed annually from a population, by other than natural causes, and allow that population to reach or maintain its optimum sustainable population (OSP).