



June 10, 2004

VIA EMAIL AND FIRST CLASS MAIL

Douglas Burn
U.S. Fish and Wildlife Service
Marine Mammals Management Office
1011 East Tudor Road
Anchorage, Alaska 99503

Re: Advance Notice of Proposed Rulemaking to Designate the Southwest Alaska Distinct Population Segment of the Northern Sea Otter (*Enhydra lutris kenyoni*) as Threatened Under the ESA

Dear Mr. Burn,

On behalf of Defenders of Wildlife (“Defenders”) and The Humane Society of the United States (“The HSUS”) and our nine million combined members and supporters, we appreciate the opportunity to comment on the U.S. Fish and Wildlife Service’s (“FWS”) Advance Notice of Proposed Rulemaking (“ANPR”) to designate the southwest Alaska Distinct Population Segment (“DPS”) of the northern sea otter (*Enhydra lutris nereis*) as threatened under the Endangered Species Act (“ESA”). 69 Fed. Reg. 6600 (February 11, 2004).

Defenders, established in 1947, is a national non-profit organization dedicated to the protection of all native wild animals and plants in their natural communities. Defenders focuses its programs on what scientists consider two of the most serious environmental threats to our planet: the accelerating rate of species extinction and associated loss of biological diversity, and habitat alteration and destruction. Long known for its leadership role on endangered species issues, Defenders also advocates new approaches to wildlife conservation that will help prevent species from becoming endangered. Our programs encourage protection of entire ecosystems and interconnected habitats while protecting predators that serve as indicator species for ecosystem health.

The HSUS is the nation's largest animal protection organization and has an extensive wildlife protection program. HSUS promotes the humane treatment and protection of marine mammals through several program initiatives and has actively advocated against practices that injure, harass, or abuse marine mammals. The organization organizes political initiatives to achieve its goals and aims of increasing respect for the intrinsic value of animals and their habitat.

Although northern sea otters in Alaska were found to have recovered to their

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pre-exploitation population levels by the mid-1980s, a 1992 survey by the FWS found that otters had declined more than 50 percent in the waters surrounding Rat, Delarof and western Andreanof Islands. The survey was conducted again in 2000 and found that sea otters in the Aleutians had declined by 70 percent from 1992 to 2000. In 2000 and 2001, additional aerial surveys were conducted for the northern and southern Alaska Peninsula and the Kodiak archipelago. When these data were compared to data from previous surveys in the late 1980s, declines of 93 to 94 percent were documented for the South Alaska Peninsula and declines of 27 to 49 percent were documented for the North Alaska Peninsula. In the Kodiak Archipelago, a 40 percent decline since 1994 has occurred.

Like many in the scientific and conservation communities, we were disturbed by the news of these significant declines. In 2001, Defenders launched an educational outreach campaign to educate people about the plight of sea otters in southwest Alaska. The campaign focused on the keystone nature of this species and the multiple benefits to Alaska's nearshore marine environment that are derived from its abundance. Defenders' video, poster and brochure described how the species' recent drastic, widespread declines could negatively impact important nursery grounds of commercial fish species and how they are indicative of much larger scale disturbances occurring throughout the Bering Sea. We believe the education campaign has been effective in generating support for this listing of this portion of the population under the ESA and look forward to assisting the FWS in implementing the recovery plan.

Background

In the mid-1980s, sea otter experts believed that the majority of the world's sea otters lived in the nearshore waters of southwest Alaska and that half of the world's population of sea otters lived in the Aleutian archipelago at that time. The onset of the decline of sea otters in southwest Alaska is believed to have begun in the late 1980s to the early 1990s. Estimates of pre-decline populations for the Aleutian archipelago ranges from 55,000 to 74,000 sea otters and the entire DPS ranged from 94,000 to 129,000. The current estimate for the DPS is 36,000, reflecting the most recent survey data for the Aleutian archipelago (3,311 animals: Jim Estes , personal communication). These data reflect a 94 to 95.5 percent decline in the Aleutian population since the late 1980s and a 62 to 72 percent decline in the entire DPS since that time.

Based on the results of an April 2000 sea otter survey in the Aleutian Islands, northern sea otters in the Aleutians were added to the list of candidate species meriting protection under the ESA (65 Fed. Reg. 67343-67345, November 9, 2000). That notice indicated that the reason for the listing was the precipitous decline in sea otter numbers in the Aleutian Archipelago. On October 25, 2000, FWS received a petition from the Center for Biological Diversity requesting that the Aleutian population of the northern sea otter be listed as "endangered" under the ESA.

On January 11, 2002, the petition from Sea Otter Defense Institute (SODI) requested an emergency and permanent listing of the DPS as "endangered" under the ESA. Based on additional sea otter surveys along the Alaska Peninsula and Kodiak archipelago in 2000 and 2001, and the identification of multiple stocks of sea otters in Alaska (see Gorbics and Bodkin,

2001), the candidate species designation was expanded on June 13, 2002 (67 Fed. Reg. 40657) to include the geographic range of the southwest Alaska stock of the northern sea otter. Through analysis of phylogeny, phenology and the limited genetic exchange between the other populations in Alaska, the research concluded that it was justified to designate the southwest stock as a DPS.

Support for Listing

After careful review of the population data, scientific studies, the SODI listing petition, and the criteria used to list species under the ESA, we conclude that an “endangered,” rather than a “threatened” listing is appropriate.¹ Sea otter experts indicate that if the current declining trend continues, sea otters are in danger of disappearing across all or much of the Aleutian archipelago over the next decade. Research documents that the current sea otter population in the Aleutians is approximately 3 percent of the estimated carrying capacity for this area (Jim Estes, personal communication).

As outlined in the SODI petition:

“Part 424 of the regulations of the Departments of the Interior and Commerce sets forth as part of its purpose “to interpret and implement those portions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), that pertain to the listing of species....” 50 C.F.R. § 424.01(b).

Section 424.02 defines certain relevant terms, including “endangered” and “threatened” species. It defines an endangered species as “a species that is in danger of extinction throughout all or a significant portion of its range,” *id.* § 424.02(e), and a threatened species as “any species that is likely to become an endangered species within the foreseeable future.” *Id.* § 424.02(m). The unexplained and precipitous declines in the southwestern stock of northern sea otters, which have led to the present low levels and are described elsewhere in this petition, are such that the definition of “endangered” is unequivocally met.

Section 424.11(c) states that “[a] species shall be listed if the Secretary determines...that the species is endangered or threatened because of any one or a combination of the following factors:

- 1) The present or threatened destruction, modification, or curtailment of its habitat range;

¹ Population data and scientific studies are derived from the August 2002 Alaskan sea otter stock assessment reports, USFWS factsheets and reports, Simenstad and Estes (Alaska Geographic, 1980), Calkins and Schneider (Alaska Dept. of Fish and Game Bulletin, 1985), Gelatt et al. (Journal of Wildlife Management, 1996), Evans et al. (U.S. Fish and Wildlife Service Tech. Report, 1997), Estes et al. (Science, 1998), Hatfield et al. (Science, 1998), Bodkin et al. (Marine Mammal Science, 2000), Monson et al. (Oikos, 2000), Gorbics and Bodkin (Marine Mammal Science, 2001), Burn et al. (Northwestern Naturalist, 2003), Doroff et al. (Journal of Mammalogy, 2003)

- 2) Over utilization for commercial, recreational, scientific, or educational purposes;
- 3) Disease or predation;
- 4) The inadequacy of existing regulatory mechanisms; or
- 5) Other natural or manmade factors affecting its continued existence.”

While it is only necessary that one factor pertain to warrant a listing, four of the five factors apply to the southwestern stock of northern sea otters. With respect to factor 1, sea otter numbers have been substantially reduced, most likely as a result of habitat modification which has led to sea otters becoming prey to killer whales as the latter's more usual prey species, Steller sea lions and harbor seals, have declined; with respect to factor 3, while no evidence has been found to indicate that disease has played and is playing a role in the decline as discussed above and elsewhere in the petition, it seems likely that predation is influencing the decline; with respect to factor 4, as discussed below, the existing regulatory mechanisms are inadequate to determine the cause or causes of the decline and stop and reverse it; and with respect to factor 5, factors which are neither known nor understood, but are clearly “other natural or manmade factors,” have contributed to the dramatic decline of the southwestern stock of the northern sea otter and are thereby “affecting its continued existence.”

With respect to factors #2 and #4 under Section 424.11(c), we acknowledge that native subsistence take is not responsible for the declines in the DPS, however, we believe it is not prudent to allow for the current level of take of nearly 100 sea otters per year from the DPS. The continued magnitude of the declines and the uncertainty in the geographic extent of the declines should force FWS to err on the side of caution. This should be seriously considered by FWS when proceeding with any restrictions that may be imposed on native subsistence take. So, once the listing is completed, we urge FWS to begin a separate process to evaluate the possible need for restrictions.

In addition to the arguments for an “endangered” listing presented in the SODI petition, some biologists and conservationists argue that the “endangered” listing for the Steller sea lion, whose population trends are similar to those documented with the sea otter DPS, should apply to this imperiled sea otter population.

Critical Habitat Designation

The ANPR states the FWS does not believe they have “information sufficient to perform the required analysis of the impacts of the designation of critical habitat.” The ANPR further states that, “at this time the identification of specific physical and biological features and specific areas for consideration as critical habitat is complicated by uncertainty as to the extent to which habitat may or may not be a limiting factor for this DPS, resulting in uncertainty as to which specific areas might be essential to the conservation of the species and thus meet a key aspect of the definition of critical habitat.”

In a letter submitted by Dr. James A. Estes' to FWS dated March 11, 2004, he says the following regarding critical habitat designation:

“The critical habitat issue will likely prove a very difficult one for sea otters in southwest Alaska. At present, there is no evidence that the habitat actually occupied by sea otters (the nearshore coastal zone) has in any way been degraded to the detriment of sea otters, or that the decline is related in any way to that specific habitat. Thus, designating their entire physical habitat as critical and doing everything humanly and even inhumanly possibly to restore this habitat may well do not one bit of good for the otters. The habitat problem is much more likely in the open sea in environments where otters don't actually live—this is where the real critical habitat for sea otters is, in a strange but very real sort of way. Thus, remediation of the sea otter problem almost certainly will require management actions directed toward offshore oceanic ecosystems, not the nearshore zone where otters actually live. There is a growing realization in ecology that differing kinds of ecosystems are often linked together, sometimes on quite large spatial scales.”

Because the prevailing theory for the sea otter declines by Dr. Estes and colleagues has a much broader scope (fisheries, regime shifts and predation by orcas) than simply the condition of the nearshore ecosystem, his point about critical habitat is duly noted. However, Section 4(a)(3) of the Endangered Species Act, as amended, (16 U.S.C. § 1533(a)(3)), states that the Secretary shall designate critical habitat within one year of listing. Given this legal mandate, we urge FWS upon completion of the listing to develop a recovery plan and that critical habitat be examined immediately in that context.

Concluding Comments

The decline in sea otters throughout southwest Alaska over the past 20 years (a 95.5 percent decline throughout the Aleutian archipelago and a 62 to 72 percent decline in the entire DPS) is cause for serious concern. Sea otters are a critical nearshore species that serve important roles as keystone and indicator species. Alaska's magnificent and diverse coastal ecosystems benefit by the abundance of sea otters. Reversing the decline in the DPS will ultimately restore a healthy balance of kelp, fish, and invertebrates.

It is our assessment that four out of five factors used in the ESA listing criteria have been satisfied to warrant an “endangered” listing. The listing of the DPS under the ESA is intended, among other things, to precipitate an immediate establishment of a Recovery Team and a Recovery Plan for the population. We urge FWS to expeditiously move forward with the development of a recovery plan immediately following the completion of the listing. The results from listing this DPS will be the identification and initiation of steps to further investigate the cause(s) of the decline, location of funding resources for these research needs, and the development of time-lines for the completion of that research, which would in turn lead to actions to stop and reverse the decline.

We would like to incorporate by reference the comments submitted by Dr. Estes to FWS dated March 11, 2004 and the petition submitted by SODI on January 11, 2002.

Mr. Douglas Burn

June 10, 2004

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We appreciate this opportunity to comment on this long overdue ANPR. Please feel free to contact us should you need further clarification or have any questions.

Sincerely,

A handwritten signature in black ink that reads "Jim Curland". The signature is written in a cursive style with a large, looped initial "J".

Jim Curland, Marine Program Associate

Cc:

David Cottingham, Tim Ragen, **Marine Mammal Commission**

Jim Estes, **U.S. Geological Survey, Biological Resources Division**

Naomi Rose, Toni Frohoff, **The Humane Society of the United States**

Cindy Lowry, **Sea Otter Defense Initiative, a project of Earth Island Institute**