

**DEFENDERS OF WILDLIFE • FRIENDS OF THE SEA OTTER • THE
HUMANE SOCIETY OF THE U.S. • SEA OTTER DEFENSE
INITIATIVE A PROJECT OF EARTH ISLAND INSTITUTE/IMMP**

October 11, 2005

VIA FIRST CLASS MAIL / ELECTRONIC MAIL

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

**Re: Special Rule for the Southwest Alaska Distinct Population Segment of
the Northern Sea Otter 70 Fed. Reg. 46387 (Aug. 9, 2005)**

Dear Mr. Burn,

Defenders of Wildlife, Friends of the Sea Otter, The Humane Society of the United States, and Sea Otter Defense Initiative a project of Earth Island Institute/IMMP respectfully submit the following comments on the U.S. Fish and Wildlife Service's ("FWS" or "Service") Proposed Special Rule for the Southwest Alaska Distinct Population Segment of the Northern Sea Otter, *Enhydra lutris*, allowing for the limited noncommercial import and export of items that qualify as authentic native articles of handicrafts and clothing derived from sea otter parts. 70 Fed. Reg. 46387 (Aug. 9, 2005) ("Proposed Rule"). This letter addresses several important issues, including: 1) that FWS has premised the Proposed Rule on an impermissibly broad reading of the exception to the "take" prohibitions granted to Alaskan Natives in section 10 of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1539(e); 2) FWS has not adequately explained how authorizing this otherwise unlawful "take" of sea otters will aid in the conservation of this critically imperiled population; and 3) FWS has failed to support its determination that the authorized take will not harm the population.

BACKGROUND

Sea otters inhabit the shores of the North Pacific and are a critical nearshore species that serve as keystone and indicator species for the ecosystem. The southwestern stock inhabits the Alaska Peninsula and Bristol Bay coasts, as well as the Aleutian, Barren, Kodiak, and Pribilof Islands. See FWS, Stock Assessment, Sea Otter: Southwest Alaska Stock, p.1 (Aug. 20, 2002) ("Stock Assessment"). On August 9, 2005, FWS announced that this stock – the Southwest Alaska Distinct Population Segment (DPS) of the northern sea otter – was to be listed as a "threatened" population under the Endangered Species Act. See 70 Fed. Reg. 46366 (Aug. 9, 2005).

This designation was prompted by the population's precipitous decline over the past two decades; a decline which, if it remains unchecked, may result in the extirpation of sea otters across all or much of the Aleutian archipelago over the next decade. *See* 70 Fed. Reg. 46366, 46373. After being driven to near extinction by commercial hunting in the late nineteenth and early twentieth centuries, the sea otter population rebounded significantly by the mid-1980, reaching a total population in the southwestern DPS of between 94,000 to 129,000 individuals. Unfortunately, since that time the population has plummeted and now is estimated at 36,000 individuals – a 62 to 72 percent decline over the past twenty years. In the Aleutian Islands, the sea otter population had successfully rebounded to an estimated 55,100 to 73,700 individuals in the 1980s, but by 1992, the total population of otters in this area had plummeted to just over eight thousand. In 2000, the population had fallen further to as few as 2,442 animals- a decline of 70 percent from 1992 to 2000, and a decline of almost 95 percent since the late 1980s.

Generally, the sea otter is protected from hunting. The Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*, for example, while generally prohibiting the "taking" of marine mammals, provides a specific exemption for Native Alaskans from this prohibition to allow for the hunting of marine mammals, if carried out for a "subsistence purpose[] or [] for purposes of creating and selling authentic native articles of handicrafts or clothing."¹ *Id.* § 1371(b). Between 1996 and 2004, the mean annual take by Alaska natives of seas otters under this exemption from the southwestern stock was over a hundred animals and the total annual take of sea otters in Alaska was over seven hundred animals. *See* FWS, Sea Tagging Statistics by Sea Otter Stock (Aug. 1, 2005) (reporting the total take of sea otters from the Southwest stock in 2005 to date at fifty-nine individuals).

Once the DPS was listed as threatened, the ESA prohibited the "take" o sea otters from this population,² *see* 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31, but section 10(e) of the Act states that this prohibition "shall not apply to . . . any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or [] any non-native permanent resident of an Alaskan native village [] if such take is primarily for subsistence purposes." *Id.* § 1539(e). Under this exemption, "non-edible byproducts" of animals taken *for subsistence purposes* can be transported, exchanged, or sold in interstate commerce when made into authentic Native articles of handicraft and clothing. *Id.*

Notably, the exemption granted by the ESA is far more limited then under the MMPA, and thus, some activities that would justify the take of individuals under the MMPA would not qualify for the exemption under the ESA. One such activity is the export and import of authentic native articles of handicrafts. Nonetheless, with the Proposed Rule, FWS proposes to "allow for the limited, noncommercial import and export of items that qualify as authentic native articles of handicrafts and clothing." *Id.* at

¹ The MMPA defines "take" to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13).

² The ESA, in turn, defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

46387 ("The proposed rule addresses only activities relating to cultural exchange and limited types of travel, and to the creation and shipment of authentic native handicrafts and clothing that are currently allowed under section 101 of the MMPA that are not already clearly exempted under the Act."). *Id.* at 46388.

DISCUSSION

At the outset, we wish to acknowledge the important role that Native Alaskan communities play in the conservation of the sea otter. We recognize the efforts of The Alaska Sea Otter and Steller Sea Lion Commission (TASSC) and support their cooperative efforts with the Service and wish to recognize the positive steps that they have taken toward sea otter conservation and management. However, the proposed rule seeks to eliminate the restrictions on take under the ESA by allowing the more permissive exemption of the MMPA to prevail. At this time, given the grave situation confronting the southwest Alaska DPS of the northern sea otter, and the uncertainty as to the cumulative effect of various factors behind the recent precipitous population decline, it is not prudent to allow the hunting of otters from this DPS beyond subsistence needs unless a quantifiable conservation benefit that will offset this direct take is demonstrated. Here, the Service must err on the side of caution.

The Proposed Rule Independently Permits the Take of Sea Otters

The Proposed rule is premised on a misapplication of the exemption afforded Alaska Natives under the ESA. Under the plain language of the ESA's exemption for Alaska natives, to be lawful the take of a listed species must be to meet a *primary subsistence purpose*. See 16 U.S.C. § 1539(e). FWS's implementing regulations define "subsistence" as "the use of endangered or threatened wildlife for food, clothing, shelter, heating, transportation and other uses necessary to maintain the life of the taker of the wildlife, or those who depend upon the taker to provide them with such subsistence, and includes selling any edible portions of such wildlife in native villages and towns in Alaska for native consumption within native villages and towns." 50 C.F.R. § 17.3. Section 10(e) goes on to state that "Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing."³ 16 U.S.C. § 1539(e); *see also* 50 C.F.R. § 17.5(a) (Service's administrative regulations require that, while *byproducts* of the taken animals may be used in specified ways, allowed take by Alaska natives must be "*primarily* for subsistence purposes.") Thus, the requirement that the individual be taken for a "subsistence purpose" is a condition precedent to the subsequent authorization that the

³ "Authentic native articles of handicrafts and clothing" is currently defined by FWS as "items made by an Indian, Aleut, or Eskimo which . . . are composed wholly or in some significant respect of natural materials, and [] are significantly altered from their natural form and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts . . . Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting." 50 C.F.R. § 17.3.

by-products of the individuals taken can be made into and sold as authentic handicrafts.⁴ Simply put, under this scheme, the taking of a species for the sole purpose of creating authentic native articles of handicrafts and clothing is not exempted.

The preamble to the Proposed Rule, however, repeatedly states that the handicrafts at issue in this rule will be "derived *from sea otters legally taken for subsistence purposes* by Alaska Natives from the listed population." 70 Fed. Reg. at 46387 (emphasis added). The FWS goes on to state more specifically that "[t]he taking of northern sea otters and the creation, shipment, and interstate sale of authentic native handicrafts and clothing derived from such *taking are already exempted under the Act.*" *Id.* at 46389 (emphasis added).⁵

Here, sea otters are not being taken for a subsistence purpose; rather, the sea otters are being taken for the sole purpose of the creation of handicrafts. Indeed, it is notable that FWS does not even attempt to demonstrate what the "subsistence purpose" might be for which these sea otters would be taken. This regulation, therefore would allow an entirely new category of Native take.

By permitting, "any activity authorized or exempted under the Marine Mammal Protection Act with a part or product of a southwest Alaska DPS northern sea otter,"⁶ 70 Fed. Reg. at 46,392 (proposed 50 C.F.R. 17.40(p)(3)), FWS, without saying as much – and indeed, apparently attempting to hide from the fact – through the Proposed Rule, is

⁴ The Act's use of the term "non-edible byproducts" in establishing what parts of the animal taken for a subsistence purpose may be turned into and sold as handicrafts supports this conclusion. The term byproduct is generally defined as "something produced [] in addition to the principal product." *See Webster's New Collegiate Dictionary* (1981). Thus, the exemption allowing the production and sale of handicrafts – here, the 'additional' product – will only vest when the taking of the animal has met some initial subsistence purpose – the principle product.

⁵ *See also* 70 Fed. Reg. at 43688 ("this *proposed rule would not regulate the taking or importation of northern sea otters nor the sale in interstate commerce of authentic native articles of handicrafts and clothing by qualifying Alaska Natives; these have already been exempted by statute.*") (emphasis added).

⁶ The preamble to the proposed rule states that the exceptions for Native Alaskans under the ESA "are similar to the exemptions provided Alaska Natives under the MMPA." *See* 70 Fed. Reg. at 46,388. While these provisions are indeed "similar," they are by no means identical. Indeed, the difference in the language of the ESA and MMPA highlights the limited scope of the ESA exemption. *Compare* 16 U.S.C. § 1371(6)(b)(1)-(2) (allowing for the take of marine mammals by Alaska natives for both "subsistence purposes" and "for purposes of creating and selling authentic native articles of handicrafts and clothing"), *with Id.* § 1539(e)(1)(B) (waiving the taking provision only in instances where the individual of a listed species is taken for "subsistence purposes."). Clearly, the MMPA allows for the take of an individual for the sole purpose of creating a handicraft, while the ESA does not. This is an important distinction as it evidences Congress' intent to limit the scope of allowable take of threatened and endangered species. For FWS to conflate the two provisions, implying that they are identical, is impermissible.

attempting to create a clearly unlawful regulatory exemption for the take of sea otters – namely, hunting for the sole purpose of creating a handcraft item.

While, as discussed below, FWS may possess the authority to establish specific exemptions to the take prohibition of the Act for threatened species, such as the sea otter, rather than explicitly employing this authority – and making the required showing that the killing of members of this highly imperiled population must be allowed, so that the population as a whole might be conserved – here, FWS attempts to claim that the "take" of these individuals is already exempted. This simply is not the case. Instead, through the Proposed Rule, FWS is allowing for the take of sea otters that, absent this rule, would be illegal.

The Proposed Regulations Will Not Enhance the Conservation of the Species

Pursuant to Section 4(d) of the ESA, FWS may establish an exemption to the take prohibition of the Act, but in order to do so FWS must unequivocally demonstrate that the regulation is "necessary and advisable to provide for the conservation" of the species.⁷ 16 U.S.C. § 1533(d). Indeed, because FWS is proposing to allow for the "take" of individuals for this critically imperiled species – rather than simply allowing for the non-commercial trade of handicrafts made from "legally" taken individuals, as the preamble to the Proposed Rule inaccurately suggests – it must first demonstrate that the waiver of this vital protection is necessary for the protection and recovery of the population. Here, FWS falls well short of this mandate.

The discretion of the Secretary to create special rules, pursuant to 4(d), is limited by the duty to conserve threatened species. *See Sierra Club v. Clark*, 755 F.2d 608, 612-613 (8th Cir. 1985) (The extent of the Secretary's discretion is limited by the requirement that the regulations must provide for the *conservation* of threatened species.). The court in *Sierra Club v. Clark* found that 4(d) rules allowing for the direct kill of threatened species must be for the ultimate biological good of the species.⁸ *Id.* at 612-613. Indeed, the intent and purpose of the ESA suggests that it was Congress' intent for agencies to use

⁷ The term "conserve" is defined by the ESA to mean "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. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking." 16 U.S.C. § 1532(3).

⁸ In *Clark*, the population of wolves in question was arguably straining the carrying capacity of its habitat, and the Service found that direct kills were advisable to protect the biologically strongest members of the species as population pressures could not otherwise be relieved. Here, that is clearly not the case. In fact, research has shown that the current sea otter population in the Aleutians is only an estimated 3 percent of the estimated carrying capacity for the area. (<http://www.defenders.org/wildlife/new/marine/otters/ak/ak34.pdf>).

the flexibility in section 4(d) only to tailor prohibitions to meet the threats faced by threatened species. The direct take of sea otters allowed under the Proposed Rule is wholly different from the type of sanctioned by the court in *Clark*, as it is not necessary for the benefit and survival of the species, and, in fact, serves no discernable conservation goal for the species.

Indeed, FWS has failed to establish that a valid "conservation" purpose exists that would support the expansion of Native take. The purported "conservation" justification for relaxing the take prohibition here is that the "proposed special rule would encourage cooperative management efforts between the Service and Alaska Natives by recognizing and providing for the cultural, social, and economic activities of Alaska Natives." 70 Fed. Reg. at 46389. Certainly, cooperation with Native Alaskans is a highly desirable goal, and one that should be vigorously pursued. It is not, however, a legitimate basis for opening up a new category of Native take. Here, however, FWS has offered no meaningful explanation as to how expanding the ESA statutory exemption, and therefore allowing a significantly greater take than otherwise would occur, can be considered an action that will promote recovery of this species. To the contrary, all available evidence suggests this expanded exemption would impede conservation.

FWS has thus failed to demonstrate how removing the prohibition against killing sea otters will further the efforts to recover the species. Defenders again stresses that it recognizes the commitment that native communities have to the conservation of the sea otter, and arguably, the preamble to the Proposed Rule provides examples of how some native communities contribute to the conservation of the sea otter, including "collect[ing] and contribut[ing] biological specimens from [] for biological analysis" and "conduct[ing] skiff surveys of sea otters in their local areas." 70 Fed. Reg. at 46387. What is lacking, however, is any discussion of how the minimal ancillary benefit derived from the limited information gathered from the activities noted above – which could be gained more efficiently through rigorous scientific research and presumably non-lethal means – outweighs the potential harm to the population from the direct take of individual sea otters.

The Service further attempts to justify the Proposed Rule by stating that "there is a benefit to this DPS, and northern sea otters throughout Alaska, to maintain and encourage involvement of the Alaska Native community in the conservation of sea otters." *Id.* But the Service does not demonstrate that this "involvement" would wane if this rule was not promulgated nor that it cannot be maintained through other means. Given, that, as FWS notes, Alaska Natives generally have an "interest in ensuring that northern sea otters stocks are conserved and managed for healthy populations throughout the range in coastal Alaska," *Id.* at 46388, presumably these groups would continue to cooperate with FWS in the conservation of the sea otter and take those steps necessary to ensure the species recovers. If this is not the case, FWS must make this showing in order to justify the Proposed Rule.

Other claims made by FWS, as to why this rule is necessary, similarly fail to provide adequate justification. For example, the Service contends that the Proposed Rule

will "support conservation of the DPS by discouraging excessive harvests." *Id.* at 46389. The FWS provides no support for this claim, and it appears counterintuitive that a group of people whom the Service suggests are integral to the conservation of the species, would, in the absence of this rule, begin to over-harvest the species simply because they could no longer legally take them. Similarly, FWS claims that this rule would "encourage[] self-regulation of the northern sea otter harvest by subsistence hunters in ways that meet the Service's goal for recovery of the DPS." *Id.* Again, if FWS is concerned that action is needed to prompt the native groups to regulate the level of take, it seems odd FWS would, instead of using its authority to implement regulations to limit the amount of take, simply allow the unfettered take of the species.

Furthermore, despite the stated limitation that the Proposed Rule is for the "noncommercial trade" of handicrafts between indigenous peoples, FWS repeatedly justifies the rule by demonstrating how it will protect the Alaska native's rights to profit economically from the authorized takes. *See, e.g., Id.* at 46388 ("Therefore we have developed this special rule to provide for the conservation of sea otters, while at the same time accommodating Alaska Natives' subsistence, cultural, and *economic interests.*") (emphasis added). As part of the justification for this rule, FWS notes that it received comments from Alaska Natives that this rule is needed to avoid "limiting Alaska Natives' ability to *sell* authentic native handicrafts to foreign visitors or tourists." *Id.* (emphasis added). This statement is troubling as the expressed purpose of this rule is to allow the non-commercial trade of handicrafts derived for sea otter parts. FWS must clarify the intent and scope of this rule, and if it is planning on allowing the commercial sale of these items it must explicitly say so, and provide justification as to how this exemption will provide for the conservation of the species.

Finally, maintaining species protection under the statutory requirements of the ESA does not preclude cooperation with Native communities. There are clear examples of such relationships that already exist. One of the most striking examples has been the cooperation between the United States government and Alaskan Eskimos, represented by the Alaska Eskimo Whaling Commission, for the bowhead whale. The Bowhead Whale is listed as an endangered species under the ESA, and limited subsistence harvest, set by quotas, is allowed for Native Alaskans. Given that, as the Service notes, Alaska Natives generally have an "interest in ensuring that northern sea otters stocks are conserved and managed for healthy populations throughout the range in coastal Alaska," *id.*, presumably these groups would continue to cooperate with the Service in the conservation of the sea otter and take those steps necessary to ensure the species recovers. If this is not the case, the Service must make this showing in order to justify the proposed rule.

FWS has Failed to Demonstrate that allowing the Take of Sea Otters will not Harm the Species

In the preamble to the Proposed Rule, FWS repeatedly states that the take of over a hundred sea otters per year is not "negatively or materially impacting the DPS." This claim is unsupported and in light of the precipitous decline of the species, highly dubious. The lack of information and data in support in support of this claim highlights that FWS

has failed to meet its statutory duties under the ESA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, in making this decision.

To begin with, when promulgating a regulation, such as the Proposed Rule, FWS must comply with section 7 of the ESA, 16 U.S.C. § 1536, which imposes on all Federal agencies the independent duty to "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 . . ." *Id.* § 1536(a)(2). To guarantee compliance with the "no-jeopardy" mandate, section 7(a)(2) requires that the potential impacts of an action are fully assessed.⁹ Specifically, this analysis is required whenever an action agency "may effect" a listed species or critical habitat, 50 C.F.R. § 402.14; 51 Fed. Reg. 19,949-950 (June 3, 1986) ("The burden is on the Federal agency to show the absence of likely, adverse effects to listed species or critical habitat as a result of its proposed action in order to be excepted from [this] obligation."). "Actions" subject to these requirements include "all activities or programs of any kind authorized, funded, or carried out by the agency," such as: the promulgation of regulations; "granting of licenses, contracts . . . permits, or grants in aid;" or "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

Specifically, the criteria for determining whether consultation is required, as set out by FWS, are: (1) Is there a federal action?; (2) Are listed, proposed, or candidate species or their habitat present?; (3) Is the proposed federal action a major construction activity?; (4) Is there a "may affect" situation?; (5) What are the options for "may affect" situations?; (6) What are the procedures for formal consultation or formal conference?; and (7) What are the options if a jeopardy/adverse modification opinion is received? U.S. Fish & Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, March 1998 (Handbook). Applying these factors here, it is clear that FWS must thoroughly assess the impact the Proposed Rule will have on the species.

- 1) *Is there a federal action?* Here, there is clearly a federal action. The agency action here is the Service's proposal of a section 4(d) rule. Under the Service's implementing regulations an "action" is defined to included the "promulgation of regulations." 50 C.F.R. § 402.02. Thus, the Proposed Rule is clearly an agency action, and is subject to the requirements of the section 7 consultations under the ESA.
- 2) *Are listed, proposed, or candidate species or their habitat present?* Here, the southwest Alaska DPS of the northern sea otter is clearly present in the area

⁹ An agency action is deemed to "jeopardize the continued existence of a species" if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

concerned and is the focus of the agency action itself. There can be no doubt that the species is present.

- 3) *Is the proposed federal action a major construction activity? If not, is this still a "may affect" situation?* While, the Proposed Rule does not involve a major construction activity, as the Handbook states, "[e]ven if the action is not a major construction activity, intra-Service consultation may be necessary." Therefore, the Service "should determine whether the action 'may affect' those species or habitat or may destroy or adversely modify critical habitat." Having already determined that the threatened species is present in the area affected by the rule, it thus follows that the Service must proceed to the next step.
- 4) *Is there a "may affect" situation?* The Handbook defines "may affect" situations as follows: "the appropriate conclusion when a proposed action may pose *any* effects on listed species or designated critical habitat." (emphasis in original). It is clear that this rule passes the "may affect" threshold for consultation. Between the years of 1996 and 2000, the mean annual take by Alaska Natives was over 100 animals. *See* Sea Tagging Statistics by Sea Otter Stock. A very limited amount of that take is undertaken for subsistence purposes, though actual subsistence take levels remain unknown, and is therefore something that the Service must consider and analyze. Thus, without this rule, the number of sea otters that would be taken would be quite small. By allowing a take for the purpose of obtaining materials for handicrafts and exchange, the Proposed Rule will expand the permissible level of take. Furthermore, it appears that females are often taken in these hunts, further hampering the species' ability to reproduce and rebuild. This is a "may affect" situation for which section 7(a)(2) consultation must occur.

Here, as described above, it is clear that the Service must prepare its Biological Opinion on whether the action will jeopardize the sea otter. Specifically, during this process, FWS must evaluate all relevant information, including the status of the species and the "effects of the action and cumulative effects on listed species or critical habitat." *Id.* § 402.14(g).¹⁰ The ESA and its implementing regulations also make clear that, when evaluating the effects of an agency's activities, it is not sufficient to consider the action in isolation. Thus, the "effects of the action" that must be considered include "the direct and indirect effects of an action on the species or critical habitat, *together with the effects of other activities that are interrelated or interdependent with that action*, that will be added to the environmental baseline." 50 C.F.R. § 402.02 (emphasis added)¹¹ The

¹⁰ Cumulative effects are "those effects of the future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02.

¹¹ "Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration." 50 C.F.R. § 402.02.

"environmental baseline," in turn, is defined to include "the past and present impacts of all Federal, State or private actions and other human activities in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." *Id.*

Therefore, as much remains unknown about the cumulative causes of population decline for this DPS, FWS assess the overall stress that the species is under when considering the harm caused by the Native Alaskan take under the Proposed Rule. The actual take of sea otters for true subsistence purposes must be calculated and compared to the number of sea otters taken for the creation of handicrafts and clothing in order to determine the margin of harm that this rule brings upon the species. More accurate data concerning the sex of taken otters, and their ages and reproductive capacity must be gathered and considered as part of the Biological Opinion. Much remains unknown about the species, and, as determined above, the Service has an affirmative duty to provide for the *conservation* of the species, something that cannot be accomplished without taking the time to analyze how proposed rules and species management will affect the individuals in the population, and therefore the population as a whole.

The proposed special rule is also subject to the requirements of NEPA. In the preamble, the Service claims that the rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA. 70 Fed. Reg. at 46391. FWS claims that the Proposed Rule falls under a Categorical Exclusion (CE) and therefore is not subject to NEPA. *Id.* citing Department of Interior, 516 Department Manual 2, 2.3; Appendix 1.9. The language of this CE states that "[p]olicies, directives, regulations and guidelines that are of an administrative, financial, legal, technical, or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case" will be considered categorical exclusions. 516 DM 2, Appendix 1.9. FWS is incorrect in using the CE here.

The Service's action in using the CE in this way is too broad and sweeping in its effect of expanding the allowances under the statute to include previously precluded Native take. While the exact number of animals killed is not known, we estimate that the number of otters taken for true subsistence purposes, as compared with the number that would be taken for the creation of handicrafts and clothing, is large. Moreover, FWS implicit assertion that the environmental effects of the Proposed Rule are "too broad, speculative, or conjectural to lend themselves to meaningful analysis" is unsupported. Here, considerable information is available regarding Native take and its effect on the DPS can, and must, be determined. There is no basis for making a finding that the CE applies. FWS therefore must undertake NEPA compliance through the preparation of an environmental assessment, and if necessary an Environmental Impact Statement.

CONCLUSION

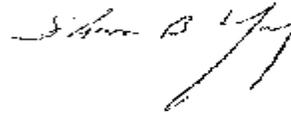
The decline in sea otters throughout southwest Alaska over the past 20 years is cause for serious concern. Alaska's magnificent and diverse coastal ecosystems benefit

by the abundance of sea otters. Reversing the decline in the DPS will ultimately restore a healthy balance of kelp, fish, and invertebrates. We support the efforts of the Service to work in connection and cooperation with Native Alaskan communities and recognize the important role of these communities in the overall recovery of the species. Our fundamental disagreement, however, lies in the fact that the ESA Native take exemption is supposed to serve a limited purpose, especially for ESA listed species. In this case, however, FWS proposes to expand killing of the species by Natives for purposes that are not clearly subsistence in nature. For these reasons, we ask that you not adopt the proposed special rule for the southwest Alaska DPS of the southern sea otter and rather, should undertake a review of what measures are necessary to protect the species.

Sincerely,



Jim Curland
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Defenders of Wildlife



Sharon Young
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D'Anne Albers
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Cindy Lowry
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