

**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**

February 15, 2007

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 71 Fed. Reg. 46864 (Aug. 15, 2006)**

Dear Mr. Burn:

We are writing to once again convey the significant concerns 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/International Marine Mammal Program has with the U.S. Fish and Wildlife's ("FWS" or "Service") recently promulgated Special Rule for the Southwest Alaska Distinct Population Segment ("DPS") of the Northern Sea Otter, allowing for the limited, non-commercial import and export of items that qualify as "authentic native articles of handicrafts and clothing" derived from sea otter parts. 71 Fed. Reg. 46864 (Aug. 15, 2006). As we have previously detailed in our comments on the Proposed Special Rule, 70 Fed. Reg. 46387 (Aug. 9, 2005), and during the most recent Southwest Alaska Sea Otter Recovery Team Meeting, October 25-26, 2006, the rule is premised 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); 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 FWS has failed to support its determination that the authorized take will not harm the population.

So that we may properly assess whether the Service has, in compliance with the structure and intent of the ESA, ensured that this regulation will not negatively impact the survival or recovery of the species, we respectfully request FWS address the specific issues raised below.

BACKGROUND

The Southwest Alaska sea otter DPS is listed as "threatened" under the ESA, and thus, pursuant to FWS's regulation, the "take" of members of the population is

prohibited.¹ See 50 C.F.R. § 17.31(a). Section 10(e) of the Act, however, exempts Alaska Natives from this prohibition "if such take is primarily for subsistence purposes."² 16 U.S.C. § 1539(e). Further, under this exemption, "non-edible byproducts" of individuals taken *for a subsistence purpose* "may be transported, exchanged, or sold in interstate commerce when made into authentic Native articles of handicraft and clothing."³ *Id.*

Sea otters are also protected under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*, which similarly prohibits the "taking" of sea otters, and provides a specific exemption for Native Alaskans to allow for hunting carried out for a "subsistence purpose." *Id.* § 1372(a). Notably, the exemption under the MMPA goes a step further than the ESA and allows for the take of marine mammals "for purposes of creating and selling authentic native articles of handicrafts or clothing." *Id.* § 1371(b). Thus, the exemption granted by the ESA is far more limited than under the MMPA, as take for the purpose of creating handicrafts is not exempted under the ESA.

With this Rule, FWS's stated intention is to remove a potential hurdle to the ability of Alaska Natives "to participate in cultural exchanges that foster the sharing and exchange of ideas, information, gifts, clothing, or handicrafts." 71 Fed. Reg. at 46865. To this end, the Rule "aligns the provisions of the Act relating to the creation, shipment, and sale of authentic native handicrafts and clothing by Alaska Natives with what is already allowed under the MMPA." *Id.* at 46866.

DISCUSSION

FWS Must Document the Subsistence Purpose for Which Sea Otters Are Lawfully Taken

Any regulation that will allow for the increased take of the already critically imperiled sea otter population is suspect; this is no exception. To begin with, this Rule is arguably inconsistent with the plain language of the ESA. Under the exemption to the

¹ "Take" includes "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(18).

² 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.

³ "Authentic native articles of handicrafts and clothing" are 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.

take prohibition provided to Alaska Natives in the ESA, the requirement that the "take" of a listed species be for a "subsistence purpose" is a condition precedent to the subsequent authorization that the by-products of that individual may be made into, and sold as, authentic handicrafts. 16 U.S.C. § 1539(e). Here, the regulation allows the take of sea otters under the broader standard established by the MMPA, 71 Fed. Reg. at 46870 (50 C.F.R. 17.40(p)(3)), which specifically includes hunting of sea otters "for purposes of creating and selling authentic native articles of handicrafts or clothing." *See* 16 U.S.C. § 1371(b). As a result, the Rule circumvents the limited exemption crafted by Congress in the ESA for Alaska Natives and creates a wholly new regulatory exemption for the take of sea otters – namely, hunting for the sole purpose of creating a handicraft item.

The preamble to the Rule 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," 71 Fed. Reg. at 46864 (emphasis added), yet FWS fails to identify a single "subsistence purpose" that would warrant the take of sea otters.⁴

We request that FWS document the specific subsistence purpose for which sea otters are taken.

FWS Must Demonstrate that the Regulation Will 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.⁵ 16 U.S.C. § 1533(d). Indeed, because FWS is proposing to allow for the "take" of individuals of this critically imperiled species, it must first demonstrate that the waiver of

⁴ In its response to a comment challenging FWS to identify the subsistence purpose for which the otter are being taken, FWS stated:

The use of northern sea otter harvested by Alaska Natives is consistent with [the definition of subsistence purpose], with pelts being used to make authentic Native handicrafts and clothing. These, in turn, may be used by the hunter, or gifted, traded, or sold once the pelt is made into an authentic Native handicraft or clothing.

71 Fed. Reg. at 46868.

⁵ 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).

this vital protection is necessary for the protection and recovery of the population. However, FWS failed to describe a valid "conservation" purpose underlying the expansion of Native take. The purported "conservation" justification articulated by the Service for relaxing the take prohibition is simply that "[t]he 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." 71 Fed. Reg. at 46867.

We request that FWS describe and document how the Rule will encourage cooperative management efforts between the Service and Alaska Natives. Specifically, we request that the Service describe and document: a) the "cooperative management efforts" that have been initiated or considered as a result of the promulgation of this rule; b) how FWS has distinguished between ongoing efforts and efforts that would have occurred even absent this Regulation, and those that will occur directly as a result of this Rule; c) how these efforts will aid in the recovery of the species; d) the means or mechanism through which these efforts will be established; and e) whether any of the measures implemented by the Alaska Natives will be enforceable, and if so, by whom.

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 Rule "supports conservation of the DPS by discouraging excessive harvests." 71 Fed. Reg. at 46867. The FWS provides no support for this claim within the Federal Register notice.

We request that FWS describe and document how the Rule will discourage excessive harvests. When providing this information we request that FWS describe and document whether excessive harvest have occurred in the past or are occurring now, and if so, what action FWS has taken to prosecute the offending parties. Moreover, FWS should document the reasons it believes that "excessive" harvest would, absent this regulation, occur in the future.

FWS also 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.*, but again fails to provide any meaningful support for its assertion.

We request that FWS describe and document how this rule will "encourage self-regulation of northern sea otter harvest by subsistence hunters in ways that meet the Service's goal of recovery of the DPS" and more specifically, what is meant by "self-regulation" and how it is different than what is occurring prior to the promulgation of the rule. FWS must also describe and document what it considers to be acceptable hunting practices that are consistent with the goal of species' recovery.

Furthermore, despite the stated limitation that the 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 46866 ("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).

We request that FWS clarify the intent and scope of this rule with regard to the commercial sale of authentic native handicrafts.

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 states that the take of over a hundred sea otters per year is not "negatively or materially impacting the DPS." 71 Fed. Reg. 46865. This claim is essentially unsupported in the notice, as the Service simply points out that the amount of take is small, but provides no scientific support for its conclusion that the take is not impacting the species. *See id.*, at 46868. In light of the precipitous decline of the species, the Service's conclusion is highly dubious, as much remains unknown about the cumulative causes of population decline for this DPS.

We request that FWS describe and document the specific actions it has taken to ensure the Rule will not negatively or materially impact the species, including, but not limited to, any efforts to more accurately assess where the takes are occurring; any efforts to determine the sex, age and reproductive capacity of the otters taken; and any work on providing population counts and trends in each of the areas where the take occurs.

Further, we request that FWS describe and document its basis for any determination that Native takes are not causing or contributing to the decline of any particular populations or the species as a whole.

Finally, we request that FWS describe and document its basis for any determination that Native takes are not causing or contributing to the inability of the species to recover in all geographic areas where the species occurs or throughout the population as a whole.

FWS Must Comply with Section 7 of the Endangered Species Act

Despite FWS's unsupported claim, when promulgating a regulation, such as the 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.⁶ Specifically, this analysis is required whenever

⁶ 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.

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.

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).⁷ 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." *Id.* § 402.02.⁸ The "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.*

We request that FWS publish its Biological Opinion on the impacts of this regulation, as required under the ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2) and suspend the regulations until these issues are resolved.

CONCLUSION

We acknowledge the important role that Native Alaskan communities play in the conservation of the sea otter 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, this regulation eliminates the restrictions on take under the ESA by allowing the more permissive exemption of the MMPA to prevail. 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

⁷ 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.

⁸ "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.

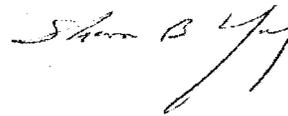
population decline, it is not prudent to allow the hunting of sea otters beyond subsistence needs.

We anticipate receiving a response to this letter, and the various issues raised herein, within thirty days. If we do not receive a complete response from FWS, we are prepared to take the appropriate action to ensure that the sea otter is fully protected. If you have any questions, please contact me at (831) 726-9010.

Sincerely,



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