



**THE HUMANE SOCIETY
OF THE UNITED STATES**



November 19, 2004

Ms. Harriet Allen
Manager
Threatened and Endangered Species Section
Washington Department of Fish and Wildlife
600 Capitol Way, N.W.
Olympia, Washington 98501-1091

Dear Ms. Allen:

This letter provides the comments of Defenders of Wildlife, Friends of the Sea Otter, the Humane Society of the United States, and the Sea Otter Defense Initiative, a project of Earth Island Institute and our collective membership and constituents of over 8 million people, on the revised draft "Washington State Recovery Plan for the Sea Otter." The Washington Department of Fish and Wildlife ("WDFW") issued the draft plan for review by letter of October 27, 2004 and requested comments by November 17, 2004. As communicated to you by Defenders of Wildlife, it was not possible for these organizations to prepare a comment letter on the plan within that timeframe. We appreciate the opportunity to submit these comments for your review at this time.

In general, our organizations are very pleased with the revised draft plan. It demonstrates a high level of attention by the State of Washington to this important issue, and we appreciate the careful review given to the comments previously submitted. In particular, our organizations consider it noteworthy that the State of Washington has taken this initiative for a species that is primarily the conservation responsibility of the federal government through the U.S. Fish and Wildlife Service ("FWS"). Obviously, the preparation of this plan involved a collaborative effort with FWS and other parties, and we commend WDFW for taking these steps.

While we generally approve of the contents of the draft plan, our organizations do have additional comments on important issues. These comments are set forth below in both general, and specific, comment sections.

General Comments

Continuing Need for Emphasis on Federal Involvement. As discussed in the initial comments submitted by Friends of the Sea Otter (FSO) on October 30, 2000, the primary responsibility for recovery of sea otters throughout their range lies with the United States government through FWS. There are many useful recovery-related actions discussed in this plan, however, many of them cannot be carried out independently by WDFW. Indeed, the State of Washington's enforcement authority regarding marine mammals has been preempted by the Marine Mammal Protection Act ("MMPA"). As a result, it is critically important for the federal government to not only be a full partner with WDFW, but to assume a leadership responsibility in carrying out the terms of this plan. The plan itself contains very little discussion of this issue or assignment of responsibility to the federal government. As the plan goes forward, we strongly urge WDFW to take all steps necessary to cause FWS to undertake the priority of recovery actions listed in this plan. Our groups intend to do so as well. In particular, we note that FWS has the authority and the opportunity pursuant to section 112 of the MMPA, 16 U.S.C. § 1382, to adopt this plan as its own. In addition, because it appears that this species is both a depleted marine mammal stock, and very well may be a strategic stock under section 118, the federal recovery plan requirements of the MMPA apply as well. We request that WDFW pursue this avenue in concert with our organizations to ensure that the many useful elements of this plan are given full effect by the responsible government agencies.

Endangered Species Act and Marine Mammal Protection Act Listing. Our organizations continue to believe that Washington State sea otters are a separate population stock entitled to protection under both the Endangered Species Act ("ESA") and MMPA. The previous comments submitted by FSO on this point have not been adequately addressed or acted upon by FWS or WDFW. Particularly, we note that the draft plan undertakes a thorough and commendable review of the population status of this stock as it pertains to the optimum sustainable population (OSP) range for Washington state's sea otters. We believe that the plan's discussion of this issue on pages 52-54 sets what we believe to be an appropriate maximum net productivity level (MNPL) of 1,640 sea otters, which represents 60% of the estimated carrying capacity of 2,734 sea otters. It is appropriate under the applicable laws to adopt a conservative approach to setting these numbers, as WDFW appears to have done.

Based upon this evaluation, it is clear that the current population size is nowhere close to the lower end of the OSP range. The 2004 population estimate of 743 animals is less than 46% of the MNPL. As a result, it is clear that this species stock is depleted under the MMPA and must be listed for this purpose. This is, of course, the responsibility of FWS. We therefore request that, upon the finalization of this plan, that WDFW formally request that FWS initiate the necessary steps to achieve a depleted listing. In addition, through the recovery team concept discussed below, we request that WDFW work with affected and interested parties to address the ESA listing issues related to this population.

Recovery Implementation Plan. The value of a plan of this nature is derived primarily from its implementation. It is therefore essential to capitalize upon the considerable effort that has gone in the preparation of this recovery plan by establishing a team that can carry forward the recommended actions. There is precedent for similar steps under federal law, such as the team that has been established for the southern sea otter to implement the federal recovery plan for that subspecies. Such a team should include a representative membership from involved governmental and nongovernmental parties. In this regard, we note our concern that no members of environmental organizations were included as, "co-managers and specialists" in preparation of this plan. The Acknowledgment section of this plan identified a number of outside parties who were providing such a role, including representatives of the Point Defiance Zoo and Aquarium, and Tribes and Indian organizations. In as much as WDFW did not limit its outside participation or constrain the team participation in the preparation of this plan to state and federal representatives, it is clear that environmental groups should have been included. Clearly, our organizations provide the type of "specialty" information that appears to have been solicited from other outside parties for purposes of preparing this plan. While WDFW has done a very good job in responding to our comments and seeking public review, there is no substitute for including representatives from the affected organizations on the team that is responsible for developing plans of this nature and putting them into place. We therefore consider it very important to have environmental group representation in any recovery implementation team that is established. In addition, our organizations should be identified as active participants in the appropriate steps set forth in the "Recovery Strategies and Tasks" section beginning on page 54.

Native Take. One area of continuing disagreement with the plan is its failure to pin down the Native take issue. The plan does not fully address the comments previously submitted on this point. In particular, the plan does not address what is the clear-cut issue of whether Indian Tribes would be allowed to harvest sea otters for any purpose. This is not even a close question. The answer is no. There are no existing treaties involving the Tribes within the sea otter range that would authorize such take. The treaties, while expressly covering fish, whale, and seals, do not cover sea otters. The law is crystal clear on this point. As a result, it is not even necessary to address the question of whether the MMPA abrogates any treaty rights. There are no treaty rights that would authorize such take, and the MMPA take prohibition therefore would apply to all such tribes. We request that WDFW adopt this position in the final plan.

Specific Comments

Page x, paragraph 5: This paragraph discusses the oil spill threat to sea otters in Washington State. We note that the discussion on this point, which is correct, provides a rationale for both MMPA depleted and ESA threatened/endangered listing. The same rationale that is identified in this recovery plan of small population size, limited distribution, and

vulnerability to a single oil spill catastrophic event, are the same grounds that served as the basis for the ESA listing for the southern sea otter. There appears to be no distinction in this situation, and the plan's discussion of this point is a rationale for such action.

Page 2, paragraph 1: This paragraph discusses the existence of five population stocks of sea otters in U.S. waters. The southern sea otter, however, is a distinct subspecies, not merely a separate population stock. This distinction should be noted.

Page 2, paragraph 2: In this paragraph, it is stated that the British Columbian sea otter population stock is not recognized as such under the MMPA. We do not agree that the MMPA limits its definition to U.S. waters. To the contrary, one of the primary purposes of the MMPA is to promote the international conservation of marine mammal species, and there is no reason that its definition of population stock would not apply to animals located in Canada.

Page 8, paragraph 4: In previous comments, FSO noted that it was important to recognize the work undertaken by the Marine Wildlife Veterinary Care and Research Center, California Department of Fish and Game (Dr. David Jessup and Dr. Melissa Miller) as well as the National Wildlife Health Lab (Dr. Nancy Thomas and others). The plan does recognize the National Wildlife Health Lab, but still fails to identify the significant work of the Marine Wildlife Veterinary Care and Research Center. This is an important point that must be added to the final plan.

Page 10, human-caused sources of mortality: As noted in previous comments, it is necessary to discuss the effect that human recreational and other activities can have on sea otter populations. There is clear potential for such interactions to result in harassment and disturbance, if not mortality, of sea otters. Additional research is being conducted in this field, and the WDFW should discuss the issue in greater detail.

Page 10, paragraph 3: For this small, vulnerable population, any mortality due to fishery gear should be prohibited.

Page 18, paragraph 1: In recent accounts by Dr. Jim Estes, he has referred to estimates of the historic worldwide population to be between 500,000 to over a million.

Page 20, paragraph 2: None of our organizations consider the current 3-year running average for the southern sea otter as a positive trend yet. More data from future Spring counts, depicting increases in the population, are needed before this can be conclusively stated. The jury is still out on whether what we have observed in the last few years in southern sea otter population trends can be construed as "positive".

Page 33, paragraph 5: This paragraph refers to the Court's ruling in favor of FWS in response to a lawsuit filed by commercial fishermen in the unlawful attempt to enforce the zonal management of sea otters south of Point Conception. Actually, the case never reached the point where a court had to issue a final decision. The fishing group plaintiffs withdrew the case before a decision could be issued.

Page 33, paragraph 6: This paragraph discusses the recovery plan for the southern sea otter. One of the key findings of that recovery plan is that the zonal management program was inconsistent with the recovery of the species and should be discontinued. This point needs to be discussed in greater detail in the WDFW plan. This is especially important in-as-much as the plan suggests, at various points, that management action may be necessary in the future if the Washington state population continues to grow. Our organizations are opposed to a zonal management approach and we believe that it is important that the Washington sea otter plan reflect the carefully considered findings of the southern sea otter recovery plan on this issue.

Page 35, paragraph 1: In this section there is mention that the ATBA compliance is not "mandatory" and later in this document it says that compliance should be "encouraged." WDFW should take a stronger stance on this issue since it is agreed that an oil spill would wipe out this population.

Page 36, paragraph 2, under "Fishery Interactions": Our organizations would oppose any predator control measure either proposed by a state or federal agency and/or a potential future native harvest redirected in a conflict area as a form of predator control.

Page 39, paragraph "abalone discussion": As noted in previous comments, it is necessary to identify human harvest of abalones as a significant factor affecting the viability of this species. The initial draft plan placed too much emphasis on sea otter predation. This issue still needs to be addressed in the final plan.

Page 47, paragraph 1, 3rd and 2nd to last sentences under "Entanglement and Entrapment": The current CDFG regulations are in place between Point Reyes and Point Arguello. As described here, it appears to be saying that there is a gap between Yankee Point and Point Arguello or Point Sal. These regulations were finalized and made permanent in September 2002.

Page 53, carryover paragraph: This paragraph states that a population below MNPL "may be considered" depleted under the MMPA. This is incorrect as a matter of law, and we are aware of no legal authority for the proposition that a species below a MNPL would not be depleted. It may be the case that the responsible federal agency has not taken the necessary action to formally designate a species as depleted, but this does not mean that such status is

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not required. This is an important point in consideration of the severely depleted status of the Washington state population.

Page 56, action item 2.2: This action item for the recovery plan implementation calls for documenting sea otter deaths caused by fishing gear. Certainly this is an appropriate step, but it is even more important to require that action be taken to address and avoid such mortality. The recovery plan needs to be revised to include an action item that focuses on actions necessary to prevent such take from occurring and, when it does, to undertake the necessary enforcement actions to protect sea otters. Such action appears to be necessary because the draft plan notes, on page 48, that some numbers of sea otters have been caught in nets.

We hope that these comments are helpful to WDFW as it prepares a final version of the recovery plan. Please feel free to contact any of us regarding these comments, and we look forward to working with WDFW and FWS in implementing requirements of this well prepared and comprehensive blueprint for recovery.

Sincerely,



Defenders of Wildlife



Friends of the Sea Otter



Humane Society of the United States



Sea Otter Defense Initiative

Cc: Steve Williams, Deanna Lynch, Greg Sanders, **U.S. Fish and Wildlife Service**
David Cottingham, Tim Ragen, **Marine Mammal Commission**
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