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VIA FACSIMILE AND MAIL

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Ms. Diane Bowen
Division of Federal Program Activities
U.S. Fish and Wildlife Service
Attention: Native Handicrafts
Room 400, ARLSQ
4401 North Fairfax Drive
Arlington, Virginia 22203.

Re: Comments on Fish and Wildlife Service Proposed Rule Amending regulations implementing the Marine Mammal Protection Act of 1972 (MMPA), as amended

Dear Ms. Bowen:

Defenders of Wildlife (Defenders) and Sea Otter Defense Initiative (SODI), a project of Earth Island Institute, submit the following comments on the United States Fish and Wildlife Service (Service) proposed rule amending the regulations implementing the Marine Mammal Protection Act of 1972 (MMPA), as amended. The amendment would revise the Service's existing definition of "authentic native articles of handicrafts and clothing" to reflect a December 28, 1992, Court ruling, which found that the Service's regulation defining "authentic native articles of handicrafts and clothing" is inconsistent with the MMPA. 69 Fed. Reg. 31582 (June 4, 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. Defenders' programs encourage protection of entire ecosystems and interconnected habitats while protecting predators that serve as indicator species for ecosystem health.

In the 1991 case referenced in the Federal Register, the court held that: "As stated above, section 1371(b) clearly states 'the provisions of this act shall not

apply' to takings for the purpose of creating authentic native handicrafts. Thus, the broad grant of regulatory authority granted to the Secretary by section 1373 does not apply to takings under the native handicrafts exception. Any regulatory authority of the Secretary over such takings must be found in section 1371(b) itself. Under Section 1371(b), the Secretary's authority to issue regulations is limited to the situation where the 'Secretary determines any species or stock of marine mammal ... to be depleted'". (*Didrickson v. United States*, 796 F.Supp.2nd 1281, 1289 (USDC. AK, 1991) aff'd *Didrickson v. United States*, 982 F.2d 1332 (9th Cir. 1992).)

Since the Court's ruling in 1991, the status of the southwest Alaska distinct population segment (DPS) of the northern sea otter (*Enhydra lutris nereis*) has taken a significant turn for the worse. To this end, on January 11, 2002, SODI petitioned the Service for an emergency and permanent listing of the southwest Alaska DPS of the northern sea otter as "endangered" under the Endangered Species Act (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.

In response to SODI's petition, the Service released for public comment and review the Advance Notice of Proposed Rulemaking to designate the southwest Alaska DPS of the northern sea otter as threatened under the ESA. (69 Fed. Reg. 6600 (February 11, 2004).) A determination by the Secretary that the DPS is threatened also means that the species will be deemed depleted under the Marine Mammal Protection Act.

Therefore, we request that, once the listing is completed, the Secretary reevaluate the regulations regarding native take exemptions in order to address the fact that portions of the otter population subject to the native take exemption would now be classified as depleted under the MMPA.

If you have any questions or comments, please do not hesitate to contact Jim Curland at (831) 726-9010 or Cindy Lowry at (207) 622-3587.

Sincerely,



Jim Curland
Marine Program Associate
Defenders of Wildlife



Cindy Lowry
Director
Sea Otter Defense Initiative

Cc: Don Mooney