

BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR &
THE UNITED STATES FISH AND WILDLIFE SERVICE

In the Matter of the Petition of the
California Sea Urchin Commission
to Rescind the Failure Criteria for
the Sea Otter Management Zone,
52 Fed. Reg. 29,754, and Decision
to Terminate the Sea Otter Translocation
Program and Management Zone,
77 Fed. Reg. 75,266, as Contrary to
the Authorizing Legislation, Pub. L. No. 99-625

**PETITION OF THE CALIFORNIA SEA URCHIN
COMMISSION, CALIFORNIA ABALONE ASSOCIATION,
AND COMMERCIAL FISHERMEN OF SANTA BARBARA TO
RESCIND THE FAILURE CRITERIA FOR THE SEA OTTER
MANAGEMENT ZONE, 52 FED. REG. 29,754, AND DECISION TO
TERMINATE THE SEA OTTER TRANSLOCATION PROGRAM
AND MANAGEMENT ZONE, 77 FED. REG. 75,266, AS CONTRARY
TO THE AUTHORIZING LEGISLATION, PUB. L. NO. 99-625**

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INTRODUCTION

In 1986, Congress authorized the United States Fish and Wildlife Service to translocate sea otters to Southern California *only* if it established a “management zone” around the translocated population from which it would remove otters and where fishermen and others would be exempt from the Endangered Species and Marine Mammal Protection Acts’ take prohibitions.¹ Although the Service exercised the authority on which this condition was imposed, it asserted the power to avoid the condition if the translocation program was not successful.² In 2012, the Service decided that the program was a failure and formally disclaimed any future compliance with the condition.³ Both the failure criteria and the final rule terminating the management zone are contrary to Pub. L. No. 99-625. They are therefore illegal.

Accordingly, the California Sea Urchin Commission, California Abalone Association, and Commercial Fishermen of Santa Barbara hereby petition the Service to rescind the illegal portions of the 1987 regulation and the 2012 decision terminating the management zone. This petition is made

¹ Pub. L. No. 99-625, 100 Stat. 3500 (1986).

² 52 Fed. Reg. 29,754, 29,784 (Aug. 11, 1987).

³ 77 Fed. Reg. 75,266 (Dec. 19, 2012).

pursuant to 5 U.S.C. § 553(e) and is submitted in light of the harm that the Service's illegal actions pose to Petitioners and the public.

INTEREST OF PETITIONERS

The California Sea Urchin Commission is an entity of the state of California, created to promote sustainable sea urchin harvest, educate consumers and the public about sea urchins, and balance sea urchin harvest with environmental protection. Because sea otters voraciously consume sea urchins, 68% of sea urchin harvest occurs in the otter management zone. If the Service does not rescind its illegal regulation and decision, the Commission's ability to perform its government function will be frustrated by the gradual disappearance of the sea urchin fishery.

The California Abalone Association is a nonprofit California corporation that was formed in 1971. Its mission is to restore and steward an abalone fishery in California utilizing modern resource management concepts to guarantee its sustainable use for the future. Due to the Association's efforts, California's abalone fishery has been improving. But otter expansion into the management zone threatens to undo that progress and prevent the fishery from ever reaching the minimum viable population required for the abalone to be sustainably fished.

Commercial Fishermen of Santa Barbara is a nonprofit corporation organized to integrate regional efforts of fishing communities to improve the

economic and biological sustainability of fisheries. It aims to maintain California's fishing heritage, to improve fisheries management, and to contribute to the improvement of ocean health.

BACKGROUND

In 1986, Congress balanced the competing interests of the California sea otter and fishery protection by authorizing the Service to try to expand the otter's range into Southern California, on the condition that it establish a management zone around this population.⁴ Within this management zone, Congress' compromise required the Service to "use all feasible non-lethal means and measures to capture any sea otter" and exempted anyone engaged in an otherwise lawful activity—including fishing—that results in the take of an otter.⁵

A year later, the Service exercised this authority by creating an experimental population of otters on San Nicolas Island and establishing the management zone from Point Conception to the Mexican border.⁶ Despite exercising the authority granted by Congress, and thereby binding itself to the conditions that Congress attached, the Service asserted that, if certain

⁴ Pub. L. No. 99-625.

⁵ *See id.*

⁶ 52 Fed. Reg. 29,754.

criteria were met, it could declare the program a failure and terminate the management zone, discontinuing its obligation to comply with the conditions.⁷

On December 19, 2012, the Service published a final decision finding that one of the failure criteria from the 1987 regulation was satisfied and terminating the management zone. 77 Fed. Reg. 75,266. As a consequence, the Service disclaimed any obligation to capture sea otters found within this zone and subjected fishermen to the take prohibitions. 77 Fed. Reg. at 75,290.

On July 30, 2013, Petitioners sued the Service to challenge this decision to terminate the management zone as inconsistent with Pub. L. No. 99-625.⁸ That case was dismissed by the District Court for the Central District of California on March 3, 2014, on the grounds that the statute of limitations for challenging the 1987 regulation on which the 2012 decision relied has run.

Although Congress left to the Service the discretion whether to accept the compromise that it struck in Pub. L. No. 99-625, it gave the Service no discretion to alter or abandon that compromise once it had been accepted. Therefore, the criteria and authorization for terminating the management zone contained in the 1987 regulation is contrary to Pub. L. No. 99-625, and illegal.

⁷ *Id.* at 29,784.

⁸ *See Cal. Sea Urchin Comm'n v. Jacobson*, No. 13-cv-05517 (E.D. Cal. Mar. 3, 2014).

For the same reason, the Service's 2012 decision to terminate the management zone and disclaim its obligations under Pub. L. No. 99-625 is illegal.

**THE PROMPT RESCISSION OF
THE FAILURE CRITERIA IN THE 1987
REGULATION AND THE 2012 DECISION
TERMINATING THE SEA OTTER
MANAGEMENT ZONE IS NECESSARY
BECAUSE THEY ARE CONTRARY
TO LAW AND THREATEN FISHERMEN
AND SOUTHERN CALIFORNIA'S FISHERY**

As a consequence of the Service's illegal actions, fishermen operating in Southern California are exposed to criminal prosecution if they inadvertently harm a sea otter. This result is plainly inconsistent with Pub. L. No. 99-625 and congressional intent. This harm is immediate and requires prompt action by the Service. In addition, the Service's illegal actions threaten the viability of Southern California fisheries. Sea otters are voracious consumers that would shrink the size of the shellfisheries in Southern California to the point that they would no longer be commercially viable.

CONCLUSION

Petitioners formally request that the Service rescind the failure criteria in 52 Fed. Reg. 29,754 and the 2012 decision, 77 Fed. Reg. 75,266, providing for the termination of the sea otter management zones and the protections for

fishermen and Southern California's fishery that Congress provided in Pub. L.
No. 99-625.⁹

DATED: April 24, 2014.

Respectfully submitted,

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⁹ 5 U.S.C. § 533(e).