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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

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| CALIFORNIA SEA URCHIN COMMISSION, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>MICHAEL BEAN, *et al.*,<br><br>Defendants,<br><br>and<br><br>CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,<br><br>Defendants-Intervenors. | Case No. 2:14-CV-08499-JFW-CW<br><br>**FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** |

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## INTRODUCTION

In 1986, Congress enacted Public Law 99-625 ("P.L. 99-625"), a statute specifically designed to give the U.S. Fish and Wildlife Service ("Service") additional discretion to promote the recovery of the Southern sea otter, a species listed as "threatened" under the Endangered Species Act ("ESA"). Specifically, P.L. 99-625 removed legal barriers to implementing a sea otter translocation program, in order to permit the Service to establish an "experimental" colony of sea otters remote from the main population. P.L. 99-625 left it within the Service's discretion to decide whether or not to implement any such program, stating that the Service "may develop and implement, in accordance with this section, a plan for the relocation and management of" the sea otters. P.L. 99-625, § 1(b). If the Service did exercise its discretion to develop and implement such a plan, the statute specified that such a plan "shall include" a "management zone" surrounding the translocated population, in which the Service would capture and remove any otters found using "all feasible non-lethal means," and wherein parties who harmed sea otters while pursuing otherwise lawful activities would be exempt from the ESA prohibitions on "take" of this protected species. *Id*. §§ 1(b)(4), 1(c).

Nothing in the statute limits the discretion of the Service to discontinue the program if it determined that the program was a failure. In fact, the sponsor of the statute explicitly stated during the legislative process that the Service should establish criteria for evaluating the success or failure of the program, and end the program and rescind the program's implementing regulations if the program failed. That is just what the Service did. In 1987, it exercised its discretion to develop and

implement the program. The implementing regulations included specific, scientifically-based failure criteria under which the program would be ended if it were deemed a failure 52 Fed. Reg. 29,754 (Aug. 11, 1987) ("1987 Final Rule").

The program did not work out as intended. *See* Fed. Defs.' Mem. in Supp. of Cross-Mot. for Summ. J., ECF No. 43-1, ("Fed. Defs.' Opening Br.") at 10-13. The main sea otter population (a.k.a., the "parent population") shifted its range southward, unexpectedly bringing large numbers of otters from the parent population into the management zone, where they would be subject to the management zone's containment measures. The containment and translocation measures had a higher rate of incidental mortality than expected. The translocated population did not grow as robustly as hoped. Scientists concluded that continuation of the program would actually impede the species from needed range expansion, would disrupt the social structure of the parent population, and was likely to jeopardize the species rather than promote recovery. *See id.*; *see also* 2000 Biological Opinion, AR 26:3490-3537. In 2012, the Service applied the 1987 failure criteria and terminated the program, rescinding its implementing regulations. *See* 77 Fed. Reg. 75,266 (Dec. 19, 2012) ("2012 Termination Decision").

Plaintiffs object to the termination of this program, and have petitioned for its reinstatement, because they wish to see continued implementation of the program's sea otter management zone. But the statute clearly grants the Service discretion whether to implement the program, of which the management zone is a component. Plaintiffs advance only a single legal theory: that the Service never had

the statutory authority to end the program, once commenced, under any circumstances whatsoever. Plaintiffs have not asserted that the 2012 decision to terminate the program misapplied the 1987 regulatory failure criteria. Nor have they asserted that the 1987 failure criteria themselves were deficient in any particulars, an argument that, in any event, would be untimely. Rather, Plaintiffs simply assert that the very idea of failure criteria was inherently unlawful, because P.L. 99-625 conferred no authority whatsoever to end the program under any circumstances.

This theory is unsupported by the statute's language, purposes, and legislative history, and it defies common sense. According to Plaintiffs, P.L. 99-625, a statute that conferred discretion to carry out a program for sea otter recovery, mandated that the discretionary program could never be ended, even if it failed, even if it were undermining sea otter conservation—indeed, even if it were likely to cause the whole species to go extinct. Plaintiffs offer a tangled and often self-contradictory patchwork of arguments that falls apart under scrutiny. The standard of review that applies to an agency's denial of a petition for rulemaking is "highly deferential." *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (quoting *Nat'l Customs Brokers & Forwarders Ass'n v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)). Plaintiffs offer nothing even remotely close to the "most compelling of circumstances" needed for this Court to overturn the Service's decision not to initiate a rulemaking. *See Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 921 (D.C. Cir. 2008) (citation omitted). The Court should reject their suit and affirm the Service's appropriate denial of their rulemaking petition.

## I. Federal Defendants' Interpretation of the P.L. 99-625 Accords With its Plain Language.

Plaintiffs' entire case is built on the theory that P.L. 99-625 conferred no authority whatsoever to adopt the 1987 Final Rule's failure criteria, or any failure criteria: "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." Petition, AR 42:4848; *see also* Pls.' Combined Reply and Opp. to Cross-Mots. for Summ. J., ECF No. 44 ("Pls.' Reply") at 7 ("The statute gives the Service no authority or discretion to disclaim these mandatory obligations."); Pls.' Opening Br. in Supp. of Mot. for Summ. J., ECF No. 40-1 ("Pls. Opening Br.") at 9 ("If the Service opts to exercise this authority, the statute provides that it 'shall' implement the plan, including the management zone's protections"). In reality, P.L. 99-625's plain language provides no support for this view.

P.L. 99-625 says that the Service "may develop and implement, in accordance with this section, a plan for the relocation and management of" an "experimental" translocated sea otter population. P.L. 99-625, §§ 1(a), (b). Thus, the statute left it to the Service's discretion whether to ever implement a sea otter translocation program. Nowhere does the statute remove or limit the discretion of the Service to discontinue implementation of this discretionary program, or limit the discretion of the Service to adopt specific criteria under which the program

would be discontinued if it failed.

Plaintiffs take isolated words out of context to change their meaning. They assert that Section 1(d) of the statute provides that "if the Service establishes the program, it 'shall implement' the statute's protections." Pls.' Reply at 6. But the operative language in Section 1(d) is not the two words "shall implement." Rather, the operative phrase is: "shall implement the plan *after*" specified ESA consultations occur. P.L. 99-625, § 1(d)(1).[1] And that section further provides that, in order to provide sufficient time for such consultations, the Service must hold off on implementation in any event until "after" April 1, 1986. *See id*. § 1(d)(2). Contrary to Plaintiffs' argument, Section 1(d) simply specifies when the Service must begin implementation, if it chose to implement such a program at all. It is not a categorical mandate that the Service "shall implement" the program forever, nor does it remove the Service's discretion to cease the program later.

## II. To the Extent the Statute Were Deemed Ambiguous, The Service's Interpretation is Reasonable.

Even if the statute were found to be ambiguous, it was reasonable to interpret the statute as permitting the Service to adopt the failure criteria in the 1987 implementing regulations. *See* Fed. Defs.' Opening Br. at 18-22. That is all that would be required to affirm the Service's interpretation of an ambiguous

[1] These ESA consultations would concern "prospective actions," which P.L. 99-625 defines as "any prospective agency action that-(A) may affect either the experimental population or the parent population; and (B) has evolved to the point where meaningful consultation under section 7(a) (2) or (3) of the Act can take place." P.L. 99-625, § 1(a)(5).

statute. *Chevron, USA v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

Plaintiffs argue that the lack of statutory language limiting the Service's discretion to cease the program is of no import, because Congress could not possibly anticipate and foreclose "the infinite number of failure criteria the Service might have created." Pls.' Reply at 7. While Plaintiffs support this argument by citing Dr. Seuss's GREEN EGGS AND HAM, this argument is really more of a red herring. If Congress wished to block the adoption of failure criteria, it did not need to expressly anticipate an "infinite number" of possible failure criteria. It could have simply stated that this discretionary program, once commenced, must continue in perpetuity, or for a specific period. But Congress chose not to say this. Moreover, contrary to Plaintiffs' assertion, the reasonableness of the Service's statutory interpretation does not depend on the Court finding the Service had "absolute discretion to terminate" the program "for any reason or no reason whatsoever." *Id*. at 7 n.9. The only issue the Court needs to decide in order to rule in Defendants' favor is whether the actual failure criteria adopted in 1987 reflect a permissible interpretation of the statute. Plaintiffs have asserted no specific deficiency in any of the rational, science-based failure criteria adopted in 1987.

Plaintiffs also assert that continuing the program was mandatory because it reflects a legislative compromise that would both "allow the Service to establish a new otter population while also reducing impacts on individuals" through the implementation of the management zone. Pls.' Reply at 10. It is true that the program, if implemented, must include a management zone. However, that in no way prohibited the Service from adopting an implementing regulation in 1987 that

would allow the program, with its included management zone, to be discontinued altogether.

It is difficult to imagine a dispute over statutory interpretation where the legislative history is any clearer in favoring one side of the dispute. The sponsor of the statute, Congressman John Breaux, said: "The Service should specify . . . what would constitute a successful translocation" and that "[i]f the Service determines that the translocation is not successful, it should, through the informal rulemaking process, *repeal the rule authorizing the translocation*." AR 19:1322 (Statement of Rep. Breaux, 131 Cong. Rec. H6468 (daily ed., July 29, 1985))[2] (emphasis added). The management zone is, by statute, a component of what Representative Breaux called "the rule authorizing the translocation." *See* P.L. 99-625, § 1(b) (stating that if a program is developed and implemented, the program's implementing regulations "shall include" various provisions including the management zone). Repeal of the implementing rule repeals the entire program, including the management zone. Representative Breaux also noted, "[a]fter the rule is repealed, the limiting provisions of [P.L. 99-625] would no longer apply," and "[t]hus, section 7 and section 9 of the ESA would apply to otters within the management zone" if the program failed and was terminated. AR 19:1322, 131 Cong. Rec. H6468.

Plaintiffs dismiss Representative Breaux's statement as having no bearing because "it wasn't made during the discussion of the bill that was ultimately

[2] These statements appear in the permanent edition of the Congressional Record at 131 Cong. Rec. 20992 (1985).

enacted." Pls.' Reply at 12. This argument is specious. Representative Breaux was discussing Section 5 of H.R. 107, the text of which is virtually identical to P.L. 99-625. *Compare* H.R. 107, July 29, 1985, Section 5, AR 19:1319, *with* P.L. 99-625. Plaintiffs essentially acknowledge that H.R. 107 does not differ in any relevant respect from P.L. 99-625. *See* Pls.' Reply at 13.

Plaintiffs also argue that it was unlawful to adopt or apply the 1987 failure criteria because the management zone was a statutory "condition" on the Service's statutory authority to implement the program in the first place. Pls.' Reply at 9. The management zone is a mandatory part of any sea otter translocation program under P.L. 99-625, but a sea otter translocation program was not itself mandatory under P.L. 99-625.

Plaintiffs cannot distinguish the cases cited by Federal Defendants in which courts concluded that statutes authorizing an agency to implement a program did not bar the agency from discontinuing that program. In *Castellini* and *McLean*, two courts concluded that a statute authorizing the Bureau of Prisons to create a boot camp program for inmates did not bar the Bureau from ending that program. *See* Fed. Defs.' Opening Br. at 28-29 (discussing *Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005), and *United State v. McLean*, NO. CR 03-30066-AA, 2005 WL 2371990, at *1 (D. Or. Sept 25, 2005)). Plaintiffs incorrectly claim that statute "only used permissive language when discussing the agency's authority," and did not use any "mandatory language like that Congress used in the statute here." Pls.' Reply at 8. To the contrary, the statute in *Castellini* and *McClean*, like P.L. 99-625, used *both* discretionary language ("may") *and* mandatory language ("shall"). For

example, it said the "program shall be required to" provide job training and drug counseling. *Castellini*, 365 F. Supp. 2d at 197-98 (quoting Pub. L. No. 101-647, § 3001); *see also McLean*, 2005 WL 2371990, at *3 (noting that the language authorizing the program was discretionary, while other provisions used "mandatory" language).

Likewise, in *Pennsylvania v. Lynn*, the court affirmed the Secretary of Housing and Urban Development's discretion to suspend low-income housing programs authorized by statute. 501 F.2d 848, 855-56 (D.C. Cir. 1974). Plaintiffs again wrongly assert that the statute in *Lynn* did not interpret any "mandatory language." Pls.' Reply at 8-9. In reality, as with P.L. 99-625, the statute in *Lynn* contained "mandatory terms" where Congress was "setting minimum conditions on the exercise of his discretion," repeatedly using the word "shall." *Lynn*, 501 F.2d at 854. But the Secretary nevertheless had "the discretion, or indeed the obligation, to suspend the programs' operation when he has adequate reason to believe that" the programs were no longer serving their original purposes. *Id*. at 855-56.

As for *Herrera v. Riley*, 886 F. Supp. 45 (D.D.C. 1995), Plaintiffs wrongly assert that Congress had "expressly authorized the agency to discontinue the program at issue in that case." Pls.' Reply at 8-9. In fact, as in this case, one section of the statute in *Herrera* used discretionary language authorizing the program (a records transfer system for migrant schoolchildren), while another section set forth a mandatory requirement that the Secretary "shall" ensure "continuity" in the system's operation. *Herrera*, 886 F. Supp. at 49-50. The court concluded: "Had Congress actually intended [the statute] to eliminate the

Secretary's discretion to decide whether to continue the [] program, it certainly would not have retained the clearly *discretionary* language" authorizing the program. *Id*. at 50 (emphasis in original).

It was reasonable for the Service to interpret P.L. 99-625, in its 1987 implementing regulations, as authorizing the Service to specify failure criteria under which the program could be discontinued. Plaintiffs' claim therefore fails.

**III. Plaintiffs Interpretation of the Statute Would Have Absurd Results.**

The Service's interpretation of the statute should be affirmed if it is reasonable, and it is not necessary for Federal Defendants to prove that the Plaintiffs' contrary interpretation is wrong. *Chevron*, 467 U.S. at 843. Nevertheless, Plaintiffs' interpretation must be rejected because it has "absurd results." *See United States v. Tatoyan*, 474 F.3d 1174, 1181 (9th Cir. 2007).

According to Plaintiffs, P.L. 99-625 categorically prohibits the Service from adopting failure criteria that would lead the Service to cease implementation of an "experimental" sea otter translocation program. They do not assert any other deficiency in the 1987 failure criteria or their application in 2012, but simply assert that any failure criteria whatsoever were prohibited by the statute. Thus, they claim that the program, intended by Congress to aid sea otter recovery, could not be discontinued even if the program failed to achieve its goals, or even if continuing the program could cause extinction of the sea otters. This result would be absurd.

Plaintiffs attempt to turn the tables by rejoining that Defendants have not "explained how it would be absurd for Congress to depart from the Endangered Species Act's approach to protecting species 'whatever the cost.'" Pls.' Reply at 18

(quoting *TVA v. Hill*, 437 U.S. 153, 184 (1978)). It is not Federal Defendants' burden to show that Congress's announced policies in the ESA continue to be in effect. Plaintiffs may profess that it does not seem to them an absurd result to interpret P.L. 99-625, a statute enacted to promote sea otter recovery, as a statute that mandates the potential extinction of the species. But the policy of avoiding extinction "whatever the cost" is one that Congress made plain "not only in the stated policies of the [ESA], but in literally every section of the statute." *TVA v. Hill*, 437 U.S. at 184; *see also* 16 U.S.C. § 1536(a)(2) (categorically directing agencies to "insure" that their actions are not likely to jeopardize a listed species); *see also id.* § 1531(c)(1) (mandating that Federal agencies "utilize their authorities" to conserve listed species). Implied repeal of such ESA policies and provisions must be rejected unless the "intention of the legislature to repeal [is] clear and manifest." *TVA v. Hill*, 437 U.S. at 189 (quoting *Posades v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)).

Plaintiffs can cite nothing that would indicate such a repeal of the ESA Section 7 mandate against allowing or causing a species to be put in jeopardy of extinction. They cite Section 1(f) of P.L. 99-625, which says that "no act" taken by the Service "[f]or purposes of implementing the plan" (such as capturing and relocating otters) shall be construed as violating the ESA. *See* Pls.' Reply at 6. While that might shield particular implementation actions from ESA "take" liability, the statute also makes clear that the Service, in adopting a sea otter translocation plan, had to comply with ESA Section 7, the section of the ESA containing the prohibition on jeopardizing the species. *See* P.L. 99-625, § 1(b)(6)

(directing the sea otter translocation plan to include the "determinations of the Secretary under section 7 of the [ESA]"); *see also* AR 21:2040-2287 (1987 biological opinion under ESA Section 7 regarding effects of the translocation program). The statute also provides limited changes to the applicability of ESA Section 7 regarding the members of the translocated population itself, stating that in the management zone, those individual otters will not be treated as members of a threatened species for purposes of ESA Section 7. P.L. 99-625 § 1(c)(2). A similar status applied in the translocation zone, but only with respect to defense-related activities. *Id*. § 1(c)(1). Thus, the statute leaves in place ESA Section 7's protections for the parent population and the species as a whole (large numbers of which were unexpectedly moving into the management zone in the late 1990s as the species shifted its range). *See* Fed. Defs.' Opening Br. at 10-11.

In addition, the Service's obligation to insure that the overall program did not jeopardize sea otters did not cease once the program commenced. The ESA requires a new ESA Section 7 consultation for ongoing actions to insure against jeopardy whenever new information "reveals effects of the action that may affect listed species . . . in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(b). On this basis, the Service carried out the 2000 consultation that found that due to unanticipated circumstances and effects, containment (capture and removal of otters entering the management zone), and the artificial restriction on sea otter range expansion, which were key components of the translocation program authorized under P.L. 99-625, would violate the ESA's mandate to avoid jeopardizing a listed species. *See* 2000 Biological Opinion, AR 26:3521-26.

The ESA consultation requirements apply "to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Plaintiffs invoke this to argue that no ESA Section 7 duty to avoid jeopardy existed here because the Service had no discretion to terminate the program. *See* Pls.' Reply at 6 (citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007)). But this is circular logic, assuming the lack of discretion that Plaintiffs seek to prove. The inference that a statute like P.L. 99-625 would remove the Service's discretion to modify or discontinue the program in order to avoid jeopardizing the species is one that would be disfavored here: "an agency cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute that has consistent, complementary objectives." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 640 (9th Cir. 2014) (quoting *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1032 (9th Cir.2005), *cert. denied sub nom. Stewart & Jasper Orchards v. Jewell*, 135 S. Ct. 948 (2015), *cert. denied sub nom. State Water Contractors v. Jewell*, 135 S. Ct. 950 (2015). It is a long stretch to interpret P.L. 99-625, a statute designed to promote the species' recovery, as a statute that eliminates the fundamental ESA prohibition on jeopardizing the existence of listed species.[3]

Plaintiffs also posit that resurrecting the management zone need not

[3] Plaintiffs also assert in this context that the ESA "only forbids the take of *endangered* species," while the sea otter is merely a "threatened" species. Pls.' Reply at 19. This is factually incorrect, since take of many threatened species, including the sea otter, is prohibited under the ESA by regulation. *See* 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. Moreover, the Section 7 prohibition on jeopardizing a listed species is distinct from the ESA Section 9 prohibitions on "taking."

jeopardize the species, because the Service could selectively implement only portions of the statute's management zone requirements, restoring the incidental take exemptions while disregarding the sea otter containment provisions. Pls.' Reply at 3, 17-19. But P.L. 99-625 requires that the management zone include *both* incidental take exemptions and containment measures. P.L. 99-625 § 1(b)(4). Plaintiffs assert, without factual basis, that "[b]ecause there is no feasible, non-lethal means of capturing and removing sea otters within the management zone, the statute doesn't require the Service to do so." Pls.' Reply at 1 n.1; *see also id*. at 3, 17. This statement contradicts Plaintiffs' consistent statements in its petition, Complaint, and opening brief that granting the relief requested by their petition and lawsuit requires bringing back the management zone and the containment measures that the statute requires in the management zone. *See* Part V, *infra*. Contrary to Plaintiffs' implications, the Service did not conclude in the 2000 Biological Opinion that the containment measures should be discontinued because they were inconsistent with P.L. 99-625. The 2000 Biological Opinion's jeopardy determination was based mainly on findings that containment would block a necessary expansion of the species' range and would be disruptive to the parent population's social structure. AR 26:3521-3526.[4]

[4] Even if Plaintiffs' unfounded premise that the management zone could be brought back without containment measures were valid, doing so would still allow unlimited incidental take of sea otters in the management zone by anyone "during the course of an otherwise lawful activity." P.L. 99-625 § 1(c)(2). The management zone covered a vast area, all waters of the United States south of Point Conception. *See* 1987 Final Rule, 52 Fed. Reg. at 27,769; *see also* AR 21:1545 (map of management zone in Final Environmental Impact Statement).

Plaintiffs' interpretation of P.L. 99-625 has the absurd result of interpreting a statute authorizing a sea otter conservation program as requiring perpetual implementation even if the program failed and was undermining sea otter conservation or even increasing the likelihood of sea otter extinction. That interpretation should therefore be rejected.

## IV. The Constitutional Non-Delegation Doctrine Does Not Support Plaintiffs' Misinterpretation of the Statute.

Plaintiffs attempt to rescue their unsupported statutory interpretation by invoking the constitutional doctrine of non-delegation and the canon of constitutional avoidance. Pls.' Reply at 13-17. The canon of constitutional avoidance only comes into play when there are "competing plausible interpretations" of a statute. *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (citation omitted). Plaintiffs' completely implausible interpretation provides no basis for applying the canon of constitutional avoidance, and the Service's interpretation of the statute raises no constitutional non-delegation issue.

Plaintiffs are unable to cite any case in which a court has found a constitutional non-delegation violation under comparable circumstances. In fact, adverse applications of the non-delegation doctrine are so exceedingly rare that the doctrine is likely moribund. *See Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 n.3 (9th Cir. 1995) ("The vitality of the nondelegation doctrine is questionable."). There have been only two occasions when any statute was found to violate this doctrine, both in 1935. *See United States v. Cooper*, 750 F.3d 263, 268 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 209 (2014). As the Supreme Court has

more recently noted, "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

If the non-delegation doctrine has any continuing vitality at all, it applies only to "the most extravagant delegations of authority," *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988), such as a virtually standardless delegation of authority "to regulate the entire economy." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citing *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935)). In the present case, in contrast, the statute provides a narrow and carefully circumscribed delegation of authority to relocate sea otters. This easily avoids any problems with the non-delegation doctrine: "[t]his Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta*, 488 U.S. at 372-73 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). To the extent there is any need to identify further guidance for the agency's exercise of discretion, the statute may derive "meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *Am. Power & Light Co.*, 329 U.S. at 104. This may include the statute's "goals," "purposes," and its legislative history. *Mistretta*, 488 U.S. at 361, 374-75, 376 n.10. Here, as already described, the statute's goals, purpose, and legislative history amply support the Service's interpretation. The Service's adoption of failure criteria in 1987 raises no constitutional non-delegation issue.

## V. Plaintiffs' New Positions Contradict Their Prior Ones, And Further Undermine Any Basis for Granting Relief.

Plaintiffs' reply brief radically alters their positions and claim for relief.[5] Plaintiffs previously said their claim required, and that they sought, restoration of the sea otter containment measures in the management zone. In an abrupt about-face, their reply brief disclaims those positions. Their new positions do nothing to rescue Plaintiffs' deficient legal arguments.[6] These changes of position also fatally undermine Plaintiffs' Article III standing.

P.L. 99-625 requires that if a sea otter translocation program is implemented, it shall include a management zone, in which the Service must "use all feasible non-lethal means and measures to capture any sea otter found within the management zone and return it to either the translocation zone or to the range of the parent population." P.L. 99-625, §1(b)(4). Plaintiffs' petition asserted the Service lacked any authority to end the program once commenced, and thus asked for the management zone to be resurrected. *See* AR 42:5845 ("Both the failure

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[5] As noted previously, prior to this suit, Plaintiffs also adopted, in rulemakings and litigation, contradictory positions as to whether the 1987 Final Rule should include failure criteria. Accordingly, their suit should be barred by the doctrines of laches and estoppel. *See* Fed. Defs.' Opening Br. at 12, 30-32.

[6] Federal Defendants have previously noted Plaintiffs' petition was not a valid petition under the Administrative Procedure Act ("APA"). *See* Fed. Defs.' Opening Br. at 32-33. Plaintiffs' contradictory statements during litigation call into further question what granting the petition would actually entail. In any event, were the Court for some reason to rule in favor of Plaintiffs on the merits of their claim, the appropriate remedy under the APA would be to remand the matter to the agency, not order the petition granted. *See Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

criteria and the final rule terminating the management zone are contrary to Pub. L. No. 99-625"); AR 42:5849-50 (asking the Service to "rescind the failure criteria for the sea otter management zone, 52 Fed. Reg. 29,754, and [rescind the] decision to terminate the Sea Otter Translocation Program and Management Zone"); Pls.' Statement of Uncontroverted Facts, ECF No. 40-2, ¶ 12 (stating that Plaintiffs' petition requests "the reinstatement of the management zone"). Plaintiffs asserted that restoration of the management zone, including its containment measures, was necessary to prevent an expanding sea otter population from consuming the shellfish and other fisheries that the Plaintiffs harvest. *See, e.g.*, AR 42:5846.

Similarly, Plaintiffs' Complaint and summary judgment motion stated that their petition and lawsuit sought to revive enforcement of the management zone, including sea otter containment. *See* Compl. ¶ 71 ( "Through Public Law 99-625, Congress . . . mandated that any [sea otter translocation] program contain a management zone"); *id*. ¶ 74 (asserting that the rule terminating the management zone "had to be rescinded"); Pls.' Opening Br. at 1 (asserting that P.L. 99-625 mandated that the Service "establish a management zone around the population to protect the fishery from predation," and "gave the Service *no* authority to terminate these protections") (emphasis in original). Plaintiffs now attempt, in their reply brief, to advance entirely new positions:

> This case is ultimately about whether individuals who work and recreate in Southern California's waters can be fined and even imprisoned for accidentally harming, harassing, or getting too near a southern sea otter. That's all. Ruling for the Plaintiffs (fishermen)

> wouldn't require the Defendants (Service) to resume moving otters into Southern California or capturing any that wander into the management zone. Instead, it would only require them to restore an exemption from criminal prosecution under the Endangered Species and Marine Mammal Protection Acts for individuals who incidentally "take" an otter within that zone while engaged in otherwise lawful activities.

Pls.' Reply at 1; *see also id*. at 17 (stating that their suit "wouldn't require the Service to resume capturing and removing otters that wander into the management zone" and only concerns the incidental take exemptions).

Such new positions, and any arguments based upon them, are untimely. Plaintiffs waived any such arguments by failing to assert them previously. *See Mountain States Legal Found. v. Espy*, 833 F. Supp. 808, 813 n.5 (D. Idaho 1993) (entering summary judgment in favor of defendants on claim not raised by plaintiffs in summary judgment motion); *see also Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (holding that issue raised for the first time in reply is waived). In addition, Plaintiffs did not take these positions in the administrative petition process, and until such claims are "exhausted, suit is premature and must be dismissed." *See Reiter v. Cooper*, 507 U.S. 258, 269 (1993). Moreover, their new positions should also be dismissed under the doctrine of primary jurisdiction, which "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963).

In any case, Plaintiffs' new positions make no difference as regards the merits of their suit. Their shifting statements about what granting their petition would cause to happen have no bearing on the flaws of that position and the reasonableness of the Service's statutory interpretation.

Plaintiffs' new position in their reply brief also fatally undermines any basis for finding Article III standing. If their lawsuit avowedly will not cause otters to be removed from the management zone, then Plaintiffs cannot claim that alleged injuries from predation by otters on fishery resources could be redressed by their suit, and such redressability is a mandatory element of standing.

The constitutional minimum of standing requires the plaintiff to show, first, an "injury in fact," which is an invasion of a legally protected interest that is both: "concrete and particularized"; and "actual or imminent, and not "conjectural" or "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). Second, there must be a causal connection between the injury and the conduct complained of. *Id*. Third, it must not be likely and not merely speculative that the injury will be redressed by a favorable decision. *Id*. at 561. Plaintiffs have based their injury allegations primarily on the assertion that otter predation in the management zone diminishes the shellfish and other fishery stocks that Plaintiffs harvest, and that they are therefore harmed by the Service's ceasing to remove otters from the management zone. *See* Compl. ¶ 56 (asserting that "sustainable shellfish and other marine fisheries in Southern California will be severely compromised if not destroyed" if otters are not removed from the management zone); *id*. ¶ 62 ("If an injunction does not issue requiring the Service to grant

Plaintiffs' petition, Plaintiffs and their members will be . . . unable to protect their livelihoods adequately from otter predation"); *id*. ¶¶ 3, 6, 7 (describing alleged injuries from otter predation on fisheries in the management zone); *see also* Affidavit of David J. Goldenberg, ECF No. 40-3 ("Goldenberg Decl.") ¶ 8 (same); Affidavit of Michael Harrington, ECF No. 40-4 ("Harrington Decl.") ¶ 13 (same); Pls.' Statement of Uncontroverted Facts, ECF No. 40-2, ¶¶ 4-5 (same).

Plaintiffs might argue that they offered an alternative basis for standing—their assertion that a lack of incidental take exemptions is "causing them to refrain from pursuing their livelihoods for fear of prosecution for take of otter." Compl. ¶ 68. However, that assertion is too vague and conclusory to support standing on its own, especially since it is unsupported by any specific facts. While "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," in responding to a summary judgment motion, "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence '*specific facts*,' which for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561 (emphasis added, citation omitted). Standing based on a fear of prosecution requires a "'genuine threat of imminent prosecution' and not merely an 'imaginary or speculative fear of prosecution.'" *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 772-73 (9th Cir. 2006) (quoting *San Diego Cnty Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996)). A court evaluating such a claim must ascertain that "the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to

initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (citation omitted). Plaintiffs have not alleged, let alone proven, these elements.[7] *See also In re Delta Smelt Consol. Cases*, 663 F. Supp. 2d 922, 931 (E.D. Cal. 2009) ("Given that there is no threat of imminent Section 9 enforcement in this case, there is no causal connection between Plaintiffs' injury and the conduct complained of, namely Section 9's application to the coordinated operation of the project."), *aff'd sub nom. San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011)

In light of their recent change of positions, Plaintiffs do not assert that any injuries from otter predation can be redressed through this lawsuit, and have failed to meet their mandatory burden to plead and demonstrate Article III standing. Their lawsuit must therefore be dismissed.

## CONCLUSION

Congress crafted P.L. 99-625 to give the Service discretion to implement sea otter translocation in order to pursue recovery of the species under the ESA, and the adoption of the 1987 Final Rule, with its failure criteria, was a reasonable

[7] The 2012 termination of the program reinstated the same regulatory environment in the former management zone as exists within the range of the parent population of sea otters. *See* AR 36:5496. The regulatory regime in the parent range, an area where "substantial numbers of sea otter are found," has resulted in a "minimal" number of ESA consultations and take authorizations "because there are few otherwise lawful activities that result in take of southern sea otters." *Id*. A 2012 Environmental Impact Statement noted that "commercial fisheries are unlikely to be adversely affected by the change in regulatory environment because few fisheries will likely interact with southern sea otters." *Id*.

interpretation and application of the statute. Plaintiffs' theory that P.L. 99-625 conferred no authority to adopt such failure criteria is unsupported, and the Service's denial of Plaintiffs' petition for rulemaking was therefore wholly appropriate and should be upheld.

Dated: August 28, 2015

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on August 28, 2015, I caused to be served the foregoing through the Court's CM-ECF System, which will automatically provide service to all counsel of record.

*/s/ Daniel J. Pollak*