

1 Benjamin Z. Rubin (CA-249630)
brubin@nossaman.com
2 NOSSAMAN LLP
18101 Von Karman Avenue, Suite 1800
3 Irvine, CA 92612
4 Telephone: (949) 833-7800
Facsimile: (949) 833-7878

5 George J. Mannina, Jr., *pro hac vice*
gmannina@nossaman.com
6 NOSSAMAN LLP
1666 K Street, N.W., Suite 500
7 Washington, D.C. 20006
8 Telephone: (202) 887-1400
9 Facsimile: (202) 466-3215

10 *Attorneys for Proposed Intervenor-Defendants*
CALIFORNIA SEA URCHIN COMMISSION,
11 PETER HALMAY, HARRY LIQUORNIK,
CALIFORNIA ABALONE ASSOCIATION, AND
12 SONOMA COUNTY ABALONE NETWORK

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 THE OTTER PROJECT; ENVIRONMENTAL)
DEFENSE CENTER,)
17)
Plaintiffs,)
18)
vs.)
19)
KEN SALAZAR, *et al.*,)
20)
Defendants.)

Case No: 5:09-cv-04610-JW

21)
22)
23)
24)
25)
26)
27)
28)
**REPLY OF PROPOSED INTERVENOR
DEFENDANTS TO PLAINTIFFS'
OPPOSITION TO FEDERAL DEFENDANTS'
SECOND MOTION TO DISMISS**

Hearing Date: March 22, 2010
Time: 9:00 a.m.
Courtroom: 8, 4th Floor

TABLE OF CONTENTS

(Page)

1

2

3 TABLE OF AUTHORITIES ii

4 I. INTRODUCTION1

5 II. PURPOSE OF THE TRANSLOCATION.....1

6 III. THE TRANSLOCATION PROGRAM MET ITS OBJECTIVES2

7 IV. THE FAILURE CRITERIA IN THE REGULATIONS3

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(Page)

Regulations

50 C.F.R. §17.84(d)(1)(ii)..... 3

50 C.F.R. §17.84(d)(8)..... 4

50 C.F.R. §17.84(d)(8)(iii)..... 4

52 Fed. Reg. 29754 1

Other Authorities

Biological Analysis of Sea Otters and Coastal Marine Ecosystems in Central and Southern California:
Synopsis and Update; J.A. Estes, B. Hatfield, and M.T. Tinker 2, 3

Draft Evaluation of the Southern Sea Otter Translocation Program 1987-2004 1, 2, 3, 4

Draft Supplemental Environmental Impact Statement: Translocation of Southern Sea Otters..... 1, 2

P.L. 99-625..... 3

Unpublished U.S. Geological Survey Data reported at the California Marine Life Protection Act
Initiative Meeting of the South Coast Regional Stakeholder Group in the Response to Questions,
April 27, 2009 2

1 **I. INTRODUCTION**

2 Since there has been no decision on the Motion to Intervene, Proposed Intervenors do not want
3 to be presumptuous and file a full reply to Plaintiffs’ Opposition to the Federal Defendants’ Second
4 Motion to Dismiss. Instead, Proposed Intervenors respectfully submit this Reply only to focus on
5 certain factual issues that Proposed Intervenors hope will be helpful to the Court. As to the legal
6 issues, Proposed Intervenors support the position of Federal Defendants.

7 At its core, Plaintiffs’ argument is that the Fish and Wildlife Service (“FWS”) has preliminarily
8 determined the translocation of southern sea otters to San Nicolas Island (“SNI”) has failed and FWS
9 should get on with it to make that preliminary decision final. Plaintiffs’ factual presentation overlooks
10 significant facts bearing directly on whether the translocation has failed and, therefore, what actions may
11 or may not be required.

12 **II. PURPOSE OF THE TRANSLOCATION**

13 The Draft Supplemental Environmental Impact Statement: Translocation of Southern Sea Otters
14 (“DSEIS”) prepared by FWS in August, 2005, available at [http://www.fws.gov/ventura/speciesinfo/](http://www.fws.gov/ventura/speciesinfo/so_sea_otter/)
15 [so_sea_otter/](http://www.fws.gov/ventura/speciesinfo/so_sea_otter/), concludes the “primary purpose [of the translocation program] was to bring southern sea
16 otters closer to recovery and to eventual delisting...” DSEIS at 5. The final rule establishing the
17 translocation program stated that once the translocated colony was established, the southern sea otter
18 could be considered for delisting. 52 Fed. Reg. 29754, 29775 (Aug. 11, 1987) (“Final Rule”). The
19 Draft Evaluation of the Southern Sea Otter Translocation Program 1987-2004, set forth as Appendix C
20 of the DSEIS (“Draft Evaluation”) echoes the DSEIS statement that the primary purpose of the
21 translocation was to increase the otter population, moving it toward delisting. *Id.* at 4, 26. In other
22 words, the principal purpose of the translocation program was to increase the number of southern sea
23 otters.
24
25
26
27
28

1 **III. THE TRANSLOCATION PROGRAM MET ITS OBJECTIVES**

2 To carry out its purposes, the translocation program was to establish a population of 70 sea otters
3 that would serve as a breeding nucleus. Draft Evaluation at 4. To achieve that goal, the translocation
4 plan was to move a maximum of 70 otters in the first year of the program. That number would be
5 supplemented with up to 70 otters annually to a total of 250 that could be moved. *Id.* However, FWS
6 translocated only 140 otters, 56% of the 250 originally planned. *Id.* at 1.

7 The 2005 DSEIS cited the population of SNI otters as 32, 46% of the initial goal for a breeding
8 nucleus. DSEIS at 77. If the full translocation program had been implemented, it is likely we would
9 now have, or be close to, the sought after breeding nucleus of 70. In 2008, the sea otter population at
10 SNI was 42. Unpublished U.S. Geological Survey Data reported at the California Marine Life
11 Protection Act Initiative Meeting of the South Coast Regional Stakeholder Group in the Response to
12 Questions, April 27, 2009, at 10-11, available at www.dfg.ca.gov/MLPA/pdfs/agenda_042809a5.pdf.

13 When answering the question if there is anything that currently threatens the “health and well-
14 being of the [SNI] population ... to the point that the colony’s continued survival is unlikely,” FWS said
15 no. Draft Evaluation at 26. Four other factors confirm this assessment.

16 First, virtually all of the otters at SNI are offspring of the originally translocated population. *Id.*
17 at 13. This means there is a healthy and successfully reproducing population at SNI. Second, at least 90
18 pups have been born at SNI, *id.*, further confirming the presence of a healthy, reproducing population.
19 Even FWS admits that given the restricted number of animals moved to SNI, emigration, natural
20 mortality, etc., FWS “would not expect to have many more sea otters at the island than we currently
21 have.” *Id.* at 24. Third, the SNI population is reproducing at a rate of 10% annually. Biological
22 Analysis of Sea Otters and Coastal Marine Ecosystems in Central and Southern California: Synopsis
23 and Update; J.A. Estes, B. Hatfield, and M.T. Tinker (“Estes, *et al.*”) at 3-4, available at
24 http://www.defenders.org/resources/publications/programs_and_policy/wildlife_conservation/imperiled
25
26
27
28

1 _species/sea_otter/biological_analysis_of_sea_otters_and_coastal_marine_ecosystems_in_central_and_s
2 outhern_california.pdf. This is precisely in the middle of the 5-15% reproduction rate FWS expected.
3 Draft Evaluation at 4. In fact, this reproduction rate exceeds the reproduction rate of the parent
4 population and represents an “exponential population increase.” Estes, *et al.* at 3-4. Fourth, a study
5 comparing the translocated population with the parent population found that the “length and mass at age
6 and the age-specific mass to length ratios were significantly higher for otters at San Nicolas Island than
7 in the central population.” *Id.* at 6. In other words, the SNI population appears to be healthier than the
8 parent population.
9

10 What we have is not a failure of results but a failure of expectations. Indeed, FWS admits: “In
11 retrospect, our expectations of success were overly optimistic.” Draft Evaluation at 16. FWS further
12 admits the “translocation program has followed the same general pattern of all previous sea otter
13 translocations.” *Id.*

14 **IV. THE FAILURE CRITERIA IN THE REGULATIONS**

15 The regulations implementing P.L. 99-625 set forth five standards for evaluating the status of the
16 SNI population. Those standards are:
17

- 18 1. no otters remain in the translocation zone after one year;
- 19 2. fewer than 25 otters remain in the translocation zone after three years;
- 20 3. the translocation population is declining after two years;
- 21 4. sea otters are dispersing from the translocation zone and are becoming established in the
22 management zone¹ in such numbers to demonstrate that containment cannot be
23 successfully accomplished; and
24

25
26
27
28 ¹ The term “management zone” refers to the no sea otter management zone south of Point Conception,
California. 50 C.F.R. §17.84(d)(1)(ii).

1 5. the health and well being of the translocated population is threatened such that its
2 continued survival is unlikely.

3 50 C.F.R. §17.84(d)(8). However, “termination of the project under [the first three criteria] may be
4 delayed if reproduction is occurring and the degree of dispersal into the management zone is small
5 enough that the efforts to remove otters from the management zone is acceptable to [FWS] and
6 California Department of Fish and Game.” 50 C.F.R. §17.84(d)(8)(iii). In other words, FWS has the
7 discretion to delay any failure determination based on the relevant facts.
8

9 As to the five criteria listed above, FWS admits in the DSEIS that criteria 1 and 5 have not been
10 met and provide no basis for declaring the translocation a failure. Draft Evaluation at 22, 26. As to
11 criterion 3, FWS concluded it is “unable to evaluate” whether the translocation program failed this
12 criterion. *Id.* at 24. FWS also stated the fourth criterion “has not been met.” *Id.* at 25.

13 Thus, Plaintiffs’ presentation that the translocation has failed and we should get on with it is
14 limited to an FWS determination that under criterion 2 fewer than 25 otters remained at SNI after three
15 years. *Id.* at 23. This presentation ignores the facts discussed above that:
16

- 17 1. the SNI population was at 32 in 2004 and has since increased to 42;
- 18 2. the SNI population is successfully reproducing with at least 90 pups born;²
- 19 3. there is no threat to the “health and well being of the [SNI] population”;
- 20 4. FWS “would not expect to have many more sea otters at the island than we currently
21 have”;
- 22 5. the SNI population is reproducing at a greater rate than the parent population and appears
23 healthier;
- 24 6. the SNI translocation is following the pattern of “all previous sea otter translocations;”
25

26
27 _____
28 ² The average life span of a southern sea otter is 10-15 years, and the mortality rate for first year pups is 40-50%. Draft Evaluation at 23. The translocation began in 1987.

1 7. only about half of the otters expected to be moved to SNI were actually moved; and

2 8. criterion 2 was established in anticipation of translocating 250 otters, not 140.

3 These facts, coupled with the regulations reservation of authority to FWS to delay any decision about
4 the translocation based on criterion 2, suggests not only that FWS is not under a mandatory duty to make
5 any determination about the success of the translocation, but that it would be reasonable for FWS to
6 delay any determination to see how the SNI population continues to evolve.
7

8
9
10 Dated: March 8, 2010

Respectfully submitted,

11 NOSSAMAN LLP
12 BENJAMIN Z. RUBIN
13 GEORGE J. MANNINA, JR., *pro hac vice*

14 /s/ _____
15 George J. Mannina, Jr.

16 *Attorneys for Proposed Intervenor-Defendants*
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

X I hereby certify that on March 8, 2010, the foregoing *Reply of Proposed Intervenor Defendants to Plaintiffs' Opposition to Federal Defendants' Second Motion to Dismiss* was electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Brian Segee, Staff Attorney
bsegee@edenet.org
Linda Krop, Chief Counsel
lkrop@edenet.org
Environmental Defense Center
906 Garden Street
Santa Barbara, CA 93101

Lawson Emmett Fite
lawson.fite.usdoj.gov
USDOJ-ENRD
Wildlife and Marine Resources Section
Ben Franklin Station
P.O. Box 7369
Washington, D.C. 20044

_____ I hereby certify that on the _____ day of _____, 2009, I served the attached document by United States mail on the following, who are not registered participants of the CM/ECF System:

/s/ _____
George J. Mannina, Jr.