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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE OTTER PROJECT and ENVIRONMENTAL DEFENSE CENTER, Plaintiffs, v. KEN SALAZAR, Secretary of the United States Department of the Interior, SAM HAMILTON, Director of the U.S. Fish & Wildlife Service, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES FISH & WILDLIFE SERVICE, Defendants.	No. C 09-4610 JW **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1)** **Date:** March 15, 2010 **Time:** 9:00 a.m. **Ctrm:** 8, 4th Floor The Honorable James Ware

NOTICE:

TO THIS HONORABLE COURT AND COUNSEL FOR THE PARTIES:

PLEASE TAKE NOTICE, under Civil L.R. 7-2, that on March 15, 2010, at 9:00

a.m., or as soon thereafter as the matter may be heard, in the Courtroom of The Honorable James Ware, United States District Judge, at the United States Courthouse, 280 South 1st Street, San Jose, California, 95113, Federal Defendants, Ken Salazar, Sam Hamilton, the United States Department of the Interior, and the United States Fish & Wildlife Service, will argue their motion, set forth below, to dismiss the Complaint for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

MOTION:

Federal Defendants move to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction. The motion has two separate grounds. First, the Court lacks subject-matter jurisdiction because the Complaint seeks, pursuant to Administrative Procedure Act ("APA") Section 706(1), 5 U.S.C. § 706(1), to compel performance of discretionary duties, but Section 706(1) applies only to nondiscretionary, mandatory duties. Thus, Plaintiffs' claims do not fall within the APA's limited waiver of sovereign immunity. Second, the Complaint's allegations, even if taken as true, do not establish that Plaintiffs have suffered injury-in-fact, and thus Plaintiffs cannot have standing to sue under Article III of the United States Constitution. This motion is based on the accompanying memorandum of points and authorities, the other filings in this case; and the oral arguments at hearing.

WHEREFORE, Federal Defendants pray that this Court grant the Motion to Dismiss, and thereby dismiss Plaintiffs' Complaint.

December 21, 2009

Respectfully Submitted,

IGNACIA S. MORENO, Asst. Attorney General
JEAN E. WILLIAMS, Section Chief

/s/ Lawson E. Fite
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THE OTTER PROJECT and ENVIRONMENTAL DEFENSE CENTER, Plaintiffs, v. KEN SALAZAR, Secretary of the United States Department of the Interior, SAM HAMILTON, Director of the U.S. Fish & Wildlife Service, UNITED STATES DEPARTMENT OF THE INTERIOR, and UNITED STATES FISH & WILDLIFE SERVICE, Defendants.	No. C 09-4610 JW **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1)** **Date:** March 15, 2010 **Time:** 9:00 a.m. **Ctrm:** 8, 4th Floor The Honorable James Ware

I. INTRODUCTION

Federal Defendants in this action, Ken Salazar, Sam Hamilton, the United States Department of the Interior, and the United States Fish & Wildlife Service (collectively "FWS" or "Service") hereby provide points and authorities in support of their motion to dismiss the Complaint for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). The Complaint should be dismissed because it asks the Court to compel the Service to take action that is not legally required, and thus fails to establish jurisdiction under the Administrative Procedure Act ("APA"), and in the alternative because the Plaintiffs lack standing.

Specifically, the Complaint alleges that Service regulations that establish a plan for translocation of southern sea otters require the Service to make a finding that the translocation is a failure when certain factual criteria are met, and further require regulation to be withdrawn. The plain language of the regulations, however, establish that a failure determination is discretionary. Moreover, further regulatory action could only be required if a failure determination had been made---which it has not. Even if a failure determination had been made, the regulations establish that regulatory implementation of a failure determination is itself discretionary.

Alternatively, the Complaint should be dismissed because Plaintiffs cannot establish standing to sue. Because the Service suspended any capture or containment of sea otters in 2001, and Plaintiffs' allegations of injury-in-fact depend on containment actually happening, Plaintiffs cannot establish that the Service's regulations, in the abstract, cause them any injury. Thus there is no case or controversy and this Court lacks jurisdiction over the Complaint.

II. BACKGROUND

A. The Endangered Species Act

Congress enacted the Endangered Species Act ("ESA" or "the Act"), 16 U.S.C. §§ 1531-1544, in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of

such endangered species and threatened species. . . .” 16 U.S.C. § 1531(b). Section 4 of the ESA directs the Secretary[1] to determine which species should be listed as endangered or threatened based on consideration of five listing factors. 16 U.S.C. § 1533(a)(1). Once the species is listed, it enjoys a variety of legal protections. 16 U.S.C. §§ 1533(d), 1536, 1538; see also TVA v. Hill, 437 U.S. 153, 180 (1978). Section 4(f) of the ESA requires the development of a recovery plan unless a plan would not “promote the conservation of the species.” 16 U.S.C. § 1533(f). Such plans are to incorporate, to the maximum extent practicable, “management actions” necessary for “conservation and survival of the species,” measurable criteria for attaining recovery of the species and removal from the endangered species list, and estimates of the time and cost necessary to achieve recovery of the species. See id. §§ 1533(f)(1)(B)(i)-(iii).

Specifically, Section 7(a)(2) of the ESA provides that each federal agency must, in consultation with either the Secretary of the Interior or of Commerce, insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any species that has been listed as endangered or threatened under the ESA, or result in the destruction or adverse modification of any designated critical habitat of the species. 16 U.S.C. § 1536(a)(2). To assist action agencies in complying with this provision, Section 7 and the implementing regulations set out a detailed consultation process for determining the biological impacts of a proposed activity. 16 U.S.C. § 1536; 50 C.F.R. Part 402.

Section 9 of the ESA also prohibits any person from “taking” an endangered species. 16 U.S.C. § 1538(a)(1)(B). “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). There are certain exceptions to this prohibition including an exemption for takings that are in

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[1] Depending on the species in question, the “Secretary” referred to in the language of the Act may be the Secretary of the Interior or the Secretary of Commerce. 16 U.S.C. § 1532(15). The Secretary of the Interior has jurisdiction over the southern sea otter. The Service is the agency within the Department of the Interior with delegated responsibility for administering the ESA with respect to those species within Interior’s jurisdiction. Accordingly, Defendants refer herein only to the Service.

compliance with the terms and conditions of an incidental take statement issued in conjunction with a biological opinion and an exception for certain permitted activities. 16 U.S.C. §§ 1536(o)(2), 1539(a). Under the authority of ESA Section 4(d), 16 U.S.C. § 1533(d), the Service has issued a regulation which generally extends the Section 9 "take" prohibition to threatened species under the Service's jurisdiction. 50 C.F.R. § 17.31(a).

Section 10(j) of the ESA, 16 U.S.C. § 1539(j), provides the Service with additional flexibility to conserve listed species. While the Act does not restrict the Service's ability to reintroduce any listed species into new or historical habitat, under Section 10(j), the Service can designate a population of a listed species as "experimental" and thereby relax the requirements of the Act that are otherwise applicable to the reintroduced experimental population under ESA Sections 7 and 9. By allowing the Service to modify the Act's protections, Section 10(j) encourages the acceptance of the reintroduced population by affected nearby landowners and interested third parties. "Congress purposely designed section 10(j) to provide the Secretary flexibility and discretion in managing the reintroduction of endangered species." Wyoming Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1233 (10th Cir. 2000).

B. The Marine Mammal Protection Act

The Marine Mammal Protection Act ("MMPA"), enacted in 1972, was intended to prevent marine mammal populations from "diminish[ing] beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part." 16 U.S.C. § 1361(2). The MMPA further provides that marine mammals "should not be permitted to diminish below their optimum sustainable population." Id. It imposes a moratorium on the taking or importation of marine mammals, 16 U.S.C. § 1371, and broadly defines "take" to mean "to harass, hunt, capture, or kill" any marine mammal. Id. § 1362(13). The MMPA generally authorizes the Secretary of Commerce or of the Interior to issue regulations of up to a five-year duration allowing incidental take of marine mammals, 16 U.S.C. § 1371(a)(5)(A), unless the activity in question is commercial fishing, where the limit is three years. 16 U.S.C.

§ 1371(a)(5)(E). The MMPA also empowers the Secretary of Defense, after conferring with the Secretary of Commerce or of the Interior, to exempt any activity from the MMPA for two years upon a determination that the activity is necessary for national defense. 16 U.S.C. § 1371(f).

The Secretary of Commerce administers the MMPA with respect to whales, seals, sea lions, dolphins, and porpoises. 16 U.S.C. § 1362(12)(A)(i). The Secretary of the Interior administers the MMPA with respect to all other marine mammals: sea otters, walruses, polar bears, and manatees. 16 U.S.C. § 1362(12)(A)(ii). The Secretary has delegated this authority to the U.S. Fish and Wildlife Service.

C. Public Law No. 99-625

In its 1982 recovery plan for the southern sea otter, the Service had identified the establishment of a second experimental colony of Southern sea otters isolated from the current, small population of Southern sea otters along the central California coast as an important recovery measure out of concern that a major oil spill within the otter's current range could decimate the entire population. However, the southern sea otter is protected by both the MMPA and the ESA, and the MMPA—unlike the ESA—does not provide a legal framework for establishment of experimental populations or for a relaxation of statutory restrictions that would otherwise apply to such populations. In order to facilitate the establishment of an experimental population of southern sea otters, then, Congress enacted Public Law No. 99-625, which authorizes the Service to establish such a population and exempts the members of the experimental population from certain provisions of the ESA and MMPA.[2] 16 U.S.C. § 1536 note, Pub. L. No. 99-625, 100 Stat. 3500 (Nov. 7, 1986).[3] As Plaintiffs concede in their

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[2] The plan regulation adopted by the Service specifically provides, however, that taking of sea otters within the translocation zone surrounding San Nicolas island is generally prohibited (with the exception of defense-related activity). 50 C.F.R. § 17.84(d)(4)(iii) (applying 50 C.F.R. § 17.21).

[3] The full text of the law is attached hereto as Exhibit A to the Declaration of Lawson E. Fite.

Complaint, the law "authorized, but did not require, FWS to develop a sea otter translocation and management plan." Compl., ¶¶ 31, 53.

Public Law No. 99-625 specifically provides that "[t]he Secretary may develop and implement . . . a plan for the relocation and management of a population of California sea otters from the existing range of the parent population to another location." Publ. L. No. 99-625, §1(b). 100 Stat. at 3,500. Notably, however, the law does not require the Secretary to issue such a plan (also called a translocation plan), nor does it require withdrawal of such a plan. The law also provides that the plan "must be developed by regulation and administered by the Service in cooperation with the appropriate State agency." Id. The law specifies six elements that the plan, if developed, must include, among which are the establishment of a translocation zone, to which the experimental population of southern sea otters is to be transported, and a management zone surrounding the translocation zone, from which all otters are to be removed. [4] Id., § 1(b)(4). Otters that stray into the management zone are required to be removed and returned to the parent population or to the translocation zone. Id.

Public Law 99-625 further requires that the boundaries of the management zone be far enough away from the current range of the species to allow for expansion necessary for the recovery of the species. Id. The law provides that otters within the management zone are to be treated only as members of a species proposed to be listed for purposes of the ESA, as opposed to species that are formally. Therefore, consultation under Section 7(a)(2) of the ESA is not required for activities in the management zone; rather, as a proposed species in concerned, only conferencing under ESA Section 7(a)(4) is required. Pub. L. No. 99-625, § 1(c)(1). Within the management zone, Public Law 99-625 also exempts incidental take of southern sea otters from the prohibitions against take under both the ESA and MMPA. Id., § (1)(c)(2). Within the translocation zone, defense-related activities fall under the same exemptions that apply within

[4] The maintenance of a management zone, in which no otters live, is known as the "containment" component of the translocation plan. 52. Fed. Reg. at 29,754.

the management zone; however, the standard ESA and MMPA restrictions apply to non-defense related activities in the translocation zone. Id., § 1(c)(1).

D. Facts and Proceedings

1. The Southern Sea Otter

The southern sea otter, *Enhydra lutris nereis*, was listed as a threatened species under the ESA in 1977. 42 Fed. Reg. 2,968 (Jan. 14, 1977). The species chiefly inhabits California coastal waters from Half Moon Bay south to Point Conception, and historically ranged at least from northern California to Baja California, Mexico. Chief threats to the species have been identified as oil spills, environmental contamination, disease, shooting, and entanglement in fishing gear. See 69 Fed. Reg. 5,861, 5,863 (Feb. 6, 2004). Under the recovery plan issued by the Service, as revised in 2003, the sea otter will be considered recovered, and thus eligible for de-listing under the ESA, "when the average population level over a 3-year period exceeds 3,090 animals." Id. The Service's December 2008 stock assessment, issued pursuant to Section 117 of the MMPA, 16 U.S.C. § 1386, estimated the species had a minimum size of 2,723 animals. U.S. Fish & Wildlife Service, Ventura Field Office, Final Southern Sea Otter Stock Assessment Report, December, 2008, at 2, available at http://www.fws.gov/ventura/speciesinfo/so_sea_otter/SSO_SAR_2008_FINAL.pdf.[5] The population growth rate was estimated to be approximately three percent per year. Id.

2. Establishment of the Translocation Program

Shortly after the southern sea otter was listed, the Service began considering ways to protect the species, which has a relatively small range, from the potentially catastrophic effects of an oil spill in Southern California waters. Thus, in 1986, Congress authorized, via P.L. 99-625, the establishment of a translocation plan. The Service established the plan by regulation in 1987. 52 Fed. Reg. 29,754 (Aug. 11, 1987); 50 C.F.R. § 17.84(d). The regulations establish an

[5] A copy of the Stock Assessment is attached as Exhibit B to the Fite Declaration.

experimental population at San Nicolas Island and a translocation zone surrounding the island.[6] 50 C.F.R. § 17.84(d)(4); see also 52 Fed. Reg. at 29,782 (map of the two zones). All U.S. waters south of Point Conception to the U.S.-Mexico border were designated as the management zone from which stray otters would be removed. 50 C.F.R. § 17.84(d)(5). The Service completed an internal consultation under Section 7 of the ESA on the southern sea otter translocation plan in 1987 and concluded that implementation of the plan was not likely to jeopardize the continued existence of the southern sea otter.

The translocation plan also provided that the Service may make a determination that the program has failed and withdraw the plan. 50 C.F.R. § 17.84(d)(8). The regulations state that "[t]he translocation would generally be considered to have failed if one or more" of five different conditions exists. Id.[7] The regulations also provide a procedure to conclude the program:

> If, based on any one of these criteria, the Service concludes, after consultation with the affected State and Marine Mammal Commission, that the translocation has failed to produce a viable, contained experimental population, this rulemaking will be amended to terminate the experimental population, and all otters remaining within the translocation zone will be captured and all healthy otters will be placed back into the range of the parent population.

50 C.F.R. § 17.84(d)(8)(vi) (emphasis added). The regulation also provides that if the causes of the program's failure can be determined, "and legal and reasonable remedial measures identified and implemented, consideration will be given to continuing to maintain the translocated population." 50 C.F.R. § 17.84(d)(8)(vii). The regulations note that the San Nicolas population will be considered "stabilized" once the population reaches 70 otters and is growing. 50 C.F.R.

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[6] San Nicolas is part of Naval Base Ventura County and hosts Naval activities relating to missile testing. See About San Nicolas Island, at https://www.cnic.navy.mil/Ventura/About/SanNicolasIsland/index.htm (last visited Dec. 21, 2009).

[7] The criteria are: (1) no otters remaining in the translocation zone after one year; (2) fewer than 25 otters remaining after three years; (3) after two years from completion of transplants, the population is declining and transplanted otters are not reproducing; (4) otters are dispersing from the translocation zone into the management zone "in sufficient numbers to demonstrate that containment cannot be successfully accomplished;" and (5) if removal is required to prevent loss of the experimental population. 50 C.F.R. § 17.84(d)(8).

§ 17.84(d)(1)(vii). At that stage, the Service intends to reduce the intensity of its monitoring efforts. 50 C.F.R. § 17.84(d)(3)(iv).

3. Suspension of Sea Otter Containment

The translocation program was initiated with the translocation of 140 otters to San Nicolas Island between August 1987 and March 1990. As of March 1991, only 14 otters remained. The others had died, swum back to the parent population, moved into the management zone, or their status was unknown. See 66. Fed. Reg. 6,650 (Jan. 22, 2001). From 1987 to 1993, the Service captured and removed 24 stray sea otters from the management zone. However, the Service stopped removing otters in February 1993, due to the difficulty of capturing otters, particularly those that had been removed before and had returned to the management zone, and also out of concern that some of the removals were resulting in sea otter injury or mortality. See id. Subsequently, the Service reinitiated consultation under the ESA regarding the containment component of the translocation plan, and a final biological opinion was issued in 2000. This opinion concluded that the capture and removal of large numbers of otters who had migrated into the management zone from the parent population and their containment north of Point Conception was likely to result in substantial adverse effects on the parent population and thus would be likely to jeopardize the continued existence of the species. Id.

The Service, in a policy statement issued in the Federal Register, explained its suspension of the containment component of the translocation plan and announced that it intended to undertake further environmental review of the entire translocation program. 66 Fed. Reg. 6,649 (Jan. 22, 2001). As part of the further review, the Service prepared a Draft Supplemental Environmental Impact Statement ("DSEIS") in which it identified the preferred course as terminating the translocation program but permitting otter populations to remain at San Nicolas Island and in the management zone. U.S. Fish & Wildlife Serv., Ventura, Cal., Fish & Wildlife Office, Draft Supp. Envtl. Impact Statement: Translocation of Southern Sea Otters, at 17, 22,

201-26 (Aug. 2005), available at http://www.fws.gov/ventura/speciesinfo/so_sea_otter/.[8] A final SEIS has not been completed to date. As of late 2008, the San Nicolas population consisted of approximately 42 animals—triple the population in 1991—including five pups, and was growing at a rate of approximately nine percent annually. FWS Stock Assessment at 2.

III. STANDARD OF REVIEW

Rule 12(b)(1) of the Federal Rules of Civil Procedure authorizes a federal court to dismiss a claim that does not fall within the court's subject-matter jurisdiction. Where a motion to dismiss under Rule 12(b)(1) makes a facial attack on the complaint, asserting that the complaint's allegations fail to establish subject matter jurisdiction as a matter of law, the court "take[s] the allegations in the plaintiff's complaint as true." Whisnant v. United States, 400 F.3d 1177, 1179 (9th Cir. 2005) (citing Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004)). When a complaint fails to state a claim under a narrowly-construed waiver of sovereign immunity, the case is considered to be jurisdictionally defective. Oregon Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 982 (9th Cir. 2006); Sea Hawk Seafoods, Inc. v. Locke, 568 F.3d 757, 766-67 (9th Cir. 2009).

Where a motion under Rule 12(b)(1) asserts a factual basis for the Court's lack of jurisdiction, the Court "is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). "In such circumstances, '[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'" Id. (quoting Thornhill Publ'g Co. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979)).

[8] Pages from the DSEIS cited herein are attached as Exhibit C to the Fite Declaration.

IV. ARGUMENT

Plaintiffs' claims are brought under Section 706(1) of the Administrative Procedure Act, 5 U.S.C. § 706(1), which provides that a court reviewing agency action is empowered to "compel agency action unlawfully withheld or unreasonably delayed." The crux of Plaintiffs' case is the claim that:

> The 1987 rule requires FWS to conduct an evaluation of the translocation effort as measured by five "failure criteria." 50 C.F.R. § 17.84(d)(8)(i)-(vii). The rule directs FWS to consider these criteria at specified times during the translocation effort, and *mandates* that it be terminated, and the experimental population and no otter zone designation be withdrawn, if *any* of the criteria are met.

Compl., ¶ 5 (emphasis in original). As shown below, Plaintiffs are mistaken when they assert that FWS is under a regulatory mandate either to make a finding that the translocation has failed, or to initiate rulemaking to amend or withdraw the translocation regulations. Thus, this Court lacks jurisdiction over the Complaint and should dismiss it.

In particular, Plaintiffs must demonstrate that FWS "has 'failed to take a discrete agency action that it is required to take.'" Coos County Bd. of Comm'rs v. Kempthorne, 531 F.3d 792, 802, 809 (9th Cir. 2008) (quoting Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) ("SUWA")). In order to state a claim under Section 706(1), the Ninth Circuit has held, a party "must at least show 'agency recalcitrance ... in the face of clear statutory duty or ... of such magnitude that it amounts to an abdication of statutory responsibility.'" North County Cmty. Alliance v. Salazar, 573 F.3d 738, 744 (9th Cir. 2009) (quoting Confederated Tribes of Umatilla Indian Reservation v. Bonneville Power Admin., 342 F.3d 924, 930 (9th Cir.2003)); accord Dmitriev v. Chertoff, No. C 06-7677 JW, 2007 WL 1319533 at *2 (N.D. Cal. May 4, 2007) (holding that "[u]nder the APA, a plaintiff must show that (1) an agency had a nondiscretionary duty to act and (2) the agency unreasonably delayed in acting"). This, Plaintiffs cannot do, as any further action on the translocation regulations is discretionary. Accordingly, the Complaint should be dismissed.

A. Because Neither the Special Law Nor the Service's Regulations Establish a Duty that FWS Is Required to Take, the Service Cannot Be Compelled to Act Under APA Section 706(1).

1. The Special Law Gives the Service the Authority—But Not the Duty—to Promulgate or Withdraw the Translocation Regulations.

As an initial matter, it is plain that Public Law 99-625 establishes no duty or requirement that the Service must take any discrete action. The plain language of the law states that "[t]he Secretary may develop and implement . . . a plan for the relocation and management of a population of California sea otters." The use of "may" establishes that any action taken pursuant to this authority is discretionary. Trout Unlimited v. Lohn, 559 F.3d 946, 962 n.12 (9th Cir. 2009); Sea Hawk Seafoods, 568 F.3d at 767. Plaintiffs concede as much in their Complaint. Compl., ¶¶ 31-32. Thus, if any required duty is to be found, it cannot come from the special law.

2. The Regulations Do Not Require the Service To Make a "Failure" Determination, and a Failure Determination Is a Prerequisite to Any Arguable Duty to Amend or Withdraw the Regulations.

Plaintiffs' Complaint alleges, however, that the sea otter translocation plan itself establishes a duty for the Service to make a "failure" determination. Compl., ¶¶ 120-23, 126. Plaintiffs cannot show, however, that there is a "discrete" agency action that the Service is "required to take." Thus, this case cannot proceed.

The plan does not require any action of the Service. Instead, it states that

> If, based on any one of these criteria, the Service concludes that the translocation has failed to produce a viable, contained experimental population, this rulemaking will be amended to terminate the experimental population, and all otters remaining within the translocation zone will be captured and all healthy otters will be placed back into the range of the parent population.

50 C.F.R. § 17.84(d)(8)(vi) (emphasis added).[9] It is clear from the plain language of the regulation that there is no duty to make any evaluation or to make a failure determination. The

[9] As the translocation plan was implemented by regulation, the Service will use "plan" and "regulation" as equivalent terms in its briefing.

regulation says that amendments will be made "if" the service evaluates the translocation and "if" it makes a determination that the translocation has failed. Thus, the failure criteria contained in the translocation regulations create no enforceable duty. What the failure criteria do, instead, is to provide guidance and points of comparison in the event that the Service decides to evaluate the plan. They do not require the Service to make any decision or evaluation, much less undertake a rulemaking to terminate the plan.[10] See Fund for Animals v. Rice, 85 F.3d 535, 547 (11th Cir. 1996) (examining provisions regarding ESA recovery plans and holding that "by providing general guidance as to what is required in a recovery plan, the ESA 'breathe[s] discretion at every pore.'") (quoting Strickland v. Morton, 519 F.2d 467, 469 (9th Cir.1975)). Thus there is no duty that Plaintiffs can ask this Court to compel.

The regulation also establishes that rulemaking is contemplated only after the Service formally decides, based upon its evaluation of the plan and any of the failure criteria, that translocation is a failure. Because the Service has not made such a failure determination (the "if" in the regulation), then no arguable duty to initiate rulemaking has been triggered. Plaintiffs acknowledge, however, the Service has not made such a failure determination. See Compl., ¶ 6 (alleging that "[t]he agency, however, never finalized any of these determinations. . . ."). Thus, even if the Plaintiffs were correct that the statement that the regulations "will" be amended creates a duty—which, as shown below, it does not—there is no question that such a duty has not been triggered. Because no duty has been triggered, then there can be no unlawful withholding or unreasonable delay on the part of the Service, and Plaintiffs' claim must be dismissed. The Ninth Circuit rejected a similar claim in San Francisco BayKeeper v. Whitman, 297 F.3d 877 (9th Cir. 2002). There, the statute provided that once a state submitted certain lists to the EPA, "certain mandatory duties by EPA are triggered." Id. at 880. The Court found that the submission had not occurred, either directly or constructively, and thus that the EPA had not

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[10] Of course, any amendments to the regulation could be challenged under APA Section 706(2)(A), and the Service's consideration of the failure criteria might be a factor in such judicial review.

violated a mandatory duty. Id. at 881-85. Additionally, the Court found that "EPA does not presently have a statutory duty to act. Therefore, there can be no unreasonable delay in this case." Id. at 886. Similarly, here the Service has not made a failure finding. Thus any arguable duty has not been triggered and the Service cannot be sued under APA Section 706(1).

3. Even if the Service Had Made a Failure Determination, it Would Still Have No Duty to Initiate Amendatory Rulemaking.

Even if the Service had made a failure finding (which, as noted above, it has not), the regulations do not establish any subsequent duty to initiate rulemaking. The regulations state that, upon a "Determination of a failed translocation . . . this rulemaking will be amended." 50 C.F.R. §§ 17.81(d)(8), (d)(8)(vi). The regulations further state that "[p]rior to declaring the translocation a failure, a full evaluation will be conducted into the probable causes of the failure." 50 C.F.R. § 17.84(d)(8)(vii). The regulations' use of the word "will" instead of "shall" indicates that the regulations set forth a plan and not a mandate. In other words, the Service has stated how it intends to proceed in the event it determines the plan has failed, while reserving to itself the discretion to decide whether to amend the regulations at all. For this reason, the regulations provide that the Service will consider "continuing to maintain the translocated population." 50 C.F.R. § 17.84(d)(8)(vii). This situation is similar to SUWA, where the Supreme Court held that such language, combined with statutory language stating that the agency shall act "in accordance with" land use plans, did not create a judicially-enforceable duty: "The claim presently under discussion, however, would have us . . . conclude that a statement in a plan that BLM 'will' take this, that, or the other action, is a binding commitment that can be compelled under § 706(1). In our view it is not-at least absent clear indication of binding commitment in the terms of the plan." 542 U.S. at 69 (emphasis added). Here, then, Plaintiffs' entire attempt to invoke Section 706(1) rests on the word "will." Under SUWA, that is not enough. See also Silver Dollar Grazing Ass'n v. FWS, No. 07-35612, 2009 WL 166924 at *3 (9th Cir. Jan. 13, 2009) (holding that, in an FWS plan for managing a wildlife refuge, "language

asserting that habitat changes in the Refuge 'will be evaluated' according to certain monitoring techniques cannot be the basis for a suit under 5 U.S.C. § 706(1).").[11]

The Supreme Court further stated that "[q]uite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them." SUWA, 542 U.S. at 71 (construing a statute that required action "in accordance with" such land use plans). That is exactly the case here. The regulations even preface the failure criteria with a statement the plan would "generally be considered to have failed" under any one of the criteria. 50 C.F.R. § 17.84(d)(8) (emphasis added). Thus, the translocation plan guides the Service's actions, but does not issue any "specific … command" that the Service could be ordered to follow. Accord Our Children's Earth Found. v. EPA, 527 F.3d 842, 851 (9th Cir. 2008) (under the Clean Water Act's citizen-suit provision, holding that a claimant "must point to a nondiscretionary duty that is 'readily-ascertainable' and not 'only [] the product of a set of inferences based on the overall statutory scheme'" and that a statute must "expressly and unequivocally" set forth such a mandate) (quoting Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987)).

Moreover, the translocation plan's language is even more hortatory than language that the Ninth Circuit has found not to create a judicially-enforceable duty. For example, in Sierra Club v. Whitman, 268 F.3d 898, 904 (9th Cir. 2001), the court found no mandatory duty even where the statute stated that the agency "shall" take certain actions. See 33 U.S.C. § 1319(a)(3). The court held:

> It is true that "shall" in a statute generally denotes a mandatory duty. Alabama v. Bozeman, 533 U.S. 146, — , 121 S. Ct. 2079, 2085, 150 L.Ed.2d 188 (2001). Nonetheless, the use of "shall" is not conclusive. See Escoe v. Zerbst, 295 U.S. 490, 493, 55 S.Ct. 818, 79 L.Ed. 1566 (1935). Particularly when used in a statute that prospectively affects government action, "shall" is sometimes the equivalent of "may." Richbourg Motor Co. v. United States, 281 U.S. 528, 534, 50 S.Ct. 385,

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[11] This decision is cited under Ninth Cir. R. 36-3, which permits citation of unpublished opinions issued after January 1, 2007.

> 74 L.Ed. 1016 (1930). The question whether "shall" commands or merely authorizes is determined by the objectives of the statute.

268 F.3d at 904. On this basis, the Whitman court found that no duty existed, even whether the statute said that the EPA "shall" act. Similarly, in Trout Unlimited, 559 F.3d at 950, the Ninth Circuit held that a provision of the ESA which provided that "the Secretary shall issue such regulations as he deems necessary and advisable" indicated that issuance of such regulations was discretionary. Here, the regulations do not even use "shall." Instead, they state that prospective government action "will" be taken. At most, the regulations authorize FWS to take the actions it states it "will" take in certain circumstances, and give notice to the public of the FWS's likely actions. They do not create a requirement that FWS engage in further rulemaking.

Plaintiffs' Complaint points to the Service's response to comments in the final rulemaking notice in an attempt to show that the Service intended to make the failure criteria mandatory. Compl., ¶ 64. This attempt fails. The Service did state that the criteria "are critical to whether or not the experimental population will achieve its intended purposes or will have to be terminated," 52 Fed. Reg. at 29,764, but the Service's use of the phrase "have to be" is not a legal determination, but rather an expression equivalent to "should" or "will." In the same sentence, moreover, the Service states that termination "would involve Service evaluation and informal rulemaking procedures," thus indicating the Service's intent to retain discretion over the initial determination of program failure. Id. Accordingly, Plaintiffs cannot use a turn of phrase to overturn the plain text of the regulations or the Service's reasonable interpretation of them. See Norfolk Southern Ry. Co. v. Shanklin, 529 U.S. 344, 356 (2000) (holding that an agency's construction of its own regulations is entitled to deference unless contradicted by the text of the regulation); Oregon Natural Res. Council v. Kantor, 99 F.3d 334, 339 (9th Cir. 1996) (holding that "if the language of a statute is clear, we look no further than that language in determining the statute's meaning").

4. The Service Has Not Shouldered a Duty of Timeliness By Preparing the 2005 Draft Supplemental Environmental Impact Statement.

Plaintiffs might argue that the Service has triggered a duty of timeliness by preparing the Draft Supplemental EIS in 2005 or previous internal draft documents. In this vein, the Complaint alleges a violation of Section 555(b) of the APA, which provides that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b); see Compl., ¶ 126. This argument fails. By its plain language, section 555(b) applies to agency "proceeding[s]", which the APA defines as rulemakings, adjudications, and licensings. 5 U.S.C. § 551(12). No such proceeding is alleged in the Complaint. Thus, no matter has been "presented" to the Service, and, under the plain language of the statute, the Service is not subject to a duty of timeliness.

When a matter has not been presented to an agency for decision, no basis exists for finding that the agency "unreasonably delayed" acting on the matter. Accordingly, appellate cases addressing APA unreasonable delay claims have done so in reliance on the express language in Section 555(b) of the APA, which provides an opportunity to present matters to the agency, and requires the agency to proceed with reasonable dispatch to conclude any matter presented to it; these cases all speak to a failure by the agency to respond to a specific request for action or conclude pending administrative proceedings. Auer v. Robbins, 519 U.S. 452, 459 (1997) (holding that where "the claim is not that . . . it was 'arbitrary' and 'capricious' not to conduct amendatory rulemaking . . . [t]he proper procedure for pursuit of respondents' grievance is set forth explicitly in the APA: a petition to the agency for rulemaking. . ."); National Labor Relations Bd. v. Hanna Boys Center, 940 F.2d 1295, 1299 (9th Cir. 1991) (stating that Section 555(b) applies to matters "submitted" to an agency); Friends of the Bow v. Thompson, 124 F.3d 1210, 1221 (10th Cir. 1997) (observing that Section 555(b) "reasonable time" requirements typically apply "when there has been no response to a request for agency action"). Thus, unless and until the Service (1) initiates an administrative proceeding, such as a rulemaking or

adjudication, to amend the plan; or (2) is presented with a petition for rulemaking pursuant to 5 U.S.C. § 553, there can be no claim of unlawful withholding or unreasonable delay.[12] See Friends of the Bow,124 F.3d at 1220-21 (in a pre-SUWA decision, holding that a claim under Section 555(b) must, at the barest minimum, involve an "explicit and colorably valid request for the Service to take action arguably required of it by law"). Accordingly, section 555(b) does not apply here, absent a petition for rulemaking or its equivalent.

Additionally, because Section 555(b) is equivalent to the "unreasonable delay" provision of Section 706(1), it applies only if there is a baseline requirement of action in the first place. The D.C. Circuit stated in Sierra Club v. Thomas that a court "may review agency inaction that is alleged to work an "unreasonable delay" of final action." 828 F.2d at 794 (emphasis added); cf. General Motors Corp. v. United States, 496 U.S. 530, 539 (1990) (linking Sections 555(b) and 706(1)). SUWA makes clear that such claims cannot expand the scope of Section 706(1) claims beyond discrete and specific actions that an agency is required to take. 542 U.S. at 64 n.1 ("Of course § 706(1) also authorizes courts to 'compel agency action ... unreasonably delayed'-but a delay cannot be unreasonable with respect to action that is not required."); accord San Francisco BayKeeper v. Whitman, 297 F.3d 877, 885-86 (9th Cir. 2002) (holding that "for a claim of unreasonable delay to survive, the agency must have a statutory duty in the first place"). Thus, even if Thomas ever stood for the idea that an agency could be compelled to take action that it had no duty to take, then it surely does not do so now. See Hi-Tech Pharmacal Co.. v. FDA, 587 F. Supp. 2d 1, 9 (D.D.C. 2008) (holding that the "general directive of Section 555(b) is a far cry from the 'discrete agency action' that courts require" under Section 706(1)); accord Orlov v. Howard, 523 F. Supp. 2d 30, 37 (D.D.C. 2007); see also Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1999) (holding that "when an agency is required to act-either by organic

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[12] Notably, Plaintiffs cannot directly challenge either the plan regulations or the 2000 policy, as the six-year statute of limitations, 28 U.S.C. § 2401(a), has long since run. Plaintiffs could, however, petition for rulemaking pursuant to 5 U.S.C. § 553 and, if the petition were denied, challenge the petition denial. Auer, 519 U.S. at 459; Mid-Water Trawlers Coop. v. Mosbacher, 727 F. Supp. 12, 15-16 (D.D.C. 1989).

statute or by the APA-within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable.") (emphasis added). As described above, however, the Service has no duty to make this decision, or any decision, and its issuance of the DSEIS falls well short of triggering any duty of timeliness that might arise.

B. Plaintiffs Cannot Establish Standing Because No Otters Are Being Captured or Moved.

Even if Plaintiffs could theoretically invoke this Court's jurisdiction under APA Section 706(1), the case should still be dismissed because Plaintiffs cannot establish standing to sue. Plaintiffs can suffer no harm due to the Service's alleged failure to act because sea otter containment—the action which Plaintiffs allege injures them—was suspended indefinitely in 2001. Plaintiffs' standing allegations claim that their "interests are directly harmed by defendants' failure to finalize the failure determination, abolish the no otter zone, and withdraw the 1987 rule, and that harm would be remedied by an Order of this Court compelling such action." Compl., ¶ 13. Plaintiffs further allege that their members "seek to view sea otters in waters north and south of Point Conception, and defendants' challenged action has reduced their opportunities to do so." Compl., ¶ 14.

These allegations fail to establish the "irreducible constitutional minimum" of standing to sue under Article III. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In order to invoke Article III jurisdiction, a plaintiff "must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009) (citation omitted).[13] In

[13] Because the Plaintiffs are organizations bringing suit on behalf of their members, Compl., ¶¶ 10-14, their standing is further analyzed under the test set forth in Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000):

environmental cases, injury-in-fact can be established by showing that "the plaintiff has an aesthetic or recreational interest in the particular place and that interest will be impaired by the defendant's conduct." White Tanks Concerned Citizens, Inc. v. Strock, 563 F.3d 1033, 1038 (9th Cir. 2009) (citations omitted). When allegations relate to sites or areas that are remote or inaccessible, specific allegations that a plaintiff will visit those sites must be presented, because it is "not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis." Lujan, 504 U.S. at 579 (Kennedy, J., concurring). Thus, "environmental plaintiffs must allege that they will suffer harm by virtue of their geographic proximity to and use of areas that will be affected by the [agency]'s policy." Citizens for Better Forestry v. USDA, 341 F.3d 961, 971 (9th Cir. 2003).

Here, Plaintiffs cannot establish that they have suffered injury-in-fact. The core of their claim of standing is that the Service's past actions have reduced the numbers of sea otters near Point Conception in the past. Wholly past injury, however, cannot establish "imminent" rather than "conjectural" harm. Summers, 129 S. Ct at 1150 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 111-112, (1983)). What Plaintiffs appear to assume is that the regulations' establishment of management and translocation zones necessarily results in removal of otters from the management zone. In particular, Plaintiffs seem to assume that as the parent population grows southward into the management zone, the Service will contain and remove otters from the area southeast of Point Conception. As the Service made clear over eight years ago, however, no further translocation of otters will occur unless and until the Service issues a new biological

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> An organization has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

(quoting Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977), and citing Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000)). In the Service's view, as described above, prong (a) is not met. However, the Service acknowledges that the Complaint's allegations are likely to satisfy prongs (b) and (c).

opinion that concludes that future containment of southern sea otters is not likely to jeopardize the continued existence of the species. Plaintiffs have not alleged—nor could they—that the Service is actually removing otters in violation of its announced policy. Thus, absent real, on-the-ground impacts, their suit is merely an attempt to assert a "nonconcrete interest in the proper administration of the laws" that the Supreme Court has made clear is outside the realm of Article III jurisdiction. Summers, 129 S. Ct. at 1151 (quoting Lujan, 504 U.S. at 580-81 (Kennedy, J., concurring)).

In this regard, the similarities between the present case and Summers are compelling. In Summers, the parties settled a specific challenge to a specific timber salvage project. 129 S. Ct. at 1148. The Plaintiffs pressed, and won, a challenge to timber planning regulations. Id. The Supreme Court held that standing was no longer present, specifically rejecting a claim that the plaintiff "retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests." Id. at 1150 (emphasis added). In fact, the court held, such a rule "would fly in the face of Article III's injury-in-fact requirement." Id. Similarly, here the Plaintiffs are challenging an abstract harm that results from a regulation that is on the books but that the Service has suspended in order to comply with other statutory mandates. Thus, Plaintiffs can no more challenge this "regulation in the abstract" than could the Summers plaintiffs.

V. CONCLUSION

Plaintiffs' Complaint does not and cannot identify a duty that the Service is required to take. Thus, Plaintiffs cannot invoke this Court's jurisdiction under APA Section 706(1). Alternatively, Plaintiffs cannot establish standing to sue because no action on the part of the Service is injuring or will injure them. Accordingly, this Court lacks jurisdiction over the Complaint, and the Service's motion to dismiss should be granted.

December 21, 2009

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE OTTER PROJECT, et al.,

Plaintiffs,

v.

KEN SALAZAR, et al.,

Defendants.

No. C 09-4610 JW

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2009, I electronically filed the foregoing NOTICE OF MOTION AND MOTION TO DISMISS, DECLARATION OF LAWSON E. FITE AND EXHIBITS A-C THERETO, and PROPOSED ORDER with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Lawson E. Fite

LAWSON E. FITE