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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

The Otter Project; Environmental Defense  
Center,

NO. C 09-04610 JW

Plaintiff,

**ORDER GRANTING CSUC’S MOTION  
TO INTERVENE; DENYING  
DEFENDANTS’ MOTION TO DISMISS**

v.

Ken Salazar, et al.,

Defendants.

**I. INTRODUCTION**

The Otter Project; Environmental Defense Center (“Plaintiff”) brings this action against the United States Department of Interior and the United States Fish and Wildlife Service (collectively, “Defendant”)<sup>1</sup> for declaratory and injunctive relief under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1). Plaintiff alleges that Defendants violated the APA by refusing to make a determination as to whether the translocation program of California sea otters has failed after its commencement nearly 24 years ago.

Presently before the Court are Federal Defendants’ Motion to Dismiss First Amended Complaint for Lack of Subject-Matter Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1),<sup>2</sup> and Motion of California Sea Urchin Commission, et al. (collectively, “Proposed Intervenors”) for Leave to

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<sup>1</sup> Plaintiff also names Ken Salazar, Secretary of the Interior, Sam Hamilton, Director of U.S. Fish and Wildlife Service as Defendants.

<sup>2</sup> (hereafter, “Motion to Dismiss,” Docket Item No. 32.)

1 Intervene.<sup>3</sup> The Court conducted a hearing on March 22, 2010. Based on the papers submitted to  
 2 date and oral argument, the Court GRANTS CSUC's Motion to Intervene and DENIES Defendants'  
 3 Motion to Dismiss.

## 4 II. BACKGROUND

5 In a First Amended Complaint filed on December 23, 2009,<sup>4</sup> Plaintiffs allege as follows:

6 The southern sea otter species, also called the California sea otter, historically  
 7 numbered between 16,000 and 18,000 individuals off the California Coast. (FAC ¶ 47.)  
 8 Although their population was decimated by the fur trade, and they were believed to be  
 9 extinct by the early 1900s, a small group of fewer than fifty sea otters was discovered off the  
 10 Central California coast in 1938. (Id.) Despite the subsequent expansion of their population,  
 11 the southern sea otter continued to be highly imperiled, and in 1977 was listed as a  
 12 threatened species under the ESA. (Id. ¶ 48.)

13 In 1980, the Marine Mammal Commission ("MMC") concluded that "a transplant of  
 14 sea otters to an area substantially removed from the present California range seems to offer  
 15 the only practical means for reducing the threat posed by potential oil spills . . . a transplant  
 16 should be undertaken as soon as possible." (FAC ¶ 50.) In 1982, the Fish and Wildlife  
 17 Service ("FWS") adopted the MMC's recommendation, identifying the need to establish,  
 18 through translocation, one or more sea otter populations as a primary management action  
 19 necessary to ensure recovery. (Id. ¶ 51.)

20 On November 7, 1986, Congress passed Public Law 99-625, authorizing, but not  
 21 requiring, FWS to develop a sea otter translocation plan. (FAC ¶ 61.) In the event that the  
 22 FWS chose to exercise its authority to develop a translocation plan, Congress directed FWS  
 23 to designate an otter-free management zone surrounding the translocation zone on San

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24 <sup>3</sup> (Motion of California Sea Urchin Commission, Peter Halmay, Harry Liquornik, California  
 25 Abalone Association, and Sonoma County Abalone Network for Leave to Intervene Under FRCP  
 26 24, hereafter, "Motion to Intervene," Docket Item No. 19.)

27 <sup>4</sup> (First Amended Complaint for Declaratory and Injunctive Relief, hereafter, "FAC," Docket  
 28 Item No. 24.)

1 Nicolas Island off the southern California coast. (Id. ¶ 62.) Within the no-otter zone,  
2 encompassing the entire southern California coastline aside from San Nicolas island, FWS  
3 was to “use all feasible non-lethal means and measures to capture any sea otter . . . and return  
4 it to either the translocation zone or to the range of the parent population.” (Id.)

5 On August 11, 1987, FWS finalized its rulemaking and associated NEPA process  
6 designating the waters around San Nicolas Island as the translocation zone, with all other  
7 California waters and islands south of Point Conception designated as the no-otter  
8 management zone. (FAC ¶ 65.) That same year, in accordance with the new rule, FWS  
9 began translocating sea otters to San Nicolas Island, releasing 140 individuals between  
10 August 1987 and March 1990. (Id. ¶ 83.) The translocation effort was plagued with  
11 difficulties from the beginning, and resulted in much higher levels of otter deaths and  
12 disappearances than predicted during the rulemaking process. (Id. ¶ 84.) By March 1991,  
13 only fourteen individual otters remained within the translocation zone. (Id.) In 1991, FWS  
14 “stopped translocating sea otters to San Nicolas Island due to high rates of dispersal and poor  
15 survival.” (Id. ¶ 86.)

16 As early as 1990, FWS monitoring reports noted that the translocation program  
17 appeared to meet at least one of the failure criteria contained in the 1987 rule. (FAC ¶ 89.)  
18 In 1992, FWS prepared the first of several draft evaluations of the translocation and  
19 management rule, none of which have ever been finalized. (Id. ¶ 90.) At that time, FWS  
20 “concluded that the management zone could not be maintained in the long-term using  
21 available non-lethal techniques, and that the persistence of the management zone would  
22 reduce the options available to recover the southern sea otter and likely delay recovery.” (Id.  
23 at 11 (quoting July 21, 2000 Biological Opinion, Reinitiation of Formal Consultation on the  
24 Containment Program for the Southern Sea Otter (“Biological Opinion”).)

25 In the Winters of 1997-98 and 1998-99, large groups of more than 100 sea otters  
26 moved of their own volition south of Point Conception into the waters of southern California.  
27 (FAC ¶ 106.) At this same time, sea otter populations in the parent central coast population  
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1 experienced significant declines. (Id. ¶ 107.) On July 19, 2000, FWS issued a final  
2 biological opinion that concluded that “the primary action for promoting the recovery of this  
3 population at this time is the cessation of the ‘otter-free management zone’ in the southern  
4 California Bight” and that “the continuing containment program and restricting the southern  
5 sea otter to the area north of Point Conception . . . is likely to jeopardize [the southern sea  
6 otter’s] continued existence.” (Id. ¶¶ 114-15.) FWS further stated its intent “to undertake a  
7 comprehensive review of the translocation program under NEPA” and evaluate whether it  
8 should be continued, modified, or terminated.” (Id. ¶ 118.) In an April 2001 “scoping”  
9 report, FWS stated that it would “publish and distribute a draft supplemental EIS in the Fall  
10 of 2001.” (Id. ¶¶ 122-23.)

11 In a 2005 draft evaluation, FWS concluded that at least one of the failure criteria had  
12 been met. (FAC ¶ 128.) The draft evaluation stated, “we conclude that the translocation  
13 program has failed to fulfill its purpose and that our recovery and management goals for the  
14 species cannot be met by continuing the program.” (Id. ¶ 130.)

15 On the basis of the allegations outlined above, Plaintiff alleges a claim for relief for  
16 Violation of the Administrative Procedure Act, 5 U.S.C. § 706(1).

17 Presently before the Court is Federal Defendants’ Motion to Dismiss for lack of subject  
18 matter jurisdiction.

### 19 **III. STANDARDS**

20 Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for a motion to dismiss for  
21 lack of subject-matter jurisdiction. A Rule 12(b)(1) motion may be either facial, where the inquiry  
22 is confined to the allegations in the complaint, or factual, where the court is permitted to look  
23 beyond the complaint to extrinsic evidence. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004).  
24 On a facial challenge, all material allegations in the complaint are assumed true, and the question for  
25 the court is whether the lack of federal jurisdiction appears from the face of the pleading itself. See  
26 Wolfe, 392 F.3d at 362; Thornhill Pub’g Co. v. Gen. Tel. Elecs., 594 F.2d 730, 733 (9th Cir. 1979).  
27 When a defendant makes a factual challenge “by presenting affidavits or other evidence properly  
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1 brought before the court, the party opposing the motion must furnish affidavits or other evidence  
 2 necessary to satisfy its burden of establishing subject matter jurisdiction.” Safe Air For Everyone v.  
 3 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). The court need not presume the truthfulness of the  
 4 plaintiff’s allegations under a factual attack. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000);  
 5 Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). However, in the absence of a  
 6 full-fledged evidentiary hearing, disputes in the facts pertinent to subject matter are viewed in the  
 7 light most favorable to the opposing party. Dreier v. United States, 106 F.3d 844, 847 (9th Cir.  
 8 1996). The disputed facts related to subject-matter jurisdiction should be treated in the same way as  
 9 one would adjudicate a motion for summary judgment. Id.

#### 10 **IV. DISCUSSION**

##### 11 **A. Motion to Intervene**

12 Proposed intervenors Peter Halmay, Harry Liquornik, California Sea Urchin Commission  
 13 (“CSUC”), California Abalone Association (“CAA”), and Sonoma County Abalone Network  
 14 (“SCAN”) (collectively, “Proposed Intervenors”) move to intervene in this action on the ground that  
 15 they and their members are commercial fishermen whose ability to make a living is directly  
 16 impacted by the presence of sea otters in waters off of the southern California coast. (Motion to  
 17 Intervene at 3.) Plaintiff contends that proposed intervenors’ are not entitled to intervene as of right,  
 18 but does not oppose permissive intervention.<sup>5</sup>

19 Fed. R. Civ. P. 24(a)(2) provides:

20 On timely motion, the court must permit anyone to intervene who . . . claims an  
 21 interest relating to the property or transaction that is the subject of the action, and is so  
 22 situated that disposing of the action may as a practical matter impair or impede the movant’s  
 23 ability to protect its interest, unless existing parties adequately represent that interest.

24 Fed. R. Civ. P. 24(b) provides:

25 On a timely motion, the court may permit anyone to intervene who . . . has a claim or  
 26 defense that shares with the main action a common question of law or fact. . . . In exercising  
 27 its discretion, the court must consider whether the intervention will unduly delay or prejudice  
 28 the adjudication of the original parties’ rights.

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26 <sup>5</sup> (Response in Partial Opposition to Motion of California Sea Urchin Comm’n et al. for  
 27 Leave to Intervene, Docket Item No. 25.)

1 Here, the Court finds that Proposed Intervenors at least meet the standard for permissive  
2 intervention. Proposed Intervenors moved to intervene at the earliest stage of the litigation, thus  
3 there is no issue as to timeliness. Furthermore, as commercial fishermen who depend upon the sea  
4 urchin and abalone fisheries located within the boundaries of the current sea otter management zone,  
5 the claims of Proposed Intervenors depend upon the same issues of law and fact that are at issue in  
6 this action. Finally, it does not appear to the Court that allowing permissive intervention here would  
7 cause any undue delay or prejudice the original parties' rights.

8 Since Plaintiff does not oppose permissive intervention, and Federal Defendants' do not  
9 express a position on the matter one way or the other, the Court does not find it necessary to reach  
10 the issue of intervention as of right.

11 Accordingly, the Court GRANTS CSUC's Motion to Intervene.

12 **B. Motion to Dismiss**

13 Federal Defendants move to dismiss Plaintiffs' Complaint for lack of subject matter  
14 jurisdiction on the ground that it asks the Court to compel FWS to take action that is not legally  
15 required. (Motion to Dismiss at 1.) Plaintiff responds that FWS's regulations plainly establish a  
16 duty to prepare a failure determination.<sup>6</sup>

17 The Administrative Procedure Act ("APA") authorizes suit by "[a] person suffering legal  
18 wrong because of agency action, or adversely affected or aggrieved by agency action within the  
19 meaning of the relevant statute." 5 U.S.C. § 702. The APA defines "agency action" as including  
20 "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial  
21 thereof, or failure to act." *Id.* § 551(13). The APA further provides that a "reviewing court shall . . .  
22 compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). The Supreme  
23 Court has held that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency  
24 failed to take a *discrete* agency action that it is *required to take*." Norton v. Southern Utah  
25 Wilderness Alliance (SUWA), 542 US. 55, 64 (2004) (emphasis in original).

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27 <sup>6</sup> (Plaintiffs' Response in Opposition to Federal Defendants' Second Motion to Dismiss at 2,  
28 hereafter, "Opposition," Docket Item No. 35.)

1 In 1987, Congress enacted Public Law No. 99-625, which provides that “[t]he Secretary may  
 2 develop and implement . . . a plan for the relocation and management of a population of California  
 3 sea otters from the existing range of the parent population to another location.” Pub. L. No. 99-625,  
 4 § 1(b), 100 Stat. 3500. Public Law No. 99-625 further provides that if the Secretary develops a plan,  
 5 it must contain six elements, including the establishment of a “translocation zone,” to which the  
 6 experimental population will be relocated, and a “management zone,” which surrounds the  
 7 translocation zone and from which all otters are to be removed. Id. § 1(b)(4).

8 Pursuant to the authority granted by Public Law No. 99-625, FWS promulgated regulations  
 9 designating the waters around San Nicolas Island as the translocation zone, with all other California  
 10 waters and islands south of Point Conception designated as the no-otter management zone. 50  
 11 C.F.R. § 17.84(d). The regulations also stated:

12 Determination of a failed translocation.—The translocation would generally be considered to  
 13 have failed if one or more of the following conditions exists:

- 14 (i) If, after the first year following initiation of translocation or any subsequent year, no  
 15 translocated otters remain within the translocation zone and the reasons for  
 16 emigration or mortality cannot be identified and/or remedied;
- 17 (ii) If, within three years from the initial transplant, fewer than 25 otters remain in the  
 18 translocation zone and the reason for emigration or mortality cannot be identified  
 19 and/or remedied;
- 20 (iii) If, after two years following the completion of the transplant phase, the experimental  
 21 population is declining at a significant rate and the translocated otters are not  
 22 showing signs of successful reproduction . . . .
- 23 (iv) If the Service determines, in consultation with the affected State and Marine Mammal  
 24 Commission, that otters are dispersing from the translocation zone and becoming  
 25 established within the management zone in sufficient numbers to demonstrate that  
 26 containment cannot be successfully accomplished. . . .
- 27 (v) If the health and well-being of the experimental population should become threatened  
 28 to the point that the colony’s continued survival is unlikely, despite the protections  
 given to it by the Service, State, and applicable laws and regulations. . . .
- (vi) 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.

Id. § 17.84(d)(8).

1 It is undisputed that making a failure determination pursuant to 50 C.F.R. § 17.84(d)(8)  
 2 constitutes a discrete agency action.<sup>7</sup> Thus, to determine whether the Court may compel agency  
 3 action unlawfully withheld or unreasonably delayed pursuant to § 706(1), the issue becomes whether  
 4 the regulation requires FWS to make such a failure determination.

5 In analyzing § 17.84(d), the Court begins with the plain language. See Bayview Hunters  
 6 Point Comty. Advocates v. Metropolitan Transp. Comm'n, 366 F.3d 692, 698 (9th Cir. 2004). “A  
 7 regulation should be construed to give effect to the natural and plain meaning of its words.” Id.  
 8 Here, the regulation provides the criteria that FWS must apply when making a determination of a  
 9 failed translocation, and further provides the action FWS must take should it conclude that the  
 10 translocation has failed, but it does not address directly whether such a determination is required in  
 11 the first instance.<sup>8</sup> Since the plain language of the regulation is ambiguous as to whether a failure  
 12 determination is a required action, the Court may consider FWS’s intent in promulgating the rule.  
 13 See El Comite Para el Bienestar de Earlimart v. Warmerdam, 539 F.3d 1062, 1072 (9th Cir. 2008) (a  
 14 court is “justified in considering administrative intent only if the regulation is ambiguous”).

15 The regulation’s enumeration of benchmarks for evaluating the success of the program at  
 16 specific time intervals indicates that FWS contemplated that a failure determination would indeed  
 17 occur. For example, two of the failure criteria depend upon the total number of otters remaining in  
 18 the translocation zone one and three years respectively after the initiation of translocation. 50  
 19 C.F.R. § 17.84(d)(i)-(ii). If FWS was under no duty to ever actually undertake a failure  
 20 determination, the inclusion of these specific benchmarks would be rendered meaningless. Such a  
 21 result would violate “the basic rule of statutory construction . . . that one provision should not be

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 23 <sup>7</sup> (See Federal Defendants’ Reply in Support of Motion to Dismiss First Amended  
 24 Complaint at 5, hereafter, “Reply,” Docket Item No. 38 (“The issue in the present case is not  
 25 discreteness of the regulation but whether the regulation imposes any required action.”); Opposition  
 26 at 12-14.)

27 <sup>8</sup> The parties devote considerable space in their briefs to the issue of whether the word “will”  
 28 creates a mandatory action. (See Opposition at 15-18; Reply at 4.) However, the word “will” is  
 used in the context of describing what is to occur should FWS make a determination that the  
 translocation has failed. Thus, the regulation’s use of the word “will” is not relevant to the question  
 before the Court, whether FWS must undertake a failure determination in the first instance.



1 interpreted in a way which is internally contradictory or that renders other provisions of the same  
2 statute inconsistent or meaningless.” Bayview, 366 F.3d at 700.

3 The actions of FWS in the years following the initiation of the translocation program provide  
4 further weight for a finding that making a failure determination is a required action under § 17.84(d).  
5 As alleged in the First Amended Complaint, FWS drafted several failure determinations between the  
6 enactment of the regulation in 1987 and the present. (See FAC ¶¶ 90, 128-30.) Although for  
7 reasons as yet unexplained, FWS never completed any of its failure determination drafts, the Court  
8 finds that the act of engaging in the drafting process itself demonstrates FWS’s own understanding  
9 that it was under a duty to make a failure determination. Moreover, on numerous occasions, FWS  
10 made public statements indicating its intent to complete the failure determination, which themselves  
11 may constitute commitments binding the agency to take further action.<sup>9</sup> See SUWA, 542 U.S. at 71  
12 (“Of course, an action called for in a plan may be compelled when . . . language in the plan itself  
13 creates a commitment binding on the agency.”).

14 Finally, the history of the § 17.84(d) rulemaking process itself also weighs in favor of a  
15 finding that making a failure determination is a required, rather than discretionary, act. Specifically,  
16 in response to an official comment suggesting that “the Criteria for a Failed Translocation be  
17 included in the regulation as well as in the preamble of the rule,”<sup>10</sup> FWS stated:

18 The Criteria for a failed Translocation are critical to whether or not the experimental  
19 population will achieve its intended purposes or have to be terminated, which would involve  
20 [FWS] evaluation and informal rulemaking procedures. Because they hold such importance  
21 to the future continuation of the experimental population as well as to future conflicts with  
22 fisheries and other uses in the translocation and management zones, the [FWS] agrees with

22 <sup>9</sup> The public statements that Plaintiffs cite are: (1) statements in a 1995 draft failure  
23 evaluation that “a decision regarding success or failure of the program was anticipated in the next  
24 year,” Biological Opinion at 15; (2) statements at a 1998 public hearing that “process of evaluating  
25 failure criteria would be commenced,” Draft Evaluation of the Southern Sea Otter Translocation  
26 Program 1987-2004 at 22; (3) statements in the 2001 Draft Policy, 66 Fed. Reg. 6649, that a final  
27 determination, “including evaluation of the failure criteria developed for the program” would be  
28 completed by December 2002; and (4) statements made in prior litigation that “FWS expects to  
make a decision to continue, modify, or terminate the program by 2002,” Opposition, Ex. H at 3.  
Opposition at 21. Federal Defendants do not dispute that FWS did in fact make these statements.

<sup>10</sup> See Comment 36, 52 Fed. Reg. at 29,764.

1 the suggestion and has incorporated the Criteria for a Failed Translocation into the final  
2 regulation.

3 Id. The Court finds that FWS’s decision to move the failure criteria from the preamble into the body  
4 of the rule itself, and the importance that FWS expressly imparted on the criteria for the future of the  
5 program, indicates FWS’s intention to bind themselves to make a determination based on those  
6 criteria.

7 Since FWS enumerated criteria for determining whether the translocation program failed,  
8 and included benchmarks at specified time intervals for making such a determination, the Court  
9 finds that FWS intended to make the failure determination a required action. FWS’s actions  
10 subsequent to the initiation of the translocation program indicate that FWS understood that it was  
11 under an obligation to make a failure determination, engaging in a drafting process and making  
12 numerous public statements to the effect that the determination would be finalized in the near future.  
13 Thus, the Court finds that it has subject matter jurisdiction over this action pursuant to 5 U.S.C. §  
14 706(1).<sup>11</sup>


15 Accordingly, the Court DENIES Federal Defendants’ Motion to Dismiss.

16 **V. CONCLUSION**

17 The Court GRANTS CSUC’s Motion to Intervene and DENIES Defendants’ Motion to  
18 Dismiss.

19 The parties shall appear for a Case Management Conference on **May 24, 2010 at 10 a.m.**  
20 On or before **May 14, 2010**, the parties shall file a Joint Case Management Statement. The  
21 Statement shall include, among other things, the parties’ proposed schedules as to how the case  
22 should proceed.

23 Dated: May 5, 2010

24   
25 \_\_\_\_\_  
26 JAMES WARE  
27 United States District Judge

28 \_\_\_\_\_  
29 <sup>11</sup> In their Reply brief, Federal Defendants withdrew their challenge to Plaintiff’s standing at  
30 the pleading stage of the litigation with a reservation of rights. (Reply at 2.)

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 Benjamin Zachary Rubin brubin@nossaman.com  
3 Brian Paul Segee bsegee@edcnet.org  
4 George J. Mannina gmannina@nossaman.com  
5 Lawson Emmett Fite lawson.fite@usdoj.gov  
6 Linda J. Krop Lkrop@edcnet.org

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**Dated: May 5, 2010**

**Richard W. Wieking, Clerk**

By:           /s/ JW Chambers            
**Elizabeth Garcia**  
**Courtroom Deputy**